

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

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<p>UNITED STATES OF AMERICA,  Plaintiff,  vs.  CLYDE AQUALLO,  Defendant.</p>	<p>3:14-CR-30051-RAL  FINAL JURY INSTRUCTIONS</p>
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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. The instructions I am about to give you now are in writing and will be available to you in the jury room.

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.

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 and the documents and other things received as exhibits.

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.

When you were instructed that evidence was received for a limited purpose, 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.

You should judge the testimony of the defendant in the same manner as you judge the testimony of any other witness.

INSTRUCTION NO. 5

You have heard testimony from a person described as an expert. A person who, by knowledge, skill, training, education, or experience, has become an expert in some field may state opinions on matters in that field and may also state the reasons for those opinions.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

INSTRUCTION NO. 6

The second superseding indictment in this case charges the defendant with seven different crimes. Count I of the second superseding indictment charges that the defendant committed the crime of possession of an unregistered firearm. Count II of the second superseding indictment charges that the defendant committed the crime of prohibited person in possession of a firearm. Count III of the second superseding indictment charges that the defendant committed the crime of assault with a dangerous weapon, with intent to do bodily harm. Count IV of the second superseding indictment charges that the defendant committed the crime of using a firearm during and in relation to a crime of violence. Count V of the second superseding indictment charges that the defendant committed the crime of prohibited person in possession of a firearm. Counts VI and VII of the second superseding indictment charge that the defendant committed the crime of distribution or possession with intent to distribute a controlled substance. The defendant has pleaded not guilty to each of these charges.

The second superseding 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 element of the crimes charged.

A separate crime, or offense, is charged in each count of the second superseding indictment. Each alleged offense, and the evidence pertaining to it, must be considered separately. The fact that you may find the defendant not guilty or guilty as to one of the offenses charged should not control your verdict as to the other offenses charged. You must base your verdict on each count solely on the evidence presented relevant to that count.

There is no burden upon a defendant to prove that he is innocent.

INSTRUCTION NO. 7

The crime of possession of an unregistered firearm, as charged in Count I of the second superseding indictment, has four elements, which are:

***One*, that on or about the 27th day of February, 2014, the defendant, Clyde Aquallo, knowingly possessed or received the firearm, a Remington Wingmaster, Model 870 magnum short-barreled shotgun, bearing serial number S751097M;**

***Two*, the defendant knew the firearm was a shotgun having a barrel less than 18 inches in length;**

***Three*, the firearm was capable of operating as designed or could readily be put in operating condition; and**

***Four*, the firearm was not registered to the defendant in the National Firearms Registration and Transfer Record.**

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged; otherwise you must find the defendant not guilty of this crime.



INSTRUCTION NO. 8

The crime of being a prohibited person in possession of a firearm, as charged in Count II of the second superseding indictment, has three elements, which are:

***One*, that on or about the 27th day of February, 2014, the defendant, Clyde Aquallo, was an unlawful user of a controlled substance, that is, methamphetamine, or was a drug addict as defined in Instruction Number 15;**

***Two*, the defendant knowingly received or possessed a firearm, that is a Savage model 24S-E, .22 caliber / 20 gauge combination rifle shotgun, bearing no serial number; a Remington Fieldmaster model 572, .22 caliber rifle, bearing serial number 1827090; a Mossberg model 702 Plinkster, .22 caliber rifle, bearing serial number ELA3324304; a Remington model 710, .30-06 caliber rifle, bearing serial number 71250079, with a Bushnell scope attached; or a Remington Wingmaster model 870 Magnum, short-barreled shotgun, bearing serial number S751097M, while he was an unlawful user of a controlled substance or a drug addict; and**

***Three*, the firearm was or firearms were transported across a state line at some time during or before the defendant's receipt or possession.**

If you have found beyond a reasonable doubt that a firearm in question was manufactured in a state or country other than South Dakota and that the defendant possessed that firearm in the state of South Dakota then you may, but are not required to, find that it was transported across a state line.

The term "firearm" means any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosive.

You are instructed that methamphetamine is a controlled substance.

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 9

The crime of assault with a dangerous weapon, with intent to do bodily harm, as charged in Count III of the second superseding indictment, has five elements, which are:

***One*, that on or about the 3rd day of March, 2014, the defendant, Clyde Aquallo, without just cause or excuse, voluntarily and intentionally assaulted Shari Burnette, as defined in Instruction Number 16;**

***Two*, that the defendant used a Remington .22 caliber rifle in the assault and that the Remington .22 caliber rifle was a dangerous weapon;**

***Three*, that the defendant had the specific intent to do bodily harm to Shari Burnette;**

***Four*, that the defendant is an Indian; and**

***Five*, that the offense took place in Indian country.**

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 10

If you should unanimously find the defendant “Not Guilty,” of the crime of assault with a dangerous weapon as charged in Count III of the second superseding indictment, or if, after reasonable efforts, you are unable to reach a verdict as to the crime charged in Count III of the second superseding indictment, then you must proceed to determine the guilt or innocence of the defendant as to the crime of simple assault under this Instruction.

The crime of simple assault, a lesser included offense to the crime of assault with a dangerous weapon as charged in Count III of the second superseding indictment, has three essential elements, which are:

***One, that on or about the 3rd day of March, 2014, the defendant, Clyde Aquallo, without just cause or excuse, voluntarily and intentionally engaged in an assault as defined in the first paragraph of Instruction Number 16 of Shari Burnette;***

***Two, that the defendant, is an Indian; and***

***Three, that the offense took place in Indian country.***

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 11

The crime of using a firearm during and in relation to of a crime of violence as charged in Count IV of the second superseding indictment has three elements, which are:

***One, that on or about the 3rd day of March, 2014, the defendant committed the crime of assault with a dangerous weapon as charged in Count III;***

***Two, the defendant knowingly used a firearm, that is a Remington .22 caliber rifle, in furtherance of that crime; and***

***Three, the defendant brandished the firearm in furtherance of that crime.***

The phrase “used a firearm in the furtherance of that crime” means that the firearm was actively employed in the course of the commission of the crime of assault with a dangerous weapon. You may find that a firearm was used during the commission of the crime of assault with a dangerous weapon if you find that it was brandished. The term “brandish” means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

You must first consider the evidence pertaining to Count III of the second superseding indictment and determine whether the Government has proved that offense beyond a reasonable doubt. If you reach a verdict of guilty on assault with a dangerous weapon as charged in Count III, only then may you consider Count IV. If your verdict was not guilty on Count III, you must return a verdict of not guilty on Count IV. If you find with respect to Count III, that the defendant did not commit the crime of assault with a dangerous weapon, but do find the defendant committed the crime of simple assault, then you should find the defendant not guilty of Count IV.

If all of the elements of Count IV have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 12

The crime of being a prohibited person in possession of a firearm, as charged in Count V of the second superseding indictment, has three elements, which are:

***One, that on or about the 3rd day of March, 2014, the defendant, Clyde Aquallo, was an unlawful user of a controlled substance, that is, methamphetamine, or was a drug addict as defined in Instruction Number 15;***

***Two, the defendant knowingly received or possessed a firearm, that is a Remington .22 caliber rifle, while he was an unlawful user of a controlled substance or a drug addict; and***

***Three, the firearm was transported across a state line at some time during or before the defendant's receipt or possession of it.***

If you have found beyond a reasonable doubt that the firearm in question was manufactured in a state other than South Dakota and that the defendant possessed that firearm in the state of South Dakota then you may, but are not required to, find that it was transported across a state line.

The term "firearm" means any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosive.

You are instructed that methamphetamine is a controlled substance.

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 13

The crime of distribution or possession of cocaine with intent to distribute, as charged in Count VI of the second superseding indictment, has three elements, which are:

***One*, that on or about between the 1st day of December, 2011, and the 31st day of December, 2012, the defendant, Clyde Aquallo, was in possession of or distributed a mixture or substance with a detectable amount of cocaine;**

***Two*, the defendant knew that he was in possession of or distributed a mixture or substance with a detectable amount of cocaine; and**

***Three*, the defendant intended to distribute some or all of the mixture or substance with a detectable amount of cocaine to another person.**

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged, otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 14

The crime of distribution or possession of methamphetamine with intent to distribute, as charged in Count VII of the second superseding indictment, has three elements, which are:

***One*, that on or about between the 1st day of October, 2013, and the 31st day of December, 2013, the defendant, Clyde Aquallo, was in possession of or distributed a mixture or substance with a detectable amount of methamphetamine;**

***Two*, the defendant knew that he was in possession of or distributed a mixture or substance with a detectable amount of methamphetamine; and**

***Three*, the defendant intended to distribute some or all of the mixture or substance with a detectable amount of methamphetamine to another person.**

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged, otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 15

The phrase "unlawful user of a controlled substance" means a person who uses a controlled substance in a manner other than as prescribed by a licensed physician. The defendant must have been actively engaged in use of a controlled substance during the time he possessed the firearm, but the law does not require that he used the controlled substance at the precise time he possessed the firearm. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. An inference that a person was a user of a controlled substance may be drawn from evidence of a pattern of use or possession of a controlled substance that reasonably covers the time the firearm was possessed.

The term "drug addict" means any individual who habitually uses any controlled substance so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of a controlled substance as to have lost the power of self-control with reference to his addiction.



INSTRUCTION NO. 16

An "assault" under Federal law is (1) any intentional and voluntary attempt or threat to do injury to another person, when coupled with the apparent present ability to do so, sufficient to put the person against whom the attempt is made in fear of immediate bodily harm or (2) any intentional or knowing harmful or offensive bodily touching or contact, however slight, without justification or excuse, with another's person, regardless of whether physical harm is intended or inflicted or whether the victim has a reasonable apprehension of bodily harm.

However, for an assault with a dangerous weapon to be committed, the assault must involve use of a dangerous weapon with the specific intent to do harm to the victim.

INSTRUCTION NO. 17

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 of it.

A person who, although not in actual possession, has both the power and the 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.

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.

Whenever 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.

INSTRUCTION NO. 18

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The Government is not required to prove that the defendant knew that his actions were unlawful. 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.

INSTRUCTION NO. 19

Intent 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 which may aid in the determination of the defendant's intent.

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. 20

A witness may be discredited or “impeached” by contradictory evidence, by a showing that he or she 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 which is inconsistent with the witness’s present testimony.

If you believe that any witness has been so impeached, then it is your exclusive decision to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

INSTRUCTION NO. 21

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. 22

The second superseding indictment in this case alleges that the defendant is an Indian and that some of the alleged offenses occurred in Indian country. The existence of those two factors is necessary in order for this Court to have jurisdiction over the crime charged in Count III second superseding indictment and for the defendant to be found guilty of Count IV of the second superseding indictment.

A person is considered an "Indian" if that person has some Indian blood and if the person is recognized as an Indian. A person is generally recognized to be an "Indian" if that person is enrolled as a member in a federally recognized Indian tribe. The Rosebud Sioux Tribe is a federally recognized Indian tribe.

Todd County is, and was during the relevant time periods, within what is considered "Indian country." It is for you to decide whether the defendant committed the Indian country offense charged and, if so, whether such offense occurred in Todd County.

INSTRUCTION NO. 23

You will note that the second superseding indictment charges that the offense was committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the case establishes beyond a reasonable doubt that the offense was committed on a date or dates reasonably near the dates alleged.



INSTRUCTION NO. 24

You have heard testimony that the defendant, Clyde Aquallo, made statements to Rosebud Sioux Tribe Law Enforcement Services officers. It is for you to decide:

First, Whether the defendant, Clyde Aquallo, made the statements.

Second, if so, how much weight you should give to them.

In making these two decisions, you should consider all of the evidence, including the circumstances under which the statement may have been made.

## INSTRUCTION 25

You heard evidence that Defendant Clyde Aquallo allegedly threatened and assaulted Shari Burnette on occasions prior to March 3, 2014. If you believe this evidence to be true, you may consider such evidence for the purpose of determining whether the defendant had the specific intent to do bodily harm to Shari Burnette on March 3, 2014. The defendant is not charged with any other assault other than the one that allegedly occurred on March 3, 2014. Evidence of any prior alleged threats or assaults by Defendant Clyde Aquallo on Shari Burnette may not be considered as evidence of the defendant's character or tendency to commit criminal acts, but only for the purposes of understanding the defendant's motive, opportunity, intent, or absence of mistake or accident.

You also heard evidence about marijuana use or distribution allegedly involving Defendant Clyde Aquallo. The defendant is not charged with any offense involving marijuana use or distribution. Evidence concerning marijuana use or distribution was allowed in evidence because marijuana was present in the home when the defendant was arrested, and both the defendant and Shari Burnett discussed with law enforcement around the time of the defendant's arrest the presence and use of marijuana. You may also use the evidence and testimony about marijuana in judging the credibility of the defendant and Shari Burnette. You may not use evidence of marijuana use or distribution as proof of any element of any of the crimes charged or as being relevant in any way to Defendant Clyde Aquallo's character or tendency to commit criminal acts.

INSTRUCTION NO. 26

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 or bailiff, 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*, during your deliberations, you must not communicate with or provide any information to anyone other than by note to me by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, Instagram, YouTube, or Twitter, to communicate to anyone information about this case or to conduct any research about this case until I accept your verdict.

*Sixth*, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. 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 bailiff that you are ready to return to the courtroom.

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

<p>UNITED STATES OF AMERICA,  Plaintiff,  vs.  CLYDE AQUALLO,  Defendant.</p>	<p>3:14-CR-30051-RAL  VERDICT FORM</p>
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We, the jury, duly empaneled and sworn to try the issues in this case, find as follows:

1. We find Defendant Clyde Aquallo \_\_\_\_\_ (fill in either “not guilty” or “guilty”) of possession of an unregistered firearm as charged in Count I of the second superseding indictment.

2. We find Defendant Clyde Aquallo \_\_\_\_\_ (fill in either “not guilty” or “guilty”) of prohibited person in possession of a firearm as charged in Count II of the second superseding indictment.

3. We find Defendant Clyde Aquallo \_\_\_\_\_ (fill in either “not guilty” or “guilty”) of assault with a dangerous weapon with intent to do bodily harm, as charged in Count III of the second superseding indictment.

3a. (Complete if, and only if, you found Defendant Clyde Aquallo “not guilty” of the crime charged in Count III of the second superseding indictment. If you found the defendant “guilty” on Count III, then leave this portion blank) We find Defendant Clyde Aquallo \_\_\_\_\_ (fill in either

“not guilty” or “guilty”) of simple assault, a lesser-included offense to the crime charged in Count III of the second superseding indictment.

4. (Complete if, and only if, you found Defendant Clyde Aquallo “guilty” of Count III. If you found the defendant “not guilty” of assault with a dangerous weapon as charged in Count III, leave this portion blank.) We find Defendant Clyde Aquallo \_\_\_\_\_ (fill in either “not guilty” or “guilty”) of using and carrying a firearm during and in relation to a crime of violence as charged in Count IV of the second superseding indictment.

5. We find Defendant Clyde Aquallo \_\_\_\_\_ (fill in either “not guilty” or “guilty”) of drug user in possession of a firearm as charged in Count V of the second superseding indictment.

6. We find Defendant Clyde Aquallo \_\_\_\_\_ (fill in either “not guilty” or “guilty”) of distribution of a controlled substance (cocaine) as charged in Count VI of the second superseding indictment.

7. We find Defendant Clyde Aquallo \_\_\_\_\_ (fill in either “not guilty” or “guilty”) of distribution of a controlled substance (methamphetamine) as charged in Count VII of the second superseding indictment.

DATED this \_\_\_\_ day of January, 2015.

\_\_\_\_\_  
FOREPERSON