

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>MICHAEL WAYNE ZEPHIER,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: right;">4:20-CR-40036-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 – POSSESSION WITH INTENT TO DISTRIBUTE
METHAMPHETAMINE

For you to find Zephier guilty of possession with the intent to distribute methamphetamine, as charged in the Indictment, the prosecution must prove the following essential elements beyond a reasonable doubt:

One, that on or about February 2, 2020, Zephier was in possession of methamphetamine (actual);

You are instructed, as a matter of law, that methamphetamine (actual) is a controlled substance.

Two, that Zephier knew that he was in possession of methamphetamine (actual);

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.

And three, that Zephier intended to distribute some or all of the methamphetamine (actual) to another person.

The term “distribute” means to deliver a controlled substance to the actual or constructive possession of another person. It is not necessary that money or anything of value change hands. The law prohibits the “possession with intent to distribute” a controlled substance; the prosecution does not have to prove that there was, or was intended to be,

a “sale” of a controlled substance to prove “possession with intent to distribute.”

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 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.

It is not necessary for the government to prove that Zephier knew the precise nature of the controlled substance that he possessed with the intent to distribute.

The government must prove beyond a reasonable doubt, however, that Zephier did know that some type of controlled substance was possessed with intent to distribute.

In attempting to determine the intent of any person, you may consider all the facts and circumstances shown by the evidence received in the case concerning that person. If you find beyond a reasonable doubt that the defendant possessed a large quantity of methamphetamine, that is evidence from which you may, but are not required to, find or infer that the defendant intended to distribute methamphetamine.

In determining a person’s “intent to distribute” a controlled substance, you may consider, among other things, the purity of the controlled substance, the quantity of the controlled substance, the presence of equipment used in the processing or sale of controlled substances, and large amounts of cash or weapons.

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

Quantity of Methamphetamine

If you find Zephier guilty of possession with intent to distribute methamphetamine, as charged in the Indictment, you must also determine beyond a reasonable doubt the quantity of methamphetamine for which the defendant can be held responsible. The government must prove beyond a reasonable doubt the quantity of methamphetamine actually involved in the

offense for which Zephier can be held responsible. Therefore, you must ascertain whether or not the controlled substance in question was in fact methamphetamine, as charged in the Indictment, and you must determine beyond a reasonable doubt the amount of methamphetamine involved in the offense for which Zephier 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.

You must determine the *total quantity* of the controlled substance involved in the offense in 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 methamphetamine.

Again, you must determine *beyond a reasonable doubt* the quantity of methamphetamine involved in the offense in which the defendant can be held responsible.

Lesser Included Offense – Possession of a Controlled Substance

If your verdict under this Instruction No. 2 is not guilty of possession with intent to distribute methamphetamine, or if, after all reasonable efforts, you are unable to reach a verdict on Instruction No. 2, you should record that decision on the verdict form and go on to consider whether Zephier is guilty of the crime of Possession of a Controlled Substance. The crime of Possession of a Controlled Substance, a lesser included offense of the crime charged in the sole count of the Indictment, has the following two essential elements:

One, that on or about February 2, 2020, Zephier was in possession of methamphetamine;

And two, that Zephier knew that he was in possession of methamphetamine.

For you to find Zephier guilty of the crime of Possession of a Controlled Substance, the prosecution must prove all of these essential elements beyond a reasonable doubt; otherwise you must find Zephier not guilty of this crime.

FINAL INSTRUCTION NO. 3 – 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.

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. 4 – 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 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. 5 – 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. 6 – 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. 7 – DUTY DURING DELIBERATIONS

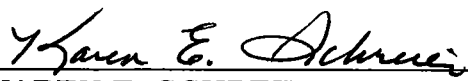
You must follow certain rules while conducting your deliberations and returning your verdict:

- 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 March 3, 2021.

BY THE COURT:



KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE