

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LINDA DARCELL GILBERT, PAUL
MATTHEW GILBERT, and ROBERT
EARL COLE,

Defendants.

No. 06-CR-106-LRR

FINAL JURY INSTRUCTIONS

Ladies and Gentlemen of the Jury:

The instructions I gave you at the beginning of the trial and during the trial remain in effect. I will now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of and during trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NUMBER 1

In considering these instructions, attach no importance or significance whatsoever to the order in which they are given.

INSTRUCTION NUMBER 2

Neither in these instructions nor in any ruling, action or remark that I have made during this trial have I intended to give any opinion or suggestion as to what the facts are or what your verdicts should be.

INSTRUCTION NUMBER 3

It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different.

Do not allow sympathy or prejudice to influence you. The law demands of you just verdicts, unaffected by anything except the evidence, your common sense and the law as I give it to you.

INSTRUCTION NUMBER 4

I have mentioned the word “evidence.” The “evidence” in this case consists of the following: the testimony of the witnesses, the stipulations of the parties and the documents and other things received as exhibits.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I shall list those things again for you now:

1. Anything that might have been said by jurors or the attorneys during the jury selection process is not evidence.
2. Statements, arguments, questions and comments by the lawyers are not evidence.
3. Objections are not evidence. The parties have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
4. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.
5. Anything you saw or heard about this case outside the courtroom is not evidence.

INSTRUCTION NUMBER 5

There are two types of evidence from which a jury may properly find the truth as to the facts of a case: direct evidence and circumstantial evidence. Direct evidence is the evidence of the witness to a fact or facts of which they have knowledge by means of their senses. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NUMBER 6

As you know, there are three defendants on trial here: Linda Darcell Gilbert, Paul Matthew Gilbert and Robert Earl Cole. Each defendant is entitled to have his or her case decided solely on the evidence which applies to him or her.

INSTRUCTION NUMBER 7

The government and Linda Darcell Gilbert and Robert Earl Cole have stipulated—that is, they have agreed—that certain facts are as counsel have stated. You must, therefore, treat those facts as having been proved.

INSTRUCTION NUMBER 8

The jurors are the sole judges of the weight and credibility of the testimony and the value to be given to each witness, including a defendant, who has testified in this case. In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider, therefore, whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NUMBER 9

In a previous instruction, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you are to consider the testimony of certain witnesses.

A witness may be discredited or impeached by contradictory evidence; by showing that the witness testified falsely concerning a material matter; by showing the witness has a motive to be untruthful; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness’s present testimony.

You have heard testimony from witness Kendrick Ankum. If this witness provides substantial assistance to the government in its investigation of crimes, the prosecutor could file a motion for a reduction of the witness’s sentence. If the prosecutor handling this witness’s case believes that this witness provided substantial assistance, the prosecutor can file, in the court in which the charges were brought against the witness, a motion to reduce the witness’s sentence. The judge has no power to reduce a sentence for substantial assistance unless the government, acting through the United States Attorney, files such a motion. If such a motion for reduction of sentence for substantial assistance is filed by the government, then it is up to the judge to decide whether to reduce the sentence at all, and, if so, how much to reduce it. The witness’s testimony was received in evidence and may be considered by you. You may give the testimony of the witness such weight as you think it deserves. Whether or not certain testimony by a witness was influenced by that witness’s hope of receiving a reduced sentence is for you to decide.

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INSTRUCTION NUMBER 9 (Cont'd)

You have heard testimony from certain witnesses who were once convicted of crimes. You may use that evidence to help you decide whether to believe these witnesses and how much weight to give their testimony.

INSTRUCTION NUMBER 10

You have heard testimony that Linda Darcell Gilbert and Paul Matthew Gilbert made statements to law enforcement officers in this case. It is for you to decide: (1) whether Linda Darcell Gilbert and Paul Matthew Gilbert made the statements and (2) if so, how much weight you should give to them. In making these two decisions, you should consider all of the evidence, including the circumstances under which the statements were made.

INSTRUCTION NUMBER 11

You have heard testimony from persons described as experts. A person who, by knowledge, skill, training, education or experience, has become an expert in some field may state his opinions on matters in that field and may also state the reasons for his opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used and all the other evidence in the case.

INSTRUCTION NUMBER 12

Exhibits have been admitted into evidence and are to be considered along with all of the other evidence to assist you in reaching your verdicts. You are not to tamper with the exhibits or their contents, and each exhibit should be returned into open court, along with your verdicts, in the same condition as it was received by you.

INSTRUCTION NUMBER 13

The Indictment in this case charges Linda Darcell Gilbert in Count 1, Paul Matthew Gilbert in Counts 3 and 5 and Robert Earl Cole in Counts 1, 2 and 4. Each count charges a separate offense.

Under Count 1, the Indictment charges that, on about March 25, 2004, Linda Darcell Gilbert and Robert Earl Cole possessed an unregistered firearm.

Under Count 2, the Indictment charges that on or about March 25, 2004, Robert Earl Cole was a felon and an unlawful user of a controlled substance in possession of firearms.

Under Count 3, the Indictment charges that, on about August 19, 2005, Paul Matthew Gilbert knowingly possessed an unregistered firearm.

Under Count 4, the Indictment charges that, on or about August 19, 2005, Robert Earl Cole was a felon and an unlawful user of a controlled substance in possession of a firearm.

Under Count 5, the Indictment charges that, on or about August 19, 2005, Paul Matthew Gilbert was an unlawful user of a controlled substance in possession of a firearm.

Each defendant has pled not guilty to each crime with which he or she is charged.

As I told you at the beginning of trial, an Indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendants are presumed to be innocent. Thus the defendants, even though charged, begin the trial with no evidence against them. The presumption of innocence alone is sufficient to find the defendants not guilty and can be overcome only if the government proves, beyond a reasonable doubt, each essential element of the crimes charged.

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INSTRUCTION NUMBER 13 (Cont'd)

Keep in mind that you must give separate consideration to the evidence about each individual defendant. Each defendant is entitled to be treated separately, and you must return a separate verdict for each defendant. Also keep in mind that you must consider, separately, each crime charged against each individual defendant, and must return a separate verdict for each of those crimes charged.

There is no burden upon the defendants to prove that they are innocent. Accordingly, the fact that a defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdicts.

INSTRUCTION NUMBER 14

The crime of possession of an unregistered firearm, as charged against Linda Darcell Gilbert in Count 1 of the Indictment, has four essential elements, which are:

- One,* on about March 25, 2004, Linda Darcell Gilbert knew she had the Iver Johnson Champion Model 12 gauge shotgun in her possession;
- Two,* Linda Darcell Gilbert knew the firearm had an overall length of less than 26 inches or had a barrel length of less than 18 inches;
- Three,* the firearm was capable of operating as designed; and
- Four,* the firearm was not registered to Linda Darcell Gilbert in the National Firearms Registration and Transfer Record.

You are instructed that the government and Linda Darcell Gilbert have stipulated, that is, agreed, that the Iver Johnson Champion Model 12 gauge shotgun was measured by a Specialist with the Bureau of Alcohol, Tobacco, Firearms and Explosives and had an overall length of nineteen-and-one-half inches and a barrel length of twelve-and-three-fourths inches.

You are instructed that the government and Linda Darcell Gilbert have stipulated, that is, agreed, that the Iver Johnson Champion Model 12 gauge shotgun qualifies as a "firearm," in that it will, or is designed to, or may be readily converted to, expel a projectile by the action of an explosive, and you must consider the third essential element as proven.

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INSTRUCTION NUMBER 14 (Cont'd)

You are instructed that the government and Linda Darcell Gilbert have stipulated, that is, agreed, that the Iver Johnson Champion Model 12 gauge shotgun was not registered to Linda Darcell Gilbert in the National Firearms Registration and Transfer Record, and you must consider the fourth essential element as proven.

To find Linda Darcell Gilbert guilty of possession of an unregistered firearm, the government must prove all of these essential elements beyond a reasonable doubt. If the government failed to prove any essential element beyond a reasonable doubt, then you must find Linda Darcell Gilbert not guilty of possession of an unregistered firearm, as charged in Count 1 of the Indictment.

INSTRUCTION NUMBER 15

The crime of possession of an unregistered firearm, as charged against Robert Earl Cole in Count 1 of the Indictment, has four essential elements, which are:

- One,* on about March 25, 2004, Robert Earl Cole knew he had the Iver Johnson Champion Model 12 gauge shotgun in his possession;

- Two,* Robert Earl Cole knew the firearm had an overall length of less than 26 inches or had a barrel length of less than 18 inches;

- Three,* the firearm was capable of operating as designed; and

- Four,* the firearm was not registered to Robert Earl Cole in the National Firearms Registration and Transfer Record.

You are instructed that the government and Robert Earl Cole have stipulated, that is, agreed, that the Iver Johnson Champion Model 12 gauge shotgun was measured by a Specialist with the Bureau of Alcohol, Tobacco, Firearms and Explosives and had an overall length of nineteen-and-one-half inches and a barrel length of twelve-and-three-fourths inches.

You are instructed that the government and Robert Earl Cole have stipulated, that is, agreed, that the Iver Johnson Champion Model 12 gauge shotgun qualifies as a "firearm," in that it will, or is designed to, or may be readily converted to, expel a projectile by the action of an explosive, and you must consider the third essential element as proven.

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INSTRUCTION NUMBER 15 (Cont'd)

You are instructed that the government and Robert Earl Cole have stipulated, that is, agreed, that the Iver Johnson Champion Model 12 gauge shotgun was not registered to Robert Earl Cole in the National Firearms Registration and Transfer Record, and you must consider the fourth essential element as proven.

To find Robert Earl Cole guilty of possession of an unregistered firearm, the government must prove all of these essential elements beyond a reasonable doubt. If the government failed to prove any essential element beyond a reasonable doubt, then you must find Robert Earl Cole not guilty of possession of an unregistered firearm, as charged in Count 1 of the Indictment.

INSTRUCTION NUMBER 16

The crime of being a felon or an unlawful user of a controlled substance in possession of a firearm, as charged against Robert Earl Cole in Count 2 of the Indictment, has three essential elements, which are:

One, on or about March 25, 2004, Robert Earl Cole either:

- (a) had been convicted of a crime punishable by imprisonment for a term exceeding one year, or
- (b) was then an unlawful user of marijuana;

Two, on or about March 25, 2004, Robert Earl Cole knowingly possessed one or more firearms, that is:

- (a) an Iver Johnson Champion model 12 gauge shotgun, no serial number;
- (b) a Federal Ordnance, .45 caliber pistol, Government Model, Serial Number F8902557; or
- (c) a Smith & Wesson, .22 caliber pistol, Model 422, Serial Number TBL7761; and

Three, the firearm(s) was/were transported across a state line at some time during or before Robert Earl Cole's possession of it/them.

You are instructed that the government and Robert Earl Cole have stipulated, that is, agreed, that prior to the times alleged in the Indictment, he had been convicted of at least one crime punishable by a term of imprisonment exceeding one year and was an unlawful user of marijuana, and you must consider the first essential element as proven.

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INSTRUCTION NUMBER 16 (Cont'd)

You are instructed that the government and Robert Earl Cole have stipulated, that is, agreed, that the firearms in question were transported across a state line, and you must consider the third essential element as proven.

You are instructed that the government and Robert Earl Cole have stipulated, that is, agreed, that the firearms in question qualify as "firearms," in that each will or is designed to, or may be readily converted to, expel a projectile by the action of an explosive.

The government need not prove that Robert Earl Cole possessed all of the firearms alleged; it is sufficient that the government prove that Robert Earl Cole possessed a single firearm. Again, however, you must unanimously agree whether the government has proven beyond a reasonable doubt that Robert Earl Cole possessed one, two or all three firearms in order to find Robert Earl Cole guilty of this charge.

To find Robert Earl Cole guilty of being a felon or an unlawful user of a controlled substance in possession of a firearm, the government must prove all of these essential elements beyond a reasonable doubt. If the government failed to prove any essential element beyond a reasonable doubt, then you must find Robert Earl Cole not guilty of being a felon or an unlawful user of a controlled substance in possession of a firearm, as charged in Count 2 of the Indictment.

INSTRUCTION NUMBER 17

The crime of possession of an unregistered firearm, as charged against Paul Matthew Gilbert in Count 3 of the Indictment, has four essential elements, which are:

- One,* on about August 19, 2005, Paul Matthew Gilbert knew he had the Winchester 12 gauge shotgun in his possession;
- Two,* Paul Matthew Gilbert knew the firearm had an overall length of less than 26 inches or had a barrel length of less than 18 inches;
- Three,* the firearm was capable of operating as designed; and
- Four,* the firearm was not registered to Paul Matthew Gilbert in the National Firearms Registration and Transfer Record.

To find Paul Matthew Gilbert guilty of possession of an unregistered firearm, the government must prove all of these essential elements beyond a reasonable doubt. If the government failed to prove any essential element beyond a reasonable doubt, then you must find Paul Matthew Gilbert not guilty of possession of an unregistered firearm, as charged in Count 3 of the Indictment.

INSTRUCTION NUMBER 18

The crime of being a felon or unlawful user of a controlled substance in possession of a firearm, as charged against Robert Earl Cole in Count 4 of the Indictment, has three essential elements, which are:

- One,* on or about August 19, 2005, Robert Earl Cole either:
- (a) had been convicted of a crime punishable by imprisonment for a term exceeding one year, or
 - (b) was then an unlawful user of marijuana;
- Two,* on or about August 19, 2005, Robert Earl Cole knowingly possessed a firearm, that is, a Smith & Wesson .44 caliber revolver, Model 629, Serial Number BNN8460; and
- Three,* the firearm was transported across a state line at some time during or before Robert Earl Cole's possession of it.

You are instructed that the government and Robert Earl Cole have stipulated, that is, agreed, that prior to the times alleged in the Indictment, he had been convicted of at least one crime punishable by a term of imprisonment exceeding one year and was an unlawful user of marijuana, and you must consider the first essential element as proven.

You are instructed that the government and Robert Earl Cole have stipulated, that is, agreed, that the firearm in question was transported across a state line, and you must consider the third essential element as proven.

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INSTRUCTION NUMBER 18 (Cont'd)

You are instructed that the government and Robert Earl Cole have stipulated, that is, agreed, that the firearm in question qualifies as a "firearm," in that it will or is designed to, or may be readily converted to, expel a projectile by the action of an explosive.

To find Robert Earl Cole guilty of being a felon or an unlawful user of a controlled substance in possession of a firearm, the government must prove all of these essential elements beyond a reasonable doubt. If the government failed to prove any essential element beyond a reasonable doubt, then you must find Robert Earl Cole not guilty of being a felon or an unlawful user of a controlled substance in possession of a firearm, as charged in Count 4 of the Indictment.

INSTRUCTION NUMBER 19

The crime of being an unlawful user of a controlled substance in possession of a firearm, as charged against Paul Matthew Gilbert in Count 5 of the Indictment, has three essential elements, which are:

- One,* on or about August 19, 2005, Paul Matthew Gilbert was an unlawful user of marijuana;
- Two,* Paul Matthew Gilbert knowingly possessed a firearm, that is a loaded Winchester 12 gauge shotgun, with an obliterated serial number; and
- Three,* the firearm was transported across a state line at some time during or before Paul Matthew Gilbert's possession of it.

If you find beyond a reasonable doubt that the firearm in question was manufactured in a state other than Iowa and that Paul Matthew Gilbert possessed the firearm in Iowa, then you may, but are not required to, find that it was transported across a state line.

To find Paul Matthew Gilbert guilty of being an unlawful user of a controlled substance in possession of a firearm, the government must prove all of these essential elements beyond a reasonable doubt. If the government failed to prove any essential element beyond a reasonable doubt, then you must find Paul Matthew Gilbert not guilty of being an unlawful user of a controlled substance in possession of a firearm, as charged in Count 5 of the Indictment.

INSTRUCTION NUMBER 20

The term "firearm" means any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosive.

INSTRUCTION NUMBER 21

The term “unlawful user of a controlled substance” means a person who uses a controlled substance in a manner other than as prescribed by a licensed physician. The defendant under consideration by you must have been actively engaged in the use of a controlled substance during the period of time he possessed the firearm, but the law does not require that he use the controlled substance at the precise time he possessed the firearm. An inference that a person was a user of a controlled substance may be drawn from evidence of a pattern of use or possession of a controlled substance that reasonably covers the time the firearm was possessed.

INSTRUCTION NUMBER 22

It is not necessary for the government to prove the defendant under consideration by you knew it was illegal to have the firearm or firearms in his or her possession within the meaning of the law. Further, it is not necessary for the government to prove who owned the firearms at any time. The statute involved speaks in terms of possession, not ownership.

INSTRUCTION NUMBER 23

“Possession” is an element of all of the offenses charged in the Indictment. The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.

A person who knowingly has direct physical control over a thing at a given time is in actual possession of it.

A person who, although not in actual possession, has both the power and intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is in constructive possession of it.

If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

Whenever the word “possession” is used in these instructions, it includes “actual” as well as “constructive” possession and also “sole” as well as “joint” possession.

INSTRUCTION NUMBER 24

Intent may be proven by circumstantial evidence. It rarely can be established by other means. While witnesses may see or hear and thus be able to give direct evidence of what a person does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit an offense.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done, but you are not required to do so. As I have previously mentioned, it is entirely up to you to decide what facts to find from the evidence.

INSTRUCTION NUMBER 25

An act is done “knowingly” if the defendant under consideration by you realized what he or she was doing and did not act through ignorance, mistake or accident. The government is not required to prove that the defendant under consideration by you knew that his or her acts or omissions were unlawful. You may consider the evidence of a defendant’s acts and words, along with all other evidence, in deciding whether the defendant under consideration by you acted knowingly.

INSTRUCTION NUMBER 26

Mere presence at the scene plus association with illegal possessors is not enough to support a conviction for illegal possession of an unregistered firearm, possession of a firearm by a felon or possession of a firearm by an unlawful drug user, unless you find, beyond a reasonable doubt, that the defendant under consideration by you knowingly possessed the firearm or firearms at issue.

INSTRUCTION NUMBER 27

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

INSTRUCTION NUMBER 28

You will note the Indictment charges that offenses were committed “on about” or “on or about” certain dates. The government need not prove with certainty the exact date or the exact time period of an offense charged. It is sufficient if the evidence established that an offense occurred within a reasonable time of the date or period of time alleged in the Indictment.

INSTRUCTION NUMBER 29

Throughout the trial, you have been permitted to take notes. Your notes should be used only as memory aids, and you should not give your notes precedence over your independent recollection of the evidence.

In any conflict between your notes, a fellow juror's notes and your memory, your memory must prevail. Remember that notes sometimes contain the mental impressions of the note taker and can be used only to help you recollect what the testimony was. At the conclusion of your deliberations, your notes should be left in the jury room for destruction.

INSTRUCTION NUMBER 30

In conducting your deliberations and returning your verdicts, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because a verdict—whether guilty or not guilty—must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right or simply to reach a verdict.

Third, if a defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the government has proved its case beyond a reasonable doubt.

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INSTRUCTION NUMBER 30 (Cont'd)

Fourth, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

Finally, your verdicts must be based solely on the evidence and on the law which I have given to you in my instructions. Each verdict, whether guilty or not guilty, must be unanimous. Nothing I have said or done is intended to suggest what your verdicts should be—that is entirely for you to decide.

INSTRUCTION NUMBER 31

Attached to these instructions you will find Verdict Forms. The Verdict Form for Count 2 includes one Interrogatory. These Verdict Forms are simply the written notices of the decisions that you reach in this case. The answers to these Verdict Forms, including the one Interrogatory for Count 2, must be the unanimous decisions of the jury.

You will take the Verdict Forms to the jury room, and when you have completed your deliberations and each of you has agreed on answers to the Verdict Forms, your foreperson will fill them out, sign and date them and advise the marshal or court security officer that you are ready to return to the courtroom.

Finally, members of the jury, take this case and give it your most careful consideration, and then without fear or favor, prejudice or bias of any kind, return such verdicts as accord with the evidence and these instructions.

DATE

**LINDA R. READE
JUDGE, U. S. DISTRICT COURT**