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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GERALD WAYNE LEBEAU,
a/k/a Gers LeBeau, and
NEIL THOMAS LEBEAU,

Defendants.

No. CR 14-50048-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 – POSSESSION WITH THE INTENT TO DISTRIBUTE COCAINE

For you to find Gerald Wayne LeBeau, a/k/a Gers LeBeau, guilty of the offense charged in Count I of the Superseding Indictment, the prosecution must prove the following essential elements beyond a reasonable doubt:

***One*, on or about January 10, 2014, in the District of South Dakota, Gerald LeBeau was in possession of a mixture or substance containing a detectable amount of cocaine, its salts, optical and geometric isomers, or salts of isomers;**

***Two*, Gerald LeBeau knew that he was, or intended to be, in possession of a controlled substance;**

Intent or knowledge 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 a determination of the 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.

***And three*, Gerald LeBeau intended to distribute some or all of the mixture or substance to another person.**

To "distribute" means to transfer.

If you find proof beyond a reasonable doubt that Gerald LeBeau possessed a large quantity of a mixture or substance containing a detectable amount of cocaine, its salts, optical and geometric isomers, or salts of isomers, that is evidence from which you may, but are not required to, find or infer that Gerald LeBeau intended to distribute some or all of the mixture or substance.

For you to find Gerald LeBeau guilty, the prosecution must prove all of the essential elements of this offense beyond a reasonable doubt. Otherwise, you must find Gerald LeBeau not guilty of the offense charged in Count I of the Superseding Indictment.

FINAL INSTRUCTION NO. 3 – LESSER INCLUDED OFFENSE

If your verdict under Final Instruction No. 2 on Count I against Gerald Wayne LeBeau, a/k/a Gers LeBeau, is "Not Guilty," or if, after all reasonable efforts, you are unable to reach a verdict on that count, you should record that decision on the verdict form and go on to consider whether Gerald LeBeau is guilty of the crime of simple possession of a controlled substance under this instruction. The crime of simple possession of a controlled substance has three elements, which are:

***One*, that the defendant knowingly or intentionally;**

***Two*, possessed;**

***And three*, a controlled substance.**

For you to find Gerald LeBeau guilty of simple possession of a controlled substance, the prosecution must prove all of the essential elements of this offense beyond a reasonable doubt. Otherwise, you must find Gerald LeBeau not guilty of the offense of simple possession of a controlled substance.

FINAL INSTRUCTION NO. 4 – CONSPIRACY TO DISTRIBUTE OR POSSESS WITH THE INTENT TO DISTRIBUTE COCAINE

For you to find Gerald Wayne LeBeau, a/k/a Gers LeBeau, or Neil Thomas LeBeau guilty of the "conspiracy" offense charged in Count II of the Superseding Indictment, the prosecution must prove the following essential elements beyond a reasonable doubt:

***One*, beginning at a time unknown but no later than on or about 2010, and continuing to on or about August 26, 2014, two or more persons reached an agreement or came to an understanding to distribute or possess with the intent to distribute a mixture or substance containing a detectable amount of Cocaine, its salts, optical and geometric isomers, or salts of isomers;**

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,

- The defendant 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 the conspiracy
- The conspirators did not have to personally benefit from the conspiracy

The Superseding Indictment charges a conspiracy to commit two separate crimes: distribution of cocaine and possession of cocaine with the intent to distribute. For you to find that the government has proved a conspiracy, you must unanimously find that there was an agreement to act for at least one of these purposes. You must unanimously agree which purpose or purposes motivated the members of the agreement to act. If you are unable to unanimously agree on at least one of these purposes, you cannot find the defendant guilty of conspiracy.

To help you decide whether the defendant agreed to commit the crime of distribution of cocaine, you should consider the elements of a "distribution" offense. The elements of distribution of cocaine are the following:

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

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

Remember that the prosecution does not have to prove that distribution of cocaine actually occurred for this element of the "conspiracy" offense to be proved.

