

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSE WILLIAM ORELLANA,

Defendant.

No. CR 14-4046-MWB

**INSTRUCTIONS
TO THE JURY**

TABLE OF CONTENTS

INSTRUCTIONS

No. 1 — INTRODUCTION	1
No. 2 — PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF	3
No. 3 — REASONABLE DOUBT	5
No. 4 — OTHER IMPORTANT TERMS	6
No. 5 — THE ALLEGED “METHAMPHETAMINE CONSPIRACY” OFFENSE	9
No. 6 — FORM AND QUANTITY OF METHAMPHETAMINE	13
No. 7 — DEFINITION OF EVIDENCE	16
No. 8 — TESTIMONY OF WITNESSES	18
No. 9 — DEFENDANT’S PRIOR STATEMENTS	22
No. 10 — OBJECTIONS	23
No. 11 — BENCH CONFERENCES	24
No. 12 — NOTE-TAKING	25
No. 13 — CONDUCT OF JURORS DURING TRIAL	26
No. 14 — DUTY TO DELIBERATE	30
No. 15 — DUTY DURING DELIBERATIONS	32

VERDICT FORM

No. 1 — INTRODUCTION

Congratulations on your selection as a juror! These Instructions are to help you better understand the trial and your role in it.

In an Indictment, a Grand Jury has charged defendant Jose William Orellana with a “methamphetamine conspiracy” offense. An Indictment is simply an accusation—it is not evidence of anything. The defendant has pled not guilty to the crime charged against him, and he is presumed absolutely not guilty of the offense charged, unless and until the prosecution proves his guilt on that offense beyond a reasonable doubt.

You must decide during your deliberations whether or not the prosecution has proved the defendant’s guilt on the offense charged against him beyond a reasonable doubt. In making your decision, you are the sole judges of the facts. You must not decide this case based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Do not take anything that I have said or done or that I may say or do as indicating what I think of the evidence or what I think your verdict should be.

Remember, only defendant Jose William Orellana, and not anyone else, is on trial. Also, the defendant is on trial *only* for the offense charged against him in the Indictment, and not for anything else.

Please remember that this case is important to the parties and to the fair administration of justice. Therefore, please be patient, consider all of the evidence, and do not be in a hurry to reach a verdict just to be finished with the case.

No. 2 — PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

The presumption of innocence means that the defendant is presumed to be absolutely not guilty.

- This presumption means that you must put aside all suspicion that might arise from the defendant's arrest, the charge, or the fact that he is here in court
- This presumption remains with the defendant throughout the trial
- This presumption is enough, alone, for you to find the defendant not guilty of the offense charged against him, unless the prosecution proves, beyond a reasonable doubt, all of the elements of that offense

The burden is always on the prosecution to prove guilt beyond a reasonable doubt.

- This burden never, ever shifts to the defendant to prove his innocence
- This burden means that the defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify
- This burden means that, if the defendant does not testify, you must not consider that fact in any way, or even discuss it, in arriving at your verdict
- This burden means that you must find the defendant not guilty of the offense charged against him, unless the prosecution proves beyond a

reasonable doubt that he has committed each and every element of that offense

No. 3 — REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense.

- A reasonable doubt may arise from evidence produced by the prosecution or the defendant, keeping in mind that the defendant never, ever has the burden or duty to call any witnesses or to produce any evidence
- A reasonable doubt may arise from the prosecution's lack of evidence

The prosecution must prove the defendant's guilt beyond a reasonable doubt.

- Proof beyond a reasonable doubt requires careful and impartial consideration of all of the evidence in the case before making a decision
- Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on it in the most important of your own affairs

The prosecution's burden is heavy, but it does not require proof beyond all doubt.

No. 4 — OTHER IMPORTANT TERMS

Before I turn to specific instructions on the offense charged in this case, I will explain some important terms.

Elements

The offense charged consists of “elements,” which are the parts of the offense. The prosecution must prove beyond a reasonable doubt all of the elements of the offense charged against the defendant for you to find him guilty of that offense.

Timing

The Indictment alleges an approximate time period for the charged “methamphetamine conspiracy” offense.

- The prosecution does not have to prove that the offense occurred on an exact date
- The prosecution only has to prove that the offense occurred at a time that was reasonably close to or within the period alleged for the offense in the Indictment

Location

You must decide whether the defendant’s conduct occurred in the Northern District of Iowa.

- The prosecution alleges that the defendant’s criminal conduct occurred in Sioux City, Iowa, and Woodbury County, which are in the Northern District of Iowa
- The prosecution alleges that the defendant’s criminal conduct also occurred in South Sioux City, Nebraska, and Dakota County, Nebraska, which are in the District of Nebraska

It is enough if the prosecution proves that the offense conduct was begun, continued, or completed in the Northern District of Iowa.

Methamphetamine

The offense charged in this case allegedly involved methamphetamine. Methamphetamine is an illegal drug. Two forms of methamphetamine are allegedly involved in this case:

- “methamphetamine mixture”
 - “methamphetamine mixture” is a mixture or substance containing a detectable amount of methamphetamine
- “actual (pure) methamphetamine”
 - “actual (pure) methamphetamine” is methamphetamine itself—either by itself or contained in a methamphetamine mixture

Possession

A person possessed something if both of the following are true:

- the person knew about it, *and*

- the person had
 - physical control over it, *or*
 - the power, or ability, and the intention to control it, *or*
 - control over a place in which it was concealed

More than one person may have possessed something at the same time.

Distribution

A person distributed an illegal drug, if the person transferred possession of the illegal drug to another person.

The prosecution does not have to prove

- that the illegal drug was “sold,” or
- that money or anything of value changed hands

* * *

I will now give you the “elements” instruction on the charged offense. The “elements” themselves are set out in **bold**.

No. 5 — THE ALLEGED “METHAMPHETAMINE CONSPIRACY” OFFENSE

The Indictment charges defendant Jose William Orellana with a “methamphetamine conspiracy” offense. The defendant denies that he committed this offense.

For you to find the defendant guilty of the “methamphetamine conspiracy” offense, the prosecution must prove beyond a reasonable doubt *all* of the following elements against him:

One, at some time during the period alleged for the conspiracy, from about 2012 through about May 13, 2014, in the Northern District of Iowa, two or more persons reached an agreement or understanding to distribute methamphetamine.

A conspiracy is an agreement of two or more persons to commit one or more crimes. For this element to be proved,

- the defendant may have been, but did not have to be, one of the original conspirators
- the crime that the conspirators agreed to commit did not actually have to be committed
- the agreement did not have to be written or formal
- the agreement did not have to involve every detail of the conspiracy

Here, the conspirators allegedly agreed to “distribute methamphetamine.”

- To help you decide whether or not the conspirators agreed to “distribute methamphetamine,” you should consider the elements of that crime
- The elements of “distributing methamphetamine” are the following:
 - a person intentionally distributed methamphetamine to another; and
 - at the time of the distribution, the person knew that he or she was distributing an illegal drug

Remember,

- the prosecution does not have to prove that any conspirator actually distributed methamphetamine for a conspiracy charge to be proved, *but*
- if there was no agreement, there was no conspiracy

Two, the defendant voluntarily and intentionally joined in the agreement or understanding.

The prosecution must prove that the defendant had some degree of knowing involvement and cooperation in the agreement to prove that he joined in the agreement.

The defendant may have joined in the agreement

- at any time during its existence
- even if he agreed to play only a minor role in it

The defendant did not have to do any of the following to join the agreement:

- join the agreement at the same time as all of the other conspirators
- know all of the details of the conspiracy, such as the names, identities, or locations of all of the other members, or
- conspire with every other member of the conspiracy

On the other hand, each of the following, alone, is not enough to show that a person joined the agreement:

- evidence that a person was merely present at the scene of an event
- evidence that a person merely acted in the same way as others
- evidence that a person merely associated with others
- evidence that a person was friends with or met socially with individuals involved in the conspiracy
- evidence that a person who had no knowledge of a conspiracy acted in a way that advanced an objective of the conspiracy
- evidence that a person merely knew of the existence of a conspiracy
- evidence that a person merely knew that an objective of the conspiracy was being considered or attempted, or
- evidence that a person merely approved of the objectives of the conspiracy

If you find that there was an agreement, but you find that the defendant did not join in that agreement, then you cannot find the defendant guilty of the charged conspiracy offense.

Three, at the time that the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding.

The prosecution

- must prove that the defendant knew the purpose of the conspiracy, *but*
- does not have to prove that the defendant knew that what he did was unlawful

If the prosecution *does not* prove all of these elements beyond a reasonable doubt, then you must find the defendant not guilty of the “methamphetamine conspiracy” offense charged in the Indictment.

If you find the defendant guilty of the “methamphetamine conspiracy” charged in the Indictment, then you must also determine the form and quantity of any methamphetamine involved in that conspiracy for which the defendant can be held responsible, as explained in Instruction No. 6.

No. 6 — FORM AND QUANTITY OF METHAMPHETAMINE

If you find defendant Orellana guilty of the “methamphetamine conspiracy” charged in the Indictment, then you must determine beyond a reasonable doubt the form and quantity of any methamphetamine involved in that offense for which he can be held responsible.

A defendant guilty of the “methamphetamine conspiracy” charged in the Indictment is responsible for:

- any methamphetamine that he actually distributed or agreed to distribute during the course of the conspiracy
- any methamphetamine that he personally used or acquired for personal use from a co-conspirator
- any methamphetamine that fellow conspirators actually distributed or agreed to distribute during the conspiracy that was reasonably foreseeable as a necessary or natural consequence of the conspiracy

The Indictment charges that the “methamphetamine conspiracy” involved either or both “methamphetamine mixture” and “actual (pure) methamphetamine.” You must determine the quantity of any form of methamphetamine that you find was involved in the “methamphetamine conspiracy.” If you find that the “methamphetamine conspiracy” involved both “methamphetamine mixture” and “actual (pure) methamphetamine,” you must determine the total quantity of each form of methamphetamine, even if the “actual (pure) methamphetamine” was contained in a “methamphetamine mixture.”

If you find that the “methamphetamine conspiracy” involved “methamphetamine mixture,” then you must indicate in the Verdict Form whether defendant Orellana can be held responsible for

- 500 grams or more of “methamphetamine mixture,” or
- 50 grams or more, but less than 500 grams, of “methamphetamine mixture,” or
- less than 50 grams of “methamphetamine mixture”

If you find that the “methamphetamine conspiracy” involved “actual (pure) methamphetamine,” then you must indicate in the Verdict Form whether defendant Orellana can be held responsible for

- 50 grams or more of “actual (pure) methamphetamine,” or
- 5 grams or more, but less than 50 grams, of “actual (pure) methamphetamine,” or
- less than 5 grams of “actual (pure) methamphetamine”

The following conversion table may be helpful:

POUNDS/OUNCES	GRAMS
1 lb.	453.6 g. (0.4536 kilogram)
2.2 lb.	1,000 g. (1 kilogram)
1 oz.	28.34 g. (0.028 kilogram)

At the end of your deliberations, if you have found defendant Orellana guilty of the “methamphetamine conspiracy” charged in the Indictment, you will check the appropriate blanks in the Verdict Form to indicate

- the form or forms and
- the quantity of any form

of methamphetamine involved in that offense for which you find that he is responsible.

No. 7 — DEFINITION OF EVIDENCE

Evidence is the following:

- testimony
- exhibits admitted into evidence, but exhibits are not necessarily more important than any other evidence, just because they are shown to you
- stipulations, which are agreements between the parties that certain facts are true; you must treat stipulated facts as having been proved

The following are not evidence:

- testimony that I tell you to disregard
- exhibits that are not admitted into evidence
- statements, arguments, questions, and comments by the lawyers
- objections and rulings on objections
- anything that you see or hear about this case outside the courtroom

You may have heard of “direct” or “circumstantial” evidence.

- “Direct” evidence is direct proof of a fact
 - An example is testimony by a witness about what that witness personally saw or heard or did

- “Circumstantial” evidence is proof of one or more facts from which you could find another fact
 - An example is testimony that a witness personally saw a broken window and a brick on the floor, from which you could find that the brick broke the window
- You should consider both kinds of evidence, because the law makes no distinction between their weight
- The weight to be given any evidence, whether it is “direct” or “circumstantial,” is for you to decide.

Some evidence may be admitted only for a limited purpose.

- I will tell you if that happens
- I will instruct you on the purposes for which the evidence can and cannot be used

No. 8 — TESTIMONY OF WITNESSES

You may believe all of what any witness says, only part of it, or none of it.

In evaluating a witness's testimony, consider the witness's

- Opportunity to have seen and heard what happened
- Memory. Memory is not an exact recording of past events and witnesses may misremember events and conversations. Scientific research has established
 - that human memory is not at all like video recordings that a witness can simply replay to remember precisely what happened
 - that when a witness has been exposed to statements, conversations, questions, writings, documents, photographs, media reports, and opinions of others, the accuracy of their memory may be affected and distorted
 - that a witness's memory, even if testified to in good faith, and with a high degree of confidence, may be inaccurate, unreliable, and falsely remembered; thus, human memory can be distorted, contaminated, or changed, and events and conversations can even be falsely imagined
 - that distortion, contamination, and falsely imagined memories may happen at each of the three stages of memory: acquisition (perception of events); storage (period of time between

acquisition and retrieval); and retrieval (recalling stored information).

- Demeanor. Scientific research has established
 - that there is not necessarily a relationship between how confident witnesses are about their testimony and the accuracy of their testimony; thus, less confident witnesses may be more accurate than confident witnesses
 - that common cultural cues, like shifty eyes, shifty body language, the failure to look one in the eye, grimaces, stammering speech, and other mannerisms, are not necessarily correlated to witness deception or false or inaccurate testimony
- Motives for testifying
- Interest in the outcome of the case
- Drug or alcohol use or addiction, if any
- The reasonableness of the witness's testimony

In evaluating a witness's testimony, also consider the following:

- Any differences between what the witness says now and said earlier
- Any inconsistencies between the witness's testimony and any other evidence that you believe
- Whether any inconsistencies are the result of seeing or hearing things differently, actually forgetting things, or innocent mistakes or are, instead, the result of lies or phony memory lapses, and

- Any other factors that you find bear on believability or credibility

If the defendant testifies,

- you should judge his testimony in the same way that you judge the testimony of any other witness

You should not give any more or less weight to a witness's testimony just because the witness is

- a public official or law enforcement officer
- an expert

You may give any witness's opinion whatever weight you think it deserves, but you should consider

- the reasons and perceptions on which the opinion is based
- any reason that the witness may be biased, and
- all of the other evidence in the case

You must consider with greater caution and care the testimony, if any, of a witness who is testifying

- that he or she participated in the charged offense
- after a promise from the prosecution not to use that witness's testimony, to a grand jury or at this trial, against that witness in a criminal case, or

- pursuant to a plea agreement
 - The plea agreement may be a “cooperation” plea agreement that provides that the prosecution may recommend a less severe sentence if the prosecutor believes that the witness has provided “substantial assistance”
 - A judge cannot reduce a sentence for “substantial assistance” unless the prosecution asks the judge to do so, but if the prosecution does ask, the judge decides if and how much to reduce the witness’s sentence

It is for you to decide

- what weight you think the testimony of such a witness deserves, and
- whether or not such a witness’s testimony has been influenced by
 - the desire to please the prosecution
 - any promises by the prosecution, or
 - a plea agreement

Remember, it is your exclusive right to give any witness’s testimony whatever weight you think it deserves.

No. 9 — DEFENDANT’S PRIOR STATEMENTS

You may hear evidence that the defendant made a statement or statements to law enforcement officers after his arrest. You must decide the following:

- whether defendant Orellana made the statement or statements, and
- if so, how much weight you should give the statement or statements

In making these two decisions, you should consider all of the evidence, including the circumstances under which the statement may have been made.

No. 10 — OBJECTIONS

The lawyers may make objections and motions during the trial that I must rule upon.

- If I sustain an objection to a question before it is answered, do not draw any inferences or conclusions from the question itself
- Do not hold it against a lawyer or a party that a lawyer has made an objection, because lawyers have a duty to object to testimony or other evidence that they believe is not properly admissible

No. 11 — BENCH CONFERENCES

During the trial it may be necessary for me to talk with the lawyers out of your hearing.

- I may hold a bench conference while you are in the courtroom or call a recess
- These conferences are to decide how certain evidence is to be treated, to avoid confusion and error, and to save your valuable time, so please be patient
- We will do our best to keep such conferences short and infrequent

No. 12 — NOTE-TAKING

You are allowed to take notes during the trial if you want to.

- Be sure that your note-taking does not interfere with listening to and considering all the evidence
- Your notes are not necessarily more reliable than your memory or another juror's notes or memory
- Do not discuss your notes with anyone before you begin your deliberations
- Leave your notes on your chair during recesses and at the end of the day
- At the end of trial, you may take your notes with you or leave them to be destroyed
- No one else will ever be allowed to read your notes, unless you let them
- If you choose not to take notes, remember that it is your own individual responsibility to listen carefully to the evidence
- An official court reporter is making a record of the trial, but her transcripts will not be available for your use during your deliberations

No. 13 — CONDUCT OF JURORS DURING TRIAL

You must decide this case *solely* on the evidence and your own observations, experiences, reason, common sense, and the law in these Instructions. You must also keep to yourself any information that you learn in court until it is time to discuss this case with your fellow jurors during deliberations.

To ensure fairness, you must obey the following rules:

- Do not talk among yourselves about this case, or about anyone involved with it, until you go to the jury room to decide on your verdict.
- Do not talk with anyone else about this case, or about anyone involved with it, until the trial is over.
- When you are outside the courtroom, do not let anyone ask you about or tell you anything about this case, anyone involved with it, any news story, rumor, or gossip about it, until the trial is over. If someone should try to talk to you about this case during the trial, please report it to me.
- During the trial, you should not talk to any of the parties, lawyers, or witnesses—even to pass the time of day—so that there is no reason to be suspicious about your fairness. The lawyers, parties, and witnesses are not supposed to talk to you, either.
- You may need to tell your family, friends, teachers, co-workers, or employer about your participation in this trial, so that you can tell

them when you must be in court and warn them not to ask you or talk to you about the case. However, do not provide any information to anyone by any means about this case until after I have accepted your verdict. That means do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, a Blackberry, a PDA, a computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, any blog, or any website such as Facebook, MySpace, YouTube, or Twitter, to communicate to anyone any information about this case until I accept your verdict.

- Do not do any research—on the Internet, in libraries, in the newspapers, in dictionaries or other reference books, or in any other way—or make any investigation about this case, the law, or the people involved on your own.
- Do not visit or view any place discussed in this case and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony.
- Do not read any news stories or articles, in print, on the Internet, or in any “blog,” about this case, or about anyone involved with it, or listen to any radio or television reports about it or about anyone involved with it, or let anyone tell you anything about any such news reports. I assure you that when you have heard all the evidence, you will know more about this case than anyone will learn through the news media—and it will be more accurate.

- Do not make up your mind during the trial about what the verdict should be. Keep an open mind until you have had a chance to discuss the evidence with other jurors during deliberations.
- Do not decide the case based on “implicit biases.” As we discussed during jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes—that is, “implicit biases”—that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.
- A Verdict Form is attached to these Instructions. A Verdict Form is simply a written notice of your decision. After your deliberations, if you have reached a unanimous verdict, your foreperson will complete one copy of the Verdict Form by marking the appropriate blank or blanks for each question. You will all sign that copy to indicate that you agree with the verdict and that it is unanimous. Your foreperson

will then bring the signed Verdict Form to the courtroom when it is time to announce your verdict.

- If, at any time during the trial, you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the restroom, please send a note to the Court Security Officer (CSO), who will give it to me. I want you to be comfortable, so please do not hesitate to tell us about any problem.

I will read the remaining two Instructions at the end of the evidence.

No. 14 — DUTY TO DELIBERATE

A verdict must represent the careful and impartial judgment of each of you. However, before you make that judgment, you must consult with one another and try to reach agreement, if you can do so consistent with your individual judgment.

- If you are convinced that the prosecution has *not* proved beyond a reasonable doubt that the defendant is guilty of the charged offense, say so
- If you are convinced that the prosecution *has* proved beyond a reasonable doubt that the defendant is guilty of the charged offense, say so
- Don't give up your honest beliefs just because others think differently or because you simply want to be finished with the case
- On the other hand, do not hesitate to re-examine your own views and to change your opinions, if you are convinced that they are wrong
- You can only reach a unanimous verdict if you discuss your views openly and frankly, with proper regard for the opinions of others, and with a willingness to re-examine your own views
- Remember that you are not advocates, but judges of the facts, so your sole interest is to seek the truth from the evidence
- The question is never who wins or loses the case, because society always wins, whatever your verdict, when you return a just verdict

based solely on the evidence, reason, your common sense, and these instructions

- You must consider all of the evidence bearing on each question before you
- Take all the time that you feel is necessary
- Remember that this case is important to the parties and to the fair administration of justice, so do not be in a hurry to reach a verdict just to be finished with the case

No. 15 — DUTY DURING DELIBERATIONS

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

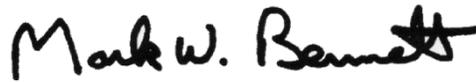
- Select a foreperson to preside over your discussions and to speak for you here in court.
- Do not consider punishment in any way in deciding whether the defendant is not guilty or guilty. If the defendant is guilty of the charged offense, I will decide what his sentence should be.
- Communicate with me by sending me a note through a CSO. The note must be signed by one or more of you. Remember that you should not tell anyone, including me, how your votes stand. I will respond as soon as possible, either in writing or orally in open court.
- Base your verdict solely on the evidence, reason, your common sense, and these instructions. Again, nothing I have said or done was intended to suggest what your verdict should be—that is entirely for you to decide.
- Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex. To emphasize the importance of this requirement, the verdict form

contains a certification statement. Each of you should carefully read that statement, then sign your name in the appropriate place in the signature block, if the statement accurately reflects how you reached your verdict.

- Complete the Verdict Form. The foreperson must bring the signed Verdict Form to the courtroom when it is time to announce your verdict.
- When you have reached a verdict, the foreperson will advise the CSO that you are ready to return to the courtroom.

Good luck with your deliberations.

DATED this 20th day of May, 2015.



MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSE WILLIAM ORELLANA,

Defendant.

No. CR 14-4046-MWB

VERDICT FORM

As to defendant Jose William Orellana, we, the Jury, find as follows:

METHAMPHETAMINE CONSPIRACY		VERDICT
Step 1: Verdict	On the “methamphetamine conspiracy” offense, charged in the Indictment and explained in Instruction No. 5 , please mark your verdict. <i>(If you find the defendant “not guilty” of this offense, do not answer the questions in Step 2. Instead, please read the Certification, sign the Verdict Form, and notify the Court Security Officer (CSO) that you have reached a verdict.)</i>	<input type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty
Step 2: Form and Quantity of Methamphetamine	<i>If you found the defendant “guilty” of the “methamphetamine conspiracy” offense charged in the Indictment in Step 1, please indicate (a) which one or more forms of methamphetamine were involved in the conspiracy, and (b) the quantity of any form of methamphetamine involved in the conspiracy for which the defendant is responsible, as explained in Instruction No. 6. (When you have answered the questions in this step, please read the Certification, sign the Verdict Form, and notify the CSO that you have reached a verdict.)</i>	
(a)	<input type="checkbox"/> methamphetamine mixture	<input type="checkbox"/> actual (pure) methamphetamine
(b)	<input type="checkbox"/> 500 grams or more	<input type="checkbox"/> 50 grams or more
	<input type="checkbox"/> 50 grams or more, but less than 500 grams	<input type="checkbox"/> 5 grams or more, but less than 50 grams
	<input type="checkbox"/> less than 50 grams	<input type="checkbox"/> less than 5 grams

CERTIFICATION

By signing below, each juror certifies the following:

(1) that consideration of the defendant's race, color, religious beliefs, national origin, or sex was not involved in reaching the juror's individual decision, *and*

(2) that the individual juror would have returned the same verdict for or against the defendant on the charged offense regardless of the defendant's race, color, religious beliefs, national origin, or sex.

Date

_____ Foreperson	_____ Juror
_____ Juror	_____ Juror

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FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

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JOSE WILLIAM ORELLANA,

Defendant.

No. CR 14-4046-MWB

**COURT’S PROPOSED
INSTRUCTIONS
TO THE JURY**

(05/13/15 FINAL “ANNOTATED”
VERSION)

TABLE OF CONTENTS

INSTRUCTIONS

No. 1 — INTRODUCTION	1
No. 2 — PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF	3
No. 3 — REASONABLE DOUBT	5
No. 4 — OTHER IMPORTANT TERMS	6
No. 5 — THE ALLEGED “METHAMPHETAMINE CONSPIRACY” OFFENSE	11
No. 6 — FORM AND QUANTITY OF METHAMPHETAMINE.....	17
No. 7 — DEFINITION OF EVIDENCE	20
No. 8 — TESTIMONY OF WITNESSES	22
No. 9 — DEFENDANT’S PRIOR STATEMENTS	27
No. 10 — OBJECTIONS	28
No. 11 — BENCH CONFERENCES	29
No. 12 — NOTE-TAKING	30
No. 13 — CONDUCT OF JURORS DURING TRIAL	31
No. 14 — DUTY TO DELIBERATE	35
No. 15 — DUTY DURING DELIBERATIONS	37

VERDICT FORM

No. 16 — INTRODUCTION¹

Congratulations on your selection as a juror! These Instructions are to help you better understand the trial and your role in it.

In an Indictment, a Grand Jury has charged defendant Jose William Orellana with a “methamphetamine conspiracy” offense.² An Indictment is simply an accusation—it is not evidence of anything. The defendant has pled not guilty to the crime charged against him, and he is presumed absolutely not guilty of the offense charged, unless and until the prosecution proves his guilt on that offense beyond a reasonable doubt.

You must decide during your deliberations whether or not the prosecution has proved the defendant’s guilt on the offense charged against him beyond a reasonable doubt. In making your decision, you are the sole judges of the facts. You must not decide this case based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that

¹ *Compare* 8th Cir. Criminal Model 1.01 (2014). For many years, I have *not* given separate preliminary and final jury instructions. Rather, before opening statements, I provide the jurors with “front-end loaded” instructions that explain all of the issues that we can reasonably anticipate and the “elements” in the charged offense. I reserve only the last two instructions, on deliberations, to read after the parties’ closing arguments. In rare circumstances, where either unexpected issues arise during trial or I must assess the adequacy of certain evidence before instructing on an issue, I give “supplemental” instructions during the trial or at the close of the evidence. At this point, I do not anticipate the need for any “supplemental” jury instructions in this case.

² I do not find it necessary to reiterate more specifically the offense with which the defendant is charged. Rather, the charged offense will be addressed with particularity in the “elements” instruction.

you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Do not take anything that I have said or done or that I may say or do as indicating what I think of the evidence or what I think your verdict should be.

Remember, only defendant Jose William Orellana, and not anyone else, is on trial. Also, the defendant is on trial *only* for the offense charged against him in the Indictment, and not for anything else.

Please remember that this case is important to the parties and to the fair administration of justice. Therefore, please be patient, consider all of the evidence, and do not be in a hurry to reach a verdict just to be finished with the case.

**No. 17 — PRESUMPTION OF INNOCENCE AND
BURDEN OF PROOF³**

The presumption of innocence means that the defendant is presumed to be absolutely not guilty.

- This presumption means that you must put aside all suspicion that might arise from the defendant's arrest, the charge, or the fact that he is here in court
- This presumption remains with the defendant throughout the trial
- This presumption is enough, alone, for you to find the defendant not guilty of the offense charged against him, unless the prosecution proves, beyond a reasonable doubt, all of the elements of that offense

The burden is always on the prosecution to prove guilt beyond a reasonable doubt.

- This burden never, ever shifts to the defendant to prove his innocence
- This burden means that the defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify
- This burden means that, if the defendant does not testify, you must not consider that fact in any way, or even discuss it, in arriving at your verdict

³ Compare 8th Cir. Criminal Model 3.05 (2014).

- This burden means that you must find the defendant not guilty of the offense charged against him, unless the prosecution proves beyond a reasonable doubt that he has committed each and every element of that offense

No. 18 — REASONABLE DOUBT⁴

A reasonable doubt is a doubt based upon reason and common sense.

- A reasonable doubt may arise from evidence produced by the prosecution or the defendant, keeping in mind that the defendant never, ever has the burden or duty to call any witnesses or to produce any evidence
- A reasonable doubt may arise from the prosecution's lack of evidence

The prosecution must prove the defendant's guilt beyond a reasonable doubt.

- Proof beyond a reasonable doubt requires careful and impartial consideration of all of the evidence in the case before making a decision
- Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on it in the most important of your own affairs

The prosecution's burden is heavy, but it does not require proof beyond all doubt.

⁴ Compare 8th Cir. Criminal Model 3.11 (2014).

No. 19 — OTHER IMPORTANT TERMS⁵

Before I turn to specific instructions on the offense charged in this case, I will explain some important terms.

Elements

The offense charged consists of “elements,” which are the parts of the offense. The prosecution must prove beyond a reasonable doubt all of the elements of the offense charged against the defendant for you to find him guilty of that offense.⁶

⁵ I recognize that 8th Cir. Criminal Model 7.05 (2014) provides an instruction on “proof of intent or knowledge.” In late 2001, during one of my numerous attempts to refine and streamline my stock jury instructions, I stopped giving the second paragraph of that model, concerning inferring intent from the natural and probable consequences of acts knowingly done. At that time, I explained that I had deleted that language, because I simply did not believe that it was helpful to the jury, and I doubted that jurors would understand what it meant. In approximately late 2009, I stopped giving any instruction at all on “knowledge” and “intent” as unnecessary and unhelpful to the jury. I do not find 8th Cir. Criminal Model 7.05, or any part of it, to be either necessary or helpful here. See *United States v. Iron Eyes*, 367 F.3d 781, 785 (8th Cir. 2004) (“In our circuit, . . . a trial judge is not required to give the jury such a definition [of ‘knowingly’ or ‘knowing’] because the definition is ‘a matter of common knowledge.’” (quoting *United States v. Brown*, 33 F.3d 1014, 1017 (8th Cir. 1994))).

⁶ Judges and attorneys take for granted that an offense has “elements,” but this concept may not be so obvious to lay jurors.

Timing

The Indictment alleges an approximate time period for the charged “methamphetamine conspiracy” offense.

- The prosecution does not have to prove that the offense occurred on an exact date
- The prosecution only has to prove that the offense occurred at a time that was reasonably close to or within the period alleged for the offense in the Indictment

Location

You must decide whether the defendant’s conduct occurred in the Northern District of Iowa.

- The prosecution alleges that the defendant’s criminal conduct occurred in Sioux City, Iowa, and Woodbury County, which are in the Northern District of Iowa
- The prosecution alleges that the defendant’s criminal conduct also occurred in South Sioux City, Nebraska, and Dakota County, Nebraska, which are in the District of Nebraska

It is enough if the prosecution proves that the offense conduct was begun, continued, or completed in the Northern District of Iowa.⁷

⁷ I have drawn the city and county from the Report And Recommendation (docket no. 34), on the defendant’s Motion To Suppress. ***The parties are requested to provide information about any other town(s) or count(ies) in which the criminal offense allegedly occurred. The prosecution alleges that offense conduct also occurred in***

Methamphetamine

The offense charged in this case allegedly involved methamphetamine. Methamphetamine is an illegal drug. Two forms of methamphetamine are allegedly involved in this case:

- “methamphetamine mixture”
 - “methamphetamine mixture” is a mixture or substance containing a detectable amount of methamphetamine
- “actual (pure) methamphetamine”
 - “actual (pure) methamphetamine” is methamphetamine itself—either by itself or contained in a methamphetamine mixture⁸

*Possession*⁹

A person possessed something if both of the following are true:

- the person knew about it, *and*
- the person had

South Sioux City and Dakota County, Nebraska. I have added a clarification, based on 18 U.S.C. § 3237(a), that it is enough if the offense was begun, continued, or completed in the Northern District of Iowa.

⁸ My “stock” instruction on forms of methamphetamine. *See United States v. Kuenstler*, 325 F.3d 1015, 1023 (8th Cir. 2003) (defining the phrase “mixture or substance containing a detectable amount of methamphetamine”); U.S.S.G. § 2D1.1 (defining “methamphetamine (actual)”); *see also United States v. Mesner*, 377 F.3d 849, 852 & n.1 (8th Cir. 2004) (relying on U.S.S.G. § 2D1.1); *United States v. Houston*, 338 F.3d 876, 881 (8th Cir. 2003) (same).

⁹ 9th Cir. Criminal Model 3.18 (modified and recast in past tense).

- physical control over it, *or*
- the power, or ability,¹⁰ and the intention to control it, *or*
- control over a place in which it was concealed¹¹

¹⁰ See *United States v. Zoch*, No. CR 11-4031-MWB (N.D. Iowa Nov. 16, 2011) (docket no. 55-1) (giving an explanation of “power” in terms of “ability” in answer to a jury question).

¹¹ This explanation is consistent with numerous decisions of the Eighth Circuit Court of Appeals. See, e.g., *United States v. Goodrich*, 739 F.3d 1091, 1097 (8th Cir. 2014) (“‘Constructive possession is established by proof that the defendant had control over the place where the firearm was located, or control, ownership, or dominion of the [item] itself.’” (quoting *United States v. Brown*, 634 F.3d 435, 439 (8th Cir. 2011))). I recognize that the Eighth Circuit Court of Appeals has also stated, “[C]onstructive possession generally requires knowledge of an object, the ability to control it, and the intent to do so.” *United States v. Chantharath*, 705 F.3d 295, 304 (8th Cir. 2013) (quoting *United States v. Pazour*, 609 F.3d 950, 952–53 (8th Cir. 2010)). Nevertheless, the “intent to control” requirement is not necessarily “intent to exercise control over the [item],” but may be “‘intent and ability to exercise control over [the item] or the place where it is kept.’” *United States v. Kent*, 531 F.3d 642, 652 (8th Cir. 2008) (emphasis added) (quoting *United States v. Robertson*, 519 F.3d 452, 455 (8th Cir. 2008)). Also, even when “intent to control” is expressly identified as a requirement, it is not always explicitly considered in determining the sufficiency of the evidence of constructive possession. See, e.g., *Chantharath*, 705 F.3d at 304 (finding sufficient evidence of constructive possession of a firearm where the defendant was the registered tenant of the house and apartment where the firearms were discovered and he acknowledged possession of a firearm at the house when he sent another person to retrieve a bag that the defendant claimed contained firearms). Furthermore, the Eighth Circuit Court of Appeals has recognized that, where “constructive possession requires evidence that a defendant knowingly had the power and intention to exercise control over a[n] [item],” “[s]uch possession may be established by showing the defendant had dominion over the premises where the [item] is kept.” *United States v. Saddler*, 538 F.3d 879, 888 (8th Cir. 2008). Where it is proper to infer “intent to control” an item or the place where it is found from “knowledge” of the item and “dominion” (or “control”) of the item or the place where the item is found, it is not necessary to state “intent to control” the item or the place where it is found as an express requirement of constructive possession.

More than one person may have possessed something at the same time.¹²

*Distribution*¹³

A person distributed an illegal drug, if the person transferred possession of the illegal drug to another person.

The prosecution does not have to prove

- that the illegal drug was “sold,” or
- that money or anything of value changed hands

* * *

I will now give you the “elements” instruction on the charged offense. The “elements” themselves are set out in **bold**.

¹² I find that it is unnecessary to include an additional instruction defining “sole” and “joint” possession, as set out in 8th Cir. Criminal Model 8.02 (2014), because instructing that “[m]ore than one person may have possessed something at the same time” adequately addresses the concepts of “sole” and “joint” possession.

¹³ 8th Cir. Criminal Model 6.21.841B n.1 (2014) (suggesting that “transfer” may be more understandable than “distribute”); *see also United States v. Ragland*, 555 F.3d 706, 714 (8th Cir. 2009) (noting that “[n]o commercial element is required,” and citing cases).

**No. 20 — THE ALLEGED “METHAMPHETAMINE
CONSPIRACY” OFFENSE¹⁴**

The Indictment charges defendant Jose William Orellana with a “methamphetamine conspiracy” offense. The defendant denies that he committed this offense.

For you to find the defendant guilty of the “methamphetamine conspiracy” offense, the prosecution must prove beyond a reasonable doubt *all* of the following elements against him:¹⁵

One, at some time during the period alleged for the conspiracy, from about 2012 through about May 13, 2014, in the Northern District of Iowa, two or more persons reached an agreement or understanding to distribute methamphetamine.

A conspiracy is an agreement of two or more persons to commit one or more crimes. For this element to be proved,

- the defendant may have been, but did not have to be, one of the original conspirators

¹⁴ Compare 8th Cir. Criminal Model 6.21.846A (2014).

¹⁵ I consider a drug conspiracy offense to be complete upon proof of these elements; determination of the drug quantity involved (where necessary) is made pursuant to a separate Instruction, not as an element of the offense (or as a “lesser-included offense”). This is so, because drug quantity is only the “functional equivalent” of an element of the offense under *Apprendi* and its progeny *in the specific sense* that drug quantity must be charged and determined by a jury beyond a reasonable doubt. Moreover, treating drug quantity as an element or as the basis for a “lesser-included offense” determination is unnecessarily confusing to a jury.

- the crime that the conspirators agreed to commit did not actually have to be committed
- the agreement did not have to be written or formal
- the agreement did not have to involve every detail of the conspiracy¹⁶

Here, the conspirators allegedly agreed to “distribute methamphetamine.”

- To help you decide whether or not the conspirators agreed to “distribute methamphetamine,” you should consider the elements of that crime
- The elements of “distributing methamphetamine” are the following:
 - a person intentionally distributed methamphetamine to another; and
 - at the time of the distribution, the person knew that he or she was distributing an illegal drug¹⁷

Remember,

- the prosecution does not have to prove that any conspirator actually distributed methamphetamine for a conspiracy charge to be proved, *but*

¹⁶ 9th Cir. Criminal Model 8.16, ¶¶ 6-7.

¹⁷ See 8th Cir. Crim. Model 6.21.841B (2014).

- if there was no agreement, there was no conspiracy¹⁸

Two, the defendant voluntarily and intentionally joined in the agreement or understanding.

The prosecution must prove that the defendant had some degree of knowing involvement and cooperation in the agreement to prove that he joined in the agreement.¹⁹

The defendant may have joined in the agreement

- at any time during its existence
- even if he agreed to play only a minor role in it²⁰

The defendant did not have to do any of the following to join the agreement:

- join the agreement at the same time as all of the other conspirators

¹⁸ See 8th Cir. Criminal Model 5.06A-2 (2014) (success immaterial and “agreement” explained).

¹⁹ See *United States v. Shakur*, 691 F.3d 979, 989 (8th Cir. 2012) (“To establish that a defendant conspired to distribute drugs under 21 U.S.C. § 846, the government must prove: (1) that there was a conspiracy, i.e., an agreement to distribute the drugs; (2) that the defendant knew of the conspiracy; and (3) that the defendant intentionally joined the conspiracy.” (quoting *United States v. Bowie*, 618 F.3d 802, 812 (8th Cir.2010) (quotation omitted), *cert. denied*, --- U.S. ----, 131 S.Ct. 954 (2011)); *United States v. Slagg*, 651 F.3d 832, 846 (8th Cir. 2011) (“To prove that Taylor participated in the charged conspiracy, the Government was required to present evidence ‘establish[ing] some degree of knowing involvement and cooperation,’ *United States v. Cabrera*, 116 F.3d 1243, 1244 (8th Cir. 1997) (quoting *United States v. Fregoso*, 60 F.3d 1314, 1323 (8th Cir. 1995)), beyond ‘a mere sales agreement with respect to contraband,’ *United States v. West*, 15 F.3d 119, 121 (8th Cir. 1994).”).

²⁰ 8th Cir. Criminal Model 5.06A-2 (2014) (“minor role”).

- know all of the details of the conspiracy, such as the names, identities, or locations of all of the other members, or
- conspire with every other member of the conspiracy²¹

On the other hand, each of the following, alone, is not enough to show that a person joined the agreement:

- evidence that a person was merely present at the scene of an event
- evidence that a person merely acted in the same way as others
- evidence that a person merely associated with others
- evidence that a person was friends with or met socially with individuals involved in the conspiracy
- evidence that a person who had no knowledge of a conspiracy acted in a way that advanced an objective of the conspiracy
- evidence that a person merely knew of the existence of a conspiracy
- evidence that a person merely knew that an objective of the conspiracy was being considered or attempted, or
- evidence that a person merely approved of the objectives of the conspiracy²²

²¹ 8th Cir. Criminal Model 5.06A-2 (2014).

²² My stock “mere presence,” etc.,” instruction, modified in light of 8th Cir. Criminal Model 5.06A-2 (2014); *United States v. Burchinal*, 657 F.2d 885, 991 n.3 (8th

If you find that there was an agreement, but you find that the defendant did not join in that agreement, then you cannot find the defendant guilty of the charged conspiracy offense.

Three, at the time that the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding.

The prosecution

- must prove that the defendant knew the purpose of the conspiracy, *but*
- does not have to prove that the defendant knew that what he did was unlawful

Cir. 1981) (“Although we are aware that neither mere association with members of a conspiracy nor mere knowledge, approval or acquiescence in the object of a conspiracy is sufficient as proof that an individual is part of that conspiracy, [citing cases], there is no issue in the present case as to whether Burchinal contributed to the furtherance of the conspiracy.”). I believe that this language adequately addresses the defendant’s request for what my research suggests is a pre-2012 7th Circuit Pattern Jury Instruction on “mere presence.” See Defendant’s Proposed Additional Instructions, attached to Prosecution’s Proposed Jury Instructions (docket no. 113), 27 (5.11 Mere Presence/Association/Activity, without citation to source). Therefore, I will not give a separate “mere presence” instruction.

The defendant has also requested an instruction on the insufficiency of a “buyer-seller relationship” to prove a conspiracy. See *id.* (6.12 Buyer-Seller Relationship, without citation to source). Whether such an instruction is appropriate, however, depends upon the facts of the case. See, e.g., *United States v. Peeler*, 779 F.3d 773, 776 (8th Cir. 2015) (explaining that such an instruction is appropriate where there is evidence indicating that the defendant made only one purchase, knew only the seller, and had not ordered the drugs he bought); *United States v. Tillman*, 765 F.3d 831, 835 (8th Cir. 2014) (explaining that such an instruction is not appropriate when there is evidence of multiple drug transactions, as opposed to a single, isolated sale). Thus, I will give such an instruction, if at all, only as a separate, supplemental instruction, after I have considered the evidence presented.

If the prosecution *does not* prove all of these elements beyond a reasonable doubt, then you must find the defendant not guilty of the “methamphetamine conspiracy” offense charged in the Indictment.

If you find the defendant guilty of the “methamphetamine conspiracy” charged in the Indictment, then you must also determine the form and quantity of any methamphetamine involved in that conspiracy for which the defendant can be held responsible, as explained in Instruction No. 6.

**No. 21 — FORM AND QUANTITY OF
METHAMPHETAMINE**

If you find defendant Orellana guilty of the “methamphetamine conspiracy” charged in the Indictment, then you must determine beyond a reasonable doubt the form and quantity of any methamphetamine involved in that offense for which he can be held responsible.²³

A defendant guilty of the “methamphetamine conspiracy” charged in the Indictment is responsible for:

- any methamphetamine that he actually distributed or agreed to distribute during the course of the conspiracy
- any methamphetamine that he personally used or acquired for personal use from a co-conspirator
- any methamphetamine that fellow conspirators actually distributed or agreed to distribute during the conspiracy that was reasonably foreseeable as a necessary or natural consequence of the conspiracy

The Indictment charges that the “methamphetamine conspiracy” involved either or both “methamphetamine mixture” and “actual (pure) methamphetamine.” You must determine the quantity of any form of methamphetamine that you find was involved in the “methamphetamine conspiracy.” If you find that the

²³ In prior “drug quantity” instructions, I have stated that the jurors must determine whether the offense actually involved the illegal drug charged in the Indictment. However, the jurors have already made that determination by convicting the defendant of a charged drug offense. *See* Instruction No. 5.

“methamphetamine conspiracy” involved both “methamphetamine mixture” and “actual (pure) methamphetamine,” you must determine the total quantity of each form of methamphetamine, even if the “actual (pure) methamphetamine” was contained in a “methamphetamine mixture.”

If you find that the “methamphetamine conspiracy” involved “methamphetamine mixture,” then you must indicate in the Verdict Form whether defendant Orellana can be held responsible for

- 500 grams or more of “methamphetamine mixture,” or
- 50 grams or more, but less than 500 grams, of “methamphetamine mixture,” or
- less than 50 grams of “methamphetamine mixture”

If you find that the “methamphetamine conspiracy” involved “actual (pure) methamphetamine,” then you must indicate in the Verdict Form whether defendant Orellana can be held responsible for

- 50 grams or more of “actual (pure) methamphetamine,” or
- 5 grams or more, but less than 50 grams, of “actual (pure) methamphetamine,” or
- less than 5 grams of “actual (pure) methamphetamine”

The following conversion table may be helpful:

POUNDS/OUNCES	GRAMS
1 lb.	453.6 g. (0.4536 kilogram)
2.2 lb.	1,000 g. (1 kilogram)
1 oz.	28.34 g. (0.028 kilogram)

At the end of your deliberations, if you have found defendant Orellana guilty of the “methamphetamine conspiracy” charged in the Indictment, you will check the appropriate blanks in the Verdict Form to indicate

- the form or forms and
- the quantity of any form

of methamphetamine involved in that offense for which you find that he is responsible.

No. 22 — DEFINITION OF EVIDENCE²⁴

Evidence is the following:

- testimony
- exhibits admitted into evidence, but exhibits are not necessarily more important than any other evidence, just because they are shown to you
- stipulations, which are agreements between the parties that certain facts are true; you must treat stipulated facts as having been proved

The following are not evidence:

- testimony that I tell you to disregard
- exhibits that are not admitted into evidence
- statements, arguments, questions, and comments by the lawyers
- objections and rulings on objections
- anything that you see or hear about this case outside the courtroom

You may have heard of “direct” or “circumstantial” evidence.

- “Direct” evidence is direct proof of a fact

²⁴ My “plain language” jury instructions. *See* 8th Cir. Criminal Model 1.03 (2014).

- An example is testimony by a witness about what that witness personally saw or heard or did
- “Circumstantial” evidence is proof of one or more facts from which you could find another fact
 - An example is testimony that a witness personally saw a broken window and a brick on the floor, from which you could find that the brick broke the window
- You should consider both kinds of evidence, because the law makes no distinction between their weight
- The weight to be given any evidence, whether it is “direct” or “circumstantial,” is for you to decide.²⁵

Some evidence may be admitted only for a limited purpose.

- I will tell you if that happens
- I will instruct you on the purposes for which the evidence can and cannot be used

²⁵ See 8th Cir. Civil Model 1.03 (2014) (modified) and 9th Cir. Criminal Model 1.9 (modified); *but see* 8th Cir. Criminal Model 1.04 (suggesting that definitions of direct and circumstantial evidence are ordinarily not required).

No. 23 — TESTIMONY OF WITNESSES²⁶

You may believe all of what any witness says, only part of it, or none of it. In evaluating a witness's testimony, consider the witness's

- Opportunity to have seen and heard what happened
- Memory. Memory is not an exact recording of past events and witnesses may misremember events and conversations. Scientific research has established
 - that human memory is not at all like video recordings that a witness can simply replay to remember precisely what happened
 - that when a witness has been exposed to statements, conversations, questions, writings, documents, photographs, media reports, and opinions of others, the accuracy of their memory may be affected and distorted
 - that a witness's memory, even if testified to in good faith, and with a high degree of confidence, may be inaccurate, unreliable, and falsely remembered; thus, human memory can be distorted, contaminated, or changed, and events and conversations can even be falsely imagined

²⁶ My new “stock” jury instruction on “testimony,” which tries to take into account the teachings of social science regarding memory and eyewitness testimony. *See* 8th Cir. Criminal Models 1.05 and 3.04 (2014). I do not give, and for many years have not given, separate “credibility” and “impeachment” instructions.

- that distortion, contamination, and falsely imagined memories may happen at each of the three stages of memory: acquisition (perception of events); storage (period of time between acquisition and retrieval); and retrieval (recalling stored information).
- Demeanor. Scientific research has established
 - that there is not necessarily a relationship between how confident witnesses are about their testimony and the accuracy of their testimony; thus, less confident witnesses may be more accurate than confident witnesses
 - that common cultural cues, like shifty eyes, shifty body language, the failure to look one in the eye, grimaces, stammering speech, and other mannerisms, are not necessarily correlated to witness deception or false or inaccurate testimony
- Motives for testifying
- Interest in the outcome of the case
- Drug or alcohol use or addiction, if any
- The reasonableness of the witness's testimony

In evaluating a witness's testimony, also consider the following:

- Any differences between what the witness says now and said earlier
- Any inconsistencies between the witness's testimony and any other evidence that you believe

- Whether any inconsistencies are the result of seeing or hearing things differently, actually forgetting things, or innocent mistakes or are, instead, the result of lies or phony memory lapses, and
- Any other factors that you find bear on believability or credibility

If the defendant testifies,

- you should judge his testimony in the same way that you judge the testimony of any other witness²⁷

You should not give any more or less weight to a witness's testimony just because the witness is

- a public official or law enforcement officer
- an expert²⁸

You may give any witness's opinion²⁹ whatever weight you think it deserves, but you should consider

²⁷ Because this language is conditional (“*If* the defendant testifies . . .”), I believe that it is permissible to include it, whether or not the defendant knows at this time whether he will testify.

²⁸ I have included my stock instructions concerning “experts,” even though I do not know if there will be any expert testimony in this case.

²⁹ The factors relevant to determination of the weight to give a witness's opinions are essentially the same, whether the witness is a “lay” witness or an “expert” witness. *See* 8th Cir. Criminal Model 4.10 (2014) (opinions of experts); 8th Cir. Criminal Model 3.04 (credibility of witnesses); FED. R. EVID. 701 (basis for lay opinions); FED. R. EVID.

- the reasons and perceptions on which the opinion is based
- any reason that the witness may be biased, and
- all of the other evidence in the case

You must consider with greater caution and care the testimony, if any, of a witness who is testifying

- that he or she participated in the charged offense
- after a promise from the prosecution not to use that witness's testimony, to a grand jury or at this trial, against that witness in a criminal case, or
- pursuant to a plea agreement
 - The plea agreement may be a "cooperation" plea agreement that provides that the prosecution may recommend a less severe sentence if the prosecutor believes that the witness has provided "substantial assistance"
 - A judge cannot reduce a sentence for "substantial assistance" unless the prosecution asks the judge to do so, but if the prosecution does ask, the judge decides if and how much to reduce the witness's sentence

It is for you to decide

- what weight you think the testimony of such a witness deserves, and

702 (bases for expert opinions). I do not give separate "credibility" instructions for expert witnesses.

- whether or not such a witness's testimony has been influenced by
 - the desire to please the prosecution
 - any promises by the prosecution, or
 - a plea agreement³⁰

Remember, it is your exclusive right to give any witness's testimony whatever weight you think it deserves.

³⁰ Compare 8th Cir. Criminal Model 4.04 (2014). Because I am giving this instruction *before* any evidence is presented, I do not find it appropriate to identify the witnesses in question by name. ***The parties must advise me whether all three kinds of testimony to be treated with greater caution and care are likely to be presented in this case.***

No. 24 — DEFENDANT’S PRIOR STATEMENTS³¹

You may hear evidence that the defendant made a statement or statements to law enforcement officers after his arrest. You must decide the following:

- whether defendant Orellana made the statement or statements, and
- if so, how much weight you should give the statement or statements

In making these two decisions, you should consider all of the evidence, including the circumstances under which the statement may have been made.

³¹ See Defendant’s Proposed Additional Instructions, attached to Prosecution’s Proposed Jury Instructions (docket no. 113), 27 (3.02 Defendant’s Post-Arrest Statement). The defendant did not cite, or the prosecution did not include, the authority from which this proposed jury instruction is drawn, but my research suggests that it is based on a pre-2012 7th Circuit Pattern instruction. I have relied, instead, on 8th Cir. Criminal Model 2.07 (2014). Although the defendant’s Proposed Jury Instruction does not indicate to whom the defendant allegedly made the statement or the circumstances under which it was allegedly made, I assume that this proposal relates to the statements at issue in the defendant’s various Motions To Suppress. Therefore, I have indicated that the statement or statements were allegedly made to law enforcement officers after Orellana’s arrest.

No. 25 — OBJECTIONS³²

The lawyers may make objections and motions during the trial that I must rule upon.

- If I sustain an objection to a question before it is answered, do not draw any inferences or conclusions from the question itself
- Do not hold it against a lawyer or a party that a lawyer has made an objection, because lawyers have a duty to object to testimony or other evidence that they believe is not properly admissible

³² My “stock” jury instructions. *See* 8th Cir. Criminal Model 1.03 (2014) (numbered ¶ 2).

No. 26 — BENCH CONFERENCES³³

During the trial it may be necessary for me to talk with the lawyers out of your hearing.

- I may hold a bench conference while you are in the courtroom or call a recess
- These conferences are to decide how certain evidence is to be treated, to avoid confusion and error, and to save your valuable time, so please be patient
- We will do our best to keep such conferences short and infrequent

³³ My “stock” jury instructions. *See* 8th Cir. Criminal Model 1.07 (2014).

No. 27 — NOTE-TAKING³⁴

You are allowed to take notes during the trial if you want to.

- Be sure that your note-taking does not interfere with listening to and considering all the evidence
- Your notes are not necessarily more reliable than your memory or another juror's notes or memory
- Do not discuss your notes with anyone before you begin your deliberations
- Leave your notes on your chair during recesses and at the end of the day
- At the end of trial, you may take your notes with you or leave them to be destroyed
- No one else will ever be allowed to read your notes, unless you let them
- If you choose not to take notes, remember that it is your own individual responsibility to listen carefully to the evidence
- An official court reporter is making a record of the trial, but her transcripts will not be available for your use during your deliberations

³⁴ My “stock” jury instructions. *See* 8th Cir. Criminal Model 1.06A (2014).

No. 28 — CONDUCT OF JURORS DURING TRIAL³⁵

You must decide this case *solely* on the evidence and your own observations, experiences, reason, common sense, and the law in these Instructions. You must also keep to yourself any information that you learn in court until it is time to discuss this case with your fellow jurors during deliberations.

To ensure fairness, you must obey the following rules:

- Do not talk among yourselves about this case, or about anyone involved with it, until you go to the jury room to decide on your verdict.
- Do not talk with anyone else about this case, or about anyone involved with it, until the trial is over.
- When you are outside the courtroom, do not let anyone ask you about or tell you anything about this case, anyone involved with it, any news story, rumor, or gossip about it, until the trial is over. If someone should try to talk to you about this case during the trial, please report it to me.
- During the trial, you should not talk to any of the parties, lawyers, or witnesses—even to pass the time of day—so that there is no reason to be suspicious about your fairness. The lawyers, parties, and witnesses are not supposed to talk to you, either.

³⁵ My “stock” jury instructions. See 8th Cir. Criminal Model 1.08 (2014).

- You may need to tell your family, friends, teachers, co-workers, or employer about your participation in this trial, so that you can tell them when you must be in court and warn them not to ask you or talk to you about the case. However, do not provide any information to anyone by any means about this case until after I have accepted your verdict. That means do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, a Blackberry, a PDA, a computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, any blog, or any website such as Facebook, MySpace, YouTube, or Twitter, to communicate to anyone any information about this case until I accept your verdict.
- Do not do any research—on the Internet, in libraries, in the newspapers, in dictionaries or other reference books, or in any other way—or make any investigation about this case, the law, or the people involved on your own.
- Do not visit or view any place discussed in this case and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony.
- Do not read any news stories or articles, in print, on the Internet, or in any “blog,” about this case, or about anyone involved with it, or listen to any radio or television reports about it or about anyone involved with it, or let anyone tell you anything about any such news reports. I assure you that when you have heard all the evidence, you

will know more about this case than anyone will learn through the news media—and it will be more accurate.

- Do not make up your mind during the trial about what the verdict should be. Keep an open mind until you have had a chance to discuss the evidence with other jurors during deliberations.
- Do not decide the case based on “implicit biases.” As we discussed during jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes—that is, “implicit biases”—that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.³⁶
- A Verdict Form is attached to these Instructions. A Verdict Form is simply a written notice of your decision. After your deliberations, if you have reached a unanimous verdict, your foreperson will complete

³⁶ My “stock” instruction on “implicit bias.”

one copy of the Verdict Form by marking the appropriate blank or blanks for each question. You will all sign that copy to indicate that you agree with the verdict and that it is unanimous. Your foreperson will then bring the signed Verdict Form to the courtroom when it is time to announce your verdict.

- If, at any time during the trial, you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the restroom, please send a note to the Court Security Officer (CSO), who will give it to me. I want you to be comfortable, so please do not hesitate to tell us about any problem.

I will read the remaining two Instructions at the end of the evidence.

No. 29 — DUTY TO DELIBERATE³⁷

A verdict must represent the careful and impartial judgment of each of you. However, before you make that judgment, you must consult with one another and try to reach agreement, if you can do so consistent with your individual judgment.

- If you are convinced that the prosecution has *not* proved beyond a reasonable doubt that the defendant is guilty of the charged offense, say so
- If you are convinced that the prosecution *has* proved beyond a reasonable doubt that the defendant is guilty of the charged offense, say so
- Don't give up your honest beliefs just because others think differently or because you simply want to be finished with the case
- On the other hand, do not hesitate to re-examine your own views and to change your opinions, if you are convinced that they are wrong
- You can only reach a unanimous verdict if you discuss your views openly and frankly, with proper regard for the opinions of others, and with a willingness to re-examine your own views
- Remember that you are not advocates, but judges of the facts, so your sole interest is to seek the truth from the evidence
- The question is never who wins or loses the case, because society always wins, whatever your verdict, when you return a just verdict

³⁷ My “stock” jury instructions. See 8th Cir. Criminal Model 3.12 (2014).

based solely on the evidence, reason, your common sense, and these instructions

- You must consider all of the evidence bearing on each question before you
- Take all the time that you feel is necessary
- Remember that this case is important to the parties and to the fair administration of justice, so do not be in a hurry to reach a verdict just to be finished with the case

No. 30 — DUTY DURING DELIBERATIONS³⁸

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

- Select a foreperson to preside over your discussions and to speak for you here in court.
- Do not consider punishment in any way in deciding whether the defendant is not guilty or guilty. If the defendant is guilty of the charged offense, I will decide what his sentence should be.
- Communicate with me by sending me a note through a CSO. The note must be signed by one or more of you. Remember that you should not tell anyone, including me, how your votes stand. I will respond as soon as possible, either in writing or orally in open court.
- Base your verdict solely on the evidence, reason, your common sense, and these instructions. Again, nothing I have said or done was intended to suggest what your verdict should be—that is entirely for you to decide.
- Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant’s race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex. To

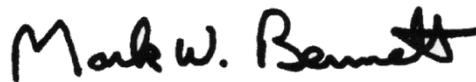
³⁸ My “stock” jury instructions. *See* 8th Cir. Criminal Model 3.12 (2014).

emphasize the importance of this requirement, the verdict form contains a certification statement. Each of you should carefully read that statement, then sign your name in the appropriate place in the signature block, if the statement accurately reflects how you reached your verdict.

- Complete the Verdict Form. The foreperson must bring the signed Verdict Form to the courtroom when it is time to announce your verdict.
- When you have reached a verdict, the foreperson will advise the CSO that you are ready to return to the courtroom.

Good luck with your deliberations.

DATED this 20th day of May, 2015.



MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSE WILLIAM ORELLANA,

Defendant.

No. CR 14-4046-MWB

VERDICT FORM

As to defendant Jose William Orellana, we, the Jury, find as follows:

METHAMPHETAMINE CONSPIRACY		VERDICT
Step 1: Verdict	On the “methamphetamine conspiracy” offense, charged in the Indictment and explained in Instruction No. 5 , please mark your verdict. <i>(If you find the defendant “not guilty” of this offense, do not answer the questions in Step 2. Instead, please read the Certification, sign the Verdict Form, and notify the Court Security Officer (CSO) that you have reached a verdict.)</i>	<input type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty
Step 2: Form and Quantity of Methamphetamine	<i>If you found the defendant “guilty” of the “methamphetamine conspiracy” offense charged in the Indictment in Step 1, please indicate (a) which one or more forms of methamphetamine were involved in the conspiracy, and (b) the quantity of any form of methamphetamine involved in the conspiracy for which the defendant is responsible, as explained in Instruction No. 6. (When you have answered the questions in this step, please read the Certification, sign the Verdict Form, and notify the CSO that you have reached a verdict.)</i>	
(a)	<input type="checkbox"/> methamphetamine mixture	<input type="checkbox"/> actual (pure) methamphetamine
(b)	<input type="checkbox"/> 500 grams or more	<input type="checkbox"/> 50 grams or more
	<input type="checkbox"/> 50 grams or more, but less than 500 grams	<input type="checkbox"/> 5 grams or more, but less than 50 grams
	<input type="checkbox"/> less than 50 grams	<input type="checkbox"/> less than 5 grams

CERTIFICATION

By signing below, each juror certifies the following:
(1) that consideration of the defendant's race, color, religious beliefs, national origin, or sex was not involved in reaching the juror's individual decision, *and*
(2) that the individual juror would have returned the same verdict for or against the defendant on the charged offense regardless of the defendant's race, color, religious beliefs, national origin, or sex.

Date

Foreperson	Juror
Juror	Juror

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSE WILLIAM ORELLANA,

Defendant.

No. CR 14-4046-MWB

**SUPPLEMENTAL
INSTRUCTIONS
TO THE JURY**

TABLE OF CONTENTS

SUPPLEMENTAL INSTRUCTIONS

No. 1 — INTRODUCTION	1
No. 2 — BUYER-SELLER RELATIONSHIP	2

VERDICT FORM

No. 31 — INTRODUCTION

Now that the prosecution has concluded its case, I must give you a supplemental instruction. This supplemental instruction should be taken together with all of the other instructions that I previously gave to you. You must consider as a whole the instructions that I gave you at the beginning of the trial and the supplemental instruction that I am giving you now.

No. 32 — BUYER-SELLER RELATIONSHIP

Defendant Orellana contends that he was not involved in any “methamphetamine conspiracy,” but only had a “buyer-seller relationship” involving methamphetamine. You may find that the defendant had only a “buyer-seller relationship,” and was not involved in the charged “methamphetamine conspiracy,” if you find the following:

One, the defendant was involved in only a single transaction or only occasional transactions to buy or sell small quantities of methamphetamine.

A single or a few drug sales involving small quantities of drugs do not automatically make the buyer and the seller co-conspirators. A “conspiracy” involves larger quantities of drugs and significant interaction between dealers and users over an extended period of time.

Two, the transaction or transactions involved the purchase of methamphetamine only for the buyer’s personal use.

Purchases for personal use ordinarily involve

- only small quantities of drugs
- limited or no knowledge of others involved in other parts of the distribution process

Therefore, you should consider the following factors to decide whether the transaction or transactions involved purchase of methamphetamine only for the buyer’s personal use or, instead, were part of a conspiracy to distribute methamphetamine:

- whether the transaction or transactions involved small quantities of methamphetamine or quantities too large for personal use
- whether the buyer knew and interacted with other co-conspirators besides the seller
- whether the buyer and seller shared the purpose of reselling or distributing methamphetamine
- whether the buyer and seller interacted over an extended period of time
- whether the buyer and seller understood that the methamphetamine would be resold
- whether the seller “fronted” methamphetamine to the buyer, that is, gave the methamphetamine to the buyer on credit or on consignment
- whether the seller expected a share of money that the buyer obtained from resale of the methamphetamine

You must consider all of the evidence to help you decide whether the prosecution has proved that defendant Orellana is guilty of the charged “methamphetamine conspiracy” or has proved only that he was involved in a “buyer-seller relationship.”

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSE WILLIAM ORELLANA,

Defendant.

No. CR 14-4046-MWB

**COURT’S PROPOSED
SUPPLEMENTAL
INSTRUCTIONS
TO THE JURY**

(05/08/15 “ANNOTATED”
VERSION)

TABLE OF CONTENTS

SUPPLEMENTAL INSTRUCTIONS

No. 1 — INTRODUCTION 1
No. 2 — BUYER-SELLER RELATIONSHIP 2

VERDICT FORM

No. 33 — INTRODUCTION³⁹

Now that the prosecution has concluded its case, I must give you a supplemental instruction. This supplemental instruction should be taken together with all of the other instructions that I previously gave to you. You must consider as a whole the instructions that I gave you at the beginning of the trial and the supplemental instruction that I am giving you now.⁴⁰

³⁹ Compare 8th Cir. Criminal Model 10.01 (2014) (response to juror question necessitating supplemental instructions). As I explained in note 22 to the 05/08/15 Revised “Annotated” Proposed Jury Instructions, the defendant has requested an instruction on the insufficiency of a “buyer-seller relationship” to prove a conspiracy. See Defendant’s Proposed Additional Instructions, attached to Prosecution’s Proposed Jury Instructions (docket no. 113), 27 (6.12 Buyer-Seller Relationship, without citation to a source). Whether such an instruction is warranted, however, depends upon the facts of the case. See, e.g., *United States v. Peeler*, 779 F.3d 773, 776 (8th Cir. 2015) (explaining that such an instruction is appropriate where there is evidence indicating that the defendant made only one purchase, knew only the seller, and had not ordered the drugs he bought); *United States v. Tillman*, 765 F.3d 831, 835 (8th Cir. 2014) (explaining that such an instruction is not appropriate when there is evidence of multiple drug transactions, as opposed to a single, isolated sale). Thus, I will give such an instruction, if at all, only as a separate, supplemental instruction, after I have considered the evidence presented.

⁴⁰ *Id.*

No. 34 — BUYER-SELLER RELATIONSHIP⁴¹

Defendant Orellana contends that he was not involved in any “methamphetamine conspiracy,” but only had a “buyer-seller relationship” involving methamphetamine.⁴² You may find that the defendant had only a “buyer-seller relationship,” and was not involved in the charged “methamphetamine conspiracy,” if you find the following:⁴³

One, the defendant was involved in only a single transaction or only occasional transactions to buy or sell small quantities of methamphetamine.⁴⁴

⁴¹ Compare Defendant’s Proposed Additional Instructions, attached to the Prosecution’s Proposed Jury Instructions (docket no. 113), 27 (6.12 Buyer-Seller Relationship, without citation to a source). There is no 8th Cir. Criminal Model “buyer-seller relationship” instruction, but there is no shortage of Eighth Circuit case law on when such an instruction is appropriate and what its content should be. This instruction is based primarily on the one approved in *United States v. Cabbell*, 35 F.3d 1255 (8th Cir. 1994), see, e.g., *Tillman*, 765 F.3d at 835 (citing *Cabbell*, 35 F.3d at 1259), with additional amplification from *United States v. Conway*, 754 F.3d 580, 591-92 (8th Cir. 2014).

⁴² This is, in essence, a “theory of defense” instruction, see, e.g., *Peeler*, 779 F.3d at 776; *Tillman*, 765 F.3d at 835, so it is appropriate to preface it with the defendant’s contention that he was involved in a “buyer-seller relationship,” not a “conspiracy.”

⁴³ These two elements are drawn from the instruction approved in *Cabbell*, which stated, “‘You are instructed that [1] transient sales [2] where the buyer is purchasing drugs for his own personal use and not for the purpose of distributing or delivering the purchased drugs to others does not in and of itself make the buyer a co-conspirator with the seller in the seller’s drug distribution conspiracy.’” *Tillman*, 765 F.3d at 835 (quoting *Cabbell*, 35 F.3d at 1259) (numbering inserted).

⁴⁴ I have replaced “transient” in the *Cabbell* example with “single” and “occasional.” See, e.g., *Peeler*, 779 F.3d at 776 (“[B]uyer-seller relationship cases

A single or a few drug sales involving small quantities of drugs do not automatically make the buyer and the seller co-conspirators.⁴⁵ A “conspiracy” involves larger quantities of drugs and significant interaction between dealers and users over an extended period of time.⁴⁶

Two, the transaction or transactions involved the purchase of methamphetamine only for the buyer’s personal use.

Purchases for personal use ordinarily involve

- only small quantities of drugs
- limited or no knowledge of others involved in other parts of the distribution process

Therefore, you should consider the following factors to decide whether the transaction or transactions involved purchase of methamphetamine only for the buyer’s

involve only evidence of *a single transient sales agreement and small amounts of drugs consistent with personal use.*” (emphasis added) (quoting *United States v. Huggans*, 650 F.3d 1210, 1222 (8th Cir. 2011) (quotation omitted), *cert. denied*, ___ U.S. ___, 132 S.Ct. 1583 (2012)); *Tillman*, 765 F.3d at 835 (quoting the *Cabbell* instruction, which refers to “transient sales” (emphasis added)).

⁴⁵ *United States v. Conway*, 754 F.3d 580, 591 (8th Cir. 2014) (quoting *United States v. Moran*, 984 F.2d 1299, 1302 (1st Cir. 1993)).

⁴⁶ *Conway*, 754 F.3d at 592 (noting that conspirators “shared a conspiratorial purpose to advance other transfers,” citing *United States v. Slagg*, 651 F.3d 832, 842 (8th Cir. 2011), and that “[where the conspiracy involves large quantities of drugs and significant interaction between dealers and users over an extended period of time, the [buyer-seller] instruction is inappropriate,” citing *United States v. Cordova*, 157 F.3d 587, 597 (8th Cir. 1998)).

personal use or, instead, were part of a conspiracy to distribute methamphetamine:

- whether the transaction or transactions involved small quantities of methamphetamine or quantities too large for personal use
- whether the buyer knew and interacted with other co-conspirators besides the seller
- whether the buyer and seller shared the purpose of reselling or distributing methamphetamine
- whether the buyer and seller interacted over an extended period of time⁴⁷
- whether the buyer and seller understood that the methamphetamine would be resold
- whether the seller “fronted” methamphetamine to the seller, that is, gave the methamphetamine to the buyer on credit or on consignment
- whether the seller expected a share of money that the buyer obtained from resale of the methamphetamine⁴⁸

You must consider all of the evidence to help you decide whether the prosecution has proved that defendant Orellana is guilty of the charged

⁴⁷ These first four “bullets” are drawn from *Conway*, 754 F.3d at 591-92.

⁴⁸ The last three “bullets” are drawn from defendant’s Proposed Jury Instruction “No. 6.12 Buyer-Seller Relationship.”

“methamphetamine conspiracy” or has proved only that he was involved in a
“buyer-seller relationship.”