

## MEMORANDUM TO ATTORNEYS IN CRIMINAL TRIALS

The following are the general procedures followed by Judge Jones in the jury trial of a criminal case. Any questions about these procedures, or any requests for changes in procedure, should be raised prior to trial.

### **Presence of Defendant**

The defendant has a right to be present at all stages of the proceedings and there will be no conferences without the defendant's presence, unless the defendant knowingly waives such presence in person prior to the conference. Counsel is responsible for assuring that no proceeding begins without the defendant being present.

### **Jury Selection**

The jury is selected immediately prior to trial using the "struck jury" method and all members of the jury venire called for the trial—usually about forty persons—are normally subjected to voir dire. A list of the jurors to be called for the case is sent to counsel by the clerk approximately a week prior to trial. Potential jurors will be seated in alphabetical order in the jury box and in the first rows of the courtroom.

The attorneys are permitted to conduct voir dire after preliminary questions from the Judge. The Judge's voir dire will solicit any requests from jurors to be excused from jury duty on the ground of hardship, and the Judge will determine such requests before turning voir dire over to the attorneys. Counsel should keep in mind that the purpose of voir dire is "to allow for the impaneling of a fair and impartial jury through questions which permit the intelligent exercise of challenges by counsel." *United States v. Brown*, 799 F.2d 134, 135 (4th Cir. 1989). Following voir dire, any party having any challenge for cause should make known to the court that a matter outside of the presence of the jury is to be taken up, in which case the jury panel will be excused and the challenges determined.

The parties will then strike the jury, using alternative strikes on a single jury list. Depending on how many jury panel members are left, the Judge will grant additional preemptory challenges to both sides, keeping in mind the ratio set forth in the rules of ten for the defendants and six for the government. The Judge normally seats fourteen jurors, of whom two will be alternates and if not earlier used, will be excused before jury deliberations begin at the end of the case. Each side's last strike will be designated as an alternate. Those persons will be sworn as jurors and will not be told that they are alternates until they are excused at the end of the case. If it is necessary to use one of the alternates as a regular juror, that person will be chosen by the court by lot.

It should be noted that the method of selection of alternates as described above is different from that prescribed by the rules, Fed. R. Crim. P. 24(c), and it will be assumed that

the parties have no objection to the above-described method, unless such objection is made before jury selection begins. *See United States v. Love*, 134 F.3d 595, 600-603 (4th Cir. 1998).

Counsel is reminded that the Fourth Circuit has ruled that “reasonable doubt” should not be defined and counsel will not be permitted to advise the jury of any such definition in voir dire, opening statements or argument. *See United States v. Adkins*, 937 F.2d 947, 950 (4th Cir. 1991).

After the jury is sworn, preliminary instructions are given by the Judge. Jurors are told that they will be permitted to take notes. Juror questioning is not permitted.

Use opening statements to summarize objectively the facts that you expect the evidence to show. In most cases, an opening statement should not take more than ten or fifteen minutes.

### **Presentation of Evidence**

Questions to witnesses and argument to the court must be made from the lectern. Counsel may approach the witness to hand the witness a document or exhibit without permission of the Judge, but must promptly return to the lectern. Once received into evidence, an exhibit may ordinarily be displayed to, or passed among the jurors for their inspection while examination of the witness continues. Exhibits remain in custody of the courtroom deputy clerk and should be returned to the deputy promptly after use by a witness or the jury.

All objections and other remarks to the court must be made while standing. Objections must be succinct, without argument or other comment. If argument is needed, the Judge will so indicate.

Side bar conferences are discouraged and argument outside of the presence of the jury will normally take place only during regular recesses or before or after court sessions. Accordingly, counsel should anticipate any evidentiary questions or disputes and bring them to the attention of the Judge ahead of time.

Normally witnesses will be ordered excluded from the courtroom so that they cannot hear the testimony of other witnesses. This order means that no excluded witness should be advised by anyone, including the attorneys, of the testimony of any other witness who has already testified. Witnesses should be released from further attendance as soon as they are no longer needed. After testifying, a witness is deemed released by consent unless counsel

or the court indicates that the witness should not be so released. The witness should not be released if there any likelihood that the witness may be later called to testify by any party.

### **Multiple Defendant Cross Examination**

When there are multiple defendants, counsel are responsible for coordination of cross-examination. The Judge will not permit repetitive cross-examination.

### **Scheduling**

Normally, trials begin promptly at 9:00 a.m. and end at approximately 5:00 p.m. each day, with an hour lunch break at noon and twenty minute breaks in mid-morning and mid-afternoon. Matters to be taken up outside of the presence of the jury should be scheduled before or after the trial day or during the recesses. If there are such matters to be taken up, a request should be made to the clerk or the bailiff, and notice given to opposing counsel.

### **Jury Instructions**

Attached is a copy of the Judge's standard preliminary and final jury instructions. Counsel is responsible for submitting any other instructions desired, as well as specific issue instructions as to the particular case. Counsel for the government should be prepared to submit its requested instructions by the end of the government's case. Counsel for the defense must submit requested instructions by the end of the defense case.

### **Submission to Jury**

Prior to closing argument the Judge will conduct a charge conference and advise counsel of the substance of the jury charge. The charge is given after closing argument, and before the jury begins deliberations, counsel will be given an opportunity to make any objections to the charge on the record. In most cases, the Judge will send with the jury a written copy of his charge for the jury's reference during deliberations. The jury will be instructed that during deliberations it may request any or all of the exhibits.

Closing argument is normally limited to thirty minutes per side.

During jury deliberations, counsel will be expected to remain in the courthouse, unless excused by the Judge.

PRELIMINARY INSTRUCTIONS TO JURY  
PRIOR TO BEGINNING OF TRIAL  
CRIMINAL CASE

Judge James P. Jones

1 Ladies and gentlemen of the jury, before we begin the trial, I would like to tell you about what  
2 will be happening. I want to describe how the trial will be conducted and explain what we will be  
3 doing) ) you, the lawyers for both sides, and I. At the end of the trial I will give you more detailed  
4 guidance on how you are to go about reaching your decision. But now I simply want to explain how  
5 the trial will proceed.

6 This criminal case has been brought by the United States government. I will sometimes refer  
7 to the government as the prosecution.

8 The defendant(s) (has/have) been charged by the government with violation(s) of federal law.  
9 The charge(s) against the defendant(s) (is/are) contained in the indictment. The indictment is simply  
10 the description of the charge(s) made by the government against the defendant(s); it is not evidence  
11 of anything. The defendant(s) pleaded not guilty to the charge(s) and deny(ies) committing the  
12 offenses. The defendant(s) (is/are) presumed innocent and may not be found guilty unless all of you  
13 unanimously find that the government has proved guilt beyond a reasonable doubt. [The defendants  
14 are being tried together. But you will have to give separate consideration to the case against each  
15 defendant. Each is entitled to your separate consideration.]

16 The first step in the trial will be the opening statements. The government in its opening  
17 statement will tell you about the evidence which it intends to put before you, so that you will have  
18 an idea of what the government's case is going to be.

19 Just as the indictment is not evidence, neither is the opening statement evidence. Its purpose  
20 is only to help you understand what the evidence will be and what the government will try to prove.

21 After the government's opening statement, the defense attorney(s) may make opening  
22 statement. At this point in the trial, no evidence has been offered by either side.

1           Next the government will offer evidence that it says will support the charges against the  
2 defendants. The government's evidence in this case will consist of the testimony of witnesses as well  
3 as documents and exhibits.

4           After the government's evidence, the defense may make an opening statement and present  
5 evidence in the defendant(s) behalf, but is not required to do so. I remind you that the a defendant  
6 is presumed innocent and the government must prove guilt beyond a reasonable doubt. The  
7 defendant(s) (do/does) not have to prove (his/her/their) innocence.

8           The only persons who may ask questions of witnesses are the lawyers and myself. You are  
9 not permitted to ask questions of witnesses.

10          After you have heard all the evidence on both sides, the government and the defense will each  
11 be given time for their final arguments. I just told you that the opening statements by the lawyers are  
12 not evidence. The same applies to the closing arguments. They are not evidence either. In their  
13 closing arguments the lawyers for the government and the defense will be attempting to summarize  
14 their cases and help you understand the evidence that was presented.

15          The final part of the trial occurs when I instruct you about the rules of law which you are to  
16 use in reaching your verdict. After hearing my instructions, you will leave the courtroom together  
17 to make your decision. Your deliberations will be secret. You will never have to explain your verdict  
18 to anyone.

19          If you want to take notes during the course of the trial you may do so. However, it is difficult  
20 to take detailed notes and pay attention to what the witnesses are saying at the same time. If you do  
21 take notes, be sure that your taking of notes does not interfere with listening to and considering all  
22 the evidence. Also, if you take notes, do not discuss them with other jurors before you begin your

1 deliberations at the end of the case. Do not take the notes with you at the end of the day. Be sure  
2 to leave them in the jury room.

3 Whether or not you choose to take notes, remember it is your own individual responsibility  
4 to listen carefully to the evidence. You cannot give this responsibility to someone who is taking  
5 notes. We depend on the judgment of all members of the jury. Your notes are for your own  
6 individual benefit.

7 You will notice that we do have an official court reporter making a record of the trial.  
8 However, we will not have typewritten transcripts of this record available for use in reaching your  
9 decision in this case.

10 Now that I have described the trial itself, let me explain the jobs that you and I are to perform  
11 during the trial. I will decide which rules of law apply to this case. I will decide this in response to  
12 questions raised by the attorneys as we go along and also in the final instructions given to you after  
13 the evidence and arguments are completed. You will decide whether the government has proved,  
14 beyond a reasonable doubt, that the defendants or any of them have committed the crimes charged.

15 In particular, the defendant has been charged with [describe].

16 If you find a defendant guilty, it will then be my job to decide what punishment should be  
17 imposed. In considering the evidence and arguments that will be given during the trial, you should  
18 not guess about the punishment. It should not enter into your consideration or discussions at any  
19 time.

20 During the course of the trial, you should not talk with any witness, or with the defendants,  
21 or with any of the lawyers in the case. Please don't talk with them about any subject at all. In  
22 addition, during the course of the trial you should not talk about the case with anyone else) ) not your

1 family, not your friends, not the people you work with. Also, you should not discuss this case among  
2 yourselves until I have instructed you on the law and you have gone to the jury room to make your  
3 decision at the end of the trial. It is important that you wait until all the evidence is received and you  
4 have heard my instructions on rules of law before you deliberate among yourselves.

5 Let me add that during the course of the trial you will receive all the evidence you properly  
6 may consider to decide the case. Because of this, you should not attempt to gather any information  
7 on your own which you think might be helpful. Do not engage in any outside reading on this case,  
8 do not attempt to visit any places mentioned in the case, and do not in any other way try to learn  
9 about the case outside the courtroom.

10 Now that the trial has begun you must not read about it in the newspapers or watch or listen  
11 to television or radio reports of what is happening here.

12 The reason for these rules, as I am certain you will understand, is that your decision in this  
13 case must be made solely on the evidence presented at the trial.

14 At times during the trial, a lawyer may make an objection to a question asked by another  
15 lawyer, or to an answer by a witness. This simply means that the lawyer is requesting that I make a  
16 decision on a particular rule of law. Do not draw any conclusion from such objections or from my  
17 rulings on the objections. These only relate to the legal questions that I must determine and should  
18 not influence your thinking. If I sustain an objection to a question, the witness may not answer it.  
19 Do not attempt to guess what answer might have been given had I allowed the question to be  
20 answered. Similarly, if I tell you not to consider a particular statement, you should put that statement  
21 out of your mind, and you may not refer to that statement in your later deliberations.

- 1            During the course of the trial I may ask a question of a witness. If I do, that does not indicate
- 2            I have any opinion about the facts in the case.

FINAL JURY INSTRUCTIONS

CRIMINAL CASE

Judge James P. Jones

Instruction No. \_\_\_\_\_

1 Ladies and gentlemen of the jury, I'm going to give you final instructions now, since you will  
2 soon leave the courtroom to begin your deliberations. I will send a written copy of these instructions  
3 with you.

4 As I told you earlier, the Government has accused the defendant(s) of committing certain  
5 crimes. This is only a charge. In order for you to find a defendant guilty, you must be convinced  
6 beyond a reasonable doubt that a defendant committed the crime as charged. If you are not  
7 convinced beyond a reasonable doubt that a defendant committed the crime as charged, you must find  
8 a defendant not guilty of that crime.

9 During the course of the trial, you received all the evidence you may properly consider to  
10 decide the case. Your decision in the case must be made solely on the evidence presented at the trial.  
11 You should consider all the evidence that was presented to you.

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

14 At times during the trial you saw lawyers make objections to questions asked by other  
15 lawyers, and to answers by witnesses. This simply means that the lawyers were requesting that I  
16 make a decision on a particular rule of law. Do not draw any conclusion from such objections, or  
17 from my rulings on the objections. These are only related to the legal questions I had to determine,  
18 and should not influence your thinking. When I sustained an objection to a question the witness was  
19 not allowed to answer it. Do not attempt to guess what answer might have been given had I allowed  
20 the question to be answered. Similarly, when I told you not to consider a particular statement, you  
21 were told to put that statement out of your mind, and you may not refer to that statement in your

1 deliberations. Neither in these instructions nor in any ruling, action or remark that I have made during  
2 the course of this trial have I intended to give any opinion or suggestion as to what your verdict  
3 should be. During this trial, I have occasionally asked questions of witnesses in order to bring out  
4 facts not then fully covered in testimony. Do not assume that I hold any opinion on the matter to  
5 which my questions are related.

