

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED

OCT 28 2011

[Signature]
CLERK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VIENGXAY CHANTHARATH,
a/k/a/ "OG;" and
PATRICIO GUZMAN-ORTIZ,

Defendants.

No. CR 10-40004-01-KES

No. CR 10-40004-06-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 – 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 witnesses Jeffrey Kriz, Aurelio Angel Solorio, Bruce Ross, Joseph Derosier, Megan Harper, Trish Quarve, Felicia Omara, and Sabrina Pincombe have each been convicted of a crime. You may use that evidence only to help you decide whether or not to believe these witnesses and how much weight to give their testimony.

Similarly, you have heard evidence that Jeffrey Kriz, Aurelio Angel Solorio, Bruce Ross, Felicia Omara, and Trish Quarve have pleaded guilty to a charge that arose out of the same events for which the defendants Patricio Guzman-Ortiz and Viengxay Chantharath are now on trial. You cannot consider such a witness’s guilty plea as any evidence of the guilt of either 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 evidence that Jeffrey Kriz, Aurelio Angel Solorio, Bruce Ross, and Felicia Omara are testifying pursuant to plea agreements and hope to receive reductions in their sentences in return for their cooperation with the government in this case. 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 United States Attorney files a motion requesting such a reduction. If the motion for reduction of sentence for substantial assistance is filed by the United States 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 such witnesses 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.

2. You have also heard testimony from Jeffrey Kriz, Aurelio Angel Solorio, Bruce Ross, Felicia Omara, and Trish Quarve that they participated in the crime charged against these defendants. Their testimony was received in evidence and you may consider it. You may give the testimony of such a witness such weight as you think it deserves. Whether or not the testimony of such a witness may have been influenced by his or her desire to please the government or to strike a good bargain with the government about his or her own situation is for you to determine.

3. You have heard evidence that the witnesses Megan Harper, Trish Quarve, Joseph Derosier, and Sabrina Pincombe have received a promise from the Government that their testimony will not be used against them in a criminal case. 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 the Government's promise is for you to determine.

4. You have heard evidence that Jeffrey Kriz, Aurelio Angel Solorio, and Bruce Ross had an arrangement with the government under

which they received a promise from the government that the § 851 enhancement would not be filed, which would have increased their criminal penalty. Their testimony was received in evidence and you may consider it. 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 by receiving such a benefit is for you to decide.

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. 3 – DEFENDANTS’ PHOTOGRAPHS

Aurelio Angel Solorio has testified that he viewed photographs of defendants Viengxay Chantharath and Patricio Guzman-Ortiz which were shown to him by the police. The police collect pictures of many people from many different sources and for many different purposes. The fact that the police had these defendants’ pictures does not mean that either defendant committed this or any other crime, and it must have no effect on your consideration of the case.

FINAL INSTRUCTION NO. 4 – CONSPIRACY TO DISTRIBUTE A MIXTURE
CONTAINING METHAMPHETAMINE

For you to find Viengxay Chantharath or Patricio Guzman-Ortiz guilty of the “conspiracy” offense charged in the seventh superseding indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt:

One, between on or about the summer of 2008 and on or about March 4, 2011, two or more persons reached an agreement or came to an understanding to distribute a mixture or substance containing methamphetamine;

The prosecution must prove that an individual 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 seventh superseding 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.

To assist you in determining whether there was an agreement or understanding to distribute methamphetamine, which was the alleged objective of the conspiracy, you should consider the elements of a “distribution” offense. The elements of distribution of methamphetamine are the following: (1) a person intentionally transferred methamphetamine to

another; and (2) at the time of the transfer, the person knew that what he was transferring was a controlled substance.

To find an individual defendant guilty of the "conspiracy" charged in the seventh superseding indictment, you do not have to find that the offense of distribution of methamphetamine was actually committed by a defendant or anyone else. It is the agreement to distribute methamphetamine that is illegal, so that is the conduct that has been charged in the seventh superseding indictment, and what must be proved to establish a 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;

You must decide, after considering all of the evidence, whether the conspiracy alleged in the seventh superseding indictment existed. If you find that the alleged conspiracy did exist, you must also decide whether the defendant whose case you are considering voluntarily and intentionally joined 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 that 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 that defendant.

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, mere knowledge of the existence of a conspiracy is not enough to prove that the defendant joined in the conspiracy; rather, the prosecution must establish some degree of knowing involvement and cooperation.

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 the defendant said or did.

It is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

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

The defendant whose case you are considering must know of the existence and purpose of the conspiracy. Without such knowledge, that defendant cannot be guilty of conspiracy, even if his acts

furthered the conspiracy. Mere knowledge of an illegal act or association with an individual engaged in illegal conduct is not enough to prove a person has joined a conspiracy.

“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.

For you to find a defendant guilty of “conspiracy,” as charged in the seventh superseding indictment, the prosecution must prove all of the essential elements of this offense beyond a reasonable doubt. Otherwise, you must find that defendant not guilty of the “conspiracy” charge.

Quantity of Methamphetamine

If you find an individual defendant guilty of the “conspiracy” offense alleged in the seventh superseding indictment, you must also determine beyond a reasonable doubt the quantity of methamphetamine involved in the conspiracy for which that 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 seventh superseding 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 the seventh superseding indictment, and you must determine beyond a reasonable doubt the amount of the methamphetamine involved in the offense

for which that 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 the seventh superseding 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 whose case you are considering 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 whose case you are considering can be held responsible.

FINAL INSTRUCTION NO. 5 – MULTIPLE CONSPIRACIES

The seventh superseding indictment charges that the defendants were members of one single conspiracy to commit the crime of conspiracy to distribute methamphetamine.

If the United States has failed to prove beyond a reasonable doubt the existence of the conspiracy which is charged, then you must find the defendant not guilty, even though some other conspiracy did exist or might have existed. Likewise, if the United States has failed to prove beyond a reasonable doubt that the defendant was a member of the conspiracy which is charged, then you must find the defendant not guilty even though he may have been a member of some other conspiracy. But proof that a defendant was a member of some other conspiracy would not prevent you from returning a guilty verdict, if the Government also proved that he was a member of the conspiracy charged in the indictment.

A single conspiracy may exist even if all the members did not know each other, or never met together, or did not know what roles all the other members played. And a single conspiracy may exist even if different members joined at different times, or the membership of the group changed. Similarly, just because there were different subgroups operating in different places, or many different criminal acts committed over a long period of time, does not necessarily mean that there was more than one conspiracy. These are factors you may consider in determining if more than one conspiracy existed.

FINAL INSTRUCTION NO. 6 – 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 that defendant. This includes acts done or statements made before that 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.

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

FINAL INSTRUCTION NO. 7 – PRESUMPTION OF INNOCENCE AND BURDEN
OF PROOF

Viengxay Chantharath and Patricio Guzman-Ortiz 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 the defendants 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 Viengxay Chantharath and Patricio Guzman-Ortiz have committed each and every element of the offense charged in the seventh superseding indictment against them, you must find them not guilty of that offense.

FINAL INSTRUCTION NO. 8 – 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. 9 – DUTY TO DELIBERATE

A verdict must represent the considered judgment of each juror. Your verdict as to the defendants 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 the offense charged against him, then that 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 that defendant. Of course, the opposite also applies. If, in your individual judgment, the evidence establishes the defendant's guilt beyond a reasonable doubt on the offense charged, then your vote should be for a verdict of guilty against that defendant on that charge, and if all of you reach that conclusion, then the verdict of the jury must be guilty for that defendant. As I instructed you earlier, the burden is upon the prosecution to prove beyond a reasonable doubt every essential element of the 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. 10 – 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.

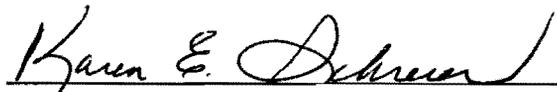
Second, if a defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment of that defendant in any way in deciding whether the prosecution has proved its case beyond a reasonable doubt.

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 October 28, 2011.



Karen E. Schreier
Chief Judge

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OCT 28 2011

GOVERNMENT'S SUPPLEMENTAL PROPOSED INSTRUCTION NO.

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Intent to distribute typically is established through circumstantial evidence. In particular, possession of a large quantity of a controlled substance can be sufficient evidence of an intent to distribute. Other indicia of intent to distribute include drug purity and presence of firearms, cash, packaging material, or other distribution paraphernalia.

Source: Committee Comments to Model Rule 6.21.841A.

References: *United States v. Shurn*, 849 F.2d 1090, 1093, 1095 (8th Cir. 1988) and cases cited therein; *United States v. Lopez*, 42 F.3d 463, 467-68 (8th Cir. 1994); *United States v. Gentry*, 555 F.3d 659, 666-667 (8th Cir. 2009) ("Circumstantial evidence such as the presence of a firearm or a large quantity of drugs may be used to prove intent to distribute."); *United States v. Espinosa*, 300 F.3d 981, 984 (8th Cir. 2002) ("We have long recognized the role of firearms in protecting drugs or drug proceeds."); *United States v. Dierling*, 131 F.3d 722, 732 (8th Cir. 1997) (evidence of firearms possession is admissible and relevant as "tools in the drug trade" in circumstantially proving involvement in drug trafficking); *United States v. Meirovitz*, 918 F.2d 1376, 1379-1380 (8th Cir. 1990) ("Firearms are generally considered tools of the drug dealer's trade and can be admitted as evidence of intent to distribute."); *United States v. Schubel*, 912 F.2d 952, 956 (8th Cir. 1990) ("The presence of firearms, generally considered a tool of the trade for drug dealers, is also evidence of intent to distribute.").

10-27-11
Refused
K. Schauer

DEFENDANT GUZMAN-ORTIZ'S PROPOSED INSTRUCTION NO. 16

As you know, there are two defendants on trial here: Viengxay Chantharath and Patricio Guzman-Ortiz. Each defendant is entitled to have his or her case decided solely on the evidence which applies to him. Some of the evidence in this case is limited under the rules of evidence to one of the defendants, and cannot be considered against the other.

The testimony you just heard can be considered only in the case against defendant _____ . You must not consider that evidence when you are deciding if the Government has proved, beyond a reasonable doubt, its case against Defendant Patricio Guzman-Ortiz.

10-27-11
Refused.
K. Schram

DEFENDANT GUZMAN-ORTIZ'S PROPOSED INSTRUCTION NO. 5

To be a conspirator, it is not required that Patricio Guzman-Ortiz knew all of the details of the conspiracy. The Government need only prove that Patricio Guzman-Ortiz tacitly agreed to participate in the conspiracy and that he intended its unlawful goal.

10-27-11

Refused

K. Scherer

Source:

U.S. v. Causor-Serrato, 234 F.3d 384, 388 (8th Cir. 2000).

DEFENDANT GUZMAN-ORTIZ'S PROPOSED INSTRUCTION NO. 4

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

Mere knowledge of an illegal act or association with an individual engaged in illegal conduct is not enough to prove a person has joined the conspiracy.

10-27-11
Revised
K. Scherer

Source:

8th Cir. Model Cr. JI, 5.06A, Committee Comments, citing U.S. v. Falcone, 311 U.S. 205, 210, 61 S.Ct. 204, 206, 85 L.Ed.2d 128 (1940).

8th Cir. Model Cr. JI, 5.06B, Committee Comments, citing U.S. v. Raymond, 793 F.2d 928, 932 (8th Cir. 1986).