To help you decide whether the defendant agreed to commit the crime of possession of cocaine with the intent to distribute, you should consider the elements of a "possession" offense. The elements of possession of cocaine with the intent to distribute are the following:

- *One*, that a person was in possession of cocaine;

- *Two*, the person knew that he was, or intended to be, in possession of a controlled substance;

- *And three*, the person intended to distribute some or all of the cocaine to another person.

Remember that the prosecution does not have to prove that possession of cocaine with the intent to distribute actually occurred for this element of the "conspiracy" offense to be proved.

***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;**

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

The defendant 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, or

- conspire with every other member of the conspiracy

On the other hand, each of the following, alone, is not enough to show that the defendant 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 acted in a way that advanced an objective 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 the defendant had some degree of knowing involvement in the conspiracy.

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 the defendant joined the agreement, you may consider only the acts and statement of the defendant.

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

> A person knows the purpose of the agreement if he 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 the defendant's mind. Thus the 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 the defendant and other alleged participants in the agreement to commit the crimes of distribution of cocaine or possession of cocaine with the intent to distribute simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. The defendant must have known of the existence and purpose of the agreement. Without such knowledge, the defendant cannot be guilty of conspiracy, even if his acts furthered the conspiracy.

For you to find Gerald LeBeau or Neil LeBeau guilty, the prosecution must prove all of the essential elements of this offense beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of the offense charged in Count II of the Superseding Indictment.

***Quantity of a mixture or substance containing a detectable amount of cocaine, its salts, optical and geometric isomers, or salts of isomers***

If you find a defendant guilty of the "conspiracy" offense alleged in the Superseding Indictment, you must also determine beyond a reasonable doubt the quantity of controlled substance 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 controlled substance charged in the Superseding Indictment, although the prosecution must prove beyond a reasonable doubt the quantity of controlled substance 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 a mixture or substance containing a detectable amount of cocaine, its salts, optical and geometric isomers, or salts of isomers, as charged in the Superseding Indictment, and you must determine beyond a reasonable doubt the amount of that controlled substance involved in the offense for which the defendant can be held responsible. In so doing, you may consider all of the evidence in the case that may aid in the determination of these issues.

A defendant guilty of conspiracy to distribute a controlled substance, as charged in the Superseding Indictment, is responsible for quantities of controlled substance that he actually distributed or agreed to distribute. Such a defendant is also responsible for those quantities of controlled substance that fellow conspirators distributed or agreed to distribute, if you find that the defendant could have reasonably foreseen, at the time he joined the conspiracy or while the conspiracy lasted, that those prohibited acts were a necessary or natural consequence of the conspiracy.

You must determine the *total quantity* of the controlled substance involved in the conspiracy for which the defendant can be held responsible. You must indicate the *range* within which that *total quantity* falls. You must determine that *total quantity* in terms of grams of a mixture or substance containing a detectable amount of cocaine, its salts, optical and geometric isomers, or salts of isomers. 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 controlled substance involved in the conspiracy for which the defendant can be held responsible.

FINAL INSTRUCTION NO. 5 – CONSPIRACY TO DISTRIBUTE OR POSSESS WITH THE INTENT TO DISTRIBUTE MARIHUANA

For you to find Gerald Wayne LeBeau, a/k/a Gers LeBeau, or Neil Thomas LeBeau guilty of the "conspiracy" offense charged in Count III of the Superseding Indictment, the prosecution must prove the following essential elements beyond a reasonable doubt:

***One*, beginning at a time unknown but no later than on or about 2010, and continuing to on or about August 26, 2014, two or more persons reached an agreement or came to an understanding to distribute or possess with the intent to distribute marihuana;**

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,

- The defendant 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 the conspiracy
- The conspirators did not have to personally benefit from the conspiracy

The Superseding Indictment charges a conspiracy to commit two separate crimes: distribution of marihuana and possession of marihuana with the intent to distribute. For you to find that the government has proved a conspiracy, you must unanimously find that there was an agreement to act for at least one of these purposes. You must unanimously agree which purpose or purposes motivated the members of the agreement to act. If you are unable to unanimously agree on at least one of these purposes, you cannot find the defendant guilty of conspiracy.

To help you decide whether the defendant agreed to commit the crime of distribution of marihuana, you should consider the

elements of a "distribution" offense. The elements of distribution of marihuana are the following:

- *One*, that a person intentionally transferred marihuana to another;
- *And two*, that at the time of the transfer, the person knew that what he was transferring was a controlled substance.

Remember that the prosecution does not have to prove that distribution of marihuana actually occurred for this element of the "conspiracy" offense to be proved.

To help you decide whether the defendant agreed to commit the crime of possession of marihuana with the intent to distribute, you should consider the elements of a "possession" offense. The elements of possession of marihuana with the intent to distribute are the following:

- *One*, that a person was in possession of marihuana;
- *Two*, the person knew that he was, or intended to be, in possession of a controlled substance;
- *And three*, the person intended to distribute some or all of the marihuana to another person.

Remember that the prosecution does not have to prove that possession of marihuana with the intent to distribute actually occurred for this element of the "conspiracy" offense to be proved.

***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;**

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

The defendant 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, or

- conspire with every other member of the conspiracy

On the other hand, each of the following, alone, is not enough to show that the defendant 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 acted in a way that advanced an objective 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 the defendant had some degree of knowing involvement in the conspiracy.

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 the defendant joined the agreement, you may consider only the acts and statement of the defendant.

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

> A person knows the purpose of the agreement if he 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 the defendant's mind. Thus the 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 the defendant and other alleged participants in the agreement to commit the crimes of distribution of marihuana or possession of marihuana with the intent to distribute simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. The defendant must have known of the existence and purpose of the agreement. Without such knowledge, the defendant cannot be guilty of conspiracy, even if his acts furthered the conspiracy.

For you to find Gerald LeBeau or Neil LeBeau guilty, the prosecution must prove all of the essential elements of this offense beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of the offense charged in Count III of the Superseding Indictment.

## FINAL INSTRUCTION NO. 6 – ACTS AND STATEMENTS OF CO-CONSPIRATORS

If you determine that an agreement existed and the defendant joined the agreement, then you may consider acts knowingly done and statements knowingly made by the 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 person.

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 witnesses Thomas "Pat" Brewer, Scott Burleson, Kateri Patton, Ramauna Ghost Bear, Holly Wilson, Marlena Pond, Delbert "Eddie" Ghost Bear, Gabe White Plume, and Twila LeBeau 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 Thomas "Pat" Brewer, Holly Wilson, and Twila LeBeau have pleaded guilty to a charge that arose out of the same events for which these defendants are now on trial. You cannot consider such a witness's guilty plea as any evidence of the guilt of these defendants. 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 Thomas "Pat" Brewer, Holly Wilson, Marlena Pond, Gabe White Plume, and Twila LeBeau 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 Pam Dereu, Delbert "Eddie" Ghost Bear, Kateri Patton, Ramauna Ghost Bear, Gabe White Plume, and Marcy Whalen that they participated in the crimes 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 Thomas "Pat" Brewer, Holly Wilson, Marlena Pond, Gabe White Plume, and Twila LeBeau have made plea agreements with the government. You have also heard evidence that the witnesses Pam Dereu, Kateri Patton, and Ramauna Ghost Bear,

hope that they will not be prosecuted. 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.

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. 8 – PRIOR SIMILAR ACTS

You have heard evidence that defendants Gerald LeBeau and Neil LeBeau were each previously convicted of a similar offense. 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 the issues of motive, intent, and knowledge. 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 Gerald LeBeau or Neil LeBeau may have committed similar acts in the past, this is not evidence that Gerald LeBeau or Neil LeBeau 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. Each defendant is on trial only for the crimes charged, and you may consider the evidence of prior acts only on the issues stated above.

## 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 charges, 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.

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 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, unless the prosecution proves beyond a reasonable doubt that he 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

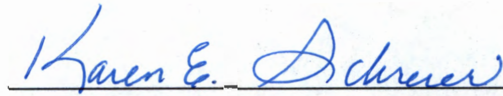
You must follow certain rules while conducting your deliberations and returning your verdict:

- 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 not guilty or guilty. If a defendant is guilty, I will decide what his 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 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 14, 2015.



Karen E. Schreier
United States District Judge