UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	)	CR. 06-50079-02-RHB
	)	
Plaintiff,	)	
	)	
vs.	)	JURY INSTRUCTIONS
	)	
HARLAN GARCIA,	)	
	)	
Defendant.	)	

Attorney for plaintiff:

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INSTRUCTION NO. 1

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

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

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

INSTRUCTION NO. 2

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

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

INSTRUCTION NO. 3

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

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

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

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

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

3. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.

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

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

INSTRUCTION NO. 4

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

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

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

INSTRUCTION NO. 5

The indictment in this case charges the defendant with two crimes: one count of Conspiracy to Distribute and Posses with Intent to Distribute a Controlled Substance, and one count of Possession with Intent to Distribute a Controlled Substance. The indictment charges:

COUNT I

> Beginning at a time unknown to the Grand Jury, but no later than 2004, and continuing through the date of this Indictment, in the District of South Dakota and elsewhere, the defendants, Michelle Lucero and Harlan Garcia, did knowingly and intentionally combine, conspire, confederate and agree with each other and others known and unknown to the Grand Jury to knowingly and intentionally distribute and possess with the intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, and salts of its isomers, a Schedule II controlled substance, all in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A).

COUNT IV

> On or about June to July, 2005, at Rapid City, in the District of South Dakota, the defendant, Harlan Garcia, did knowingly and intentionally distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, and salts of its isomers, a Schedule II controlled substance, all in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B).

The defendant has pleaded not guilty to each of these charges.

As I told you at the beginning of the trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendant is presumed to be innocent. Thus the defendant, even though charged, begins the trial with no evidence against him. The presumption of innocence alone is sufficient to find the defendant not guilty and can be

overcome only if the government proves, beyond a reasonable doubt, each essential element of the crime charged.

Keep in mind that each count charges a separate crime. You must consider each count separately, and return a separate verdict for each count.

INSTRUCTION NO. 6

CONSPIRACY TO DISTRIBUTE AND POSSESS WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE

21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A)

The crime of Conspiracy to Distribute and Possess with Intent to Distribute a Controlled Substance, as charged in Count I the indictment, has three essential elements, which are as follows:

1. That beginning at a time unknown, but no later than 2004, and continuing through October 18, 2006, two or more persons reached an agreement or came to an understanding to distribute or possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount methamphetamine, its salts, isomers, and salts of its isomers, a Schedule II controlled substance; and
2. 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
3. That at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding.

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

INSTRUCTION NO. 7

POSSESSION WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE

21 U.S.C. §§ 841(a)(1) & 841(b)(1)(B)

The crime of Possession with Intent to Distribute a Controlled Substance, as charged in Count ~~II~~ IV of the indictment, has three essential elements, which are:

1. That on or about June to July, 2005, the defendant was in possession of methamphetamine;

2. That the defendant knew that he was in possession of methamphetamine; and

3. That the defendant intended to distribute some or all of the methamphetamine to another person.

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

INSTRUCTION NO. 8

CONSPIRACY

The government 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.

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 that advances some purpose of one does not thereby become a member.

But 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.

You must decide, after considering all of the evidence, whether the conspiracy alleged in the indictment existed. If you find that the alleged conspiracy did exist, you must also decide whether the defendant voluntarily and intentionally joined in the conspiracy, either at the time it was first formed or at some later time while it was still in effect. In making that decision, you must consider only evidence of the defendant's 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.

INSTRUCTION NO. 9

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence that may aid in a determination of the defendant's knowledge or intent. An inference is a deduction or conclusion which reason and common sense leads the jury to draw from the facts that have been established by the evidence in the case.

An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

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

INSTRUCTION NO. 10

The term "distribute" means to deliver a controlled substance. The term "deliver" or "delivery" means the actual or attempted transfer of a controlled substance, with or without promises or payments made.

INSTRUCTION NO. 11

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

INSTRUCTION NO. 12

You will note that the indictment charges that the offenses were committed within a range of dates. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the dates alleged.

INSTRUCTION NO. 13

You have heard evidence that defendant Harlan Garcia was previously convicted of a crime. You may use that evidence only to help you decide whether to believe his testimony and how much weight to give it. That evidence does not mean that he committed the crime or crimes charged here, and you must not use that evidence as any proof of the crime charged in this case.

INSTRUCTION NO. 14

In order to withdraw from a conspiracy, a defendant must demonstrate that he took affirmative action to withdraw from the conspiracy by making a clean breast to the authorities or by communicating his withdrawal in a manner reasonably calculated to reach his coconspirators. Simply ceasing to be an active participant in the conduct of the conspiracy alone is not enough to establish a withdrawal from the conspiracy.

INSTRUCTION NO. 15

You have heard evidence that various witnesses have made a plea agreement with the government. This testimony was received in evidence and may be considered by you. You may give this testimony such weight as you think it deserves. Whether or not the testimony may have been influenced by the plea agreement is for you to decide.

The witnesses' guilty pleas cannot be considered by you as any evidence of this defendant's guilt. The witnesses' guilty pleas can be considered by you only for the purpose of determining how much, if at all, to rely upon the testimony.

INSTRUCTION NO. 16

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement on a matter of fact or acted in a manner inconsistent with his or her testimony in this case on a matter material to these issues. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of that witness, but you must not consider any such prior statement as establishing the truth of any fact contained in that statement.

INSTRUCTION NO. 17

The testimony of a witness may be discredited or impeached by showing that he or she previously made statements which are inconsistent with his or her present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserved.

INSTRUCTION NO. 18

You have heard evidence that various witnesses have received a reduced sentence on criminal charges in return for cooperation with the government in this case.

You may give the testimony of these witnesses such weight as you think it deserves. Whether or not testimony of a witness may have been influenced in hope of receiving a reduced sentence is for you to decide.

INSTRUCTION NO. 19

Your decision on the facts of this case should not be determined by the number of witnesses testifying for or against a party. You should consider all the facts and circumstances in evidence to determine which of the witnesses you choose to believe or not believe. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

INSTRUCTION NO. 20

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

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

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

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

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

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

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

Fifth, your verdict must be based solely on the evidence and on the law that I have given to you in my instructions. The verdict whether guilty or not 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 that you are ready to return to the courtroom.

Dated this 13th day of February, 2008.

/s/ Richard H. Battey

RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE