UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MARQUES SMITH, a/k/a CC, Defendant.	**3:19-CR-30045-RAL** **FINAL JURY INSTRUCTIONS**

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, the documents and other things received as exhibits, and the facts that have been stipulated—that is, formally agreed to by the parties.

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

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.

INSTRUCTION NO. 5

The superseding indictment in this case charges the defendant with the crime of conspiracy to distribute a controlled substance. The defendant has pleaded not guilty to this charge.

The superseding indictment is simply the document that formally charges the defendant with the crimes for which he is on trial. The superseding indictment is not evidence of anything. At the beginning of the trial, I instructed you that you must presume the defendant to be innocent. Thus, the defendant began the trial with a clean slate, with no evidence against him. The presumption of innocence alone is sufficient to find the defendant not guilty. This presumption can be overcome only if the United States proved during the trial, beyond a reasonable doubt, each element of the crime charged.

Please remember that only the defendant, not anyone else, is on trial here, and that the defendant is on trial only for the crime charged, not for anything else.

There is no burden upon a defendant to prove that he is innocent. Instead, the burden of proof remains on the United States throughout the trial.

INSTRUCTION NO. 6

The crime of conspiracy to distribute or to possess with the intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, as charged in the superseding indictment, has four essential elements, which are:

***One,* that beginning at a time unknown but no later than January 1, 2011, and continuing to on or about October 11, 2017, in the District of South Dakota and elsewhere, two or more persons reached an agreement or came to an understanding to distribute or to possess with the intent to distribute a mixture or substance containing methamphetamine, a Schedule II controlled substance;**

Methamphetamine is a Schedule II controlled substance.

***Two,* the defendant, Marques Smith, 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;**

***Three,* at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding; and**

***Four,* the agreement or understanding involved 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine.**

If you find unanimously that the government has proved these four elements beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime of conspiracy to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine. Otherwise, you must find the defendant not guilty of this crime.

If you do not find the defendant guilty of conspiracy to distribute or to possess with the intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, you must go on to consider whether the defendant conspired to distribute some lesser amount of methamphetamine. If you find that the defendant conspired to distribute an amount of methamphetamine less than 500 grams, you must then determine if the amount was 50 grams or more but less than 500 grams or was some amount less than 50 grams. You are to use the beyond a reasonable doubt standard in making this decision.

The quantity of the controlled substances involved in the agreement or understanding includes the controlled substances the defendant possessed for personal use or distributed or agreed to distribute. The quantity also includes the controlled substances fellow conspirators distributed or agreed to distribute, if you find that those distributions or agreements to distribute were a necessary or natural consequence of the agreement or understanding and were reasonably foreseeable by the defendant.

INSTRUCTION NO. 7

To find the existence of a "conspiracy," the government must prove two or more persons reached an agreement or understanding to distribute or to possess with the intent to distribute methamphetamine. It makes no difference whether those persons are named in the superseding indictment.

To assist you in determining whether there was an agreement or understanding to conspire to distribute or to possess with the intent to distribute methamphetamine, you should consider the elements of a "distribution" offense. The elements of distributing methamphetamine are: (1) a person intentionally distributed methamphetamine to another; and (2) at the time of the distribution, the person knew that what he or she was distributing was methamphetamine.

To find the defendant guilty of the "conspiracy" charged against him, you do not have to find the offense of distribution of methamphetamine was actually committed by the defendant or anyone else. It is the agreement to distribute methamphetamine which is illegal. The agreement is the conduct which has been charged in the superseding indictment and which must be proven beyond a reasonable doubt to establish the defendant's guilt on the offense charged in the superseding indictment.

The "agreement" or "understanding" need not be an express or formal agreement, or be in writing, or cover all the details of how the conspiracy was to be carried out. It is not necessary that the members have directly stated between themselves the details or purpose of the conspiracy.

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 the defendant has joined in an agreement or understanding. Similarly, the defendant's mere knowledge of the existence of a conspiracy or his mere association with an individual engaged in the illegal conduct of a conspiracy is not enough to prove he joined the conspiracy. The defendant's mere knowledge that an objective of a conspiracy was considered or attempted or his mere approval of the purpose of a conspiracy, is not enough to prove that he joined the conspiracy.

A person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of the conspiracy, does not thereby become a member of that conspiracy. The defendant must know of the existence and purpose of the conspiracy. Without such knowledge, the defendant cannot be guilty of conspiracy, even if his acts furthered the conspiracy.

On the other hand, a person may join in an agreement or understanding without knowing all the details of the agreement or understanding, and without knowing all the other members of the conspiracy. Further, it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person has an understanding of the unlawful nature of the plan and voluntarily and intentionally joins in it.

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

INSTRUCTION NO. 8

If you determine that an agreement existed and that the defendant joined the agreement, you may consider acts knowingly done and statements knowingly made by a defendant's co-conspirators during the existence of the conspiracy and in furtherance of the conspiracy as evidence pertaining to the defendant even though the acts or statements were done or made in the absence of and without the knowledge of the defendant. This includes acts done or statements made before the defendant 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.

