UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. CALMER COTTIER, Defendant.	CR. 15-50151-04-JLV INSTRUCTIONS TO THE JURY

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INSTRUCTION NO. 1 - ROLE OF INSTRUCTIONS

Members of the jury, I will take a few minutes to give you the instructions about this case and about your duties as jurors. At the end of the trial, I will give you further instructions. I may also give you instructions during the trial. These instructions explain the law that applies to this case. Unless I specifically tell you otherwise, all instructions, both those I give you now and those I will give you later, are equally binding on you and must be followed. Consider these instructions with all written and oral instructions given to you during and at the end of the trial and apply them to the facts of the case. You must consider my instructions as a whole and not single out some instructions and ignore others.

INSTRUCTION NO. 2 - DUTY OF JURORS

This is a criminal case brought by the United States government against the defendant, Calmer Cottier. The indictment charges Mr. Cottier in count I with second degree murder or aiding and abetting second degree murder, in count II with conspiracy to commit assault and in count III with solicitation to commit a crime of violence. Your duty is to decide from the evidence whether Mr. Cottier is not guilty or guilty of the offenses charged against him.

You will find the facts from the evidence presented in court. "Evidence" is defined in Instruction No. 13. You are entitled to consider that evidence in light of your own observations and experiences. You may use reason and common sense to draw conclusions from facts established by the evidence. You are the sole judges of the facts, but you must follow the law as stated in my instructions, whether you agree with the law or not. You will then apply the law to the facts to reach your verdict.

It is vital to the administration of justice that each of you faithfully perform your duties as jurors. Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict based solely on the evidence, your common sense, and the law as I give it to you. Do not take anything I may say or do during the trial as an indication of what I think about the evidence or what I think your verdict should be. Do not conclude from any ruling or comment I may make that I have any opinion on how you should decide the case.

Please remember only Mr. Cottier, not anyone else, is on trial here. Also, remember Mr. Cottier is on trial only for the offenses charged against him, not for anything else.

INSTRUCTION NO. 3 - DESCRIPTION OF THE OFFENSES

An offense consists of "elements" which the government must prove beyond a reasonable doubt in order to convict a defendant of that offense. To help you follow the evidence, I will give you the elements of the offenses charged in the indictment. However, I must first explain some preliminary matters.

The charges against Mr. Cottier are set out in an indictment. An indictment is simply an accusation. It is not evidence of anything. Mr. Cottier pled not guilty to the charges brought against him. Mr. Cottier is presumed to be innocent unless and until the government proves, beyond a reasonable doubt, each element of the offenses charged.

The indictment charges the offenses were committed "on or about" a certain date. The government does not have to prove with certainty the exact date of an offense charged. It is sufficient if the evidence establishes that an offense occurred within a reasonable time of the date alleged in the indictment. I will now give you the elements for the offenses charged in the indictment.

Keep in mind that each count charges a separate offense. You must consider each count separately and return a separate verdict for each count.

INSTRUCTION NO. 4 -

COUNT I: SECOND DEGREE MURDER

Count I of the indictment charges that on or about July 12, 2015, in Pine Ridge in Indian country, in the District of South Dakota, Calmer Cottier, an Indian person, did unlawfully and with malice aforethought kill Ferris Brings Plenty or aid and abet others in the killing of Ferris Brings Plenty by assaulting him with a machete, stick, bat or cinder block.

Elements

For you to find Mr. Cottier guilty of the offense of second degree murder as charged in count I of the indictment, the government must prove the following essential elements beyond a reasonable doubt:

***One*, on or about July 12, 2015, Mr. Cottier unlawfully killed Ferris Brings Plenty by assaulting him with a machete, stick, bat or cinder block, or aided and abetted in that offense;**

> Mr. Cottier may be found guilty of second degree murder by aiding and abetting even if he personally did not do every act constituting the offense of second degree murder. In order to have aided and abetted the offense of second degree murder, Mr. Cottier, before or at the time the offense was committed, must have:
>
> 1. Known that the assault of another individual was being committed or going to be committed;
>
> 2. Knowingly acted in some way for the purpose of causing, encouraging or aiding the commission of the assault; and

3. Acted willfully and with malice aforethought as those terms are referenced in element 2.

Merely being present at the scene of an event or merely associating with others does not prove that a person has become an aider and abettor. A person who has no knowledge that a crime is being committed or is about to be committed, but who happens to act in a way which advances the offense does not thereby become an aider and abettor.

For you to find Mr. Cottier guilty of second degree murder by reason of aiding and abetting, the government must prove beyond a reasonable doubt that all of the essential elements of second degree murder were committed by some person or persons and that Mr. Cottier aided and abetted the commission of that offense. If the government fails to prove any essential element beyond a reasonable doubt, you must find Mr. Cottier not guilty of second degree murder by aiding and abetting.

***Two*, Mr. Cottier acted with malice aforethought;**

"Malice aforethought" means an intent, at the time of a killing, willfully to take the life of a human being, or an intent willfully to act in callous and wanton disregard of the consequences to human life; but "malice aforethought" does not necessarily imply any ill will, spite or hatred towards the individual killed.

"Malice" may be established by evidence of conduct which is reckless and wanton, and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that the defendant was aware of a serious risk of death or serious bodily harm.

In determining whether Mr. Cottier unlawfully killed Ferris Brings Plenty with malice aforethought, you should consider all the evidence concerning the facts

> and circumstances before, during and after the offense which tend to shed light upon the question of intent.

and

***Three*, Mr. Cottier is an Indian person and the offense took place in Indian country at Pine Ridge, South Dakota.**

To find the defendant guilty of the offense of second degree murder or aiding and abetting second degree murder as charged in count I of the indictment, the government must prove all the essential elements beyond a reasonable doubt. If the government proves all the essential elements beyond a reasonable doubt, you must find the defendant guilty of that offense. If the government fails to prove any essential element beyond a reasonable doubt, you must find the defendant not guilty of that offense.

INSTRUCTION NO. 5 -

COUNT II: CONSPIRACY TO COMMIT ASSAULT

Count II of the indictment charges that on or about July 12, 2015, in Pine Ridge in Indian country, in the District of South Dakota, Calmer Cottier, an Indian person, knowingly and intentionally combined, conspired, confederated or agreed with other persons to commit the offense of assault with a dangerous weapon using a machete, stick, bat or cinder block, with the intent to do bodily harm to Ferris Brings Plenty or the offense of assault resulting in serious bodily injury to Ferris Brings Plenty.

Elements

For you to find Mr. Cottier guilty of the offense of conspiracy to commit assault as charged in count II of the indictment, the government must prove the following essential elements beyond a reasonable doubt:

***One*, on or about July 12, 2015, in the District of South Dakota two or more persons reached an agreement or came to an understanding to commit the offense of assault with a dangerous weapon using a machete, stick, bat or cinder block, with the intent to do bodily harm to Ferris Brings Plenty or assault resulting in serious bodily injury to Ferris Brings Plenty;**

***Two*, Mr. Cottier voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect;**

***Three*, at the time Mr. Cottier joined the agreement or understanding, he knew the purpose of the agreement or understanding;**

***Four*, while the agreement or understanding was in effect a person who had joined in the agreement or understanding knowingly did an act for the purpose of carrying out the agreement or understanding; and**

***Five*, Mr. Cottier is an Indian person and the offense took place in Indian country at Pine Ridge, South Dakota.**

To find the defendant guilty of the offense of conspiracy to commit assault as charged in count II of the indictment, the government must prove all the essential elements beyond a reasonable doubt. If the government proves all the essential elements beyond a reasonable doubt, you must find the defendant guilty of that offense. If the government fails to prove any essential element beyond a reasonable doubt, you must find the defendant not guilty of that offense.

INSTRUCTION NO. 6 - CONSPIRACY CONSIDERATIONS

To find the existence of a "conspiracy," the government must prove two or more persons reached an agreement or understanding to commit an assault. To assist you in determining whether there was an agreement or understanding to conspire to commit an assault, you should consider the elements of the offenses of assault with a dangerous weapon and assault resulting in serious bodily injury.

The elements of assault with a dangerous weapon are: (1) a person unlawfully assaulted another; (2) the assault involved the use of a dangerous weapon; and (3) the person committing the assault intended to inflict bodily harm on the individual being assaulted. For purposes of assault with a dangerous weapon, the following definitions apply:

> An "assault" is any intentional and voluntary attempt or threat to do injury to the person of another, which when coupled with the apparent present ability to do so, is sufficient to put the person against whom the attempt is made in fear of immediate bodily harm.
>
> A "dangerous weapon" is an object used in a manner likely to endanger life or inflict serious bodily harm.
>
> "Intent to inflict bodily harm" means knowingly and intentionally doing an act for the purpose of causing another person to suffer bodily injury.

The elements of assault resulting in serious bodily injury are: (1) a person unlawfully assaulted another; and (2) the assault resulted in serious bodily

injury to the individual being assaulted. For purposes of assault resulting in serious bodily injury, the following definitions apply:

> An "assault" is any voluntary attempt or threat to do injury to the person of another, which when coupled with the apparent present ability to do so, is sufficient to put the person against whom the attempt is made in fear of immediate bodily harm.
>
> "Serious bodily injury" means bodily injury which involves:
>
> (1) a substantial risk of death; or
>
> (2) extreme physical pain; or
>
> (3) protracted and obvious disfigurement; or
>
> (4) protracted loss or impairment of the function of a bodily member, organ or mental faculty.

To find Mr. Cottier guilty of the "conspiracy" charged against him, you do not have to find the offense of assault was actually committed by Mr. Cottier or anyone else. It is the agreement to assault another individual which is illegal. The agreement is the conduct which must be proven beyond a reasonable doubt to establish Mr. Cottier's guilt on the "conspiracy" offense charged in the indictment.

The agreement or understanding need not be an express or formal agreement, or be in writing, or cover all the details of how the conspiracy was to be carried out. It is not necessary that the members have directly stated between themselves the details or purpose of the conspiracy.

Merely being present at the scene of an event or merely associating with others does not prove a defendant has joined in an agreement or understanding. A person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of a conspiracy does not thereby become a member of that conspiracy. Similarly, the mere knowledge of an illegal act or association by Mr. Cottier with an individual engaged in the illegal conduct of a conspiracy is not enough to prove he joined the conspiracy. Mr. Cottier must know of the existence and purpose of the conspiracy. Without such knowledge, Mr. Cottier cannot be guilty of conspiracy, even if his acts furthered the conspiracy.

On the other hand, a person may join in an agreement or understanding without knowing all the details of the agreement or understanding, and without knowing all the other members of the conspiracy. Further, it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person has an understanding of the unlawful nature of the plan and voluntarily and intentionally joins in it.

In deciding whether Mr. Cottier voluntarily and intentionally joined in the agreement, you must consider only evidence of Mr. Cottier's own actions and statements. You may not consider actions and statements of others,

except to the extent any statement of another describes something which was said or done by Mr. Cottier.

INSTRUCTION NO. 7 -

ACTS AND STATEMENTS DURING A CONSPIRACY

You may consider acts knowingly done and statements knowingly made by the defendant's co-conspirators during the existence of the conspiracy and in furtherance of the conspiracy as evidence pertaining to the defendant even though the acts or statements were done or made in the absence of and without the knowledge of the defendant. This includes acts done or statements made before the defendant joined in the conspiracy because a person who knowingly, voluntarily and intentionally joins an existing conspiracy is responsible for all of the conduct of the co-conspirators from the beginning of the conspiracy.

INSTRUCTION NO. 8 –

COUNT III: SOLICITATION TO COMMIT A CRIME OF VIOLENCE

Count III of the indictment charges that on or about July 12, 2015, in Pine Ridge in Indian country, in the District of South Dakota, Calmer Cottier, an Indian person, with the intent that Jerome Warrior or Terry Goings III engage in conduct constituting an offense that has as an element the use, attempted use or threatened use of physical force against another person and under circumstances strongly corroborative of that intent, did solicit, command, induce or endeavor to persuade Jerome Warrior or Terry Goings to engage in that conduct, namely second degree murder.

Elements

For you to find Mr. Cottier guilty of the offense of solicitation to commit a crime of violence as charged in count III of the indictment, the government must prove the following essential elements beyond a reasonable doubt:

***One*, on or about July 12, 2015, Mr. Cottier unlawfully solicited, commanded, induced or endeavored to persuade Jerome Warrior or Terry Goings to engage in conduct constituting an offense that has as an element the use, attempted use or threatened use of physical force against another person, namely second degree murder;**

> For purposes of this instruction, second degree murder is defined in Instruction No. 4.

***Two*, the circumstances were strongly corroborative of Mr. Cottier's intent that Jerome Warrior or Terry Goings commit second degree murder;**

> In determining whether the evidence is sufficient to strongly corroborate a defendant's intent, you should consider all of the evidence concerning the facts and circumstances before, during and after the death which tend to shed light upon Mr. Cottier's intent.

***Three*, Mr. Cottier is an Indian person and the offense took place in Indian country at Pine Ridge, South Dakota.**

To find the defendant guilty of the offense of solicitation to commit a crime of violence as charged in count III of the indictment, the government must prove all the essential elements beyond a reasonable doubt. If the government proves all the essential elements beyond a reasonable doubt, you must find the defendant guilty of that offense. If the government fails to prove any essential element beyond a reasonable doubt, you must find the defendant not guilty of that offense.

INSTRUCTION NO. 9 -

STIPULATION REGARDING JURISDICTION

Counsel for the United States, counsel for the defendant, and the defendant have agreed or stipulated that Mr. Cottier is an Indian person and that the place where the alleged incidents occurred is in Indian country at Pine Ridge, South Dakota.

This stipulation applies to count I, second degree murder; count II, conspiracy to commit assault; and count III, solicitation to commit a crime of violence.

By entering into this agreement or stipulation, the defendant has not admitted his guilt of the offenses charged, and you may not draw any inference of guilt from the stipulation. The only effect of this stipulation is to establish the facts that Mr. Cottier is an Indian person and that if the alleged incidents occurred, they occurred in Indian country.

INSTRUCTION NO. 10 -

PROOF OF INTENT AND KNOWLEDGE

"Intent" and "knowledge" are elements of the offenses charged in this case and must be proven beyond a reasonable doubt. The government is not required to prove the defendant knew that his acts or omissions were unlawful. An act is done "knowingly" if the defendant realizes what he is doing and does not act through ignorance, mistake, or accident. You may consider the evidence of a defendant's words, acts, or omissions, along with all other evidence, in deciding whether the defendant acted knowingly.

Intent may be proven like anything else. You may consider any statements made or acts done by the defendant and all the facts and circumstances in evidence which may aid in a determination of the defendant's intent. You may, but are no required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

INSTRUCTION NO. 11 -

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

Mr. Cottier is presumed innocent and, therefore, not guilty. This presumption of innocence requires you to put aside all suspicion that might arise from the arrest or charge of the defendant or the fact he is here in court. The presumption of innocence remains with the defendant throughout the trial. This presumption alone is sufficient to find the defendant not guilty. The presumption of innocence may be overcome only if the government proves, beyond a reasonable doubt, each essential element of an offense charged. The burden is always on the government to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant to prove his innocence, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The defendant is not even obligated to cross examine the witnesses called to testify by the government.

If the defendant does not testify, this fact must not be considered by you in any way or even discussed in arriving at your verdict. If the defendant testifies, you should judge his testimony in the same manner in which you judge the testimony of any other witness.

If the government proves beyond a reasonable doubt all the essential elements of an offense charged, you must find the defendant guilty of that offense. If the government fails to prove beyond a reasonable doubt any essential element of an offense charged, you must find the defendant not guilty of that offense.

INSTRUCTION NO. 12 - REASONABLE DOUBT

A reasonable doubt may arise from the evidence or lack of evidence produced during trial. A reasonable doubt is a doubt based upon reason and common sense, and not doubt based on speculation. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the more serious and important affairs of life. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

INSTRUCTION NO. 13 - DEFINITION OF EVIDENCE

I mentioned the word "evidence." "Evidence" includes the testimony of witnesses, documents and other things received as exhibits and stipulated facts. Stipulated facts are facts formally agreed to by the parties. Certain things are not evidence. I shall list those things for you now:

- Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence. Opening statements and closing arguments by lawyers are not evidence.
- Objections and rulings on objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustain an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
- Testimony I strike from the record or tell you to disregard is not evidence and must not be considered.
- Anything you see or hear about this case outside the courtroom is not evidence.

The fact an exhibit may be shown to you does not mean you must rely on it more than you rely on other evidence.

Furthermore, a particular piece of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose and not for any other purpose. I will tell you when that occurs and instruct you on the purposes for which the piece of evidence can and cannot be used.

Some of you may have heard the terms "direct evidence" and "circumstantial evidence." You should not be concerned with those terms. 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.

The weight of the evidence is not determined by the number of witnesses testifying as to the existence or nonexistence of any fact. Also, the weight of the evidence should not be determined merely by the number or volume of documents or exhibits. The weight of evidence depends on its quality, not quantity. The quality and weight of the evidence are for you to decide.

INSTRUCTION NO. 14 - CREDIBILITY OF WITNESSES

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 says, only part of it, or none of it. In deciding what testimony to believe, consider:

- The witness' intelligence;
- The opportunity the witness had to see or hear the things testified about;
- The witness' memory;
- Any motives the witness may have for testifying a certain way;
- The behavior of the witness while testifying;
- Whether the witness said something different at an earlier time;
- The witness' drug or alcohol use or addiction, if any;
- 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 people sometimes see or hear things differently and sometimes forget things. You need to consider whether a contradiction results from an innocent misrecollection or sincere lapse of memory or instead from an intentional falsehood or pretended lapse of memory.

INSTRUCTION NO. 15 - IMPEACHMENT

In the last instruction, I instructed you generally on the credibility of witnesses. I now instruct you further on how the credibility of a witness may be "impeached" and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness' trial testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness and therefore, whether they affect the credibility of that witness.

If you believe a witness has been discredited or impeached, it is your exclusive right to give that witness' testimony whatever weight you think it deserves.

INSTRUCTION NO. 16 - OTHER CONSIDERATIONS

In weighing the evidence, you may also consider the following:

1. You may hear testimony from a witness who was convicted of a crime. You may use this evidence only to help you decide whether to believe the witness and how much weight to give that testimony, if any.

2. You may hear testimony from a witness who made a plea agreement with the government, received a promise they will not be prosecuted further, and received a promise their testimony will not be used against them. The fact a witness pled guilty cannot be considered by you as evidence of guilt of Mr. Cottier in this trial. Whether this testimony may have been influenced by a plea agreement or by the government's promises is for you to decide. A guilty plea made by a witness can be considered by you only for the purpose of determining how much, if at all, to rely upon this testimony. You may give this testimony whatever weight you think it deserves.

3. You may hear testimony from a witness who received a reduced sentence in return for their cooperation with the government in this case. The court had no power to reduce a sentence for substantial assistance unless the government, acting through the United States Attorney, made a motion. It was up to the court to decide whether to reduce their sentence at all, and if so, how much to reduce the sentence. Whether the testimony may have been influenced by a hope of receiving a more lenient sentence is

for you to decide. You may give this testimony whatever weight you think it deserves.

4. You may hear testimony from a witness that they participated in an offense charged against Mr. Cottier. Whether the witness' testimony may have been influenced by a desire to please the government or to strike a good bargain about their own situation is for you to decide. You may give this testimony whatever weight you think it deserves.

INSTRUCTION NO. 17 - STATEMENT BY THE DEFENDANT

You may hear testimony the defendant made a statement to others. It is for you to decide:

First, whether the statement was made; and

Second, if so, how much weight you should give the statement.

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

INSTRUCTION NO. 18 - EXPERT WITNESSES

You may hear testimony from individuals described as experts. An individual who, by knowledge, skill, training, education or experience, has become an expert in some field may state their opinions on matters in that field and may also state the reasons for their 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' 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 NO. 19 –

BENCH CONFERENCES AND RECESSES

During the trial it may be necessary for me to talk with the lawyers out of the hearing of the jury, either by having a bench conference while the jury is present in the courtroom or by calling a recess. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence, to avoid confusion and error, and to save your valuable time. We will do what we can to keep the number and length of these conferences to a minimum.

Please be patient because while you are waiting, we are working.

INSTRUCTION NO. 20 - 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. The lawyers have a duty to object to testimony or other evidence they believe is not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer has made an objection.

INSTRUCTION NO. 21 - NOTE TAKING

At the end of the trial, you must make your decision based on the evidence. We have an official court reporter making a record of the trial. However, we will not have a typewritten transcript of the trial available for your use in reaching a verdict. You must pay close attention to the evidence as it is presented.

If you want to take notes during the trial, you may, but be sure your note taking does not interfere with listening to and considering all the evidence. If you choose not to take notes, remember it is your responsibility to listen carefully to the evidence.

Notes you take during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes.

If you take notes, do not discuss them with anyone before you begin your deliberations. At the end of each day, please leave your notes in the jury room. At the end of the trial, you may take your notes out of the notebook and keep them or leave them, and we will destroy them. No one will read the notes, either during or after the trial.

INSTRUCTION NO. 22 - MEDIA AND TECHNOLOGY

You are required to decide this case based solely on the evidence and exhibits that you see and hear in the courtroom. If one or more of you were to get additional information from an outside source, that information might be inaccurate or incomplete or for some other reason not applicable to this case, and the parties would not have a chance to explain or contradict that information because they would not know about it. This is why it is so important that you base your verdict only on information you receive in this courtroom.

In order for your verdict to be fair, you must not be exposed to any other information about the case, the law or any of the issues involved in this trial during the course of your jury duty. This is very important, so I am taking the time to give you a detailed explanation about what you should do and not do during your time as jurors.

First, you must not try to get information from any source other than what you see and hear in this courtroom. That means you may not speak to anyone, including your family and friends about this case. You may not use any printed or electronic sources to get information about this case or the issues involved. This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, smartphones, PDAs, or any other electronic device. You may not do any personal investigating, such as visiting any of the places involved in this case, using internet maps or Google Earth or

any other such technology, talking to any possible witnesses, or creating your own demonstrations or reenactments of the events which are the subject of this case.

Second, you must not communicate with anyone about this case or your jury service, and you must not allow anyone to communicate with you. In particular, you may not communicate about the case through emails, text messages, tweets, blogs, chat rooms, comments or other postings, social networking sites, including but not limited to Facebook, Instagram, Twitter or any other website. This applies to communicating with your fellow jurors, your family members, your employer and the people involved in the trial, although you may notify your family and employer that you have been seated as a juror in the case. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and immediately report the contact to the court.

I recognize these rules and restrictions may affect activities you may consider to be normal and harmless. I assure you that I am very much aware I am asking you to refrain from activities which may be very common and very important in your daily lives. However, the law requires these restrictions to ensure the parties have a fair trial based on the evidence each party has an opportunity to address.

Any juror who violates the restrictions I have explained to you jeopardizes the fairness of these proceedings, and a mistrial could result which would

require the entire trial process to start over. As you can imagine, a mistrial is a tremendous expense and inconvenience to the parties, the court and the taxpayers. If any juror is exposed to any outside information or has any difficulty whatsoever in following these instructions, please notify the court immediately. If any juror becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that violation to the court as well.

These restrictions remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, post or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

INSTRUCTION NO. 23 –

CONDUCT OF THE JURY DURING TRIAL

To insure fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide your verdict.

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended, and I discharge you as jurors. This means you must not talk to your spouse, other family members or friends about this case until I discharge you as jurors.

Third, when you are outside the courtroom, do not let anyone tell you anything about the case or about anyone involved with it, until the trial has ended, and I accept your verdict. If someone should try to talk to you about the case, please report it to me.

Fourth, during the trial, you should not talk with or speak to any of the parties, lawyers or witnesses involved in this case—you should not even pass the time of day with any of them. It is important you not only do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the case sees you talking to a person from the other side, even if it is simply to pass the time of day, an unwarranted and unnecessary suspicion about your fairness might be created. If any lawyer, party or witness does not speak to you

when you pass in the hall, ride the elevator or the like, it is because they are not supposed to talk or visit with you.

Fifth, during the trial, do not make up your mind about what the verdict should be. Keep an open mind until you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

Sixth, if at any time during the trial you have a problem 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, who will deliver it to me. Or just raise your hand and get my attention. I want you to be comfortable, so please do not hesitate to inform me of any problem.

INSTRUCTION NO. 24 - OUTLINE OF THE TRIAL

The trial will proceed as follows:

After these instructions, the lawyer for the government may make an opening statement. Next, the lawyer for the defendant may, but does not have to, make an opening statement. An opening statement is not evidence. It is simply a summary of what the lawyer expects the evidence to be.

The government will then present its evidence and call witnesses. The lawyer for the defendant may, but has no obligation to, cross examine them. Following the government's case, the defendant may, but does not have to, present evidence or call witnesses. If the defendant calls witnesses, the government may cross examine them.

After presentation of the evidence is complete, the lawyers will make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence. I will then give you additional instructions, and you will retire to deliberate on your verdict.

Dated June 5, 2017.

BY THE COURT:

JEFFREY L. VIKEN
CHIEF JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. CALMER COTTIER, Defendant.	CR. 15-50151-04-JLV SUPPLEMENTAL INSTRUCTIONS TO THE JURY

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INSTRUCTION NO. 25 -

EQUALLY IMPORTANT INSTRUCTIONS

Members of the jury, I will now take a few minutes to give you additional instructions explaining the law which applies to this case. All instructions, both those I gave you earlier and these instructions, are equally binding on you and must be followed. You must consider my instructions as a whole and not single out some instructions and ignore others.

INSTRUCTION NO. 26 - FLIGHT

You may consider whether any evidence of flight by the defendant shows consciousness of guilt of an offense charged. In considering any evidence of flight, remember there may be reasons for this conduct which are consistent with innocence.

INSTRUCTION NO. 27 - DUTY TO DELIBERATE

A verdict must represent the considered judgment of each juror. Your verdict must be unanimous. It is your duty to consult with one another and to deliberate with a view of reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself, but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is wrong. To bring the jury to a unanimous result, you must examine the questions submitted to you openly and frankly with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that if, in your individual judgment, the evidence fails to establish Mr. Cottier's guilt beyond a reasonable doubt on an offense charged against him, then Mr. Cottier should have your vote for a not guilty verdict on that offense. If all of you reach the same conclusion, the verdict of the jury must be not guilty on that offense. Of course, the opposite also applies. If, in your individual judgment, the evidence establishes Mr. Cottier's guilt beyond a reasonable doubt on an offense charged, your vote should be for a verdict of

guilty against Mr. Cottier on that offense. If all of you reach that conclusion, the verdict of the jury must be guilty on that offense.

The question before you can never be whether the government wins or loses the case. The government, as well as society, always wins when justice is done, regardless of whether your verdict is not guilty or guilty.

Finally, remember that you are not partisans. You are judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. You may take all the time you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict, then this case is left open and must be resolved at some later time.

INSTRUCTION NO. 28 - DUTY DURING DELIBERATIONS

There are certain rules you must follow while conducting your deliberations and returning your verdict:

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

Second, if Mr. Cottier is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the government proved its case beyond a reasonable doubt as to the offenses charged in the indictment.

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

Fourth, your verdict must be based solely on the evidence and on the law in these instructions. **The verdict, whether not guilty or guilty, must be unanimous**. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Fifth, the verdict form is simply the written notice of the decision you reach in this case. You will take this form to the jury room. When you have unanimously agreed on the verdict, the foreperson will fill in the form, date and

sign it and advise the court security officer you have reached a verdict. You will then return to the courtroom where your verdict will be received and announced.

Dated June 8, 2017.

BY THE COURT:

JEFFREY L. VIKEN
CHIEF JUDGE