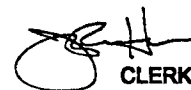


FILED

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CLERK

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JESE HERNANDEZ-MENDOZA and
EDDIE MARTINEZ,

Defendants.

No. CR 08-50027-01-KES

No. CR 08-50027-02-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 offenses 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 - COUNT 1 - CONSPIRACY TO DISTRIBUTE
METHAMPHETAMINE

Count 1 of the indictment charges that, no later than February, 2008, and continuing through the date of the indictment, near Sturgis, in the District of South Dakota and elsewhere, the defendants, Jese Hernandez-Mendoza and Eddie Martinez, did knowingly and intentionally combine, conspire, confederate, and agree with one another and with others known and unknown to the Grand Jury knowingly and intentionally to distribute and to possess with the intent to distribute 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine, its salts, isomers and salts of its isomers.

Elements

For you to find Jese Hernandez-Mendoza or Eddie Martinez guilty of the “conspiracy” offense charged in **Count 1** of the indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt as to each defendant.

One, that at a time no later than February 2008, and continuing through the date of the indictment, two or more persons reached an

agreement or came to an understanding to distribute, or to possess with the intent to distribute a mixture or substance containing 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. You do not have to find that all of the persons charged were members of the conspiracy.

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, namely distribution of methamphetamine and possession with intent to distribute methamphetamine. 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 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 was distributing was a controlled substance.

To assist you in determining whether there was an agreement to possess with the intent to distribute methamphetamine, which was the other alleged objective 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 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 find an individual defendant guilty of the “conspiracy” charged in **Count 1**, you do not have to find that the offense of distribution 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 **Count 1**, and what must be proved to establish an individual defendant’s guilt on that charge.

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

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 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.

Three, that at the time the defendant joined in the agreement or understanding, the defendant 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 an individual defendant guilty of “conspiracy,” as charged in **Count 1** of the indictment, the prosecution must prove all of the essential elements of this offense beyond a reasonable doubt as to the defendant. Otherwise, you must find him not guilty of the “conspiracy” charge.

Quantity of methamphetamine

If you find an individual defendant guilty of the “conspiracy” offense alleged in **Count 1**, you must also determine beyond a reasonable doubt the quantity of methamphetamine involved in the conspiracy for which the defendant can be held responsible. The prosecution does not have to prove that the offense involved the amount or quantity of methamphetamine charged in the indictment, although the prosecution must prove beyond a reasonable doubt the quantity of methamphetamine actually involved in the offense for which the defendant can be held responsible. Therefore, you must ascertain

whether or not the controlled substance in question was in fact methamphetamine, as charged in **Count 1** of the indictment, and you must determine beyond a reasonable doubt the amount of the methamphetamine involved in the offense for which the defendant can be held responsible. In so doing, you may consider all of the evidence in the case that may aid in the determination of these issues.

A defendant guilty of conspiracy to distribute methamphetamine, as charged in **Count 1** of the indictment, is responsible for quantities of methamphetamine that he actually distributed or agreed to distribute. Such a defendant is also responsible for those quantities of methamphetamine that fellow conspirators distributed or agreed to distribute, if you find that the defendant could have reasonably foreseen, at the time he joined the conspiracy or while the conspiracy lasted, that those prohibited acts were a necessary or natural consequence of the conspiracy.

You must determine the *total quantity* of the controlled substance involved in the conspiracy for which the defendant can be held responsible. You must indicate the *range* within which that *total quantity* falls. You must determine that *total quantity* in terms of grams of a mixture or substance

containing a detectable amount of methamphetamine. In making your determination of quantity as required, it may be helpful to remember that one pound is equal to 453.6 grams, that one ounce is equal to 28.35 grams, and that one kilogram is equal to 1000 grams.

Again, you must determine *beyond a reasonable doubt* the quantity of methamphetamine involved in the conspiracy for which the defendant can be held responsible.

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.

Acts and statements which are made after the conspiracy ended are admissible only against the person making them and should not be considered by you against any other defendant.

FINAL INSTRUCTION NO. 5 - COUNT 2 - POSSESSION WITH
INTENT TO DISTRIBUTE

Count 2 of the indictment charges that on or about February 24, 2008, near Sturgis, in the District of South Dakota, the defendants, Jese Hernandez-Mendoza and Eddie Martinez, did knowingly and intentionally possess, with the intent to distribute, 500 grams or more of a mixture and substance containing a detectable quantity of methamphetamine, its salts, isomers or salts of its isomers.

Elements

For you to find Jese Hernandez-Mendoza or Eddie Martinez guilty of “possession with intent to distribute,” charged in **Count 2** of the indictment, the prosecution must prove each of the following three essential elements beyond a reasonable doubt as to each defendant.

One, that on or about February 24, 2008, the defendant was in possession of methamphetamine;

Two, that the defendant knew that he was, or intended to be, in possession of a controlled substance; and

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

possession. A person may have sole or joint possession.

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

A person who, although not in actual possession, has both the power and intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. Mere physical proximity to contraband is generally not enough, but knowledge of its presence, combined with control is constructive possession. Knowledge can be inferred from a defendant's presence where contraband is discovered, combined with other evidence.

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

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

Three, that the defendant intended to distribute some or all of the methamphetamine to another person.

The term "distribute" means to deliver a controlled substance to the actual or constructive possession of another person. It is not necessary that money or anything of value change hands. The law

prohibits the “possession with intent to distribute” a controlled substance; the prosecution does not have to prove that there was, or was intended to be, a “sale” of a controlled substance to prove “possession with intent to distribute.”

If you find beyond a reasonable doubt that a defendant possessed a large quantity of a controlled substance, that is evidence from which you may, but are not required to, infer that the possessor intended to distribute the controlled substance.

For you to find Jese Hernandez-Mendoza or Eddie Martinez guilty of “possession with intent to distribute” as charged in **Count 2** of the indictment, the prosecution must prove all of these essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of this offense.

Quantity of methamphetamine

If you find an individual defendant guilty of the “possession with intent to distribute” offense alleged in **Count 2**, you must also determine beyond a reasonable doubt the quantity of methamphetamine for which the defendant can be held responsible. To do so, you must follow the instructions for determining quantity of methamphetamine beginning on page 7 of these instructions.

FINAL INSTRUCTION NO. 6 - COUNT 3 - POSSESSION WITH
INTENT TO DISTRIBUTE

Count 3 of the indictment charges that on or about February 24, 2008, near Sturgis, in the District of South Dakota, the defendants, Jese Hernandez-Mendoza and Eddie Martinez, did knowingly and intentionally possess, with the intent to distribute, 500 grams or more of a detectable amount of cocaine, its salts, optical and geometric isomers and salts of its isomers.

Elements

For you to find Jese Hernandez-Mendoza or Eddie Martinez guilty of “possession with intent to distribute,” as charged in **Count 3** of the indictment, the prosecution must prove each of the following three essential elements beyond a reasonable doubt.

One, that on or about February 24, 2008, the defendant was in possession of cocaine;

Two, that the defendant knew that he was, or intended to be, in possession of a controlled substance; and

The term “possession” was defined for you in Final Instruction No. 5.

Three, that the defendant intended to distribute some or all of the cocaine to another person.

The term “distribute” was defined for you in

Final Instruction No. 5.

If you find beyond a reasonable doubt that a defendant possessed a large quantity of a controlled substance, that is evidence from which you may, but are not required to, infer that the possessor intended to distribute the controlled substance.

For you to find the defendant guilty of possession with intent to distribute as charged in **Count 3** of the indictment, the prosecution must prove all of these essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of this offense.

Quantity of cocaine

If you find an individual defendant guilty of the “possession with intent to distribute” offense alleged in **Count 3**, you must also determine beyond a reasonable doubt the quantity of cocaine for which the defendant can be held responsible. The prosecution does not have to prove that the offense involved the amount or quantity of cocaine charged in the indictment, although the prosecution must prove beyond a reasonable doubt the quantity of cocaine actually involved in the offense for which the defendant can be held responsible. Therefore, you must ascertain whether or not the controlled substance in question was in fact cocaine, as charged in **Count 3** of the

indictment, and you must determine beyond a reasonable doubt the amount of the cocaine involved in the offense for which the defendant can be held responsible. In so doing, you may consider all of the evidence in the case that may aid in the determination of these issues.

You must determine the *total quantity* of the controlled substance involved in the offense for which the defendant can be held responsible. You must indicate the *range* within which that *total quantity* falls. You must determine that *total quantity* in terms of grams of a mixture or substance containing a detectable amount of cocaine. In making your determination of quantity as required, it may be helpful to remember that one pound is equal to 453.6 grams, that one ounce is equal to 28.35 grams, and that one kilogram is equal to 1000 grams.

Again, you must determine *beyond a reasonable doubt* the quantity of cocaine involved in the offense for which the defendant can be held responsible.

FINAL INSTRUCTION NO. 7 - THEORY OF DEFENSE

It is the position of both defendants that they did not know or participate in an alleged conspiracy or in the alleged possession with intent to distribute methamphetamine and cocaine. It is their defense that they were unaware that methamphetamine and cocaine were present in the vehicle or that they intended to distribute methamphetamine and cocaine.

Lack of knowledge is a defense to the crimes charged. Unless the government proves beyond a reasonable doubt that the defendant actually knew the vehicle contained methamphetamine and cocaine, you must find him not guilty of the offenses charged in the indictment.

FINAL INSTRUCTION NO. 8 - DELIBERATE IGNORANCE

You may find that a defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that he was in possession of a controlled substance and that he deliberately avoided learning the truth. The element of knowledge may be inferred if a defendant deliberately closed his eyes to what would otherwise have been obvious. You may not find a defendant acted “knowingly” if you find he was merely negligent, careless, or mistaken as to whether drugs were contained in the vehicle in which he was traveling.

FINAL INSTRUCTION NO. 9 - PRESUMPTION OF INNOCENCE AND
BURDEN OF PROOF

Jese Hernandez-Mendoza and Eddie Martinez are 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 defendants or the fact that they are here in court. The presumption of innocence remains with the defendants throughout the trial. That presumption alone is sufficient to find each defendant not guilty. The presumption of innocence may be overcome as to each defendant 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 defendants 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 Jese Hernandez-Mendoza or Eddie Martinez has committed each and every element of an offense charged in the indictment against him, you must find him not guilty of that offense.

FINAL INSTRUCTION NO. 10 - 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. 11 - STATEMENT OF ONE DEFENDANT IN
MULTI-DEFENDANT TRIAL

You may consider statements of Jese Hernandez-Mendoza to law enforcement officers only in the case against him, and not against Eddie Martinez. Similarly, you may consider the statements of Eddie Martinez to law enforcement officers only in the case against him, and not against Jese Hernandez-Mendoza. What that means is that you may consider a defendant's statement in the case against him and for that purpose rely on it as much or as little as you think proper, but you may not consider or discuss that statement in any way when you are deciding if the prosecution has proved, beyond a reasonable doubt, its case against the other defendant.

FINAL INSTRUCTION NO. 12 - 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 individual defendants are guilty, the sentence to be imposed is my responsibility. You may not consider punishment of Jese Hernandez-Mendoza or Eddie Martinez in any way in deciding whether the prosecution has proved its case beyond a reasonable doubt.

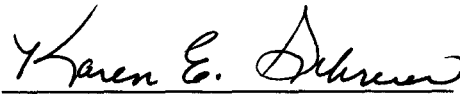
Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer, signed by one or more jurors. I will respond as soon as possible, either in writing or orally in open court. **Remember that you should not tell anyone—including 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 September 3, 2008.

A handwritten signature in cursive script that reads "Karen E. Schreier". The signature is written in black ink and is positioned above a horizontal line.

Karen E. Schreier
Chief Judge