

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

---

UNITED STATES OF AMERICA,

Plaintiff,

v.

FINAL PRETRIAL  
CONFERENCE ORDER

MARK HURN,

05-CR-085-S

Defendant.

---

On July 7, 2006, this court held the final pretrial conference. Defendant Mark Hurn was present with his attorney, Mark Eisenberg. The government was represented by Assistant United States Attorney Meredith Duchemin.

First, we discussed the voir dire questions. The government had no proposed changes or objections to the court's packet. Hurn had a set of questions that we discussed at length. I agreed to add some of Hurn's questions and declined to add others for reasons stated on the record. A copy of the final version of the voir dire is attached to this order.

Next, we discussed the universe of jury instructions. The government had no proposed changes or objections to the court's packet except to cure a typographical error and request a change in word choice. Hurn submitted a list of pattern instructions that we cross-referenced against the court's packet. I added one requested instructions and declined to add another for reasons stated on the record. A copy of the instructions is

attached to this packet. Judge Shabaz will tailor this packet in consultation with the parties at the close of all the evidence.

Third, we discussed in limine issues. Judge Shabaz will decide the disputed issues at the final hearing on July 12, 2006 at 3:30 p.m. (The parties might be requesting that the court move the hearing forward to 3:00 p.m.).

Docketed as #60 is the government's notice of intent to offer evidence. Hurn wishes to be heard on Paragraph A, regarding the amount of information about a prior conviction the government may present to the jury when impeaching the defendant if he testifies. Hurn also disputes Paragraph B, in which the government advises that it will attempt to prove Hurn's intent in this case by presenting during its case-in-chief evidence of Hurn's prior drug conviction. There might be a dispute regarding Paragraph E, at least with regard to a taped conversation by defense witness Sabrina Mayes; the government only just presented the tape to Hurn for review so he does not yet know what is on it. Hurn does not dispute the government's experts or the government's use of his statements under Rule 801(d)(2)(A).

In Docket #61 the government moved to exclude any evidence of diminished capacity because Hurn filed no notice under Rule 12.2. Hurn does not intend to argue diminished capacity directly, but the issue might come up if he testifies in a defense case. The parties might wish to be heard on this issue.

In Docket #62, the government moved to exclude any evidence regarding its informant. Because Hurn feels strongly about the informant issue, the attorneys might wish to be heard briefly on this issue.

In Docket #63, the government moved to exclude any evidence of entrapment. Hurn does not intend to argue entrapment, so no discussion is necessary.

In Docket #64, the government moved to preclude any argument by Hurn that the government refused to test certain evidence for fingerprints. Hurn does not intend directly to present this particular argument to the jury, but he may wish to make arguments regarding the government's decision not to seek fingerprint evidence. The parties dispute what is fair game in this regard, so the court will have to address this issue at the final hearing.

In Docket #65, the government moved to preclude any evidence or argument regarding potential penalties to Hurn if convicted. Hurn does not dispute this motion. The government had no other in limine issues to bring to the court's attention.

Hurn filed a four-part motion in limine (Docket #57), some of which mirrors the government's motions. First, Hurn seeks to exclude from the government's case-in-chief, any evidence of his prior drug conviction. As noted above, the parties need to be heard on this issue.

Second, Hurn seeks to preclude the government from presenting any evidence gleaned from its informant, CI 862. The government does not intend to do so. However, as noted

above, *Hurn* wishes to present evidence at trial *about* CI 862, so the informant issue must be discussed at the final hearing in a different context.

Third, Hurn seeks to limit the amount of information the government may elicit regarding prior convictions when cross-examining defense witness Sabrina Mayes if she takes the stand. The government opposes the requested limitations. The issue is framed for resolution at the final hearing.

Finally, Hurn seeks to exclude any photographs in which he is depicted as a gang member. The government does not intend to submit such photographs, but it does intend to offer photographs in which other people's gestures and clothing might be associated with gang activity. The court will need to set parameters as to which depictions are appropriate for use at trial. Hurn had no other in limine to bring to the court's attention.

The next topic of the conference was trial mechanics. As previously noted, the final hearing before Judge Shabaz is set for July 12, 2006 at 3:30 p.m. Jury selection shall begin July 17, 2006 at 9:00 a.m. in Courtroom 360 with Magistrate Judge Theresa M. Owens presiding. The trial will begin before Judge Shabaz in Courtroom 360 on July 19, 2006 at 9:00 a.m. Unless Judge Shabaz indicates otherwise at the final hearing, the parties should assume that the trial will conclude that same day, and should plan accordingly. The court will seat two alternate jurors. Hurn has access to street clothes for trial.

The parties had no other matters to bring to the court's attention.

Entered this 10th day of July, 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.

MARK HURN,

Defendant.

---

STATEMENT OF THE CASE  
AND VOIR DIRE

05-CR-85-S

Statement of the case: This is a criminal case, in which the defendant, Mark Hurn is charged with possessing cocaine and crack cocaine with intent to distribute. The defendant has entered a plea of not guilty to the charges against him.

Have any of you heard of this case before today? Would this affect your ability to serve impartially as a juror in this case?

1. Scheduling: the trial in this case will begin on this Wednesday and will finish that same evening. 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 charges. 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 a defendant is guilty.

Burden of Proof. The government has the burden of proving the defendant's guilt 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 might choose not to 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.

Memberships in any groups or organizations.

Hobbies and leisure-time activities.

Favorite types of reading material.

Favorite types of television shows.

Whether you regularly watch any legal or forensic television shows.

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

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

7. The following people might or might not testify as witnesses at this trial:

*[Court reads list to be provided by the parties; do not include defendant or case agent]*

Do any of you think you know any of these people? Would this affect your ability to be impartial in this case?

8. The defendant is African American. Would any of you find it difficult to serve as an impartial juror in a case in which an African American man is charged with crimes relating to cocaine and crack cocaine?

9. Have any of you or your relatives, ever had any unpleasant experiences with African Americans? [Sidebar if necessary]. Would this affect your ability to be impartial in this case?

10. 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?

11. 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?

12. 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?

13. 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?



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

15. 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?

16. 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?

17. 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?

18. 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?

19. Have any of you ever belonged to any organization or group that excluded people because of their race, gender, or religion?

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. Would any of you judge the testimony of a witness who was African American differently from other witnesses solely because of the witness's race?

22. 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?

23. 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?

24. 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?

25. 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?

26. How many of you have served previously as a juror in another trial, or as a member of any grand jury?

If you served on another trial jury, please tell us in which court you served, approximately when, the type of cases you heard, whether you were foreperson, and the verdicts.

If you served on a grand jury, please join us at side bar for follow up [*when, where, were you foreperson, do you know this AUSA, did your service affect ability to be impartial in this case? No inquiry into the grand jury's investigations*]

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. 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?

29. 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?

30. 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.

05-CR-85-S

MARK HURN,

Defendant.

---

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 may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

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, 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 the 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 crimes. You may consider this evidence only in deciding whether the defendant's testimony is truthful in whole, in part, or not at all. You may not consider it for any other purpose. A conviction of another crime is not evidence of the defendant's guilt of any other crime for which the defendant is now charged.

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 defendant. 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 defendant. 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.

#### THE INDICTMENT

The defendant is charged in the indictment as follows:

*[court reads 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 OFFENSES

Each count separately charges the defendant with possessing a specific controlled substance with intent to distribute it. To sustain either of these charges, the government must prove these elements:

1. The defendant knowingly or intentionally possessed the controlled substance listed in the count that you are considering;
2. The defendant possessed this controlled substance with the intent to distribute 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 as to the count that you are considering, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt as to the count that you are considering, then you must find the defendant not guilty of that count.

Count 1 charges that the defendant possessed more than 50 grams of cocaine base (crack cocaine) with intent to distribute it. If you find the defendant guilty of Count 1, then you must determine whether the government also has proved that the amount of crack cocaine involved was more than 50 grams. There is a special verdict question addressing this issue for Count 1. You are to answer this special verdict question only if you find the defendant guilty of Count 1.

The government must establish the amount of crack cocaine involved in Count 1 by proof beyond a reasonable doubt. If you find from your consideration of all the evidence that there is proof beyond a reasonable doubt that the amount of crack cocaine involved was more than 50 grams, then you should answer the special verdict question “Yes” for Count 1. If you do not find from your consideration of all the evidence that there is proof beyond a reasonable doubt as to the amount of crack cocaine specified in Count 1, then you must answer the special verdict question “No” for Count 1.

You are instructed that cocaine and cocaine base (“crack cocaine”) are controlled substances.

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

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 and control over it, either directly or through others.

The term “knowingly” means that the defendant realized what he was doing and was aware of the nature of his or her 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.

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.

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.

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

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

The 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 the defendant willfully ordered, directed or authorized the acts of another, he is responsible for such acts as though he 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 or herself 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 form has been prepared for you.

[Court reads 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 give separate consideration to each count. You must consider each count and the evidence relating to it separate and apart from the 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 the defendant under the 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. You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case. You must not reveal to any person, including the court, your numerical split on any verdict question until you have reached a unanimous verdict on every defendant and every count.

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

---

UNITED STATES OF AMERICA,

Plaintiff,

VERDICT

v.

05-CR-85-S

MARK HURN,

Defendant.

---

**COUNT 1**

We, the Jury in the above-entitled cause, find the defendant, Mark Hurn,

\_\_\_\_\_  
("Guilty" or "Not Guilty")

of the offense charged in Count 1 of the indictment.

**Special Verdict Question for Count 1**

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

Did this offense involve more than 50 grams of cocaine base (crack cocaine)?

\_\_\_\_\_  
("Yes" or "No")





COUNT 2

We, the Jury in the above-entitled cause, find the defendant, Mark Hurn,

\_\_\_\_\_  
("Guilty" or "Not Guilty")

of the offense charged in Count 2 of the indictment.

\_\_\_\_\_  
Presiding Juror

Madison, Wisconsin

Date: \_\_\_\_\_