INSTRUCTION NO. 9

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. 10

To the extent it may be helpful in your deliberations, one ounce is the equivalent of 28.35 grams and one pound is the equivalent of 453.59 grams.

INSTRUCTION 11

You have heard testimony from witnesses who made plea agreements with the government and have a hope for a reduced sentence. If the United States Attorney's Office decides that a witness convicted of a federal offense who entered into a cooperation agreement provided substantial assistance through what the United States Attorney believes was truthful testimony, then the United States Attorney may bring what is called a Rule 35 Motion for the sentencing Court to reduce the sentence. If such a motion is filed, the sentencing Court then decides whether to reduce the sentence or not and how much to reduce the sentence, and it may, or may choose not to, reduce it below a mandatory minimum. Such testimony was received in evidence and may be considered by you. You may give this testimony such weight as you think it deserves. Whether or not the testimony may have been influenced by an agreement, promise, or the hope to receive a reduced sentence is for you to determine.

Any witness's guilty plea or conviction cannot be considered by you as any evidence of this defendant's guilt. The witness's guilty plea or conviction can be considered by you only for the purpose of determining how much, if at all, to rely upon the witness's testimony.

INSTRUCTION 12

You have heard that certain witnesses called by the Assistant United States Attorney have been convicted of a crime. You may use that evidence only to help you decide whether to believe the witnesses and how much weight to give their testimony.

INSTRUCTION 13

You may also consider any evidence of flight by the defendant, along with all of the evidence in this case, and you may consider whether this evidence shows consciousness of guilt and determine the significance to be attached to any such conduct. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to any such evidence are matters exclusively within the province of the jury. In your consideration of the evidence of flight you should consider that there may be reasons for this which are fully consistent with innocence.

INSTRUCTION NO. 14

You have heard testimony from individuals described as experts. Persons who, by knowledge, skill, training, education, or experience, have become expert in some field may state their opinions on matters in that field and may also state the reasons for their 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. 15

Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant in connection with the offense charged. You may also consider 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.

INSTRUCTION 16

You have heard evidence the defendant may have used and distributed marijuana and synthetic marijuana and may have possessed a handgun. The defendant is not charged with any crime relating to handgun possession, marijuana or synthetic marijuana. Testimony on such topics come in as part of witnesses' explanations of how they say they met the defendant and what the defendant's activities were in his claimed dealings with people claimed to be involved as a part of the alleged conspiracy. You may not presume the defendant to be guilty of conspiracy to distribute methamphetamine simply because he may have possessed a handgun or may have been involved with marijuana or synthetic marijuana.

INSTRUCTION 17

You have heard testimony that the defendant has made statements to law enforcement. It is for you to decide:

First, whether the defendant made the statements; and

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

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

INSTRUCTION NO. 18

The superseding indictment charges that the offense alleged was committed "beginning at a time unknown" but near January 1, 2011, and continuing until on or about October 11, 2017. It is enough for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near or within the dates alleged in the superseding indictment. It is not necessary for the government to prove that the offense was committed precisely on the dates charged.

INSTRUCTION 19

The United States must prove it is more likely true than not true that the offense charged was begun, continued or completed in the District of South Dakota. You decide these facts by considering all of the evidence and deciding what evidence is more believable. This is a lower standard than proof beyond a reasonable doubt. The requirement of proof beyond a reasonable doubt applies to all other issues in the case.

INSTRUCTION NO. 20

Reasonable doubt is doubt based upon reason and common sense, and not doubt based on speculation. A reasonable doubt may arise from careful and impartial consideration of all the evidence, or from a lack of evidence. Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person, after careful consideration, would not hesitate to rely and act upon that proof in life's most important decisions. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

INSTRUCTION NO. 21

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 United States 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 court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

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, Snapchat, 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 court security officer that you are ready to return to the courtroom.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MARQUES SMITH, a/k/a CC, Defendant.	**3:19-CR-30045-RAL** **VERDICT FORM**

We, the jury, duly empaneled and sworn to try the issues in this case, find as follows:

1. We find Defendant Marques Smith, a/k/a CC, _____ (fill in either "guilty" or "not guilty") of the crime of conspiracy to distribute the controlled substance methamphetamine.

   If, and only if, you find the defendant "guilty" of conspiracy to distribute methamphetamine, you must answer the following:

   The quantity of methamphetamine the defendant conspired to distribute was:
   [check one blank only]

   a. _____ 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine; or

   b. _____ 50 grams or more but less than 500 grams of a mixture or substance containing a detectable amount of methamphetamine; or

   c. _____ Less than 50 grams of a mixture or substance containing a detectable amount of methamphetamine.

   Please check the drug quantity of methamphetamine involved in the conspiracy for which you find beyond a reasonable doubt that this defendant can be held responsible.

Dated October ____, 2019

_____
Foreperson