

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>WICAHPE MILK,</p> <p style="text-align: center;">Defendant.</p>	<p>5:16-CR-50149-03-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 – CONSPIRACY TO DISTRIBUTE A CONTROLLED
SUBSTANCE

For you to find Wicahpe Milk guilty of the offense of conspiracy to distribute a controlled substance, as charged in Count 1r of the Second Superseding Indictment, the prosecution must prove the following four essential elements beyond a reasonable doubt:

One, beginning on or about January 2, 2015, and continuing through on or about October 22, 2019, two or more persons reached an agreement or came to an understanding to distribute a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, and salts of its isomers;

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 Second Superseding Indictment. For this element to be proved,

- Milk 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 Second Superseding Indictment charges a conspiracy to commit two separate crimes: distribution of methamphetamine or possession of methamphetamine 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 methamphetamine, you should consider the elements of a “distribution” offense. The elements of distribution of 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.

Remember that the prosecution does not have to prove that distribution of methamphetamine 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 methamphetamine with the intent to distribute, you should consider the elements of a “possession with the intent to distribute” offense. The elements of possession of methamphetamine with the intent to distribute are the following:

- *One*, that a person was in possession of methamphetamine;
- *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 methamphetamine to another person.

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

Two, that Milk 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;

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

Milk 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 Milk 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 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 Milk 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 Milk joined the agreement, you may consider only the acts and statements of Milk.

Three, that at the time Milk 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 crime of distribution of methamphetamine 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.

And four, that the agreement or understanding involved 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, and salts of its isomers.

The quantity of 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.

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

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.

For you to find Milk guilty of the offense charged in Count 1r of the Second Superseding Indictment, the prosecution must prove all four of the

essential elements beyond a reasonable doubt. Otherwise, you must find Milk not guilty of the offense charged in Count 1r of the Second Superseding Indictment.

If you do not unanimously find all four elements beyond a reasonable doubt, but you do find the first three elements unanimously and beyond a reasonable doubt, you must go on to consider whether the defendant conspired to distribute some lesser amount of methamphetamine. If you unanimously find the defendant conspired to distribute an amount of methamphetamine less than 500 grams but more than 50 grams, then you must find the defendant 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 of Count 1r as charged in the Second Superseding Indictment.

FINAL INSTRUCTION NO. 3 – POSSESSION OF A FIREARM BY A PROHIBITED
PERSON

For you to find Wicahpe Milk guilty of the offense of possession of a firearm by a prohibited person as charged in Count 2r of the Second Superseding Indictment, the prosecution must prove the following four essential elements beyond a reasonable doubt:

One, that the defendant had been convicted of a crime punishable by imprisonment for more than one year;

You are instructed that the government and the defendant have agreed that the defendant has been convicted of a crime punishable by imprisonment for more than one year under the laws of the United States of America, and you must consider the first element as proven.

Two, that the defendant knew that he had been convicted of a crime punishable by imprisonment for more than one year;

You are instructed that the government and the defendant have agreed that the defendant knew that he had been convicted of a crime punishable by imprisonment for more than one year, and you must consider the second element as proven.

Three, that after that, on or about August 17, 2016, in Rapid City, in the District of South Dakota and elsewhere, the defendant knowingly received or possessed a firearm, that is a Raven MP-25, .25 caliber pistol, bearing serial number 665342;

The government is not required to prove that the defendant knew that his acts or omissions were unlawful. An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. You may consider evidence of the defendant's words, acts, or omissions, along with all other evidence, in deciding whether the defendant acted knowingly.

The term "firearm" means any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosive. You are instructed that the government and the defendant have agreed that the Raven MP-25, .25 caliber pistol, bearing serial number 665342 is a "firearm."

And four, that the firearm had been transported across a state line at some point during or before the defendant's possession of it.

The government is not required to prove that the defendant knew the firearm had crossed a state line.

You are instructed that the government and the defendant have agreed that the Raven MP-25, .25 caliber pistol, bearing serial number 665342 firearm was manufactured outside the state of South Dakota, and it moved in interstate commerce before its presence in the state of South Dakota on or before August 17, 2016. You must consider this element as proven.

For you to find the defendant guilty of possession of a firearm by a prohibited person as charged in Count 2r of the Second Superseding Indictment, the prosecution must prove all four of the essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of possession of a firearm by a prohibited person as charged in Count 2r of the Second Superseding Indictment.

FINAL INSTRUCTION NO. 3A – POSSESSION

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.

FINAL INSTRUCTION NO. 4 – OBSTRUCTION OF JUSTICE

For you to find Wicahpe Milk guilty of the offense of obstruction of justice, as charged in Count 3 of the Second Superseding Indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt:

One, that Wicahpe Milk wrote and caused to be delivered letters to a witness to discourage or alter the witness’s testimony in *United States v. Milk*, 16-CR-50118 or *United States v. Poor Bear et al.*, 16-CR-50149, in the United States District Court for the District of South Dakota;

Two, that Milk knew that *United States v. Milk* and *United States v. Poor Bear et al.* were pending;

And three, that by writing and causing to be delivered letters to a witness in *United States v. Milk* or *United States v. Poor Bear et al.*, Milk corruptly endeavored to influence, obstruct, or impede the due administration of justice.

To act “corruptly” means to act with the intent to secure an unlawful advantage or benefit either for oneself or for another. An “endeavor” is any effort or any act or attempt to effectuate an arrangement or to try to do something, the natural and probable consequence of which is to obstruct or impede the due administration of justice.

For you to find the defendant guilty of obstruction of justice as charged in Count 3 of the Second Superseding Indictment, the prosecution must prove all three of the essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of obstruction of justice as charged in Count 3 of the Second Superseding Indictment.

FINAL INSTRUCTION NO. 5 – 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 defendant. 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 defendant is on trial here. You must not consider that guilty plea as any evidence of this defendant’s guilt. You may consider a witness’s guilty plea only for the purpose of determine 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 Milk'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. 6 – 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, if the 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 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. 7 – 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. 8 – 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.
- Keep in mind that each count charges a separate offense. You must consider each count separately and return a separate verdict for each count.
- 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. 9 – DUTY DURING DELIBERATIONS

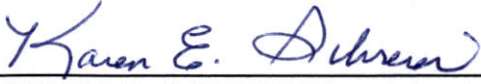
You must follow certain rules while conducting your deliberations and returning your verdict:

- 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 July 2, 2021.

BY THE COURT:



KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE