

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

<p>UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL WAYNE COOPER, Defendant.</p>	<p style="text-align: center;">No. CR. 18-40136-01-KES</p> <p style="text-align: center;">FINAL INSTRUCTIONS TO THE JURY</p>
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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 – DISTRIBUTION OF A CONTROLLED
SUBSTANCE RESULTING IN SERIOUS BODILY INJURY

For you to find Michael Wayne Cooper guilty of the offense of distribution of a controlled substance resulting in serious bodily injury as charged in the Superseding Indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt:

One, that on or about August 11, 2018, Cooper intentionally transferred a controlled substance to Victim #1, or aided and abetted in the transfer;

Fentanyl and heroin are both controlled substances.

Intent may be proven like anything else. You may consider any statements made or acts done by the defendant and all the facts and circumstances in evidence which may aid in a 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.

The prosecution need not prove that the defendant intentionally transferred the controlled substance directly to Victim #1, so long as the prosecution proves beyond a reasonable doubt that the controlled substance transferred by the defendant is the same controlled substance that later resulted in the serious bodily injury of Victim #1.

Two, that at the time of the transfer, Cooper knew it was a controlled substance;

It is not necessary for the prosecution to prove that the defendant knew the precise nature of the controlled substance that he distributed. The prosecution must prove beyond a reasonable doubt, however, that the defendant did know that some type of controlled substance was distributed.

And three, that serious bodily injury resulted from the use of the controlled substance that Cooper transferred.

A "serious bodily injury" is a bodily injury which involves a substantial risk of death, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

The prosecution must prove that serious bodily injury resulted from the unlawfully transferred controlled substance, not merely from a combination of factors to which drugs were merely contributed.

The law does not require the prosecution to prove that the defendant intended to cause serious bodily injury. Similarly, the law does not require the prosecution to prove that the defendant knew or should have known that he was exposing Victim #1 to a risk of serious bodily injury when the defendant transferred the controlled substance.

For you to find Cooper guilty of the offense charged in the Superseding Indictment, the prosecution must prove all three of the essential elements beyond a reasonable doubt. Otherwise, you must find Cooper not guilty of the offense charged in the Superseding Indictment.

Lesser Included Offense – Distribution of a Controlled Substance

If your verdict under these instructions is not guilty of distribution of a controlled substance resulting in serious bodily harm, or if, after all reasonable efforts, you are unable to reach a verdict on Count 1 of the Superseding Indictment, you should record that decision on the verdict form and go on to consider whether Cooper is guilty of the crime of distribution of a controlled substance. The crime of distribution of a controlled substance, a lesser included offense of the crime charged in Count 1 of the Superseding Indictment, has the following two essential elements:

One, that Cooper intentionally transferred a controlled substance to Victim #1, or aided and abetted in the transfer;

And two, that at the time of the transfer, Cooper knew that it was a controlled substance.

For you to find Cooper guilty of the crime of distribution of a controlled substance, the prosecution must prove all of these essential elements beyond a reasonable doubt; otherwise you must find Cooper not guilty of this crime.

FINAL INSTRUCTION NO. 3 – AIDING AND ABETTING

Cooper may also be found guilty of distribution of a controlled substance resulting in serious bodily injury or distribution of a controlled substance even if he personally did not do every act constituting the offense charged, if he aided and abetted.

In order to have aided and abetted the commission of a crime, a person must, before or at the time the crime was committed:

One, have known that distribution of a controlled substance was committed or going to be committed;

Two, have had enough advance knowledge of the extent and character of the distribution of a controlled substance that he was able to make the relevant choice to walk away from it before all elements of the offense were complete;

Three, have knowingly acted in some way for the purpose of causing, encouraging, or aiding the commission of the distribution of a controlled substance;

And four, have intended to transfer a known controlled substance.

For you to find Cooper guilty of distribution of a controlled substance resulting in serious bodily injury by reason of aiding and abetting or distribution of a controlled substance by reason of aiding and abetting, the prosecution must prove beyond a reasonable doubt that all of the essential elements of distribution of a controlled substance resulting in serious bodily injury were committed by some person or persons and that Cooper aided and abetted the commission of that crime.

You may infer the defendant had the requisite advance knowledge of the intentional transfer of the controlled substance if you find that the defendant failed to object or withdraw from actively participating in the commission of distribution of a controlled substance resulting in serious bodily injury after the defendant observed another participant complete the intentional transfer of a controlled substance.

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 become an aider and abettor. A person who has no knowledge that a crime is being committed or about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

FINAL INSTRUCTION NO. 4 – IMPEACHMENT

In Preliminary Instruction No. 6, 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 Darcy Hoff, Keith Palmer, and Herman Kleinsasser have been convicted of a crime. You may use that evidence only to help you decide whether to believe the witness and how much weight to give their testimony.

You have heard evidence that Darcy Hoff has made a plea agreement with the prosecution. Her testimony was received in evidence and may be considered by you. You may give her testimony such weight as you think it deserves. Whether or not her testimony may have been influenced by the plea agreement is for you to determine. The witness’ guilty plea cannot be considered by you as any evidence of Cooper’s guilt. The witness’ guilty plea can be considered by you only for the purpose of determining how much, if at all, to rely upon the witness’ testimony.

You have heard evidence that Herman Kleinsasser and Keith Palmer have received a promise from the prosecution that they will not be prosecuted or 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 prosecution's promise is for you to determine.

You have heard testimony from Darcy Hoff who stated that she participated in the crime charged against the defendant. Her testimony was received in evidence and may be considered by you. You may give her testimony such weight as you think it deserves. Whether or not her testimony may have been influenced by her desire to please the government or to strike a good bargain with the government about her own situation is for you to determine.

