

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT LOWERY,

Defendant.

FINAL PRETRIAL
CONFERENCE ORDER

06-CR-131-S

On November 30, 2006 this court held the final pretrial conference. Defendant Robert Lowery did not attend personally but was represented by his attorney, Charles Giesen. The government was represented by Assistant United States Attorneys David Reinhard and Timothy O'Shea. About three hours before the hearing the court provided to the parties draft voir dire questions, jury instructions and verdict form. The government had no objections to the voir dire. Lowery, by counsel, asked for a reworking of the statement of the case, which I provided. A copy of the final version of the voir dire is attached to this order.

Next we discussed the universe of jury instructions. Understanding that the instructions will be edited and culled at the close of the evidence, the government had only one proposal: to add the pattern instruction on interstate travel for the § 922(g) gun count. I granted that request. Attorney Giesen had not yet had time carefully to review the court's packet; I gave him until close of business Monday, December 5, 2006 (sooner if possible) to advise the court and the government if he wished to offer any proposed changes or

objections to the universe of instructions. A copy of the current set of instructions is attached to this order.

The parties did not have the opportunity to file written motions in limine. The government raised three issues orally: first, it wishes to preclude any evidence or argument defining “reasonable doubt.” Attorney Giesen did not object to that request, although he reserves the right to argue whether the government has met its burden of proof.

Second, the government moved to preclude any evidence or argument regarding the potential penalties Lowery faces if convicted. Lowery wishes to raise this issue at least as an impeachment point with the alleged co-conspirators; this issue will require exploration at the final hearing.

Third, the government moved to exclude any evidence or argument regarding Lowery’s cancer. Attorney Giesen responded that there is no way yet to know how obvious Lowery’s cancer will be to the jury. He described the tumor on Lowery’s neck as about the size of a orange. He does not have current information on Lowery’s energy levels, although it is his understanding that Lowery is not receiving radiation or chemotherapy, but only is receiving painkilling medication. Lowery’s physical ability to sit for whole trial days is an issue that will have to be explored at the final hearing. The parameters of what else the jury might learn about his condition also should be discussed.

Attorney Giesen had no specific in limine issues, but he did note that he had not had an opportunity to file pretrial motions, and would like to be able to do so. As of November 30, 2006, he was not sure whether he had issues to raise in pretrial motions, mainly because

this has not been his focus given the direction of the proceedings up to this point. I advised Attorney Giesen to seek leave to file motions with as much specificity as possible in a written submission to the court. The parties had no other in limine issues to bring to the court's attention at this time.

The parties are predicting that this trial will take up to three or four days to try. Two alternate jurors will suffice. Lowery has access to street clothes for trial.

Attorney Giesen's last set of concerns related to when Lowery will be returning to Madison, what sort of treatment he will be getting and what condition he is in at this time. Since no one at the hearing had any information to provide on those points, we left them pending.

Entered this 30th day of November, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER

Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff

v.

ROBERT LOWERY,

Defendant.

STATEMENT OF THE CASE
AND VOIR DIRE

06-CR-131-S

Statement of the case: This is a criminal case, in which the defendant, Robert Lowery, is charged with conspiring to distribute marijuana, possessing cocaine with intent to distribute it, and possession of firearms after having been convicted of a crime punishable by imprisonment for a term exceeding one year. The defendant has entered a plea of not guilty to the charges against him.

Mr. Lowery was arrested on June 14, 2006 during a search of his residence on Lake Farm Road, South of Madison. There was some media coverage of this arrest at the time. Have any of you heard of this case before today? [*Sidebar to explore with jurors*]. Would this affect your ability to serve impartially as a juror in this case?

1. Scheduling: this case will begin today and will conclude not later than this Thursday. Are any of you actually unable to sit as jurors because of this schedule?

2. Is there anything about the nature of the charges in this case that might affect your ability to be impartial in this case?

3. The court reads Pattern Jury Instructions of the Seventh Circuit:

Presumption of Innocence. The defendant is presumed to be innocent of the charge. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

Burden of Proof. The government has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the government throughout the case. The defendant is not required to prove his innocence or to produce any evidence.

The defendant has an absolute right not to testify. The fact that the defendant does not testify cannot be considered by you in any way in arriving at your verdict.

Would any of you be unable or unwilling to follow these instructions?

4. Ask counsel to introduce themselves, the defendants and the case agent. Ask whether jurors know them.

5. Invite each juror, in turn, to rise, and provide the following information:

Name, age, and city or town of residence.

Marital status and number of children, if any.

Current occupation (former if retired).

Current (or former) occupation of your spouse and any adult children.

Any military service, including branch, rank and approximate date of discharge.

Level of education, and major areas of study, if any.

[list continues on next page]

Memberships in any groups or organizations.

Hobbies and leisure-time activities.

Favorite types of reading material.

Favorite types of television shows.

Whether you regularly listen to talk radio, and if so, to which programs.

6. Do any of you in the jury box know each other from before today?

7. Have any of you, your relatives, or close friends ever been accused of, or convicted of any criminal offense, or any offense involving cocaine or marijuana? [Sidebar if necessary]. Would this affect your ability to be impartial in this case?

8. Have any of you, your relatives or close friends ever needed, sought, or obtained any sort of counseling or treatment for a problem related to alcohol or any other drug? [Sidebar if necessary]. Would this affect your ability to be impartial in this case?

9. Do any of you, your family or close friends work in a health related field which treats or counsels people who have problems related to alcohol or other drugs? Would this affect your ability to be impartial in this case?

10. Have any of you, your relatives or any close friends ever belonged to any group that is concerned in any way with marijuana, alcohol, or other drugs, either for or against them? What is the name of that group, and what is your involvement in it? Would this affect your ability to be impartial in this case?

11. Do any of you think that the drug laws in this country or the enforcement of the drug laws are either too harsh or too lenient?

12. Do any of you believe that a person charged with drug crimes is probably a dangerous person simply because he is charged with a drug crime?

13. How many of you own firearms or live with someone who possesses firearms? Would this affect your ability to be impartial in this case?

14. Other than what you have already told us, do any of you belong to any groups or organizations that concern themselves with firearms or the possession of firearms? Would this affect your ability to be impartial in this case?

15. Do any of you have any strong opinions or feelings about firearms or the possession of firearms? Would this affect your ability to be impartial in this case?

16. Have any of you, your family or close friends ever been injured by a firearm? Would this affect your ability to be impartial in this case?

17. Do any of you, by virtue of past dealings with the United States government, or for any reason, have any bias for or against the government in a criminal case?

18. Have any of you, your relatives, or close friends ever worked for the local, county, state, or federal government? Would this affect your ability to be impartial in this case?

19. Have any of you, your relatives, or close friends ever worked for, or had other professional contact with any law enforcement, investigative or security company or agency, or any prison? Would this affect your ability to be impartial in this case?

20. Would any of you judge the credibility of a witness who was a law enforcement officer or government employee differently from other witnesses solely because of his or her official position?

21. If the defendant were to choose to testify, would any of you judge his credibility differently from other witnesses solely because it was the defendant who was testifying?

22. Have any of you, your relatives, or close friends ever been the victim of any crime? Would this affect your ability to be impartial in this case?

23. Have any of you, your relatives, or close friends ever been a witness in a trial? Is there anything about this experience that might affect your ability to be impartial in this case?

24. Have any of you, your relatives, or close friends ever had any negative experience with any lawyer, any court, or any legal proceeding that would affect your ability to be impartial in this case?

25. How many of you have served previously as a juror in another case? Please tell us in which court you served, approximately when, the type of cases you heard, whether you were foreperson, and the verdicts.

26. If at the conclusion of the trial you were not to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of not guilty?

27. If at the conclusion of the trial you were to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of guilty?

28. The court will instruct you on the law to be applied in this case. You are required to accept and follow the court's instructions in that regard, even though you may disagree with the law. Is there any one of you who cannot accept this requirement?

29. Do you know of any reason whatever, either suggested by these questions or otherwise, why you could not sit as a trial juror with absolute impartiality to all the parties in this case?

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

JURY INSTRUCTIONS

v.

06-CR-131-S

ROBERT LOWERY,

Defendants.

Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow my instructions on the law, even if you disagree with them. Each of the instructions is important. You must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear or public opinion to influence you. Do not allow any person's race, color, religion, national ancestry or sex to influence you.

Nothing I say now and nothing I said or did during the trial is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence and stipulations.

A stipulation is an agreement between both sides that certain facts are true.

I have taken judicial notice of certain facts that may be regarded as matters of common knowledge. You may accept those facts as proved, but you are not required to do so.

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness. In evaluating the testimony of any witness, you may consider among other things: the witness's age; the witness's intelligence; the ability and opportunity the witness had to see, hear, or know the things the witness testified about; the witness's memory; any interest, bias, or prejudice the witness may have; the manner of the witness while testifying; and the reasonableness of the witness's testimony in light of all the evidence in the case.

You should judge the defendant's testimony in the same way as you judge the testimony of any other witness.

You should use common sense in weighing the evidence. Consider the evidence in light of your own observations in life. You are allowed to draw reasonable inferences from facts. In other words, you may look at one fact and conclude from it that another fact exists. Any inferences you make must be reasonable and must be based on the evidence in the case.

Some of you have heard the phrases “circumstantial evidence” and “direct evidence.” Direct evidence is the testimony of someone who claims to have personal knowledge of the

commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a series of facts that tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. You should decide how much weight to give to any evidence. You should consider all the evidence in the case, including the circumstantial evidence, in reaching your verdict.

Certain things are not evidence. I will list them for you:

First, testimony and exhibits that I struck from the record or that I told you to disregard are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, or television reports you may have seen or heard. Such reports are not evidence and must not influence your verdict.

Third, questions and objections by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements to you are not evidence. The purpose of these statements is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your collective memory is what counts.

It is proper for a lawyer to interview any witness in preparation for trial.

You have received evidence of a statement said to be made by the defendant to _____. You must decide whether the defendant did make the statement. If you find that the defendant did make the statement, then you must decide what weight, if any, you believe the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning

the defendant himself or herself, and the circumstances under which the statement was made.

The defendant has an absolute right not to testify. In arriving at your verdict, you must not consider the fact that the defendant did not testify.

You have heard evidence of acts of defendant other than those charged in the indictment. Specifically, _____.
You may consider this evidence only on the questions of _____.
You should consider this evidence only for this limited purpose.

You have heard evidence that _____
have been convicted of crimes. You may consider this evidence only in deciding whether the testimony of any of these witnesses is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

You have heard evidence that the defendant has been convicted of a crime. You may consider this evidence only for two purposes. First, you may use it to determine whether the government has proved all the elements of the offense charged in Count 3 as set forth below. Second, you may use the fact of the defendant's conviction in deciding whether the defendant's testimony is truthful as a whole, in part, or not at all. You may not consider it for any other purpose.

You have heard [reputation/opinion] evidence about the character trait of _____
_____ for truthfulness [or untruthfulness]. You should consider this evidence in deciding the weight that you will give to _____'s testimony.

You have heard [reputation and/or opinion] evidence about the defendant's character trait for [truthfulness, peacefulness, etc]. You should consider character evidence together with all the other evidence in the case and in the same way.

You have heard evidence that before the trial, witnesses made statements that may be inconsistent with their testimony here in court. If you find that it is inconsistent, you may consider the earlier statement only in deciding the truthfulness and accuracy of that witness's testimony in this trial. You may not use it as evidence of the truth of the matters contained in that prior statement. If that statement was made under oath, you may also consider it as evidence of the truth of the matters contained in that prior statement.

A statement made by the defendant before trial that is inconsistent with the defendant's testimony here in court may be used by you as evidence of the truth of the matters contained in it, and also in deciding the truthfulness and accuracy of that defendant's testimony in this trial.

_____ has admitted lying under oath. You may give his testimony such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

You have heard testimony that _____ have received benefits from the government in connection with this case. Specifically, _____. You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

You have heard testimony from _____ who each stated that he or she was involved in the commission of the alleged crime charged

against the defendants. You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

The witnesses _____
have pleaded guilty to a crime arising out of the same allegations for which the defendant is now on trial. You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care. Moreover, the guilty pleas of these defendants cannot to be considered as evidence against the defendant on trial now.

The witnesses _____
have received immunity; that is, a promise from the government that any testimony or other information he or she provided would not be used against him in a criminal case. You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

You must consider with caution and great care the testimony of any witness who is currently addicted to drugs. It is up to you to determine whether the testimony of a drug addict has been affected by drug use or the need for drugs.

The witnesses _____
gave opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness' qualifications and all of the other evidence in the case.

Certain summaries are in evidence. They truly and accurately summarize the contents of voluminous books, records or documents, and should be considered together with and in the same way as all other evidence in the case.

Certain summaries are in evidence. Their accuracy has been challenged by the defendants. Thus, the original materials upon which the exhibits are based have also been admitted into evidence so that you may determine whether the summaries are accurate.

You have heard recorded conversations. These recorded conversations are proper evidence and you may consider them, just as any other evidence. When the recordings were played during the trial, you were furnished transcripts of the recorded conversations prepared by government agents. The recordings are the evidence, and the transcripts were provided to you only as a guide to help you follow as you listen to the recordings. The transcripts are not evidence of what was actually said or who said it. It is up to you to decide whether the transcripts correctly reflect what was said and who said it. If you noticed any difference between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read. And if after careful listening, you could not hear or understand certain parts of the recordings, you must ignore the transcripts as far as those parts are concerned.

THE INDICTMENT

The defendant is charged in the indictment as follows:

[court reads the indictment]

The indictment in this case is the formal method of accusing the defendant of crimes and placing the defendant on trial. It is not evidence against the defendant and does not create any implication of guilt.

The defendant is not on trial for any act or any conduct not charged in the indictment.

The defendant is presumed to be innocent of the charges. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged.

The government has the burden of proving the defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case. The defendant is never required to prove his innocence or to produce any evidence at all.

The indictment charges that the offenses were committed "on or about" certain dates. The government must prove that the offenses happened reasonably close to those dates but it is not required to prove that the alleged offenses happened on those exact dates.

ELEMENTS OF THE CHARGE: COUNT 1

Count 1 charges defendant with conspiracy. A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. To sustain this charge against the defendant, the government must prove these elements:

- 1) That the conspiracy charged in Count 1 existed, and
- 2) That the defendant knowingly became a member of this conspiracy with an intention to further the conspiracy.

If you find from your consideration of all the evidence that both of these propositions have been proved beyond a reasonable doubt, then you should find the defendant guilty of Count 1.

If, on the other hand, you find from your consideration of all of the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you must find the defendant not guilty of Count 1.

A conspiracy may be established even if its purpose was not accomplished.

To be a member of the conspiracy, the defendant need not join at the beginning or know all the other members or the means by which its purpose was to be accomplished. The government must prove beyond a reasonable doubt that the defendant was aware of the common purpose and was a willing participant.

As to the first element of Count 1, in deciding whether the charged conspiracy existed, you may consider the actions and statements of every one of the alleged participants. An agreement may be proved from all the circumstances and the words and conduct of all of the alleged participants which are shown by the evidence.

As to the second element of Count 1, in deciding whether the defendant joined the charged conspiracy, you must base your decision solely on what the defendant personally did or said. In determining what the defendant personally did or said, you may consider the defendant's own words and acts. You also may consider the words and acts of other people to help you determine what the defendant personally did or said, and you may use the words and acts of other people to help you understand and interpret the defendant's own words and acts. Keep in mind, however, that the defendant's membership in the charged conspiracy can only be proved by his own words or acts.

In connection with the first element of the offense charged in Count 1, the government must prove the existence of at least one of the charged objectives of the conspiracy. The government has charged that this conspiracy had two objectives: to possess marijuana with the intent to distribute them; and actually to distribute marijuana. Before you may find that the government has met its burden on this point, you must unanimously agree on at least one of the charged objectives of the conspiracy. It is not enough for some of you to find that the government has proved a conspiracy to distribute marijuana and the

rest of you to find that the government has proved a conspiracy to possess marijuana with the intent to distribute it. All twelve of you must agree on at least one objective of the conspiracy and on one controlled substance in order to find that the government has proved the first element of Count 1.

If you find the defendant guilty of the conspiracy alleged in Count 1, then you must determine whether the government also has proved that the conspiracy involved 100 kilograms or more of marijuana. There is a special verdict question on this issue. You are to answer this question only if you find the defendant guilty of Count 1. If you unanimously find from your consideration of all the evidence that there is proof beyond a reasonable doubt that the conspiracy involved 100 kilograms or more of marijuana, then you should answer the special verdict question “Yes.” If you do not unanimously find from your consideration of all the evidence that there is proof beyond a reasonable doubt that the conspiracy involved 100 kilograms or more of marijuana, then you must answer the special verdict question “No.” Keep in mind that the special verdict question is asking about the conspiracy as a whole, not about what the individual defendant did.

By themselves, the defendant’s presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish the defendant’s guilt.

The defendant’s association with conspirators is not by itself sufficient to prove his or her participation or membership in a conspiracy.

If the defendant performed acts that advanced a criminal activity but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish the defendant’s guilt.

The government must prove that the defendant knowingly and intentionally joined the charged conspiracy, knowing the conspiracy’s aim and intending to achieve it.

The existence of a simple buyer-seller relationship between the defendant and another person is not sufficient to establish a conspiracy, without more, even where the buyer intends to resell controlled substances. By itself, the fact that the defendant may have bought controlled substances from another person or sold controlled substances to another person is not sufficient to establish that the defendant was a member of the charged conspiracy. In considering whether a conspiracy or a simple buyer-seller relationship existed, you should consider all of the evidence, including the following factors:

- (1) Whether the transaction involved large quantities of controlled substances;
- (2) Whether the parties had a standardized way of doing business over time;
- (3) Whether the sales were on credit or on consignment;
- (4) Whether the parties had a continuing relationship;
- (5) Whether the seller had a financial stake in a resale by the buyer;
- (6) Whether the parties had an understanding that the controlled substances would be resold.

No single factor necessarily indicates by itself that the defendant was or was not engaged in a simple buyer-seller relationship.

SINGLE OR MULTIPLE CONSPIRACIES

Although Count 1 charges a single, separate conspiracy, it might be possible to find additional, separate conspiracies regarding distinct parts of this case.

Whether there was one conspiracy, two conspiracies, multiple conspiracies or no conspiracy at all is a fact for you to determine in accordance with these instructions.

If you do not find beyond a reasonable doubt that the defendant you are considering was a member of any conspiracy, you must find that defendant not guilty of Count 1.

If you find beyond a reasonable doubt that there was one overall conspiracy as alleged in Count 1 and that the defendant was a member of that conspiracy, you should find the defendant guilty of Count 1.

If you find that there was more than one conspiracy and also find that the defendant was a member of one or more of these additional conspiracies, then you may find that defendant guilty of Count 1 only if you further find beyond a reasonable doubt that the proven conspiracy of which the defendant was a member is included within the conspiracy charged in Count 1.

On the other hand, if you find that the proven conspiracy of which the defendant was a member is not included within the conspiracy alleged in Count 1, then you must find the defendant not guilty of this count.

ELEMENTS OF THE OFFENSE: COUNT 2

Counts 2 charges the defendant with possessing cocaine with intent to distribute it. To sustain this charge, the government must prove these elements:

1. The defendant knowingly or intentionally possessed cocaine as charged in Count 2;
2. The defendant possessed this cocaine with the intent to deliver it to another person; and,
3. The defendant knew that this was a controlled substance.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty of Count 2.

On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you must find the defendant not guilty of Count 2.

If you find the defendant guilty of Count 2, then you must determine whether the government also has proved that he possessed 500 grams or more of a mixture or substance containing cocaine. There is a special verdict question on this issue. You are to answer this question only if you find the defendant guilty of Count 2. If you unanimously find from

your consideration of all the evidence that there is proof beyond a reasonable doubt that the defendant possessed 500 grams or more of a mixture or substance containing cocaine, then you should answer the special verdict question “Yes.” If you do not unanimously find from your consideration of all the evidence that there is proof beyond a reasonable doubt that the defendant possessed 500 grams or more of a mixture or substance containing cocaine, then you must answer the special verdict question “No.”

ELEMENTS OF THE OFFENSE: COUNT 3

Count 3 charges the defendant with possessing a firearm after having been convicted of a crime punishable by imprisonment for a term exceeding one year. To sustain this charge, the government must prove these elements:

- 1) Prior to June 13, 2006, the defendant had been convicted of a crime that was punishable by a term of imprisonment of more than one year;
- 2) On or about June 13, 2006,, the defendant knowingly possessed at least one of the five charged in the indictment; and
- 3) This firearm had traveled in interstate commerce prior to defendant's possession of it.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty of Count 3.

If, on the other hand, you find from your consideration of all the evidence that any one of these elements has not been proved beyond a reasonable doubt, then you must find the defendant not guilty of Count 3.

As to the first element of Count 3, the parties have stipulated that prior to June 13, 2006, the defendant had been convicted of a crime that was punishable by a term of imprisonment of more than one year. Therefore, you may conclude the government has met its burden of proof on the first element of Count 3.

As to the second element of Count 3, the government does not need to prove that the defendant possessed all five of the firearms charged, but it must prove that he possessed at least one of them. Before you may find that the government has met its burden of proof on this element, you must unanimously agree on at least one firearm. It is not sufficient for some of you to find that the defendant possessed one firearm and the rest of you to find that he possessed another. All twelve of you must agree the same firearm before you may find that the government has established this element.

As to the third element of Count 3, a firearm has traveled in interstate commerce if it has traveled between one state and any other state, or across a state or national boundary line. The government need not prove how the firearm traveled in interstate commerce or that the firearm's travel was related to the defendant's possession of it or that the defendant knew that the firearm had traveled in interstate commerce.

Possession of an object is the ability to control it. Possession may exist even when a person is not in physical contact with the object, but knowingly has the power and intention to exercise direction or control over it, either directly or through others.

You are instructed that marijuana is a Schedule I controlled substance and cocaine is a Schedule II controlled substance.

Distribution is the transfer of possession from one person to another.

When the word "knowingly" is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake or accident. Knowledge may be proved by the defendant's conduct and by all the facts and circumstances surrounding the case.

If a defendant performed acts that advanced a criminal activity but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish the defendant's guilt.

The term "knowingly" means that a defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake or accident. Knowledge may be proved by a defendant's conduct and by all the facts and circumstances surrounding the case.

An offense may be committed by more than one person. A defendant's guilt may be established without proof that the defendant personally performed every act constituting the crime charged.

If a defendant knowingly caused the acts of another, the defendant is responsible for those acts as though he personally committed them.

A defendant need not personally perform every act constituting the crime charged. Every person who willfully participates in the commission of a crime may be found guilty.

Whatever a person is legally capable of doing he can do through another person by causing that person to perform the act. If a defendant willfully ordered, directed or authorized the acts of another, he is responsible for such acts as though he or she personally committed them.

Any person who knowingly aids, abets, counsels, commands, induces or procures the commission of a crime is guilty of that crime. However, that person must knowingly associate himself with the criminal venture, participate in it and try to make it succeed.

Upon retiring to the jury room, select one of your number as your presiding juror. This person will preside over your deliberations and will be your representative here in court. A verdict forms have been prepared for you. [*Court reads the verdict form*]

Take this form to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in, date and sign the form.

Each count of the indictment charges the defendant with having committed a separate offense. You must consider each count and the evidence relating to it separate and apart from every other count. You should return a separate verdict as to each count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to any other count.

The verdict must represent the considered judgment of each juror. Whether your verdict is guilty or not guilty, it must be unanimous. You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But do not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement consistent with the individual judgment of each juror. You are impartial judges of the facts. Your only interest is to determine whether the government has proved its case beyond a reasonable doubt.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court by any

means other than a signed writing, and the court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court. Bear in mind also that you are never to reveal to any person –not even to the court– how the jury stands, numerically or otherwise, on the questions before you until after you have reached an unanimous verdict.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

VERDICT

v.

06-CR-131-S

ROBERT LOWERY,

Defendant.

COUNT 1

We, the Jury in the above-entitled cause, find the defendant, Robert Lowery,

("Guilty" or "Not Guilty")

of the offense charged in Count 1 of the indictment.

Special Verdict Questions for Count 1

Answer this special verdict question only if you found the defendant guilty of Count 1:

Did this conspiracy involve 100 kilograms or more of marijuana?

(“Yes” or “No”)

COUNT 2

We, the Jury in the above-entitled cause, find the defendant, Robert Lowery,

("Guilty" or "Not Guilty")

of the offense charged in Count 2 of the indictment.

Special Verdict Questions for Count 2

Answer this special verdict question only if you found the defendant guilty of Count 2:

Did the conduct involved in this charge involve 500 grams or more of a mixture or substance containing cocaine?

("Yes" or "No")

COUNT 3

We, the Jury in the above-entitled cause, find the defendant, Robert Lowery,

("Guilty" or "Not Guilty")

of the offense charged in Count 3 of the indictment.

Presiding Juror

Madison, Wisconsin

Date: _____