

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES VICTOR MCGILBERRY, JR.,
a/k/a "B.G."

Defendants.

No. CR 08-50081-01-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 MARIJUANA

The superceding indictment charges that, beginning at a time unknown but no later than January, 2003, and continuing through the date of the indictment, at Rapid City, in the District of South Dakota and elsewhere, the defendant, James Victor McGilberry, Jr., a/k/a “B.G.”, did knowingly and intentionally combine, conspire, confederate, and agree, with others known and unknown, to knowingly and intentionally distribute and possess, with the intent to distribute, 1000 kilograms or more of marijuana, a Schedule I controlled substance.

Elements

For you to find James Victor McGilberry, Jr., guilty of conspiracy as charged in the superceding indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt.

One, that at a time no later than January 2003, and continuing through the date of the indictment, two or more persons reached an agreement or came to an understanding to possess with the intent to distribute, or to distribute, marijuana;

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 superceding 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 superceding 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 marijuana, 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 marijuana are the following: (1) a person was in possession of marijuana; (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 marijuana, which was one of the alleged objectives of the conspiracy, you should consider the elements of a "distribution" offense. The elements of distributing marijuana are the following: (1) a person intentionally distributed marijuana 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 superceding indictment, you do not have to find that the offense of distribution of marijuana or possession with the intent to distribute marijuana, was actually committed by the defendant or anyone else. It is the agreement to distribute or to possess with the intent to distribute marijuana that is illegal, so that is the conduct that has been charged in the superceding indictment, and what must be proved to establish the 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 or 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.

Three, 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,” as charged in the superceding 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.

Quantity of marijuana

If you find the defendant guilty of the “conspiracy” offense alleged in the superceding indictment, you must also determine beyond a reasonable doubt the quantity of marijuana 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 marijuana charged in the superceding indictment, although the prosecution must prove beyond a reasonable doubt the quantity of marijuana 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 marijuana, as charged in the superceding indictment, and you must determine beyond a reasonable doubt the amount of the marijuana 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 marijuana, as charged in the superceding indictment, is responsible for quantities of marijuana that he actually distributed or agreed to distribute. Such a defendant is also responsible for those quantities of marijuana 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 marijuana. 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, that one kilogram is equal to 1000 grams, and that one kilogram is equal to 2.2 pounds.

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