You have heard evidence that Darcy Hoff hopes to receive a reduced sentence on criminal charges pending against her in return for her cooperation with the government in this case. Darcy Hoff entered into an agreement with the government which provides that in return for her assistance or testimony, the government will recommend a less severe sentence which could be less than the mandatory minimum sentence for the crime with which she is charged. Darcy Hoff is subject to a mandatory minimum sentence, that is, a sentence that the law provides must be of a certain minimum length. If the prosecutor handling this witness' case believes she provided substantial assistance, that prosecutor can file in the court in which the charges are pending against this witness a motion to reduce her sentence below the statutory minimum. The judge has no power to reduce a sentence for substantial assistance unless the government, acting through the United States Attorney, files a such a motion. If such a motion for reduction of sentence for substantial assistance is filed by the government then it is up to the judge to decide whether to reduce the sentence at all, and if so, how much to reduce it. You may give the testimony of this witness such weight as you think it deserves. Whether or not testimony of a witness may have been influenced by her hope of receiving a reduced sentence 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, if any, you think it deserves.

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.

FINAL INSTRUCTION NO. 5 – PRIOR SIMILAR ACTS

You have heard evidence that the defendant previously committed acts similar to the one charged in this case. You may consider this evidence only if you unanimously find it is more likely true than not true. You decide that by considering all of the evidence and deciding what evidence is more believable. This is a lower standard than proof beyond a reasonable doubt.

If you find this evidence has been proved, then you may consider it to help you decide if the defendant had the motive, opportunity, intent, preparation, plan, or knowledge to commit the crime of distribution of a controlled substance. You should give it the weight and value you believe it is entitled to receive. If you find that this evidence has not been proved, you must disregard it.

Remember, even if you find that the defendant may have committed similar acts in the past, this is not evidence that he committed such an act in this case. You may not convict a person simply because you believe he may have committed similar acts in the past. The defendant is on trial only for the crime charged, and you may consider the evidence of prior acts only on the issues stated above.

FINAL INSTRUCTION NO. 6 – PRESUMPTION OF INNOCENCE AND BURDEN
OF PROOF

The presumption of innocence means that the defendant is presumed to be absolutely not guilty.

- This presumption means that you must put aside all suspicion that might arise from the defendant's arrest, the charge, or the fact that he is here in court.
- This presumption remains with the defendant throughout the trial.
- This presumption is enough, alone, for you to find the defendant not guilty, unless the prosecution proves, beyond a reasonable doubt, all of the elements of an offense charged against him.

The burden is always on the prosecution to prove guilt beyond a reasonable doubt.

- This burden never, ever shifts to the defendant to prove his innocence.
- This burden means that the defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify.

This burden means that you must find the defendant not guilty of the offense charged against him, unless the prosecution proves beyond a reasonable doubt that he has committed each and every element of the offense.

FINAL INSTRUCTION NO. 7 – REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense.

- A reasonable doubt may arise from evidence produced by the prosecution or the defendant, keeping in mind that the defendant never, ever has the burden or duty to call any witnesses or to produce any evidence.
- A reasonable doubt may arise from the prosecution's lack of evidence.

The prosecution must prove the defendant's guilt beyond a reasonable doubt.

- Proof beyond a reasonable doubt requires careful and impartial consideration of all the evidence in the case before making a decision.
- Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on it in the most important of your own affairs.

The prosecution's burden is heavy, but it does not require proof beyond all possible doubt.

FINAL INSTRUCTION NO. 8 – DUTY TO DELIBERATE

A verdict must represent the careful and impartial judgment of each of you. Before you make that judgment, you must consult with one another and try to reach agreement if you can do so consistent with your individual judgment.

- If you are convinced that the prosecution has not proved beyond a reasonable doubt that the defendant is guilty, say so.
- If you are convinced that the prosecution has proved beyond a reasonable doubt that the defendant is guilty, say so.
- Do not give up your honest beliefs just because others think differently or because you simply want to be finished with the case.
- On the other hand, do not hesitate to re-examine your own views and to change your opinion if you are convinced that it is wrong.
- You can only reach a unanimous verdict if you discuss your views openly and frankly, with proper regard for the opinions of others, and with a willingness to re-examine your own views.
- Remember that you are not advocates, but judges of the facts, so your sole interest is to seek the truth from the evidence.
- The question is never who wins or loses the case, because society always wins, whatever your verdict, when you return a just verdict based solely on the evidence, reason, your common sense, and these Instructions.
- You must consider all of the evidence bearing on each element before you.
- Take all the time that you feel is necessary.
- Remember that this case is important to the parties and to the fair administration of justice, so do not be in a hurry to reach a verdict just to be finished with the case.

FINAL INSTRUCTION NO. 9 – DUTY DURING DELIBERATIONS

You must follow certain rules while conducting your deliberations and returning your verdict:

- Select a foreperson to preside over your discussions and to speak for you here in court.
- Do not consider punishment in any way in deciding whether the defendant is guilty or not guilty. If the defendant is guilty, I will decide what the sentence should be.
- Communicate with me by sending me a note through a Court Security Officer (CSO). The note must be signed by one or more of you. Remember that you should not tell anyone, including me, how your votes stand. I will respond as soon as possible, either in writing or orally in open court.
- Base your verdict solely on the evidence, reason, your common sense, and these Instructions. Again, nothing I have said or done was intended to suggest what your verdict should be—that is entirely for you to decide.
- Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.
- Complete the Verdict Form. The foreperson must bring the signed verdict form to the courtroom when it is time to announce your verdict.
- When you have reached a verdict, the foreperson will advise the CSO that you are ready to return to the courtroom.

Good luck with your deliberations.

Dated June 27, 2019.

BY THE COURT:

A handwritten signature in blue ink, reading "Karen E. Schreier", is written over a horizontal line.

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE