

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. OMAR PEREZ-OCHOA and JOHN RADERMACHER, Defendants.	4:21-CR-40097-KES FINAL INSTRUCTIONS TO THE JURY
--	--

TABLE OF CONTENTS

FINAL INSTRUCTIONS

FINAL INSTRUCTION NO. 1 – INTRODUCTION	1
FINAL INSTRUCTION NO. 2 – CONSPIRACY TO DISTRIBUTE A CONTROLLED SUBSTANCE	2
FINAL INSTRUCTION NO. 3 – BUYER-SELLER RELATIONSHIP	6
FINAL INSTRUCTION NO. 4 – QUANTITY OF METHAMPHETAMINE	7
FINAL INSTRUCTION NO. 5 – CONVERSION CHART	8
FINAL INSTRUCTION NO. 6 – CONSPIRACY TO LAUNDER MONETARY INSTRUMENTS	9
FINAL INSTRUCTION NO. 7 – CO-CONSPIRATOR ACTS AND STATEMENTS .	13
FINAL INSTRUCTION NO. 8 – IMPEACHMENT	14
FINAL INSTRUCTION NO. 9 – PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF	16
FINAL INSTRUCTION NO. 10 – REASONABLE DOUBT	17
FINAL INSTRUCTION NO. 11 – DUTY TO DELIBERATE	18
FINAL INSTRUCTION NO. 12 – DUTY DURING DELIBERATIONS.....	19

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 Omar Perez-Ochoa or John Radermacher guilty of the offense of conspiracy to distribute a controlled substance, as charged in Count 1 of the Superseding Indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt:

One, that beginning on or about an unknown date, and continuing until on or about July 7, 2021, 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,

- Perez-Ochoa or Radermacher 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 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 Perez-Ochoa or Radermacher 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;

Perez-Ochoa or Radermacher must have joined in the agreement, but they may have done so at any time during its existence. Perez-Ochoa or Radermacher may have joined the agreement even if he agreed to play only a minor role in it.

Perez-Ochoa or Radermacher 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 Perez-Ochoa or Radermacher 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 Perez-Ochoa or Radermacher 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 Perez-Ochoa or Radermacher voluntarily and intentionally joined the agreement, you must consider only the evidence of Perez-Ochoa's or Radermacher'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 Perez-Ochoa or Radermacher.

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 Perez-Ochoa or Radermacher 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 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 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 Perez-Ochoa or Radermacher guilty of Count 1 charged in the Superseding Indictment, the prosecution must prove all four of the essential elements beyond a reasonable doubt. Otherwise, you must find Perez-Ochoa or Radermacher not guilty of Count 1 charged in 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 ~~the~~ Perez-Ochoa or Radermacher conspired to distribute some lesser amount of methamphetamine. If you find the defendant conspired to distribute less than 500 grams of a mixture of substance containing methamphetamine but more than 50 grams, then you must find Perez-Ochoa or Radermacher guilty of the crime of conspiracy to distribute 50 grams or more of a mixture or substance containing methamphetamine. If you unanimously find that the defendant conspired to distribute an amount of methamphetamine less than 50 grams beyond a reasonable doubt, you must find the defendant guilty of the crime of conspiracy to distribute methamphetamine. Otherwise, you must find the defendant not guilty.

FINAL INSTRUCTION NO. 3 – BUYER-SELLER RELATIONSHIP

You are instructed that the relationship between a buyer and seller of drugs does not alone establish a conspiracy.

FINAL INSTRUCTION NO. 4 – QUANTITY OF METHAMPHETAMINE

If you determine a conspiracy existed and Omar Perez-Ochoa or John Radermacher joined the conspiracy, you must determine beyond a reasonable doubt the quantity of a mixture or substance containing methamphetamine for which Perez-Ochoa or Radermacher is responsible, if any. If you find Perez-Ochoa or Radermacher guilty of conspiracy to distribute a mixture or substance containing methamphetamine, he is responsible for:

- Any methamphetamine he 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 Perez-Ochoa or Radermacher 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 Perez-Ochoa or Radermacher can be held responsible, if any.

FINAL INSTRUCTION NO. 5 – 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. 6 – CONSPIRACY TO LAUNDER MONETARY
INSTRUMENTS

For you to find Omar Perez-Ochoa guilty of the offense of conspiracy to launder monetary instruments, as charged in Count 2 of the Superseding Indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt:

One, that from on or about January 2018, and continuing through on or about July 7, 2021, two or more persons reached an agreement to knowingly launder monetary instruments;

To help you decide whether a defendant agreed to commit the crime of laundering monetary instruments, you should consider the elements of that crime. The elements of laundering of monetary instruments are:

One, that on or about January 2018, and continuing through on or about July 7, 2021, Perez-Ochoa conducted or attempted to conduct a financial transaction, that is, a deposit, transfer, wire, or withdrawal of funds, which in any way or degree affected interstate or foreign commerce;

A defendant may be found to have attempted to conduct a financial transaction if he intended to conduct a financial transaction and voluntarily and intentionally carried out some act which was a substantial step toward conducting that financial transaction, even if the transaction was never completed.

The term “conducted” includes initiating, concluding, or participating in initiating or concluding a transaction.

The phrase “interstate commerce” means commerce between any combination of states, territories, and possessions of the United States, including the District of Columbia. The phrase “foreign commerce” means commerce between any state, territory, or possession of the United States and a foreign country. Commerce includes, among other things, travel, trade, transportation, and communication.

It is not necessary for the government to show that Perez-Ochoa’s transaction with a financial institution itself affected interstate or foreign commerce. All that is necessary is that at the time of the alleged offense, the specified institution

was engaged in or had other activities which affected interstate or foreign commerce in any way or degree.

You may find that the transaction involved the use of a financial institution which engaged in or the activities of which affected interstate or foreign commerce in any way or degree if you find from the evidence beyond a reasonable doubt that the process by which a financial institution completed the financial transaction involved crossing state lines or international borders.

Two, that Perez-Ochoa conducted or attempted to conduct the financial transaction with funds that involved the proceeds of unlawful conspiracy to distribute a controlled substance;

The term “proceeds” means any property, or interest in property, that someone derives from, or obtains or retains, either directly or indirectly, as a result of the commission of unlawful wire fraud. Proceeds can be any kind of property, not just money. It can include personal property, like a car or a piece of jewelry, or real property, like an interest in land.

It does not matter whether or not the person who committed the underlying crime, and thereby acquired or retained the proceeds, was Perez-Ochoa. It is a crime to conduct a financial transaction involving property that is the proceeds of a crime, even if that crime was committed by another person, as long as all of the elements of the offense are satisfied.

The government is not required to trace the property it alleges to be proceeds of unlawful conspiracy to distribute a controlled substance to a particular underlying offense. It is sufficient if the government proves that the property was the proceeds of unlawful wire fraud generally.

The government need not prove that all of the property involved in the transaction was the proceeds of unlawful conspiracy to distribute a controlled substance. It is sufficient if the government proves that ~~that~~ at least part of the property represents such proceeds.

Three, that at the time Perez-Ochoa conducted the financial transaction, he knew the funds represented the proceeds of some form of unlawful activity; and

The phrase “knew the funds represented the proceeds of some form of unlawful activity” means that Perez-Ochoa knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony offense under federal law. Thus, the government need not prove that Perez-Ochoa specifically knew that the funds involved in the financial transaction represented the proceeds of unlawful conspiracy to distribute a controlled substance or any other specific offense; it need only prove that Perez-Ochoa knew it represented the proceeds of some form, though not necessarily which form, of felony under federal law. I instruct you as a matter of law that conspiracy to distribute a controlled substance is a felony under federal law.

Four, Perez-Ochoa conducted or attempted to conduct the financial transaction with the intent to promote the carrying on of unlawful conspiracy to distribute a controlled substance.

A defendant may be found to have attempted to conduct a financial transaction if he intended to conduct a financial transaction and voluntarily and intentionally carried out some act which was a substantial step toward conducting that financial transaction, even if the transaction was never completed.

The other instructions provided to you under Element One of Conspiracy to Distribute a Controlled Substance (Final Instruction No. 2) also apply to this element of Conspiracy to Launder Monetary Instruments.

***Two*, that Perez-Ochoa 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; and**

The same instructions provided to you under Element Two of Conspiracy to Distribute a Controlled Substance (Final Instruction No. 2) also apply to this element of Conspiracy to Launder Monetary Instruments.

***Three*, that at the time Perez-Ochoa joined in the agreement or understanding, he knew the purpose of the agreement or understanding.**

The same instructions provided to you under Element Three of Conspiracy to Distribute a Controlled Substance (Final Instruction No. 2) also apply to this element of Conspiracy to Launder Monetary Instruments.

For you to find Perez-Ochoa guilty of the offense charged in Count 2 of the Superseding Indictment, the prosecution must prove all three of the essential elements beyond a reasonable doubt. Otherwise, you must find Perez-Ochoa not guilty of the offense charged in Count 2 of the Superseding Indictment.

FINAL INSTRUCTION NO. 7 – CO-CONSPIRATOR ACTS AND STATEMENTS

If you determine that an agreement existed and Perez-Ochoa or Radermacher 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 Perez-Ochoa or Radermacher, even though the acts and statements were done or made in the absence of and without the knowledge of Perez-Ochoa or Radermacher. This includes acts done or statements made before Perez-Ochoa or Radermacher 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 any other defendant.

FINAL INSTRUCTION NO. 8 – 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 Radermacher's or Perez-Ochoa'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. 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.

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

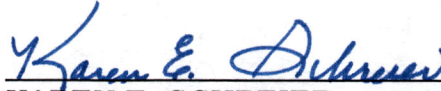
You must follow certain rules while conducting your deliberations and returning your verdict:

- 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 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 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 October 21, 2022.

BY THE COURT:

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

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE