

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FERNANDO JAIMES-MARTINEZ,

Defendant.

No. CR 15-4075-MWB

**INSTRUCTIONS  
TO THE JURY**

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**VERDICT FORM**

## No. 1 — INTRODUCTION

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

In an Indictment, a Grand Jury has charged defendant Fernando Jaimes-Martinez with being a removed alien found in the United States. 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 that offense, unless and until the prosecution proves his guilt on that offense beyond a reasonable doubt.

You must decide whether or not the prosecution has proved the defendant's guilt 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, these instructions, and any additional oral or written instructions that I may give you. 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 Jaimes-Martinez, and not anyone else, is on trial. Also, he is on trial *only* for the offense charged in the Indictment, and not for anything else.

You must return a unanimous verdict on the charge against the defendant.

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
- remains with the defendant throughout the trial
- is enough, alone, for you to find the defendant not guilty of the offense charged against him

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

- the defendant never, ever has to prove his innocence
- the defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify
- if the defendant does not testify, you must not consider that fact in any way, or even discuss it, in arriving at your verdict
- you must find the defendant not guilty of the offense charged, unless the prosecution proves beyond a reasonable doubt that he has committed each and every element of the charged 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
- may also 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
- is so convincing that you would be willing to rely and act on it without hesitation in the most important of your own affairs
- leaves you firmly convinced of the defendant's guilt

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

## No. 4 — OTHER IMPORTANT TERMS

Before I turn to a specific instruction 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 for you to find the defendant guilty of that offense.

### *Timing*

The Indictment alleges an approximate date for the offense. The prosecution

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

### *Location*

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

\* \* \*

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

**No. 5 — REMOVED ALIEN FOUND IN THE UNITED STATES**

The Indictment charges the defendant with being a removed alien found in the United States. The defendant denies that he committed this offense.

The prosecution must prove beyond a reasonable doubt *all* of the following elements against the defendant:

***One, defendant Jaimes-Martinez is an alien.***

An “alien” is a person who is not a natural-born or a naturalized citizen of the United States.

***Two, on or about April 11, 2007, defendant Jaimes-Martinez was removed from the United States to Mexico or departed from the United States while an order of removal was outstanding.***

***Three, on or about September 24, 2012, defendant Jaimes-Martinez was knowingly and voluntarily in the United States.***

The prosecution

- *is not* required to prove where or when the defendant re-entered the United States
- *is* required to prove that the defendant was knowingly and voluntarily present in the United States

***Four, on or about September 24, 2012, defendant Jaimes-Martinez was found in the United States.***

An alien is “found in” the United States when the alien is “discovered in” the United States by immigration authorities. “Discovery” consists of three elements:

- the discovery of the alien’s physical presence in the United States;
- the discovery of the alien’s identity; and
- the discovery of the alien’s status as a previously removed alien who had not obtained consent to apply for readmission

***Five*, defendant Jaimes-Martinez did not receive the consent of the Secretary of Homeland Security to apply for readmission to the United States after his removal.**

You may, but are not required to, find that the Secretary did not consent to the defendant’s application for readmission from evidence that immigration agents searched for, but did not find, a record indicating that the defendant had applied for readmission to the United States in either

- the Citizenship and Immigration Service central index system (CIS database), or
- Jaimes-Martinez’s Alien File (A-File) with the Immigration and Customs Enforcement (ICE)

If the prosecution *does not* prove all of these elements beyond a reasonable doubt, then you must find the defendant not guilty of the offense of “being a removed alien found in the United States.”

## No. 6 — 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 to 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. 7 — 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
- 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
- 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

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

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

## **No. 8 — 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. 9 — 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. 10 — 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. 11 — CONDUCT OF JURORS DURING TRIAL

You must decide this case *solely* on the evidence and the law in these Instructions and any additional written or oral instructions that I may give. 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 begin your deliberations.
- 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 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, Twitter, or Instagram 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 and the instructions that I give you. 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. 12 — 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.

- 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 and the instructions that I give you
- 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. 13 — 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 one or more offenses, 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.
- 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 11th day of April, 2016.



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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.

FERNANDO JAIMES-MARTINEZ,

Defendant.

No. CR 15-4075-MWB

**VERDICT FORM**

As to defendant Fernando Jaimes-Martinez, we, the Jury, find as follows:

<b>REMOVED ALIEN FOUND IN THE UNITED STATES</b>	<b>VERDICT</b>
On the offense of being a removed alien found in the United States, as charged in the Indictment and explained in Instruction No. 5, please mark your verdict.	<input type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty
<b>CERTIFICATION</b>	
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, <i>and</i> (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

Juror	Juror

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FERNANDO JAIMES-MARTINEZ,

Defendant.

No. CR 15-4075-MWB

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

(04/05/16 REVISED  
“ANNOTATED” VERSION)

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**VERDICT FORM**

## No. 14 — INTRODUCTION<sup>1</sup>

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

In an Indictment, a Grand Jury has charged defendant Fernando Jaimes-Martinez with being a removed alien found in the United States.<sup>2</sup> 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 that offense, unless and until the prosecution proves his guilt on that offense beyond a reasonable doubt.

You must decide whether or not the prosecution has proved the defendant’s guilt beyond a reasonable doubt. In making your decision, you are the sole judges

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<sup>1</sup> 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.

<sup>2</sup> 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. Also, the parties have described this charge in Joint Proposed Jury Instruction No. 1 as “being found in the United States after illegal reentry.” I find that description begs more questions than it answers about the nature of the offense. I have chosen a description that is rather closer to the language of the statute, 8 U.S.C. § 1326(a), and the Indictment.

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, these instructions, and any additional oral or written instructions that I may give you. 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 Jaimes-Martinez, and not anyone else, is on trial. Also, he is on trial *only* for the offense charged in the Indictment, and not for anything else.

You must return a unanimous verdict on the charge against the defendant.

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. 15 — PRESUMPTION OF INNOCENCE AND  
BURDEN OF PROOF<sup>3</sup>**

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
- remains with the defendant throughout the trial
- is enough, alone, for you to find the defendant not guilty of the offense charged against him

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

- the defendant never, ever has to prove his innocence
- the defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify
- if the defendant does not testify, you must not consider that fact in any way, or even discuss it, in arriving at your verdict
- you must find the defendant not guilty of the offense charged, unless the prosecution proves beyond a reasonable doubt that he has committed each and every element of the charged offense

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<sup>3</sup> Compare 8th Cir. Criminal Model 3.05 (2014).

## No. 16 — REASONABLE DOUBT<sup>4</sup>

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
- may also 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
- is so convincing that you would be willing to rely and act on it without hesitation in the most important of your own affairs
- leaves you firmly convinced of the defendant's guilt

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

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<sup>4</sup> Compare 8th Cir. Criminal Model 3.11 (2014).

## No. 17 — OTHER IMPORTANT TERMS

Before I turn to a specific instruction 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 for you to find the defendant guilty of that offense.<sup>5</sup>

### *Timing*

The Indictment alleges an approximate date for the offense. The prosecution

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

### *Location*

You must decide whether the defendant’s conduct occurred in the Northern District of Iowa.<sup>6</sup>

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<sup>5</sup> Judges and attorneys take for granted that an offense has “elements,” but this concept may not be so obvious to lay jurors.

<sup>6</sup> *I have previously instructed that certain towns or counties are in the Northern District of Iowa. I have recently decided, however, that it is the prosecution’s burden to prove that any relevant towns or counties are in the Northern District of Iowa.*

\* \* \*

I will now give you the “elements” instruction on the charged offense. The “elements” themselves are set out in **bold**.<sup>7</sup>

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<sup>7</sup> Although the parties included an explanation of a verdict form in Joint Proposed Jury Instruction No. 4, I now provide that explanation in the “Conduct of the Jurors During Trial” Instruction.

**No. 18 — REMOVED ALIEN FOUND IN THE  
UNITED STATES<sup>8</sup>**

The Indictment charges the defendant with being a removed alien found in the United States. The defendant denies that he committed this offense.

The prosecution must prove beyond a reasonable doubt *all* of the following elements against the defendant:<sup>9</sup>

***One, defendant Jaimes-Martinez is an alien.***

An “alien” is a person who is not a natural-born or a naturalized citizen of the United States.<sup>10</sup>

***Two, on or about April 11, 2007, defendant Jaimes-Martinez was removed from the United States to Mexico or departed from the United States while an order of removal was outstanding.***<sup>11</sup>

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<sup>8</sup> The parties identified this offense as “Count 1” in Proposed Jury Instructions Nos. 5A and 5B. Where there is only a single count of the Indictment, I do not find it necessary to identify that count as “Count 1.”

<sup>9</sup> See *United States v. Fajardo-Fajardo*, 594 F.3d 1005, 1008 (8th Cir. 2010) (citing 8 U.S.C. § 1326(a), *United States v. Rodriguez-Arreola*, 270 F.3d 611, 619 n.15 (8th Cir. 2001), and *United States v. Diaz-Diaz*, 135 F.3d 572, 575 (8th Cir. 1998)).

<sup>10</sup> See *Keller v. City of Fremont*, 719 F.3d 901, 938 n.2 (8th Cir. 2013) (The [Immigration and Nationality Act (INA)] defines ‘alien’ as “‘any person not a citizen or national of the United States.’” (quoting 8 U.S.C. § 1101(a)(3)). However, because it does not appear that Jaimes-Martinez is claiming to be a “national” of the United States, I find it unnecessary to include that part of the definition.

<sup>11</sup> See *United States v. Torres-Villalobos*, 487 F.3d 607, 611 (8th Cir. 2007) (“The government was required to prove a prior deportation, and it could satisfy that element by proving either [of the defendant’s prior deportations].”). Including the date of Jaimes-Martinez’s alleged removal and the country to which he was removed in the statement of this element obviates the need for any explanation. Compare Proposed Jury Instructions Nos. 5A and 5B. **The defendant requested that I add the explanation, “The**

**Three, on or about September 24, 2012, defendant Jaimes-Martinez was knowingly and voluntarily in the United States.<sup>12</sup>**

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prosecution is required to prove that he was physically removed from the United States to Mexico, not merely that he was ordered removed.” I am concerned that “physically removed” introduces confusion that is not present with “removed.” I also believe that “*removed from the United States to Mexico*” clearly indicates that the prosecution must show that the defendant actually left the United States for another place, not that he was merely ordered removed. I have added to element *two* “or departed from the United States while an order of removal was outstanding,” the second alternative for this element stated in *Fajardo-Fajardo*, 594 F.3d at 1008. Doing so also makes clear that the defendant must have left the United States and distinguishes between “removed” and “an order of removal.” At the same time, it forecloses an argument that a voluntary departure, while subject to an order of removal, defeats this element.

<sup>12</sup> The parties dispute the “knowledge” and “voluntariness” aspects of the “found in” element stated in *Fajardo-Fajardo*, 594 F.3d at 1008 (“the defendant knowingly entered or was found in the United States”). I believe that it is appropriate to separate the element requiring the defendant’s knowing presence in the United States from the “found in” element. Otherwise, there is potential for confusion about how “knowingly” and/or “voluntarily” apply to being “found in” the United States—where the knowing and voluntariness are the defendant’s mental state, but the finding is by immigration officials.

Moreover, although the statute in question, 8 U.S.C. § 1326(a), does not expressly state any “knowledge” or “voluntariness” requirement, the Eighth Circuit Court of Appeals (and the Indictment) apparently recognizes that the defendant must be “knowingly” present in the United States at the time that he is found. *See, e.g., United States v. Alvarado*, 141 F. App’x 504, 505 (8th Cir. 2005) (describing the offense as “being knowingly and unlawfully present in the United States,” when found by immigration officials). Other courts have developed more fully the relationship between the defendant’s knowing presence in the United States and his being found here. For example, the Ninth Circuit Court of Appeals has recognized that “[i]llegal reentry is a continuing offense, meaning that the offense ‘commences with the illegal entry, but is not completed until discovery.’” *United States v. Alvarez-Ulloa*, 784 F.3d 558, 568 (9th Cir. 2015) (quoting *United States v. Hernandez-Guerrero*, 633 F.3d 933, 936 (9th Cir. 2011)). Thus, the court held that an insanity defense was possible to a “found in” offense, because it negated the “knowing” presence requirement. *Id.* Similarly, the Tenth Circuit

The prosecution

- *is not* required to prove where or when the defendant re-entered the United States
- *is* required to prove that the defendant was knowingly and voluntarily present in the United States<sup>13</sup>

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Court of Appeals has stated, “[T]he crime of being a deported alien found in the United States is considered a continuing offense and is first committed when the defendant *voluntarily* reenters the United States.” *United States v. Huerta*, 503 F. App’x 589, 594 (10th Cir. 2012) (emphasis added) (citing *United States v. Villarreal–Ortiz*, 553 F.3d 1326, 1330 (10th Cir. 20 09)). In contrast, the Eighth Circuit Court of Appeals has stated that “[t]he governing statute requires only that the government prove that the alien entered, attempted to enter, or was found in the United States,” not both entered and was found in the United States. *Torres-Villalobos*, 487 F.3d at 611 n.1 (citing 8 U.S.C. § 1326(a)). Logically, however, an alien cannot be “found in” the United States unless he was present in the United States. ***The statement in Torres-Villalobos can be reconciled with the “continuing offense” decisions, cited above, by recognizing that what the statute requires is that the defendant was “knowingly and voluntarily” present in the United States, when immigration authorities “found” him, without any reference to knowledge about or voluntariness of his entry into the United States.*** This conclusion is consistent with the Indictment, which charges that the defendant “was found knowingly and unlawfully in the United States. . . .”

<sup>13</sup> The parties dispute the phrasing of the explanation of the “knowing and voluntary” element. The prosecution’s proffered instruction is that “the prosecution must prove that the defendant voluntarily reentered the United States and that he knew that he was entering or remaining in the United States.” The defendant’s proffered instruction is that “the prosecution must prove that the defendant knowingly and voluntarily reentered the United States.” The prosecution’s language is actually more consistent with the language from the case cited by the defendant. *See United States v. Salazar-Gonzalez*, 458 F.3d 851, 856 (9th Cir. 2006) (“[F]or a defendant to be convicted of a § 1326 ‘found in’ offense, the government must prove beyond a reasonable doubt that he *entered voluntarily* and *had knowledge that he was* committing the underlying act that made his conduct illegal—*entering or remaining* in the United States.” (emphasis added)). Again, the problem with both formulations is that they refer to “entry” or “re-entry,” which is not relevant to a “found in” violation of § 1326(a). *See Torres-Villalobos*, 487 F.3d at

**Four, on or about September 24, 2012, defendant Jaimes-Martinez was found in the United States.**

An alien is “found in” the United States when the alien is “discovered in” the United States by immigration authorities. “Discovery” consists of three elements:

- the discovery of the alien’s physical presence in the United States;

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611 n.1. The solution, again, is to refer to voluntariness and knowledge of *presence* in the United States when “found.”

Also, the defendant contends that “or remaining” is unnecessary, because element *two* requires that the prosecution prove that the defendant was previously removed to Mexico. I don’t follow how “remaining” in the United States relates to prior removal. Rather, once again, the point is that the defendant was knowingly and voluntarily present in the United States at the time he was “found” and that references to “remaining” in the United States are unnecessary and confusing.

***I reject the request by both parties for instructions explaining “knowledge” and “voluntariness.”*** 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))). The 8th Cir. Criminal Models contain no proposed instruction on “voluntariness”; indeed, 8th Cir. Criminal Model 7.02 suggest that the word “willfully” should be replaced with “voluntarily and intentionally.” To me, this strongly suggests that a definition of “voluntarily” is also unnecessary and unhelpful.

- the discovery of the alien’s identity; and
- the discovery of the alien’s status as a previously removed alien who had not obtained consent to apply for readmission<sup>14</sup>

**Five, defendant Jaimes-Martinez did not receive the consent of the Secretary of Homeland Security to apply for readmission to the United States after his removal.<sup>15</sup>**

You may, but are not required to, find that the Secretary did not consent to the defendant’s application for readmission from evidence that immigration agents searched for, but did not find, a record indicating that the defendant had applied for readmission to the United States in either

- the Citizenship and Immigration Service central index system (CIS database), or
- Jaimes-Martinez’s Alien File (A-File) with the Immigration and Customs Enforcement (ICE)<sup>16</sup>

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<sup>14</sup> Although the court in *Diaz-Diaz*, 135 F.3d at 577, referred to “two elements” of “discovery,” I believe that “the ascertainment of the identity and status of the alien” should actually be treated as two separate “identity” and “status” elements.

<sup>15</sup> This element concerning consent to readmission to the United States identifies only the Secretary of Homeland Security as the official to whom application for readmission must be made, because Jaimes-Martinez was allegedly removed from the United States after February 28, 2003 (on or about April 11, 2007). *See Fajardo-Fajardo*, 594 F.3d at 1008.

<sup>16</sup> *Fajardo-Fajardo*, 594 F.3d at 1009.

If the prosecution *does not* prove all of these elements beyond a reasonable doubt, then you must find the defendant not guilty of the offense of “being a removed alien found in the United States.”

## No. 19 — DEFINITION OF EVIDENCE<sup>17</sup>

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

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<sup>17</sup> My “plain language” jury instructions. *See* 8th Cir. Criminal Model 1.03 (2014).

- “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 to any evidence, whether it is “direct” or “circumstantial,” is for you to decide.<sup>18</sup>

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

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<sup>18</sup> 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. 20 — TESTIMONY OF WITNESSES<sup>19</sup>

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
- 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
- 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

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<sup>19</sup> My latest “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 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

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<sup>20</sup>

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<sup>21</sup>

You may give any witness's opinion<sup>22</sup> whatever weight you think it deserves, but you should consider

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<sup>20</sup> Because this language is conditional (“*If* a defendant testifies . . .”), I believe that it is permissible to include it, whether or not either defendant knows at this time whether he will testify.

<sup>21</sup> I have included my stock instructions concerning “experts,” even though the parties did not.

<sup>22</sup> Again, the parties did not include an instruction on opinions, but I ordinarily do. 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. 702

- 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

Remember, it is your exclusive right to give any witness's testimony whatever weight you think it deserves.<sup>23</sup>

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

<sup>23</sup> The parties did not include instructions on testimony that should be treated with greater caution and care, such as the testimony of cooperators or witnesses testifying pursuant to a plea agreement. *I assume that is because there will be no such testimony. The parties must inform me if that assumption is wrong.* The parties agree that there will be no testimony requiring a "greater caution and care" instruction. **ALSO, FOR THE REASONS STATED IN THE RULING ON THE DEFENDANT'S MOTION IN LIMINE, FORMER INSTRUCTION NO. 8, ON EVIDENCE OF THE DEFENDANT'S PRIOR CONVICTIONS, HAS BEEN DELETED.**

## No. 21 — OBJECTIONS<sup>24</sup>

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

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<sup>24</sup> My “stock” jury instructions. *See* 8th Cir. Criminal Model 1.03 (2014) (numbered ¶ 2).

## No. 22 — BENCH CONFERENCES<sup>25</sup>

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

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<sup>25</sup> My “stock” jury instructions. *See* 8th Cir. Criminal Model 1.07 (2014).

## No. 23 — NOTE-TAKING<sup>26</sup>

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

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<sup>26</sup> My “stock” jury instructions. *See* 8th Cir. Criminal Model 1.06A (2014).

## No. 24 — CONDUCT OF JURORS DURING TRIAL<sup>27</sup>

You must decide this case *solely* on the evidence and the law in these Instructions and any additional written or oral instructions that I may give. 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 begin your deliberations.
- 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.

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<sup>27</sup> 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 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, Twitter, or Instagram 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 and the instructions that I give you. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.<sup>28</sup>
- 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

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<sup>28</sup> My “stock” instruction on “implicit bias.”

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. 25 — DUTY TO DELIBERATE<sup>29</sup>

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.

- 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 and the instructions that I give you
- You must consider all of the evidence bearing on each question before you
- Take all the time that you feel is necessary

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<sup>29</sup> My “stock” jury instructions. *See* 8th Cir. Criminal Model 3.12 (2014).

- 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. 26 — DUTY DURING DELIBERATIONS<sup>30</sup>

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 one or more offenses, 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.
- 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

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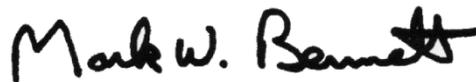
<sup>30</sup> My “stock” jury instructions. *See* 8th Cir. Criminal Model 3.12 (2014).

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 11th day of April, 2016.



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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.

FERNANDO JAIMES-MARTINEZ,

Defendant.

No. CR 15-4075-MWB

**VERDICT FORM**

As to defendant Fernando Jaimes-Martinez, we, the Jury, find as follows:

<b>REMOVED ALIEN FOUND IN THE UNITED STATES</b>	<b>VERDICT</b>
On the offense of being a removed alien found in the United States, as charged in the Indictment and explained in Instruction No. 5, please mark your verdict.	<input type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty
<b>CERTIFICATION</b>	
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, <i>and</i> (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

Juror	Juror
Juror	Juror
Juror	Juror
Juror	Juror