UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. ERIK RODRIGUEZ-VENEGAS and CODY DRAPEAU, Defendants.	4:19-CR-40005-KES **REDACTED FINAL INSTRUCTIONS TO THE JURY**

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FINAL INSTRUCTION NO. 1 – INTRODUCTION

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

FINAL INSTRUCTION NO. 2 – OBSTRUCTING JUSTICE BY RETALIATING AGAINST A WITNESS, VICTIM, OR INFORMANT, OR AIDING AND ABETTING

For you to find Erik Rodriguez-Venegas or Cody Drapeau guilty of the offense of obstructing justice by retaliating against a witness, victim, or informant, or aiding and abetting the commission of obstructing justice by retaliating against a witness, victim, or informant, as charged in the Second Superseding Indictment, the prosecution must prove the following two essential elements beyond a reasonable doubt:

***One*, that on or about July 20, 2018, in the District of South Dakota, Rodriguez-Venegas or Drapeau did knowingly engage or attempt to engage in conduct which caused bodily injury to Witness 1, or aided and abetted others in doing so;**

A person may be found guilty of an attempt if he intended to engage in conduct which caused bodily injury and voluntarily and intentionally carried out some act which was a substantial step toward engaging in conduct which caused bodily injury.

A substantial step must be something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime. In order for behavior to be punishable as an attempt, it need not be incompatible with innocence, yet it must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context, could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate that statute.

An act is done "knowingly" if a defendant is aware of the act and does not act, or fail to act, through ignorance, mistake, or accident. You may consider evidence of a defendant's words, acts, or omissions, along with all the other evidence, in deciding whether a defendant acted knowingly. The government is not required to prove that a defendant knew his acts or omissions were unlawful.

Bodily injury is defined as (A) a cut, abrasion, bruise, burn or disfigurement; (B) physical pain; (C) illness; (D) impairment of the function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary.

***And two*, that Rodriguez-Venegas or Drapeau did so with the intent to retaliate against Witness 1 because Witness 1 gave information to law enforcement related to the commission or possible commission of a Federal offense.**

> Intent may be proven like anything else. You may consider any statements made or acts done by a defendant and all the facts and circumstances in evidence which may aid in a determination of a defendant's intent. You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

For you to find Rodriguez-Venegas or Drapeau guilty of the offense charged in the Second Superseding Indictment, the prosecution must prove both of the essential elements beyond a reasonable doubt. Otherwise, you must find Rodriguez-Venegas or Drapeau not guilty of the offense charged in the Second Superseding Indictment.

FINAL INSTRUCTION NO. 3 – AIDING AND ABETTING

Rodriguez-Venegas or Drapeau may also be found guilty of obstructing justice by retaliating against a witness, victim, or informant even if he personally did not do every act constituting the offense charged if he aided and abetted others in the commission of the crime of obstructing justice by retaliating against a witness, victim, or informant.

In order to have aided and abetted the commission of a crime a person must:

One, have known that obstruction of justice by retaliating against a witness, victim, or informant was being committed or going to be committed;

Two, have had enough advance knowledge of the extent and character of the obstruction of justice by retaliating against a witness, victim, or informant that he was able to make the relevant choice to walk away from the crime before all elements of the crime were complete;

Three, have knowingly acted in some way for the purpose of causing or aiding the commission of obstructing justice by retaliating against a witness, victim, or informant;

And four, have intended to obstruct justice by retaliating against a witness, victim, or informant.

For you to find Rodriguez-Venegas or Drapeau guilty of obstructing justice by retaliating against a witness, victim, or informant by reason of aiding and abetting, the government must prove beyond a reasonable doubt that all of the essential elements of obstructing justice by retaliating against a witness, victim, or informant were committed by some person or persons and that Rodriguez-Venegas or Drapeau aided and abetted the commission of that crime.

You may infer Rodriguez-Venegas or Drapeau had the requisite advance knowledge of intentionally retaliating against Witness 1 if you find Rodriguez-Venegas or Drapeau failed to object or withdraw from actively participating in

the commission of obstructing justice by retaliating against a witness, victim, or informant after Rodriguez-Venegas or Drapeau observed another participant complete the act of intentionally retaliating against Witness 1.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others 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 about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

FINAL INSTRUCTION NO. 4 – IMPEACHMENT

In Preliminary Instruction No. 6, 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 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 has said or done something, or has failed to say or do something, that is inconsistent with the witness's present 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.

You have heard evidence that Paul Sandersfeld, Shania Hofer, Jacob Lottman, and Devlin Tommeraasen have been convicted of a crime. You may use that evidence only to help you decide whether to believe the witness and how much weight to give their testimony.

Similarly, you have heard evidence that Jacob Lottman and Reymundo Sauceda have pleaded guilty to a charge that arose out of the same events for which defendants Erik Rodriguez-Venegas and Cody Drapeau are now on trial. You must not consider their guilty pleas as any evidence of the guilt of the defendants. Rather, you may consider such a guilty plea only for the purpose of determining how much, if at all, to rely upon their testimony.

You have heard evidence that Jacob Lottman and Paul Sandersfeld have made a plea agreement with the prosecution. Their testimony was received in evidence and may be considered by you. You may give their testimony such weight as you think it deserves. Whether or not their testimony may have been influenced by the plea agreement is for you to determine. The witness' guilty

plea cannot be considered by you as any evidence of a defendant's guilt. The witness' guilty plea can be considered by you only for the purpose of determining how much, if at all, to rely upon the witness' testimony.

You have heard testimony from Jacob Lottman who stated that he participated in the crime charged against the defendants. His testimony was received in evidence and may be considered by you. You may give his testimony such weight as you think it deserves. Whether or not his testimony may have been influenced by his desire to please the government or to strike a good bargain with the government about his own situation is for you to determine.

You have heard evidence that Jacob Lottman hopes to receive a reduced sentence on criminal charges pending against him in return for his cooperation with the government in this case. Jacob Lottman entered into an agreement with the government which provides that in return for his assistance or testimony, the government will recommend a less severe sentence which could be less than the mandatory minimum sentence for the crime with which he is charged. Jacob Lottman is subject to a mandatory minimum sentence, that is, a sentence that the law provides must be of a certain minimum length. If the prosecutor handling this witness' case believes he provided substantial assistance, that prosecutor can file in the court in which the charges are pending against this witness a motion to reduce his sentence below the statutory minimum. 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. You may give the testimony of this witness such weight as you think it deserves. Whether or not testimony of a witness may have been influenced by his hope of receiving a reduced sentence is for you to decide.

Similarly, you have heard evidence that Paul Sandersfeld hopes to receive a reduced sentence in return for his cooperation with the government in this case. Sandserfeld entered into an agreement with the government which

provides that in return for his assistance or testimony, the prosecutor can file in the court in which the witness was sentenced a motion to reduce his sentence below the statutory mandatory minimum sentence for the crime with which he is charged. 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. You may give the testimony of this witness such weight as you think it deserves. Whether or not testimony of a witness may have been influenced by his hope of receiving a reduced sentence is for you to decide.

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

Your decision on the facts of this case should not be determined by the number of witnesses testifying for or against a party. You should consider all the facts and circumstances in evidence to determine which of the witnesses you choose to believe or not believe. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

FINAL INSTRUCTION NO. 5 – PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

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

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

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.

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

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

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

FINAL INSTRUCTION NO. 6 – 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 a defendant, keeping in mind that a defendant never, ever has the burden or duty to call any witnesses or to produce any evidence.
- A reasonable doubt may arise from the prosecution's lack of evidence.

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

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

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

FINAL INSTRUCTION NO. 7 – DUTY TO DELIBERATE

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

- If you are convinced that the prosecution has not proved beyond a reasonable doubt that a defendant is guilty, say so.
- If you are convinced that the prosecution has proved beyond a reasonable doubt that a defendant is guilty, say so.
- Do not 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 opinion if you are convinced that it is wrong.
- You can only reach a unanimous verdict if you discuss your views openly and frankly, with proper regard for the opinions of others, and with a willingness to re-examine your own views.
- Remember that you are not advocates, but judges of the facts, so your sole interest is to seek the truth from the evidence.
- The question is never who wins or loses the case, because society always wins, whatever your verdict, when you return a just verdict based solely on the evidence, reason, your common sense, and these Instructions.
- You must consider all of the evidence bearing on each element 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.

FINAL INSTRUCTION NO. 8 – 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 a defendant is guilty or not guilty. If a defendant is guilty, I will decide what the sentence should be.
- Communicate with me by sending me a note through a Court Security Officer (CSO). The note must be signed by one or more of you. Remember that you should not tell anyone, including me, how your votes stand. I will respond as soon as possible, either in writing or orally in open court.
- Base your verdict solely on the evidence, reason, your common sense, and these Instructions. Again, nothing I have said or done was intended to suggest what your verdict should be—that is entirely for you to decide.
- Reach your verdict without discrimination. In reaching your verdict, you must not consider a defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against a defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.
- 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 September 26, 2019.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

FJI #3

9/25/19 Refused K. Schreier

DEFENDANT'S PROPOSED INSTRUCTION NO. 3

The crime of obstructing justice by retaliating against a witness, victim, or informant, as charged in the Indictment, has two elements, which are:

One, the defendant knowingly caused bodily injury to another person, [Witness 1]; and;

Two, the defendants did so with the intent to retaliate against [Witness 1], for providing information to a law officer relating to the commission of Distribution of a Controlled Substance Resulting in Serious Bodily Injury committed by [Person 1] in violation of 21 U.S.C. § 841(a)(1).

A person may be found guilty of obstructing justice by retaliating against a witness, victim, or informant, even if he personally did not do every act constituting the offense charged, if he aided and abetted the commission of the obstructing justice by retaliating against a witness, victim, or informant.

In order to have aided and abetted the commission of a crime a person must, before or at the time of the crime committed:

1) have known obstructing justice by retaliating against a witness, victim, or informant was being committed or going to be committed;
2) have had enough advance knowledge of the extent and character of the crime that he was able to make the relevant choice to walk away from the crime before all elements of obstructing justice by retaliating against a witness, victim, or informant were complete; and
3) have knowingly acted in some way for the purpose of causing the commission of the obstructing justice by retaliating against a witness, victim, or informant.
4) have intended to retaliate against [Witness 1] for providing information to a law enforcement officer relating to the commission of Distribution of a Controlled Substance Resulting in Serious Bodily Injury committed by [Person 1] in violation of 21 U.S.C. § 841(a)(1).

For you to find the defendant guilty of obstructing justice by retaliating against a witness, victim, or informant by reason of aiding and abetting, the government must prove beyond a reasonable doubt all of the elements of obstructing justice by retaliating against a witness, victim, or informant were committed by some person or persons and that the defendant aided and abetted that crime; otherwise you must find that particular defendant not guilty of this crime.

You may infer the defendant had the requisite advance knowledge that someone had the intent to retaliate against [Witness 1], for providing information to a law officer relating to the commission of a Distribution of a Controlled Substance Resulting in Serious Bodily Injury committed by [Person 1] in violation of 21 U.S.C. § 841(a)(1) if you find the defendant failed to object or withdraw from actively participating in the commission of obstructing justice by retaliating against a witness, victim, or informant after the defendant observed another participant retaliate against [Witness 1], for providing information to a law officer relating to the

commission of a Distribution of a Controlled Substance Resulting in Serious Bodily Injury committed by [Person 1] in violation of 21 U.S.C. § 841(a)(1).

You should understand that merely being present at the scene of an event, or merely acting in the same way as others 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 about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

8th Cir. Model Cr. JI, 6.18.1513; 5.01

FJI #2/3

9/25/19 Refused Withdrawn K.

DEFENDANT'S PROPOSED INSTRUCTION NO. 3

The crime of obstructing justice by retaliating against a witness, victim, or informant, as charged in the Indictment, has two elements, which are:

One, each defendant knowingly caused bodily injury to another person, Devlin Tommeraasen; and;

Two, the defendants did so with the intent to retaliate against Devlin Tommeraasen, for providing information to law enforcement relating to the commission of Distribution of a Controlled Substance Resulting in Serious Bodily Injury committed by Shania Hofer in violation of 21 U.S.C. § 841(a)(1).

A person may be found guilty of obstructing justice by retaliating against a witness, victim, or informant, even if he personally did not do every act constituting the offense charged, if he aided and abetted the commission of the obstructing justice by retaliating against a witness, victim, or informant.

In order to have aided and abetted the commission of a crime a person must, before or at the time of the crime committed:

1) have known obstructing justice was being committed or going to be committed;
2) have had enough advance knowledge of the extent and character of the crime that he was able to make the relevant choice to walk away from the crime before all elements of obstructing justice were complete;
3) have knowingly acted in some way for the purpose of causing the commission of the obstructing justice; and
4) have intended to retaliate against Devlin Tommeraasen for providing information to a law enforcement against relating to the commission of the Federal offense committed by Shania Hofer.

For you to find the defendant guilty of obstructing justice by retaliating against a witness, victim, or informant by reason of aiding and abetting, the government must prove beyond a reasonable doubt all of the elements of obstructing justice by retaliating against a witness, victim, or informant were committed by some person or persons and that the defendant aided and abetted that crime; otherwise you must find that particular defendant not guilty of this crime.

You may infer the defendant had the requisite advance knowledge of obstructing justice by retaliating against a witness, victim, or informant if you find the defendant failed to object or withdraw from actively participating in the commission of obstructing justice by retaliating against a witness, victim, or informant after the defendant after the defendant observed another participant complete obstructing justice.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others, does not prove that a person

has become an aider and abettor. A person who has knowledge that a crime is being committed or about to be committed, but who happens to act in a way which advances some offense, does not thereby become an aider and abettor.

(6.18.1513 and 5.01)

DEFENDANT'S PROPOSED INSTRUCTION NO. 6

In this case, you must find that the defendant knew that his actions were likely to affect the official judicial proceedings against Shania Hofer. If you cannot find the required intent, you must find the defendant not guilty.

In order to find a defendant guilty of aiding and abetting obstructing justice, you must find that that defendant shared the same exact mental state as the principal offender, i.e. the mental state listed in the paragraph above. In this case, you must find that the defendant knew that his actions were likely to affect the official judicial proceedings against Shania Hofer. If you cannot find the required intent, you must find the defendant not guilty.

Arthur Anderson, LLP v. United States, 544 U.S. 696 (2005).
United States v. Lard, 734 F.2d 1290 (8th Cir. 1984).

9/25/19
Refused
K. Schreier

X

DEFENDANT'S PROPOSED INSTRUCTION NO. 4

In order to find the defendant guilty of aiding and abetting obstructing justice, you must find that that defendant shared the same mental state as the principal offender. In this case, you must find that the defendant intended to retaliate against [Witness 1], for providing information to a law officer relating to the commission of Distribution of a Controlled Substance Resulting in Serious Bodily Injury committed by [Person 1] in violation of 21 U.S.C. § 841(a)(1). If you cannot find the required intent, you must find the defendant not guilty.

9/25/19
K. Schreier
Refused

Arthur Anderson, LLP v. United States, 544 U.S. 696 (2005); *United States v. Lard*, 734 F.2d 1290 (8th Cir. 1984).