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**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SKEETS DOLPHUS,

Defendant.

No. CR 08-30039-01-KES

**FINAL
INSTRUCTIONS
TO THE JURY**

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VERDICT FORM

FINAL INSTRUCTION NO. 1 - INTRODUCTION

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

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

FINAL INSTRUCTION NO. 2 - "INTENT" AND "KNOWLEDGE"

"Intent" and "knowledge" are elements of the offense charged in this case and must be proved beyond a reasonable doubt. The prosecution is not required to prove that the defendant knew that his acts or omissions were unlawful. An act is done "knowingly" if the defendant is aware of the act and does not act through ignorance, mistake, or accident. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

FINAL INSTRUCTION NO. 3 –
CONSPIRACY TO DISTRIBUTE METHAMPHETAMINE
WITHIN 1000 FEET OF PLAYGROUND

The indictment charges that, on or about between January 1, 2003, and April 30, 2007, in the District of South Dakota, Skeets Dolphus and Joni Bad Warrior did knowingly and intentionally combine, conspire, confederate and agree together with each other and others, known and unknown to the Grand Jury, to knowingly and intentionally distribute and possess with intent to distribute a mixture and substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, within 1000 feet of the real property comprising a playground.

Elements

For you to find Skeets Dolphus guilty of conspiracy as charged in the indictment, the prosecution must prove the following four essential elements beyond a reasonable doubt.

One, that on or about January 1, 2003, and April 30, 2007, two or more persons reached an agreement or came to an understanding to possess with the intent to distribute, or to distribute, methamphetamine;

The prosecution must prove that the defendant reached an agreement or understanding with at least one other person. It makes no difference whether that person is a defendant or named in the indictment.

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

The indictment charges a conspiracy to commit two separate crimes or offenses. It is not necessary for the prosecution to prove a conspiracy to commit both of those offenses. It would be sufficient if the prosecution proves, beyond a reasonable doubt, a conspiracy to commit *one* of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon *which* of the two offenses was the subject of the conspiracy. If you cannot agree in that manner, you must find the defendant not guilty.

To assist you in determining whether there was an agreement to possess with the intent to distribute methamphetamine, which was one of the alleged objectives of the conspiracy, you should consider the elements of a “possession with intent to distribute” offense. The elements of possession with intent to distribute methamphetamine are the following: (1) a person was in possession of methamphetamine; (2) the person knew that he or she was, or intended to be, in possession of a controlled substance; and (3) the person intended to distribute some or all of the controlled substance to another person.

To assist you in determining whether there was an agreement or understanding to distribute methamphetamine, which was one of the alleged objectives of the conspiracy, you

should consider the elements of a “distribution” offense. The elements of distributing methamphetamine are the following: (1) a person intentionally distributed methamphetamine to another; and (2) at the time of the distribution, the person knew that what he or she was distributing was a controlled substance.

To find an individual defendant guilty of the “conspiracy” charged in the indictment, you do not have to find that the offense of distribution of methamphetamine or possession with the intent to distribute methamphetamine, was actually committed by the defendant or anyone else. It is the agreement to distribute or to possess with the intent to distribute methamphetamine that is illegal, so that is the conduct that has been charged in the indictment, and what must be proved to establish the defendant’s guilt on that charge.

Two, that the same two or more persons intended to distribute the substance at some place within 1000 feet of a playground;

The term “playground” means any outdoor facility (including any adjacent parking lot) intended for recreation, open to the public, and with any portion thereof containing three or more separate apparatus intended for the recreation of children including, but not limited to, sliding boards, swingsets, and teeterboards.

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

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others, does not prove that a person has joined in an agreement or understanding. A person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of one, does not thereby become a member. Similarly, the mere knowledge of an illegal act or association by a defendant with an individual engaged in the illegal conduct of a conspiracy is not enough to prove a person has joined ~~of~~^{the} conspiracy.

On the other hand, a person may join in an agreement or understanding, as required by this element, without knowing all the details of the agreement or understanding, and without knowing who all the other members are. Further, it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person has an understanding of the unlawful nature of the plan and voluntarily and intentionally joins in it.

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

Four, that at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding.

The defendant must know of the existence and purpose of the conspiracy. Without such knowledge, the defendant cannot be guilty of conspiracy, even if his acts furthered the conspiracy.

For you to find the defendant guilty of conspiracy to distribute methamphetamine within 1000 feet of a playground, as charged in the indictment, the prosecution must prove all of the essential elements of this offense beyond a reasonable doubt. Otherwise, you must find him not guilty of the charge in the indictment.

Lesser Included Offense - Conspiracy to Distribute Methamphetamine

If your verdict under this instruction is not guilty of conspiracy to distribute methamphetamine within 1000 feet of a playground, or if after all reasonable efforts you are unable to reach a verdict, you should record that decision on the verdict form and go on to consider whether the defendant is guilty of the crime of conspiracy to distribute methamphetamine. The crime of conspiracy to distribute methamphetamine, a lesser included offense of the crime charged in the indictment, has the following three essential elements:

One, that on or about January 1, 2003, and April 30, 2007, two or more persons reached an agreement or came to an understanding to possess with the intent to distribute, or to distribute, methamphetamine;

This element has been previously explained for you in this instruction.

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

This element has been previously explained for you in this instruction.

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

This element has been previously explained for you in this instruction.

For you to find Mr. Dolphus guilty of the crime of conspiracy to distribute methamphetamine, the government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find Mr. Dolphus not guilty of this crime.

FINAL INSTRUCTION NO. 4 - ACTS AND STATEMENTS OF
CO-CONSPIRATORS

You may consider acts knowingly done and statements knowingly made by a defendant's co-conspirators during the existence of the conspiracy and in furtherance of it as evidence pertaining to the defendant even though they were done or made in the absence of and without the knowledge of the defendant. This includes acts done or statements made before the defendant had joined the conspiracy, for a person who knowingly, voluntarily and intentionally joins an existing conspiracy is responsible for all of the conduct of the co-conspirators from the beginning of the conspiracy.

FINAL INSTRUCTION NO. 5 - IMPEACHMENT

In Preliminary Instruction No. 7, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

You have heard evidence that some witnesses have been convicted of a crime. You may use that evidence only to help you decide whether or not to believe those witnesses and how much weight to give their testimony.

Similarly, you have heard evidence that Reann Waloke and Joni Bad Warrior have pleaded guilty to charges that are alleged to have arisen out of the

same events for which the defendant is now on trial. You cannot consider such a witness's guilty plea as any evidence of the guilt of the defendant. Rather, you can consider such a witness's guilty plea only for the purpose of determining how much, if at all, to rely upon his or her testimony.

You should treat the testimony of certain witnesses with greater caution and care than that of other witnesses:

1. You have heard testimony from Reann Waloke and Joni Bad Warrior stating that they participated in the crime charged against the defendant. Their testimony was received in evidence and may be considered by you. You may give their testimony such weight as you think it deserves. Whether or not their testimony may have been influenced by their desire to please the Government or to strike a good bargain with the Government about their own situation is for you to determine.
2. You have heard evidence that Joni Bad Warrior has not been sentenced for her involvement in the drug conspiracy. If the prosecutor handling such a witness's case believes the witness has provided "substantial assistance," the prosecutor can file a motion to reduce the witness's sentence. The judge has no power to reduce a sentence for such a witness for substantial assistance unless the U.S. attorney files a motion requesting such a reduction. If the motion for reduction of sentence for substantial assistance is filed by the U.S. attorney, then it is up to the judge to decide whether to reduce the sentence of that witness at all, and if so, how much to reduce it. You may give the testimony of this witness such weight as you think it deserves. Whether or not testimony of a witness may have been influenced by

the witness's hope of receiving a reduction in sentence is for you to decide.

3. You have also heard evidence that Gerald Traversie, Arlen Keckler, and Jocelyn Chasing Hawk are testifying in the hope that the government will not file charges against them. Their testimony was received in evidence and you may consider it. You may give their testimony such weight as you think it deserves. Whether or not their testimony may have been influenced by their hope that the government will not file charges against them is for you to determine.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness's testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 6 - PRESUMPTION OF INNOCENCE AND
BURDEN OF PROOF

Skeets Dolphus is presumed innocent, and therefore, not guilty. This presumption of innocence requires you to put aside all suspicion that might arise from the arrest or charge of the defendant or the fact that he is here in court. The presumption of innocence remains with the defendant throughout the trial. That presumption alone is sufficient to find the defendant not guilty. The presumption of innocence may be overcome only if the prosecution proves, beyond a reasonable doubt, each element of a crime charged against him.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. Therefore, the fact that the defendant did not testify must not be discussed or considered by you in any way when deliberating and arriving at your verdict. A defendant is not even obligated to produce any evidence by cross-examining the witnesses who are called to testify by the prosecution.

Unless the prosecution proves beyond a reasonable doubt that Skeets Dolphus has committed each and every element of the offense charged in the indictment against him, you must find him not guilty of that offense.

FINAL INSTRUCTION NO. 7 - REASONABLE DOUBT

A reasonable doubt may arise from the evidence or lack of evidence produced by the prosecution. A reasonable doubt is a doubt based upon reason and common sense and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the more serious and important transactions of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

FINAL INSTRUCTION NO. 8 - DUTY TO DELIBERATE

A verdict must represent the considered judgment of each juror. Your verdict as to the defendant must be unanimous. It is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself; but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to re-examine your own views, and to change your opinion if you are convinced it is wrong. To bring twelve minds to an unanimous result, you must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that if, in your individual judgment, the evidence fails to establish the defendant's guilt beyond a reasonable doubt on an offense charged against him, then the defendant should have your vote for a not guilty verdict on that offense. If all of you reach the same conclusion, then the verdict of the jury must be not guilty for the defendant on that offense. Of course, the opposite also applies. If, in your individual judgment, the evidence

establishes the defendant's guilt beyond a reasonable doubt on an offense charged, then your vote should be for a verdict of guilty against the defendant on that charge, and if all of you reach that conclusion, then the verdict of the jury must be guilty for the defendant on that charge. As I instructed you earlier, the burden is upon the prosecution to prove beyond a reasonable doubt every essential element of a crime charged.

Remember also that the question before you can never be whether the government wins or loses the case. The government, as well as society, always wins, regardless of whether your verdict is not guilty or guilty, when justice is done.

Finally, remember that you are not partisans; you are judges—judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. However, I suggest that you carefully consider all of the evidence bearing upon the questions before you. You may take all the time that you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial, or competent jury would be selected to hear it. Any future jury must be selected in the same manner and

from the same source as you. If you should fail to agree on a verdict, the case is left open and must be disposed of at some later time.

FINAL INSTRUCTION NO. 9 - DUTY DURING DELIBERATIONS

There are certain rules you must follow while conducting your deliberations and returning your verdict:

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

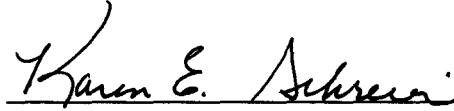
Second, if the defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment of the defendant in any way in deciding whether the prosecution has proved its case beyond a reasonable doubt.

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

Fourth, your verdict must be based solely on the evidence and on the law in these instructions. **The verdict, whether not guilty or guilty, must be unanimous.** Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or court security officer that you are ready to return to the courtroom.

Dated March 5, 2009.

A handwritten signature in black ink, reading "Karen E. Schreier", written over a horizontal line.

Karen E. Schreier
Chief Judge