UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RUSTY JAMES DRISCOLL and SHAUNA MARIE GROSS, Defendants.	4:21-CR-40169-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 – CONSPIRACY TO DISTRIBUTE A CONTROLLED SUBSTANCE

For you to find Rusty Driscoll or Shauna Gross guilty of the offense of conspiracy to distribute a controlled substance, as charged in the Superseding Indictment, the prosecution must prove the following four essential elements beyond a reasonable doubt:

***One*, that beginning on or about an unknown date and continuing until on or about March 1, 2022, two or more persons reached an agreement or came to an understanding to distribute a mixture or substance containing methamphetamine;**

Methamphetamine is a Schedule II controlled substance.

A conspiracy is an agreement of two or more persons to commit one or more crimes. It makes no difference whether any co-conspirators are defendants or named in the Superseding Indictment. For this element to be proved,

- Driscoll or Gross may have been, but did not have to be, one of the original conspirators
- The crime that the conspirators agreed to commit did not actually have to be committed
- The agreement did not have to be written or formal
- The agreement did not have to involve every detail of how the conspiracy was to be carried out
- The conspirators did not have to personally benefit from the conspiracy

Here, the conspirators allegedly agreed to commit the crime of distribution of a mixture or substance containing methamphetamine. The elements of distribution of a mixture or substance containing methamphetamine are the following:

- *One*, that a person intentionally transferred a mixture or substance containing methamphetamine to another;

- *And two,* that at the time of the transfer, the person knew that what he or she was transferring was a controlled substance.

It does not matter whether the crime of distribution of a controlled substance was actually committed or whether the alleged participants in the agreement actually succeeded in accomplishing their unlawful plan.

***Two*, that Driscoll or Gross 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;**

Driscoll or Gross must have joined in the agreement, but he or she may have done so at any time during its existence. Driscoll or Gross may have joined the agreement even if he or she agreed to play only a minor role in it.

Driscoll or Gross did not have to do any of the following to join the agreement:

- join the agreement at the same time as all the other conspirators,

- know all of the details of the conspiracy, such as the names, identities, or locations of all the other members,

- conspire with every other member of the conspiracy, or

- agree to play any particular part in carrying out the agreement.

On the other hand, each of the following, alone, is not enough to show that Driscoll or Gross joined the agreement:

- evidence that a person was merely present at the scene of an event

- evidence that a person merely acted in the same way as others

- evidence that a person merely associated with others

- evidence that a person was friends with or met socially with individuals involved in the conspiracy

- evidence that a person who had no knowledge of a conspiracy happened to act in a way that advanced some purpose of the conspiracy
- evidence that a person merely knew of the existence of a conspiracy
- evidence that a person merely knew that an objective of the conspiracy was being considered or attempted, or
- evidence that a person merely approved of the objectives of the conspiracy

Rather, the prosecution must prove that Driscoll or Gross had some degree of knowing involvement in the agreement.

In deciding whether an alleged conspiracy existed, you may consider the acts and statements of each person alleged to be part of the agreement.

In deciding whether Driscoll or Gross voluntarily and intentionally joined the agreement, you must consider only the evidence of Driscoll's or Gross's own acts and statements. You may not consider actions and statements of others, except to the extent any statement of another describes something that was said or done by Driscoll or Gross.

Intent or knowledge may be proved like anything else. You may consider any statements made by a defendant, in connection with the offense charged, and all the facts and circumstances in evidence, which may aid in a determination of a defendant's knowledge or 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.

***Three*, that at the time Driscoll or Gross joined in the agreement or understanding, he or she knew the purpose of the agreement or understanding;**

A person knows the purpose of the agreement if he or she is aware of the agreement and does not participate in it through ignorance, mistake, carelessness, negligence, or accident. It is seldom, if ever, possible to determine directly what was in a defendant's mind. Thus, a defendant's knowledge of the agreement and its purpose can be proved like anything else, from reasonable conclusions drawn from the evidence.

> It is not enough that a defendant and other alleged participants in the agreement to commit the crime of distribution of a controlled substance simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. A defendant must have known of the existence and purpose of the agreement. Without such knowledge, a defendant cannot be guilty of conspiracy, even if his or her acts furthered the conspiracy.
>
> **And *Four*, that the agreement or understanding involved 500 grams or more of a mixture or substance containing methamphetamine.**

For you to find Driscoll guilty of the Superseding Indictment, the prosecution must prove all four of the essential elements beyond a reasonable doubt as to Driscoll. For you to find Gross guilty of the Superseding Indictment, the prosecution must prove all four of the essential elements beyond a reasonable doubt as to Gross. Otherwise, you must find Driscoll or Gross not guilty of the Superseding Indictment.

If you do not unanimously find all four elements beyond a reasonable doubt, but you do find the first three elements beyond a reasonable doubt, you must go on to consider whether Driscoll or Gross conspired to distribute some lesser amount of methamphetamine. If you find tha Driscoll or Gross conspired to distribute less than 500 grams of a mixture of substance containing methamphetamine but more than 50 grams, then you must find Driscoll or Gross guilty of the crime of conspiracy to distribute 50 grams or more of a mixture or substance containing methamphetamine. If you unanimously find that Driscoll or Gross conspired to distribute an amount of methamphetamine less than 50 grams beyond a reasonable doubt, you must find Driscoll or Gross guilty of the crime of conspiracy to distribute methamphetamine. Otherwise, you must find Driscoll or Gross not guilty.

FINAL INSTRUCTION NO. 3 – QUANTITY OF METHAMPHETAMINE

If you determine a conspiracy existed and Driscoll or Gross joined the conspiracy, you must determine beyond a reasonable doubt the quantity of a mixture or substance containing methamphetamine for which Driscoll or Gross is responsible, if any. If you find Driscoll or Gross guilty of conspiracy to distribute a mixture or substance containing methamphetamine, he or she is responsible for:

- Any methamphetamine he or she possessed for personal use, distributed or agreed to distribute during the course of the conspiracy; and

- Any methamphetamine fellow conspirators distributed or agreed to distribute, if you find those distribution or agreements to distribute were a necessary or natural consequence of the agreement or understanding and were reasonably foreseeable by Driscoll or Gross during the course of the conspiracy.

Do not double count any quantities of methamphetamine if more than one co-conspirator was involved in conspiring to distribute that particular quantity of the methamphetamine. Instead, you must determine the amount of methamphetamine involved in the conspiracy for which Driscoll or Gross can be held responsible, if any.

FINAL INSTRUCTION NO. 4 – CONVERSION CHART

The following conversion chart may be helpful:

OUNCES/POUNDS	GRAMS/KILOGRAMS
1 ounce	28.35 grams / 0.028 kilogram
1 pound	453.59 grams / 0.4536 kilogram
2.2 pounds	1,000 grams / 1 kilogram

FINAL INSTRUCTION NO. 5 – CO-CONSPIRATOR ACTS AND STATEMENTS

If you determine that an agreement existed and Driscoll or Gross joined the agreement, then acts and statements knowingly done or made by a member of the agreement during the existence of the agreement and in furtherance of it, may be considered by you as evidence pertaining to Driscoll or Gross, even though the acts and statements were done or made in the absence of and without the knowledge of Driscoll or Gross. This includes acts done or statements made before Driscoll or Gross joined the agreement, because a person who knowingly, voluntarily, and intentionally joins an existing conspiracy becomes 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 a defendant who did not make the statement.

FINAL INSTRUCTION NO. 6 – SINGLE/MULTIPLE CONSPIRACIES

The Superseding Indictment charges that the defendants were members of one single conspiracy to commit the crime of knowingly and intentionally distributing 500 grams or more of a mixture or substance containing methamphetamine.

One of the issues you must decide is whether there were really two (or more) separate conspiracies to distribute methamphetamine.

The government must convince you beyond a reasonable doubt that each defendant was a member of the conspiracy to commit the crime of distribution of methamphetamine, as charged in the Superseding Indictment. If the government fails to prove this as to a defendant, then you must find that that defendant not guilty of the conspiracy charge, even if you find that he or she was a member of some other conspiracy. Proof that a defendant was a member of some other conspiracy is not enough to convict.

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 or she was a member of the conspiracy to commit the crime of distribution of methamphetamine, as charged in the Superseding 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 whether more than one conspiracy existed.

FINAL INSTRUCTION NO. 7 – 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 one or more witnesses has 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 the witness's testimony.

You have heard testimony from one or more witnesses who stated that they participated in the crime charged against the defendants. That testimony was received in evidence and may be considered by you. You may give that testimony such weight as you think it deserves. Whether or not that testimony may have been influenced by that witness's desire to please the prosecution or to strike a good bargain with the prosecution about that witness's own situation is for you to determine.

You have heard that one or more witnesses pleaded guilty to a crime which arose out of the same events for which the defendants are on trial here. You must not consider that guilty plea as any evidence of either defendant's guilt. You may consider a witness's guilty plea only for the purpose of determining how much, if at all, to rely upon that witness's testimony.

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

You have heard evidence that one or more witnesses received, or hopes to receive, a reduced sentence on criminal charges pending against that witness, in return for the witness's cooperation with the government in this case. If the prosecutor handling the witness's case believed or believes the witness provided substantial assistance, the prosecutor can file a motion to reduce the witness's sentence. If such a motion for reduction of sentence for substantial assistance is filed by the prosecutor, then it is or was up to the Judge to decide whether to reduce the sentence at all, and if so, how much to reduce it. You may give this witness's testimony 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 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. 8 – DUAL ROLE TESTIMONY

You have heard testimony from DEA Agent Brandon Purcell who testified about both facts and opinions and the reasons for his opinions. Fact testimony is based on what the witness saw, heard or did. Opinion testimony is based on the specialized knowledge, skill, experience, training, or education of the witness.

As to Agent Purcell's testimony about facts, it is your job to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

As to Agent Purcell's testimony about his expert opinions, this opinion testimony is allowed because of the specialized knowledge, skill, experience, training, or education of this witness. Opinion testimony should be judged like any other testimony. You may accept all of it, part of it, or none of it. You should give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

You also should pay careful attention as to whether Agent Purcell testified to his personal observations or involvement as a fact witness or testified to an opinion based on his specialized knowledge, skill, experience, training, or education. When a witness such as Agent Purcell provides opinion testimony based on knowledge, skill, experience, training, or education, that person might rely on facts that are not based on his personal observations or involvement, but that opinion cannot serve as proof of the underlying facts.

Take into account the factors discussed earlier in Preliminary Instruction No. 6 that were provided to assist you in weighing the credibility of witnesses. The fact that a witness is allowed to express opinions based on that person's specialized knowledge, skill, experience, training, or education should not cause you to give undue deference to any aspect of that person's testimony or otherwise influence your assessment of the credibility of that witness.

FINAL INSTRUCTION NO. 9 – PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

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

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

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

- This burden never, ever shifts to a defendant to prove his or her innocence.
- This burden means that a defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify.
- This burden means that, if a defendant does not testify, you must not consider that fact in any way, or even discuss it, in arriving at your verdict.

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

FINAL INSTRUCTION NO. 10 – 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 a defendant, keeping in mind that a 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 a 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. 11 – 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 a defendant is guilty, say so.
- If you are convinced that the prosecution has proved beyond a reasonable doubt that a 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. 12 – DUTY DURING DELIBERATIONS

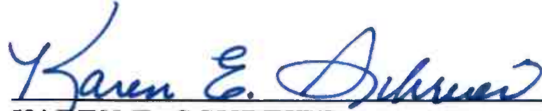
You must follow certain rules while conducting your deliberations and returning your verdict:

- 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 a defendant is guilty or not guilty. If a 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 a defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against a defendant unless you would return the same verdict without regard to his or her 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 August 4, 2023.

BY THE COURT:



KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE