UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA v. PAUL W. BERGRIN	**ELECTRONICALLY FILED** Crim. No. 09-369 (DMC)

GOVERNMENT'S REQUESTS TO CHARGE

PAUL J. FISHMAN
United States Attorney
U.S. Attorney's Office
970 Broad Street
Newark, New Jersey 07102
(973) 645-2700

On the Requests:

Steven G. Sanders
Assistant United States Attorney

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PRELIMINARY STATEMENT

The Government submits these Requests to Charge regarding general matters of law, the essential elements of the crimes charged in the Second Superseding Indictment, and certain matters of evidence particularly relevant to this case.[1] In addition, the Government respectfully requests that the Court instruct the jury as to other general matters in accordance with its customary practice. Finally, the Government respectfully requests leave of Court to submit additional, modified, or supplemental requests to charge should such submissions be warranted by subsequent developments in the trial.

[1] For any instruction taken directly from the Third Circuit's Model Criminal Jury Instructions, the Government omits the commentary accompanying that instruction. The Government annotates all other instructions with citations to pertinent authority.

REQUEST 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.

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.[2]

[2] 3d Cir. Model Crim. Instr. No. 3.01.

REQUEST NO. 2

***PRO SE* DEFENDANT**

Defendant Paul Bergrin 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 also asked questions of witnesses, made objections, and argued to the Court. I want to remind you that whatever Mr. Bergrin said in these parts of the trial is 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, not from what the lawyers in this case or Mr. Bergrin said.[3]

[3] Third Circuit Model Crim. Instr. No. 1.18.

REQUEST NO. 3

INTERVIEWS BY ASSISTANT UNITED STATES ATTORNEY

During the trial, you have heard testimony that the attorneys 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.

REQUEST 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.[4]

[4] 3d Cir. Model Crim. Instr. No. 4.14.

REQUEST 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.[5]

[5] 3d Cir. Model Crim. Instr. No. 3.05.

REQUEST 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.[6]

[6] 3d Cir. Model Crim. Instr. No. 3.02.

REQUEST 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.[7]

[7] 3d Cir. Model Crim. Instr. No. 4.06.

REQUEST 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.[8]

[8] 3d Cir. Model Crim. Instr. No. 4.02.

REQUEST 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 from Dr. Patrick Hinfey, Detective Louis Alarcon, Dr. Junaid Shaikh, and Attila Mathe. Because of their knowledge, skill, experience, training, and education in, respectively, firearms identification and forensic pathology, they were permitted to offer opinions and the reasons for those opinions.

You should give their testimony whatever weight you think appropriate, given all the other evidence in the case. In weighing this testimony you may consider the witnesses' qualifications, the reasons for their opinions, and the reliability of the information supporting their 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.[9]

[9] 3d Cir. Model Crim. Instr. No. 4.08.

REQUEST 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.[10]

[10] 3d Cir. Model Crim. Instr. No. 4.11.

REQUEST NO. 11

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.[11]

[11] 3d Cir. Model Crim. Instr. No. 3.03.

REQUEST NO. 12

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.[12]

[12] 3d Cir. Model Crim. Instr. No. 3.04.

REQUEST NO. 13

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.[13]

[13] 3d Cir. Model Crim. Instr. No. 4.18.

REQUEST NO. 14

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.[14]

[14] 3d Cir. Model Crim. Instr. No. 4.19.

REQUEST NO. 15

IMPEACHMENT OF WITNESSES – PRIOR INCONSISTENT STATEMENTS

You have heard the testimony of certain witnesses and 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 may have 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.[15]

[15] 3d Cir. Model Crim. Instr. No. 4.22.

REQUEST NO. 16

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.[16]

[16] 3d Cir. Model Crim. Instr. No. 4.26.

REQUEST NO. 17

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.[17]

[17] 3d Cir. Model Crim. Instr. No. 4.24.

REQUEST NO. 18

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.[18]

[18] 3d Cir. Model Crim. Instr. No. 4.25.

REQUEST NO. 19

DEFENDANTS' CHOICE NOT TO TESTIFY
(If applicable)

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 or she is innocent. You must not attach any significance to the fact that defendant 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 defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.[19]

[19] 3d Cir. Model Crim. Instr. No. 4.27.

REQUEST NO. 20

PRESUMPTION OF INNOCENCE;
BURDEN OF PROOF REASONABLE DOUBT

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

The presumption of innocence means that the defendant 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 the defendant is guilty and this burden stays with the Government throughout the trial.

In order for you to find the defendant 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.[20]

[20] 3d Cir. Model Crim. Instr. No. 3.06.

REQUEST NO. 21

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 the defendant. It is an accusation only. An indictment is not evidence of anything, and you should not give any weight to the fact that the defendant has been indicted in making your decision in this case.[21]

[21] 3d Cir. Model Crim. Instr. No. 3.07.

REQUEST NO. 22

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 the defendants on trial.[22]

[22] See United States v. Anthony LaDuca and Jose Perez, Crim. No. 08-245 (D.N.J. Mar. 2009) (Wolfson, J.) (jury instructions); United States v. Murray, Crim. No. 94-80 (D.N.J. Apr. 1996) (Lifland, J.); Sixth Circuit Pattern Jury Instructions (Criminal Cases) § 3.06 (Sand, Siffert) (2001 ed.).

REQUEST NO. 23

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.[23]

[23] 3d Cir. Model Crim. Instr. No. 3.08.

REQUEST NO. 24

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.[24]

[24] 3d Cir. Model Crim. Instr. No. 3.12, modified given the overlap of Racketeering Acts and substantive counts.

REQUEST NO. 25

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.[25]

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[25] 3d Cir. Model Crim. Instr. No. 6.18.1962C.

REQUEST NO. 26

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.[26]

[26] 3d Cir. Model Crim. Instr. No. 6.18.1962C-1.

REQUEST NO. 27

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 a 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 relationships among the members of the group and that the members of the group functioned as a continuing unit to achieve a 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. An enterprise is also not limited to groups whose crimes are sophisticated, diverse, complex, or unique.

Finally, the fact that membership may have changed over time does not negate the existence of an enterprise.[27]

[27] 3d Cir. Model Crim. Instr. No. 6.18.1962C-2; see United States v. Payne, 591 F.3d 46, 60 (2d Cir. 2010) ("An 'individuals associated in fact' enterprise . . . may continue to exist even though it undergoes changes in membership.") (citations omitted).

REQUEST NO. 28

RICO – "ENGAGED IN, OR THE ACTIVITIES OF WHICH AFFECT, INTERSTATE OR FOREIGN COMMERCE" DEFINED

The second element the Government must 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 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.[28]

[28] 3d Cir. Model Crim. Instr. No. 6.18.1962C-3.

REQUEST NO. 29

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 Paul Bergrin 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.[29]

[29] 3d Cir. Model Crim. Instr. No. 6.18.1962C-4.

REQUEST NO. 30

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.[30]

[30] 3d Cir. Model Crim. Instr. No. 6.18.1962C-5.

REQUEST NO. 31

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 benefitted 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.[31]

[31] 3d Cir. Model Crim. Instr. No. 6.18.1962C-6.

REQUEST NO. 32

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.[32]

[32] 3d Cir. Model Crim. Instr. No. 6.18.1962C-7, as modified.

REQUEST NO. 33

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.

REQUEST NO. 33A

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 objective 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 that objective; that is, that Paul Bergrin and at least one other alleged conspirator shared a unity of purpose and the intent to achieve that that objective.

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, these many of the instructions I will give you use the terms "knowingly," "intentionally," or "wilfully." I will define those terms later.[33]

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.

[33] 3d Cir. Model Crim. Instr. No. 6.18.1962C-7, as modified.

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.[34]

CONSPIRACY – MEMBERSHIP IN THE AGREEMENT

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

The Government need not prove that a defendant knew everything about the conspiracy or that he knew everyone involved in it, or that he or she 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.

[34] 3d Cir. Model Crim. Instr. No. 6.18.371C.

You may consider both direct evidence and circumstantial evidence in deciding whether the defendants 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 or she 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 defendant 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 a defendant joined the conspiracy.[35]

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 objective and intending to further or achieve that objectives. That is, the Government must prove that defendant Paul 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.

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[35] 3d Cir. Model Crim. Instr. No. 6.18.371D.

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 objective be achieved.[36]

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 defendant's absence and without defendant's 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.[37]

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[36] 3d Cir. Model Crim. Instr. No. 6.18.371E.

[37] 3d Cir. Model Crim. Instr. No. 6.18.371K.

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 explain to you, 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.[38]

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 United States 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 defendant Paul Bergrin's control. Proof of ownership of the controlled substance is not required.

[38] 3d Cir. Model Crim. Instr. No. 6.18.371G

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.

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.

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 defendant Paul Bergrin or his co-conspirators had in mind or planned in some way to deliver or transfer possession or control over a controlled substance to someone else.

In determining whether this was the object of the conspiracy you may consider all the facts and circumstances shown by the evidence presented, including defendant Paul Bergrin's words and actions. You may also consider, among other things, the quantity

and purity of the controlled substance, the manner in which the controlled substance was packaged, and the presence or absence of weapons, large amounts of cash, or equipment used in the processing or sale of controlled substances. I instruct you as a matter of law that Cocaine is a Schedule II narcotic drug 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 proves 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.[39]

[39] 3d Cir. Model Crim. Instr. No. 6.21.841A, Commentary. See Apprendi v. New Jersey, 530 U.S. 466 (2000); United States v. Lewis, 113 F.3d 487, 490-91 (3d Cir. 1997); see also United States v. Sheppard, 219 F.3d 766, 769 (8th Cir. 2000) (holding that Government need not prove that defendant knew the type and quantity of drugs); United States v. Aguayo-Delgado, 220 F.3d 926 (8th Cir. 2000) (same). This instruction was given in United States v. Reyeros, Crim. No. 00-822 (D.N.J. January 2005).

REQUEST NO. 33B

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 January 2003 through on or about May 21, 2009, 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, *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.[40]

[40] Seventh Circuit Model Charge at p. 661.

REQUEST NO. 33C

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 in or about October 2005, 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, *i.e.*, 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.

REQUEST NO. 33D

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, 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, *i.e.*, 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.

REQUEST NO. 34

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 is sufficient to prove 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.

REQUEST NO. 34A

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 charge defendant Paul Bergrin with conspiring 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 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."

Section 1512 is designed, in part, to protect persons who may be called to testify or give evidence in a federal proceeding--either civil or criminal--and persons who have information about federal crimes.[41] The integrity of the federal system of justice depends upon the cooperation of such potential witnesses. If persons with information do not come forward, produce evidence and appear when summoned, the criminal justice system will be significantly impaired. This statute was devised to make it unlawful for anyone to tamper with such a witness in the manner described by the statute.

[41] United States v. Duarte, 14 F. App'x 46, 53 (2d Cir. 2001) (unreported).

In order to prove the existence of the conspiracy charged in Count 1, 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.

A killing is premeditated when it is intentional and the result of planning or deliberation. 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.

For there to be premeditation, the participants in the conspiracy must have thought about the taking of human life before acting. The amount of time required for premeditation cannot be arbitrarily fixed. The time required varies as the minds and temperaments of people differ and according to the surrounding circumstances in which they may be placed. Any interval of time between forming the intent to kill, and acting on that intent, which is long enough for the someone to be fully conscious and mindful of what he intended and willfully set about to do, is sufficient to justify the finding of premeditation.

"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.[42] I instruct you that a federal criminal trial is an "official proceeding" within the

[42] See 18 U.S.C. 1515(a)(1)(A); United States v. Lara, 181 F.3d 183, 200 (1st Cir. 1999) (citing United States v. Victor, 973 F.2d 975, 978 (1st Cir. 1992)).

meaning of section 1512. While the defendant must have known of the existence of a proceeding, it is not necessary for the Government to show that he knew the proceeding was a federal one. Further, it is not necessary that a proceeding actually be pending or about to be instituted.[43]

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."[44]

[43] See 18 U.S. C. § 1512(c)(1) and (f)(1).

[44] Unites States v. Risken, 788 F.2d at 1368-69 [dismissed witness]; United States v. Wilson, 796 F.2d at 57 n.4 [excused witness]; United States v. DiSalvo, 631 F.Supp. 1398, 1402 (E.D. Pa. 1986) [potential witness].

REQUEST NO. 34B

RACKETEERING ACT 4(b)
(Aiding and Abetting the Murder of a Witness)
(as also charged in Count 13)

Both Racketeering Act 4(b) of Count 1 and Count 13 charge defendant Paul Bergrin aiding and abetting the murder of a witness to prevent his testimony at an official proceeding.

As I just explained, Section 1512 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 United States 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

Count 2 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 following four (4) 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 defendant Paul Bergrin knew that someone was committing or was going to commit murder Kemo McCray to prevent him from testifying at an official proceeding;
>
> Third: That defendant Paul 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 defendant Paul Bergrin's acts did, in some way, aid, assist, facilitate, encourage, someone in murdering Kemo McCray.

Defendant Paul Bergrin's acts need not themselves be against the law. In deciding whether defendant 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 defendant 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 defendant 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 defendant which at least encouraged another to murder Mr. McCray.[45]

[45] 3d Cir. Model Crim. Instr. No. 7.02; see United States v. Branch, 91 F.3d 699, (5th Cir. 1996) ("In a prosecution for aiding and abetting a crime, the Government need not identify a specific person or group of individuals as the principal.") (citing United States v. Campa, 679 F.2d 1006, 1013 (1st Cir. 1982); Hendrix v. United States, 327 F.2d 971, 975 (5th Cir. 1964)).

REQUEST NO. 34C

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 the defendant 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 State 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.

The other element that the State must prove beyond a reasonable doubt is that the defendant caused Kemo McCray's death or serious bodily injury resulting in death.

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 him 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.[46]

[46] New Jersey Criminal Model Charges for Conspiracy and Murder, available at:
http://www.judiciary.state.nj.us/criminal/charges/inchoate3.pdf
http://www.judiciary.state.nj.us/criminal/charges/homicide2.pdf
Some content omitted as it duplicates instructions on federal law of conspiracy.

REQUEST NO. 34D

RACKETEERING ACT 4(d)
(Murder under New Jersey Law)

Racketeering Act 4(d) of Count 1 charges that defendant Paul Bergrin with being an accomplice to knowing and intentional murder, in violation of sections 2C:2-6 and 2C:11-3(1) & (2) of New Jersey's statutes.

"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 hee 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/she committed the crime(s) himself/herself.

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 someone committed the crime of knowing and purposeful murder, as I previously explained to you.

2. That this defendant solicited that person to commit it and did aid or agree or attempt to aid him in planning or committing it.

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 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 others to commit it or aided or agreed or attempted to aid them in planning or committing it, then you should consider him as if he committed the crime himself.[47]

[47] New Jersey Criminal Model Charges for Accomplice Liability, available at: http://www.judiciary.state.nj.us/criminal/charges/liabil002.pdf. Some content omitted as it duplicates instructions on federal law of accomplice liability.

REQUEST NO. 35

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.

REQUEST NO. 35A

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, 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."[48]

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 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 (1) to distribute the proceeds of unlawful activity described in the Indictment, or (2) to promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of the unlawful activity described 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: 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,

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[48] 18 U.S.C. § 1952(b)(2).

establish, carry on or facilitate the promotion, management, establishment, or carrying on of the unlawful activity described in the Indictment.[49]

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.[50]

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

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[49] O'Mally, Grenig, and Lee, 2A Fed. Jury Prac. & Instr. § 54:03 (6th ed.).

[50] United States v. Nader, 542 F.3d 713, 717-22 (9th Cir. 2008); United States v. Heacock, 31 F.3d 249, 255 (5th Cir. 1994); United States v. Riccardelli, 794 F.2d 829, 830 (2d Cir. 1986); cf. United States v. Richeson, 338 F.3d 653, 660 (7th Cir. 2003) (holding that the intrastate use of the telephone can support a violation of the similarly worded murder-for-hire statute); United States v. Cope, 312 F.3d 757, 771 (6th Cir. 2002) (holding that the intrastate use of the mail can support a violation of the murder-for-hire statute); United States v. Marek, 238 F.3d 310, 316 (5th Cir.2001) (en banc) (holding that the intrastate use of Western Union can support a violation of the murder-for-hire statute).

necessary for the government to prove that the distribution of the proceeds of the unlawful activity or 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 travel in interstate commerce or use of a facility in interstate commerce, was, at least in part, (1) to distribute the proceeds of the unlawful activity or (2) to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of the unlawful activity described in the Indictment.[51]

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 Begrrin traveled, caused the travel, in interstate commerce, or used, or cause the use of a facility in interstate commerce with the intent to (1) distribute the proceeds of an unlawful activity or (2) promote, or facilitate the promotion, of an unlawful activity. The phrase "to distribute the proceeds" of an unlawful activity means the dividing or dealing out of the proceeds to persons involved in the unlawful activity.[52] 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

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[51] 2A Fed. Jury Prac. & Instr. § 54:04.

[52] United States v. Lightfoot, 506 F.2d 238, 242 (D.C. Cir. 1974).

accomplished or to assist the "unlawful activity" – namely, conspiracy to promote prostitution in violation of New Jersey law.[53]

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, promoting prostitution in the third degree a felony. A person is guilty of promoting prostitution in the 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,

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[53] 2A Fed. Jury Prac. & Instr. § 54:05; 2 E. Devitt, C. Blackmar & K. O'Malley, § 46.05; see also United States v. Rogers, 788 F.2d 1472, 1476 (11th Cir. 1986).

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 or she 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 or she is advancing or profiting from prostitution.

In order for you to find that defendant Paul Bergrin promoted prostitution in violation of New York law, 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 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.[54]

Like federal law, New York law recognizes that two or more individuals can act

[54] New York State Model Jury Instruction on Promoting http://www.nycourts.gov/cji/2-PenalLaw/230/230.25%281%29.pdf

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, 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 defendant Paul Bergrin 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.[55]

Finally, like federal law, New York law makes it a crime to conspire to commit an offense. Under New York law, a person is guilty of conspiracy in the fifth degree 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.[56]

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[55] N. Y. State Unified Court System, Criminal Jury Instructions 2d, available at: www.nycourts.gov/cji/1-General/CJI2d.Accessorial_Liability.Rev.pdf

[56] N. Y. State Unified Court System, Criminal Jury Instructions 2d, available at: http://www.nycourts.gov/cji/2-PenalLaw/105/105-05%281%29.pdf

Fourth Element - Overt Act

The fourth element of the Travel Act offense alleged in Racketeering Act 5(a) and Count 14 requires the Government to prove that defendant Paul Bergrin knowingly and deliberately did an act, or caused an act to be done, or attempted to do an act, (1) to distribute the proceeds of an unlawful activity or (2) 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.[57]

[57] United States v. Zolicoffer, 869 F.2d 771, 774-75 (3d Cir. 1989).

REQUEST NO. 35B

RACKETEERING ACT 5(b)
(Interstate travel to promote prostitution in violation of New York law (January 5, 2005 letter)
(as also charged in Count 16)

Both Racketeering Act 5(b) of Count 1 and Count 16 charge that on January 5, 2005, 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.

I have just defined all of the elements of this offense for you. Please refer back to those instructions.

REQUEST NO. 36

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.

REQUEST NO. 36A

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.

To find defendant Paul Bergrin guilty of this offense, the Government must prove beyond a reasonable doubt (1) that Jamal Muhammad purposely agreed to accept a benefit for testifying falsely in an official proceeding, and (2) that defendant Paul Bergrin knowingly and intentionally aided and abetted Muhammad in doing so.

Under New Jersey law, a person commits a crime of the third degree if he solicits, accepts or agrees to accept any benefit in consideration of his agreeing to testify or inform falsely.[58]

The term "benefit" means gain or advantage, or anything regarded by the beneficiary as gain or advantage, including money, property, commercial interests or

[58] N.J.S.A. 2C:28-5(c), incorporating by reference 2C:28-5(a)(1).

anything else the primary significance of which is economic gain, 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."[59]

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, to act "purposefully," the Government must show that it was Muhammad's conscious object to accept a bribe.

The Government also must show that, in return for agreeing to accept a benefit, Jamal Muhammad agreed or promised to make a material false statement under oath in an official proceeding, which is a third-degree 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

[59] There is no model charge for bribe-receiving by a witness in violation of N.J.S.A. 2C:28-c. Accordingly, these instructions are adapted from the New Jersey Criminal Model Charges for Bribe Receiving in Political Matters, available at: http://www.judiciary.state.nj.us/criminal/charges/bribery2.pdf

any such proceeding. The term 'official proceeding' is intended to include any type of proceeding where the taking of testimony under oath is authorized "[60]

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.[61]

A false statement 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.[62]

If you find that the Government has proved beyond a reasonable doubt that Jamal Muhammad accepted a bribe in return for agreeing to prove 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.

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

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[60] New Jersey Criminal Model Charges for Perjury, available at: http://www.judiciary.state.nj.us/criminal/charges/perjury1.pdf

[61] Id.

[62] Id.

I want to reiterate that to find that defendant Paul Bergrin aided and abetted Jamal Muhammad, the Government must prove beyond a reasonable doubt that defendant Bergrin knew that Muhammad agreed to accept a benefit in exchange for agreeing to testify falsely at an official proceeding, and that defendant Bergrin aided or agreed or attempted to aid Muhammad in planning or committing that crime with the purpose of promoting or facilitating its commission.[63]

[63] New Jersey Criminal Model Charges for Accomplice Liability, available at: http://www.judiciary.state.nj.us/criminal/charges/liabil002.pdf.

REQUEST NO. 36B

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, 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 four 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.

REQUEST NO. 36C

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, 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.

REQUEST NO. 37

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.

REQUEST NO. 37A

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 that:

(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.[64]

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.

[64] New Jersey Criminal Model Charges for Conspiracy and Murder, available at:
http://www.judiciary.state.nj.us/criminal/charges/inchoate3.pdf
http://www.judiciary.state.nj.us/criminal/charges/homicide2.pdf

REQUEST NO. 37B

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, 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.[65]

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 undertake 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

[65] O'Mally, Grenig, and Lee, 2A Fed. Jury Prac. & Instr. § 54:03 (6th ed.).

those same instructions here to determine whether the Government has proved 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 the crime of conspiracy to commit murder, and that he did so to further the conspiracy to distribute, or to possess with intent to distribute, a controlled substance as alleged in Racketeering Act Seven and in Counts 20 through 25

REQUEST NO. 37C

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, 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 Travel Act offense and it requires the Government to prove the same four elements I described with respect to Act 7(b). Please refer to those definitions.

REQUEST NO. 37D

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, 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 Travel Act offense and it requires the Government to prove the same four elements I described with respect to Act 7(b). Please refer to those definitions.

REQUEST NO. 37E

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, 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 Travel Act offense and it requires the Government to prove the same four elements I described with respect to Act 7(b). Please refer to those definitions.

REQUEST NO. 37F

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, 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 Travel Act offense and it requires the Government to prove the same four elements I described with respect to Act 7(b). Please refer to those definitions.

REQUEST NO. 38

RICO – RACKETEERING ACT EIGHT
(Failure To File an IRS Form 8300),
as also charged in Count 26

Both Racketeering Act 7(g) and Count 26 charge that, on or about September 4, 2008, 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.

Section 5324(b)(1) of Title 31 of the United States 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 Treasury has promulgated a regulation requiring a trade or business that receives more than $10,000 in coins or currency in 1 transaction to file, within 15 days of the transaction, an IRS Form 8300 with the Financial Crimes Enforcement Network.[66]

To find defendant Paul Bergrin guilty of this offense, the Government must prove beyond a reasonable doubt the following four elements:

1. that at the time specified in the Indictment, defendant Paul Bergrin was engaged in a trade or business, *i.e.*, Law Office of Paul Bergrin;

2. that in the course of that trade or business, defendant Bergrin knowingly received more than $10,000 in cash in a single transaction;

3. that defendant Bergrin knowingly caused the trade or business to fail to file a Form 8300 with the Financial Crimes Enforcement Network; and

4. that defendant Bergrin did so for the purpose of evading the reporting requirements in section 5331 of Title 31.[67]

[66] 31 C.F.R. § 103.30(a) (2008), recodified as 31 C.F.R. § 1010.330(a) in 2011.

[67] The Government has no been able to locate any model charges for this offense.

REQUEST NO. 39

RICO – SUMMARY

To summarize, in order for you to find the defendant guilty, the Government must prove 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 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.

REQUEST NO. 40

COUNT TWO – RICO CONSPIRACY

Count 2 of the indictment charges that defendant Paul Bergrin agreed or conspired with one or more other person 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. A conspiracy is a kind of criminal partnership, as I have already explained to you.

In order for you to find defendant 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 Bergrin was a party to or member of that agreement; and

Third: That defendant 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 defendant 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 Bergrin guilty of the RICO offense charged in Count 1, in order to find defendant 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 defendant 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 defendant 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 defendant 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 defendant 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 defendant 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 defendant 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 defendant 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 defendant 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 defendant Bergrin agreed would be committed by some member of the conspiracy in the conduct of the affairs of the enterprise. The indictment alleges that defendant 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 defendant Bergrin is not charged in Count 1 (the RICO substantive count), to determine whether defendant Bergrin agreed that at least one member of the conspiracy would commit two or more racketeering acts.

Moreover, in order to convict defendant 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, at least two acts of interstate travel in aid of racketeering, conspiracy to commit murder, or any combination thereof.[68]

[68] 3d Cir. Model Crim. Instr. No. 6.18.1962D.

REQUEST NO. 41

COUNTS THREE AND FOUR –
VIOLENT CRIMES IN AID OF RACKETEERING

Counts 3 and 4 of the Indictment charges defendant Paul Bergrin with violent crimes in aid of racketeering, also known as "VICAR." Count 3 arises from the McCray murder, whereas Count 4 arises from the 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 guilty of an offense.

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 its activities affected, interstate or foreign commerce.

3. That the enterprise was engaged in racketeering activity;

4. That, for the purposes of Count 3, that defendant Bergrin conspired to murder, or aided and abetted in the murder, of Kemo McCray in violation of

New Jersey law. For purposes of Count 4, that defendant Bergrin conspired to commit murder in violation of New Jersey law.

5. That underlying crime of violence was committed for the purpose of maintaining or increasing the defendant's position in the enterprise.

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 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 purpose of maintaining or increasing position in the charged enterprise.

The Government need only prove that the crime of violence was committed by the defendant for 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 defendants committed the crime of violence was one of the two alternative purposes that I just discussed.

The Government may prove the fifth element the VICAR offenses by proving beyond a reasonable doubt that at least one of defendant Bergrin's purposes in

committing the violent crime alleged was to "maintain" or "increase" his position in the enterprise. In determining whether one of his purposes was to "maintain" or "increase" 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.[69]

You need not, however, find that maintaining, or increasing position in the enterprise was defendant Bergrin's sole or even principal motive. It is sufficient if you find that defendant Bergrin conspired and did commit violent crimes 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 before you.

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[69] See Government's Requests to Charge, United States v. Napoli, E.D. Pa. Crim. No. 07-75, Dkt. No. 185, at p.65, 77-78 (using pagination in ECF legend), and authorities cited therein.

REQUEST NO. 42

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.

However, you will see on the Verdict Form that, if you find that the Government has proven the defendant guilty 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 the object of 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 Count Eight. If you answered "no," then you should 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.

One final thing, while you are required to specify the quantity of cocaine involved in the conspiracy, as I instructed you earlier, the Government need not prove that the defendant knew the exact type or amount of controlled substance involved.[70]

[70] United States v. Barbosa, 271 F.3d 438, 458-459 (3d Cir. 2001); see also United States v. Carranza, 289 F.3d 634 (9th Cir. 2002).

REQUEST NO. 43

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, 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, i.e., 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.

REQUEST NO. 44

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, 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, *i.e.*, cocaine.

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.

REQUEST NO. 45

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, 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, *i.e.*, cocaine.

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.

REQUEST NO. 46

COUNT TWELVE – CONSPIRACY TO MURDER A FEDERAL WITNESS
(as also charged in Racketeering Act 4(a))

Count Twelve alleges that defendant Paul Bergrin conspired to murder a witness to prevent his 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.

REQUEST NO. 47

COUNT THIRTEEN – AIDING AND ABETTING THE MURDER OF A FEDERAL WITNESS (as also charged in Racketeering Act 4(b))

Count Thirteen alleges that defendant Paul Bergrin aided and abetted the murder a witness to prevent his testimony at an official proceeding, in violation of Title 18, United States Code, Section 1512(k) 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.

REQUEST NO. 48

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, defendant Paul Bergrin conspired with others to commit an offense against the United States, that is, to travel or use the facilities in interstate commerce to promote the crime of prostitution under New York law.

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 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 defendant Bergrin was a party to or member of that agreement;

Third: That defendant Bergrin joined the agreement or conspiracy knowing of its objective 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 violate the Travel Act;

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.[71]

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[71] 3d Cir. Model Crim. Instr. No. 6.18.371A, as modified.

I previously defined for you the first three elements of the conspiracy offense when I instructed you on Racketeering Act 1(a), so I will not repeat 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 objectives of the conspiracy.

Count Fourteen of the Indictment 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 defendant Bergrin personally committed any of the overt acts. The Government must prove beyond a reasonable doubt that at least one member of the conspiracy committed at least one of the overt acts alleged in Count Fourteen and committed it during the time that the conspiracy existed, for the purpose of furthering or helping to achieve its objectives. You must unanimously agree on the overt act that was committed.[72]

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[72] 3d Cir. Model Crim. Instr. No. 6.18.371F, as modified.

REQUEST NO. 49

COUNT FIFTEEN – TRAVEL IN AID OF PROSTITUTION BUSINESS
(as also charged in Racketeering Act 5(a))

Count Fifteen charges that on December 10, 2004, 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.

This is the same offense that is alleged in Racketeering Act 5(a) of Count 1. Since I already gave you detailed instructions regarding this offense, I will not repeat those instructions here.

REQUEST NO. 50

COUNT SIXTEEN – TRAVEL IN AID OF PROSTITUTION BUSINESS
(as also charged in Racketeering Act 5(b))

Count Sixteen alleges that on January 5, 2005, 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.

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, I will not repeat those instructions here.

REQUEST NO. 51

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 conspired with others to commit an offense against the United States, that is, to travel or use the facilities in interstate commerce in aid of drug trafficking or bribery.

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. 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.

REQUEST NO. 52

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, 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 the same offense that is charged in Racketeering Act 6(b) of Count 1. Since I already gave you detailed instructions regarding this offense, I will not repeat those instructions here.

REQUEST NO. 53

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, 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 the same offense that is charged in Racketeering Act 6(c) of Count 1. Since I already gave you detailed instructions regarding this offense, I will not repeat those instructions here.

REQUEST NO. 54

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, defendant Paul Bergrin conspired with others to commit an offense against the United States, that is, to travel or use the facilities in interstate commerce with the intent to promote drug trafficking and to commit a crime of violence in furtherance of drug trafficking, 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. 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 which one.

REQUEST NO. 55

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, 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 the same offense that is alleged in Racketeering Act 7(b) of Count 1. Since I already gave you detailed instructions regarding this offense, I will not repeat those instructions here.

REQUEST NO. 56

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, 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, I will not repeat those instructions here.

REQUEST NO. 57

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, 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 the same offense that is alleged in Racketeering Act 7(d) of Count 1. Since I already gave you detailed instructions regarding this offense, I will not repeat those instructions here.

REQUEST NO. 58

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, 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 the same offense that is alleged in Racketeering Act 7(e) of Count 1. Since I already gave you detailed instructions regarding this offense, I will not repeat those instructions here.

REQUEST NO. 59

COUNT TWENTY-FIVE – TRAVEL IN AID OF DRUG TRAFFICKING BUSINESS (as also alleged in Racketeering Act 7(f))

Count Twenty-Four alleges that, on or about December 8, 2008, 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 the same offense that is alleged in Racketeering Act 7(f) of Count 1. Since I already gave you detailed instructions regarding this offense, I will not repeat those instructions here.

REQUEST NO. 60

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, 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, I will not repeat those instructions here.

REQUEST NO. 61

KNOWINGLY, INTENTIONALLY, WILFULLY

In defining the elements of the offenses charged in the Indictment, I have used the terms "knowingly," "intentionally," and "wilfully." 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 offense(s) charged.

In deciding whether defendant Paul 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 defendant's mind at that time. The Government is not required to prove that defendant knew his acts were against the law.[73]

Intentionally

Some of the offenses charged in the Indictment require that the Government prove that defendant Paul Bergrin acted "intentionally" with respect to certain elements of the offenses. This means that the Government must prove beyond a reasonable doubt either

[73] 3d Cir. Model Crim. Instr. No. 5.02.

that (1) it was defendant's conscious desire or purpose to act in a certain way or to cause a certain result, or that (2) defendant knew that he was acting in that way or would be practically certain to cause that result. In deciding whether 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 defendant's mind at that time.[74]

Wilfully

Some of the offenses charged in the Indictment requires the Government to prove that defendant Paul Bergrin acted "willfully" with respect to certain elements of the offense(s). This means the Government must prove beyond a reasonable doubt that defendant knew his conduct was unlawful and intended to do something that the law forbids. That is, to find that 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.[75]

[74] 3d Cir. Model Crim. Instr. No. 5.03.

[75] 3d Cir. Model Crim. Instr. No. 5.05.

REQUEST NO. 62

INTENT AND KNOWLEDGE INFERRED

Often the state of mind with which a person acts at any given time 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 defendant intended or knew at a particular time, 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 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 defendant's state of mind.

You may also consider the natural and probable results or consequences of any acts defendant knowingly did, and whether it is reasonable to conclude that defendant intended those results or consequences. You may find, but you are not required to find, that 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 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.[76]

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[76] 3d Cir. Model Crim. Instr. No. 5.01.

REQUEST NO. 63

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 defendant is guilty and proof of good motive alone does not establish that defendant is not guilty. Evidence of defendant's motive may, however, help you find 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.[77]

[77] 3d Cir. Model Crim. Instr. No. 5.04.

REQUEST NO. 64

DEFENDANT'S PRIOR BAD ACTS OR CRIMES

During the trial, you heard testimony by Richard Pozo about events that occurred in 2004. You also heard testimony from Oscar Cordova and Vicente Esteves 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 Counts 5 and Counts 20 through 26. You may also consider that evidence for a limited purpose when considering Counts 12 and 13, which relate to the murder of Kemo McCray. Specifically, you may consider the testimony of Pozo, Cordova, and Esteves in determining whether defendant Paul Bergrin acted with the specific intent to tamper 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 and 26—you may not consider the testimony Richard Pozo, Oscar Cordova and Vicente Esteves 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, and you may not use those guilty pleas, or the evidence I mentioned a short time ago, as proof that 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 a prior or subsequent crime or act, he must also have committed the acts charged in the Indictment.

The Government must prove beyond a reasonable doubt each element of each offense charged in the Indictment.[78]

[78] 3d Cir. Model Crim. Instr. No. 4.29.

REQUEST NO. 65

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 convict or acquit on the two offenses charged in the indictment.[79]

[79] 3d Cir. Model Crim. Instr. No. 3.16.

REQUEST NO. 66

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.[80]

[80] United States v. Fumo, 655 F.3d 288, 305 (3d Cir. 2011) (quoting Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case).

REQUEST NO. 67

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.[81]

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 Count 5, as I already indicated, there are questions about the quantity of cocaine involved in the conspiracy, which you must answer only you find the defendant guilty on Count 5.

[81] 3d Cir. Model Crim. Instr. No. 3.17.

CONCLUSION

As noted in the Preliminary Statement, the Government respectfully submits the foregoing charges as to the essential elements of the offenses charged and as to certain evidentiary matters, requests that the Court charge the jury in its usual terms as to general issues, and requests leave to submit additional or supplementary requests if warranted by developments during trial.

Respectfully submitted,

PAUL J. FISHMAN
United States Attorney

s/ Steven G. Sanders
Assistant U.S. Attorney

Dated: Newark, New Jersey
March 1, 2013

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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

V E R D I C T F O R M

WE, THE JURY, UNANIMOUSLY FIND:

COUNT 1
(RICO)

GUILTY _____ NOT GUILTY _____

In reaching our verdict on Count 1, if the verdict is guilty, we unanimously found that the Defendant committed, caused, or aided and abetted the commission of at least two of the following Racketeering Acts:

Racketeering Act 1

a. Conspiracy to distribute a controlled substance, as charged in Count 5:

Proven _____ Not Proven _____

b. Maintaining drug-involved premises (710 Summer Avenue), as charged in Count 8:

Proven _____ Not Proven _____

c. Maintaining drug-involved premises (572 Market Street), as charged in Count 9:

Proven _____ Not Proven _____

d. Maintaining drug-involved premises (50 Park Place), as charged in Count 10:

Proven _____ Not Proven _____

Racketeering Act 4

a. Conspiracy to murder a federal witness, as charged in Count 12:

Proven _____ Not Proven _____

b. Aiding and abetting the murder of a federal witness, as charged in Count 13:

Proven _____ Not Proven _____

c. Conspiracy to murder in violation of New Jersey law:

Proven _____ Not Proven _____

d. Intentional Murder in violation of New Jersey law:

Proven _____ Not Proven _____

Racketeering Act 5

a. Interstate travel to promote prostitution in violation of New York law (December 10, 2004 letter), as charged in Count 15:

Proven _____ Not Proven _____

b. Interstate travel to promote prostitution in violation of New York law (January 12, 2005 travel), as charged in Count 16:

Proven _____ Not Proven _____

Racketeering Act 6

a. Aiding a witness to accept a bribe in a criminal case against client criminal Abdul Williams, in violation of New Jersey law:

Proven _____ Not Proven _____

b. Interstate travel in aid of bribery and drug trafficking business (June 21, 2007 telephone call), as charged in Count 18:

Proven _____ Not Proven _____

c. Interstate travel in aid of bribery and drug trafficking business (July 1, 2007 telephone call), as charged in Count 19:

Proven _____ Not Proven _____

Racketeering Act 7

a. Conspiracy to murder witnesses against client criminal Vicente Esteves in violation of New Jersey law:

Proven _____ Not Proven _____

b. Interstate travel in aid of drug trafficking business (July 7, 2008 travel from Illinois to New Jersey), as charged in Count 21:

Proven _____ Not Proven _____

c. Interstate travel in aid of drug trafficking business (August 5, 2008 travel from New Jersey to Illinois), as charged in Count 22:

Proven _____ Not Proven _____

d. Interstate Travel in aid of drug trafficking business (August 21, 2008 telephone call), as charged in Count 23:

Proven _____ Not Proven _____

e. Interstate travel in aid of drug trafficking business (September 5, 2008 telephone call), as charged in Count 24:

Proven _____ Not Proven _____

f. Interstate travel in aid of drug trafficking business (December 8, 2008 travel from Illinois to New Jersey), as charged in Count 25:

Proven _____ Not Proven _____

Racketeering Act 8

8. Failing to File an IRS Form 8300, as charged in Count 26:

Proven _____ Not Proven _____

COUNT 2
(RICO Conspiracy)

GUILTY _____ NOT GUILTY _____

COUNT 3
(Violent Crimes In Aid of Racketeering - Kemo McCray)

GUILTY _____ NOT GUILTY _____

COUNT 4
(Violent Crimes In Aid of Racketeering - Esteves Case)

GUILTY _____ NOT GUILTY _____

COUNT 5
(Conspiracy to Distribute a Controlled Substance)

GUILTY _____ NOT GUILTY _____

If you find the defendant guilty of Count 5, please answer the following additional questions:

Did the United States prove beyond a reasonable doubt that the defendant conspired to distribute five or more kilograms of cocaine?

Yes _____ No _____

If you answered "no," did United States prove beyond a reasonable doubt that the defendant conspired to distribute more than 500 grams of cocaine?

Yes _____ No _____

COUNT 8
(Maintaining Drug-Involved Premises - 710 Summer Avenue)

GUILTY _____ NOT GUILTY _____

COUNT 9
(Maintaining Drug-Involved Premises - 572 Market Street)

GUILTY _____ NOT GUILTY _____

COUNT 10
(Maintaining Drug-Involved Premises - 50 Park Place)

GUILTY _____ NOT GUILTY _____

COUNT 12
(Conspiracy to Murder a Federal Witness)

GUILTY _____ NOT GUILTY _____

COUNT 13
(Aiding and Abetting the Murder of a Federal Witness)

GUILTY _____ NOT GUILTY _____

COUNT 14
(Conspiracy to Travel in Aid of Prostitution Business)

GUILTY _____ NOT GUILTY _____

COUNT 15
(Travel in Aid of Prostitution Business: December 10, 2004 Mailing)

GUILTY _____ NOT GUILTY _____

COUNT 16
(Travel in Aid of Prostitution Business: January 12, 2005 Travel)

GUILTY _____ NOT GUILTY _____

COUNT 17
(Conspiracy to Travel in Aid of Drug Trafficking Business and Bribery)

GUILTY _____ NOT GUILTY _____

COUNT 18
(Travel in Aid of Drug Trafficking Business and Bribery: June 21, 2007 telephone call)

GUILTY _____ NOT GUILTY _____

COUNT 19
(Travel in Aid of Drug Trafficking Business and Bribery: July 1, 2007 telephone call)

GUILTY _____ NOT GUILTY _____

COUNT 20
(Conspiracy to Travel in Aid of Drug Trafficking Business)

GUILTY _____ NOT GUILTY _____

COUNT 21
(Travel in Aid of Drug Trafficking Business: July 7, 2008 Travel)

GUILTY _____ NOT GUILTY _____

COUNT 22
(Travel in Aid of Drug Trafficking Business: August 5, 2008 Travel)

GUILTY _____ NOT GUILTY _____

COUNT 23
(Travel in Aid of Drug Trafficking Business: August 21, 2008 Telephone Call)

GUILTY _____ NOT GUILTY _____

COUNT 24
(Travel in Aid of Drug Trafficking Business: September 5, 2008 Telephone Call)

GUILTY _____ NOT GUILTY _____

COUNT 25
(Travel in Aid of Drug Trafficking Business: December 8, 2008 Travel)

GUILTY _____ NOT GUILTY _____

COUNT 26
(Failure to File An IRS Form 8300)

GUILTY _____ NOT GUILTY _____

FOREPERSON:_____

DATE:_____