

REQUEST FOR INSTRUCTIONS: Judge's Guide

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Conspiracy-Definition

A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. Thus a conspiracy is a kind of "partnership in criminal purposes" in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to violate or disregard the law.

Mere similarity of conduct among various persons and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

Before you may find that a defendant, or any other person, has become a member of a conspiracy, the evidence must show that the conspiracy was formed, and that the defendant, or any person who is claimed to have been with a member, knowingly and wilfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To participate knowingly and wilfully means to participate voluntarily and understandingly and with specific intent to do some acts the law forbids, that is to say, to participate with the purpose either to disobey or to disregard the law.

You are not to consider any of the acts of any of the alleged co-conspirators as binding upon the defendant or as an overt act made in pursuance of to effect the object of the alleged conspiracy in the absence of a finding by you that such persons were parties to the alleged conspiracy; and you are not to consider any of the statements made by any one party with respect to the defendant as binding on the defendant unless and until you find that both were parties to the alleged conspiracy.

Pattern jury instruction-Conspiracy-Presumption of innocence.

The presumption of innocence as to the defendant applies to the conspiracy charge as a whole and to every material element of the charge. It is presumed that the defendant has no intent to commit a crime, engage in a conspiracy and it is presumed that he did nothing corrupt with full knowledge of the objects of the conspiracy, and it is presumed that he did no corrupt act in furtherance of the conspiracy. The burden to overcome this presumption rests upon the Government and failure of any defendant to testify does not create any presumption against him. The defendant is never required to prove his innocence, the Government must prove his guilt and that proof must convince you beyond a reasonable doubt.

Pattern jury instruction-Conspiracy-Burden of proof.

The burden of proof of establishing the conspiracy charged rests

upon the Government throughout the trial to establish the guilt of the defendant beyond a reasonable doubt. The Government must meet this burden by offering substantial evidence which is worthy of belief. You must not allow suspicion or surmise or probabilities to take the place of evidence.

If you have a reasonable doubt as to the participation of the defendant in the conspiracy you shall acquit him and if you have a reasonable doubt as to his intent to join the conspiracy you must acquit him. If you have a reasonable doubt as to the knowledge of the defendant of accomplishing the object of the conspiracy through the corrupt and dishonest methods charged, you must acquit him.

I charge you that there must be independent proof of a conspiracy or common plan before the extrajudicial statements of one conspirator may be considered by you against his alleged fellow conspirators.

The Court instructs the jury that even participation in the offense which is the object of the conspiracy does not alone prove any defendant guilty of conspiracy. The evidence must convince you beyond a reasonable doubt that such defendant did something other than participate in such offense and that in addition to such participation, there must be proof of the unlawful agreement and participation therein with knowledge of the agreement.

The Court instructs the jury that if you form from the evidence a belief that some one or more of the parties may be guilty of the charge made but such evidence does not identify the guilty person or persons but leaves a reasonable doubt in your mind as to which parties may be guilty and which may be innocent, then you must acquit the defendants. In other words, if after considering all the evidence there is a reasonable doubt in your minds as to who of the parties are guilty of the acts charged and who are innocent then as to the defendants your verdict must be not guilty since he can be convicted on guess, speculation, or conjecture.

The Court instructs the jury that if there is a reasonable doubt in your minds that one or more of the parties is guilty and the evidence relating to such person or persons is not any different than it is with respect to the defendant whom you may believe guilty then you are instructed that it is your duty to acquit the defendant.

The Court instructs the jury that if no conspiracy has been proved as to any two or more of the parties as conspiracy has been defined in this case then you must find the defendant not guilty. And the Court further instructs you that even if a conspiracy has been proved as to two or more of the parties if it has not been proved that one or more of these as to whom that conspiracy was proved committed any of the overt acts charged in the indictment then also it is your duty to find the defendant not guilty.

The Court instructs the jury that the offense with which the defendant is charged cannot be committed by one person and one person alone cannot be guilty of a conspiracy and that no matter how wrong you may find the conduct of the defendant if you find that he acted alone and without entering into an agreement with any other person you must acquit him.

Pattern jury instruction-Conspiracy-Agreement.

No person can be convicted of the conspiracy unless there is substantial evidence of his participation in the plan or agreement, and that he had full knowledge of the unlawful and corrupt purposes of the plan and participated in the plan in order to carry it out. You cannot convict the defendant unless the evidence shows that he made the plan or agreement, or conspiracy a venture of his own. If you have a reasonable doubt as to any of the elements of participation and knowledge as to the defendant you must acquit him.

Pattern jury instruction-Conspiracy-Specific intent.

A conspiracy to do an act which may be unlawful, followed by the doing of an overt act does not amount to the crime of conspiracy, unless you also find a criminal intent.

Pattern jury instruction-Conspiracy-Knowledge.

The defendant cannot be convicted of the crime of conspiracy unless it is proven that the acts charged were committed by him with knowledge of the conspiracy, and that he was a party to the general plan of conspiracy, and that the things he did were done by him in furtherance and in execution of such general plan of conspiracy.

Pattern jury instruction-Conspiracy-Overt act.

A conspiracy is an agreement by two or more persons to accomplish an unlawful objective by lawful means or a lawful objective by unlawful means, and it is not sufficient to merely prove an agreement between the parties but it is further required that the Government prove beyond a reasonable doubt that an overt act was committed by one or more of the parties in furtherance of such agreement.

The Court instructs the jury that the presence of the defendant on the occasion of the commission of an overt act is not sufficient to make the defendant guilty of a conspiracy to commit that act, and even if you believe and find that one or more of the parties were present or participated in any or all of the overt acts charged you must find the defendant not guilty unless such participation was part of a knowing and intentional participation in the conspiracy which has been charged.

Pattern jury instruction-Conspiracy-Statements of co-defendant.

The Court instructs you that you may not consider against the defendant, any act or any declaration or statement of any of his alleged co-conspirators made out of his presence as tending in any manner to establish the guilt of the defendant absent at the time of such act or declaration or statement, unless the following situations exist:

First, that the act, declaration, or statement was made during the existence of the alleged conspiracy;

Second, that the act, declaration, or statement was done or made

in furtherance of the object of the conspiracy;

Third, that the person absent at the time of such making of such statement or declaration or the doing of such act is himself shown to have been a member of the conspiracy in question by his own acts and statements.

If any of the three situations do not exist, then you may not consider acts and declarations of alleged co-conspirators against the defendant absent at the doing of such acts or the making of such declarations.

In determining whether or not a defendant, or any person, was a member of a conspiracy, you may not consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence as to his own conduct, what he himself did, or said.

PROPOSED DEFENSE INSTRUCTION:
US v BARNWELL

You have heard evidence that PVT Moreno made a certain statement prior to trial that is inconsistent with her testimony at this trial. Specifically in her original statement she stated that PFC Barnes, SP4 Barnwell, and SP4 Jones agreed to "rough up" Mr. Johnson while today she states that the only one who had any discussion with her is SP4 Barnwell and that it was to "rob the old man". She also stated in her original statement that she had not only received any money but today she stated she received \$20. I am only highlighting two inconsistencies now but you heard the testimony and the evidence and may remember more. You are advised that such prior inconsistent statement is a factor to be considered in evaluating the credibility of the testimony of PVT Moreno.

You are not to consider such prior statement as evidence of the truth of the matter asserted in that prior statement. Rather, in determining the weight to be given to the testimony of PVT Moreno you may consider any inconsistency as a factor bearing adversely upon her credibility as a witness at this trial.

**PROPOSED REVERSE INSTRUCTION:
US v HANDELL**

The court is advised that a witness is an accomplice if he was culpably involved in an offense with which the accused is charged. The purpose of this advice is to call your attention to a matter specifically affecting the witness' credibility that is, his motive to falsify his testimony in whole or in part, because of his obvious self-interest under the circumstances. For example, an accomplice may be motivated to falsify his testimony in whole or in part because of his own self-interest in obtaining immunity from prosecution. Accordingly, you are advised that the testimony of an accomplice, even though apparently credible, is of questionable integrity and should be considered with great caution and given only such weight and credibility as you deem it deserves.

You are advised that, under the state of the evidence, PVT Moreno is an accomplice as a matter of law.

Furthermore, a conviction of a crime cannot be based upon the uncorroborated testimony of a purported accomplice of such testimony is self-contradictory, uncertain, or improbable. In determining whether such testimony of PVT Moreno is self-contradictory, uncertain, or improbable, you must consider it in the light of all instructions concerning factors bearing upon a witness' credibility. You are instructed as a matter of law that the testimony of PVT Moreno is uncorroborated.

In other words, what I am saying here is that insofar as the testimony of PVT Moreno puts the finger upon the accused as being a person implicated with her in the commission of these offenses, and if you consider her testimony to be uncertain, self-contradictory, or improbable, then you may not convict the accused, since identity of the accused as a perpetrator or one criminally liable for an offense, must be proved beyond a reasonable doubt by the prosecutor. On the other hand, if you consider that her testimony was not self-contradictory, uncertain, or improbable, you may accord such credibility to her testimony as you deem appropriate in the light of my other instructions.

CHARACTER EVIDENCE
Accused's

To show the probability of his innocence, the defense in this case has introduced evidence of the accused's good character including but not limited to evidence of military record and his general character as a moral, well-conducted person and law-abiding citizen. The law recognizes that a person of good character is not as likely to commit an offense as is a person of bad character. Evidence of the accused's good character, therefore is admissible as tending to show that it is improbable that the accused committed the offense charged. Considered and weighed alone, or in connection with the presumption of innocence and all the other evidence on the case, this evidence of the accused's good character may be sufficient to cause a reasonable doubt to remain as to his guilt, thereby warranting an acquittal. On the other hand, the inference of innocence to be drawn from such evidence may be more than offset by the other evidence in the case tending to establish the accused's guilt. As members of the court, the final determination as to the weight to be accorded this and all other evidence in the case rests with you.

**PROPOSED DEFENSE INSTRUCTION:
US v BARNWELL**

Credibility of Witnesses

The final determination as to the weight of the evidence and the credibility of the witnesses on this case rests solely upon you as members of the court. In determining the weight and value to be given to the testimony which you have heard, you should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witnesses are worthy of belief. Consider each witness' intelligence, the soundness of his powers of observation, the accuracy and retentiveness of his memory, his apparent candor, his appearance and deportment, and the effect of intimidation upon his observation and memory. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; the effect of a grant of immunity may have on a witness's motive to testify; and the extent to which, if at all, each witness is either supported or contradicted by other evidence. You should consider the probability of each witness' statements; the opportunity the witness had to observe and to be informed as to the matters respecting which he gave testimony; and the inclination of the witness to speak the truth or otherwise as to the matters within his knowledge.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood. Where conflict or inconsistency appears, it is your function to resolve it and to determine where the truth lies. (It is not necessary the number of witnesses called in support of a particular issue which is determinative of that issue, but it is the force, effect, and convincing character of the testimony given which will be your guide in weighing and giving due credit to this testimony.)

**DEFENSE BRIEF:
MOTION FOR FINDING OF NOT GUILTY
"UNCORROBORATED TESTIMONY OF ACCOMPLICE"**

Paragraph 71(a) MEM 1969 (Rev.) states:

"On motion of the defense, a finding of not guilty may be entered as to any offense charged after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of that offense."

The evidence of the offenses alleged in this case is insufficient to sustain a conviction of either charge. The only evidence that the government has introduced to identify either PFC Barnes or SP4 Barnwell as the perpetrators of the alleged offenses is the testimony of PVT Moreno.

PVT Moreno by her own testimony was an accomplice. She sent Mr. Johnson's taxi away; she led him out to the area in which the crime occurred and she left him there to be robbed. The government has alleged that she was a co-conspirator in the first charge. Her own testimony implicates her in the second charge. As the Court of Military Appeals stated in *US v Seales* 33 CMR 228,231, "A witness is an accomplice if he was culpably involved in the crime with which the accused was charged." PVT Moreno clearly meets this test.

Paragraph 133(a) MEM 1969 (Rev.) states that "...a conviction cannot be based...upon uncorroborated testimony given by an accomplice in a trial for any offense, if in either case the testimony is self-contradictory, uncertain, or improbable." This rule has been favorably cited and adapted by the Court of Military Appeals, *US v Seales* 27 CMR 400.

Moreno is the only witness that identifies the accused. As to the essential element she is uncorroborated. Even given the government all possible interpretations of the remaining evidence the most that it can show is that PFC Barnes and SP4 Barnwell were at the NCO Club that night.

In the case of *US v Little*, Little and another man were on guard duty with two Koreans. A Korean testified that two American soldiers, both Negroes, threw some bales of mosquito netting over the fence to him. He could not identify the accused and positively identified a third man. The man on guard duty with the accused testified that he and the accused threw the bales. The court held that the accused could not be convicted upon the uncorroborated testimony of the accomplice. It further stated "the evidence of the accused's presence in the area (does not) corroborate H.'s testimony as to the identity of the offender." 14 CMR 309. Therefore mere presence of an accused in the area is not

enough for corroboration even when he is the only other soldier known to be in that area. It is clear that PFC Barnes and SP4 Barmell were not the only black males in the area of the WCO Club that night. Obviously then, this does not in any way corroborate PVT Moreno's testimony.

PVT Moreno's testimony is self-contradictory, uncertain, and improbable. She admits that she was drunk and is uncertain about many of the occurrences that night. She has been inconsistent on many points. For instance, in her first statement to the CID she stated that Barnes, Barmell, and Jones agreed to take the "old man" out to "rough him up". Later she claimed that the purpose was to rob him. Then she claimed that there was no conversation among the four of them; it was just between Barmell and herself; and finally she states that she was too drunk to remember she was said. This is just one example of the multitude of contradictions PVT Moreno has made in her testimony. It is believed that as a matter of law, a conviction can not be had based upon her uncorroborated testimony.

Therefore there is not sufficient evidence to sustain a conviction and the motion for a finding of not guilty should be granted.

CIRCUMSTANTIAL EVIDENCE

Para 9-13 MJG (second paragraph)

On this case, for example, evidence has been introduced showing that \$82.80 was wrongfully taken from Mr. Johnson behind the EM/EW club late the evening of 14 January 1972 and shortly thereafter the accused was seen running from the general area where the money was taken and later, when handing Pv Moreno \$20 said, "Thats all the old man had." Based on this evidence you may justifiably infer that the accused wrongfully took the money from Mr. Johnson. The drawing of this inference is not mandatory but permissible. Its weight or effect, if any, is to be measured only in terms of its logical value and will depend upon all the circumstances attending the proved facts which give rise to the inference as well as all the other evidence in the case. In drawing and weighing any such inference common sense and a general knowledge of human nature and the ordinary affairs of life should be applied.