Instruction No. \_\_\_\_\_

6 It is my job to decide what rules of law apply to this case. I've explained some of these rules  
7 to you during the course of the trial, and I will explain others of them to you before you go to the jury  
8 room. This is my job, it is not the job of the lawyers. So, while the lawyers may have commented  
9 during the trial on some of these rules, you are to be guided only by what I say about them. You  
10 must follow all the rules as I explain them to you. You may not follow some and ignore others.  
11 Even if you disagree or don't understand the reasons for some of the rules, you are bound to follow  
12 them.

Instruction No. \_\_\_\_\_

13 If you decide that the Government has proved beyond a reasonable doubt that the  
14 defendant(s) (is/are) guilty, it will also be my job to decide what the punishment will be. You should  
15 not try to guess what the punishment might be. It should not enter into your consideration or  
16 discussions at any time.

Instruction No. \_\_\_\_\_

1           The decision you reach in the jury room, whether guilty or not guilty, must be unanimous.  
2           You must all agree. Your deliberations will be secret. You will never have to explain your verdict  
3           to anyone.

Instruction No. \_\_\_\_\_

4           The law presumes a defendant to be innocent of a crime. Thus, a defendant, although  
5           accused, begins the trial with a clean slate. That is to say with no evidence against (him/her), and  
6           the law permits nothing but legal evidence presented before the jury to be considered in support of  
7           any charge against a defendant. So, the presumption of innocence alone is sufficient to acquit a  
8           defendant unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all  
9           the evidence in the case. This presumption of innocence is an abiding presumption that goes with  
10          the defendant throughout the entire case and applies at every stage. As I have said many times, the  
11          Government has the burden of proving a defendant's guilt beyond a reasonable doubt. Some of  
12          you may have served as jurors in civil cases where you were told that it was only necessary to prove  
13          that a fact is more likely true than not. In criminal cases the Government's proof must be more  
14          powerful than that; it must be beyond a reasonable doubt.

Instruction No. \_\_\_\_\_

15          Remember that a defendant has an absolute right not to testify or offer evidence. The fact  
16          that a defendant did not testify should not be considered by you in any way, or even discussed in

1 your deliberations. I remind you that it is up to the Government to prove a defendant guilty beyond  
2 a reasonable doubt. It is not up to a defendant to prove that (he/she) is not guilty.

Instruction No. \_\_\_\_\_

3 There are two types of evidence which are generally presented during a trial -- direct evidence  
4 and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to  
5 have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain  
6 of facts and circumstances indicating the existence of a fact. The law makes no distinction between  
7 the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree  
8 of certainty required of circumstantial evidence than of direct evidence.

9 While you should consider only the evidence in the case, you are permitted to draw such  
10 reasonable inferences from the testimony and exhibits as you feel are justified in the light of common  
11 experience. In other words, you may make deductions and reach conclusions which reason and  
12 common sense lead you to draw from the facts which have been established by the evidence in the  
13 case.

Instruction No. \_\_\_\_\_

14 An important part of your job will be making judgments about the testimony of the witnesses  
15 who testified in this case. You should decide whether you believe what each person had to say, and  
16 how important that testimony was. In making that decision I suggest that you ask yourself a few  
17 questions. Did the person impress you as honest? Did he or she have any particular reason not to  
18 tell the truth? Did he or she have a personal interest in the outcome of the case? Did the witness

1 seem to have a good memory? Did the witness have the opportunity and ability to observe accurately  
2 the things he or she testified about? Did he or she appear to understand the questions clearly and  
3 answer them directly? Did the witnesses' testimony differ from the testimony of other witnesses?  
4 These are a few of the considerations that will help you determine the accuracy of what each witness  
5 said. The testimony of a witness may be discredited, or as we sometimes say, impeached by showing  
6 that he or she previously made statements which are different than or inconsistent with his testimony  
7 here in court. The earlier inconsistent or contradictory statements are admissible only to discredit  
8 or impeach the credibility of the witness and not to establish the truth of these earlier statements made  
9 somewhere other than here during this trial. It is your job to determine the credibility, if any, to be  
10 given the testimony of a witness who has made prior inconsistent or contradictory statements. If a  
11 person is shown to have knowingly testified falsely concerning any important or material matter, you  
12 obviously have a right to distrust the testimony of such individual concerning other matters. You  
13 may reject all of the testimony of that witness, or give it such weight or credibility as you may think  
14 it deserves. Inconsistencies or discrepancies in the testimony of a witness or between the testimony  
15 of different witnesses may or may not cause you to disbelieve or discredit such testimony. Two or  
16 more persons witnessing an incident or transaction may simply see or hear it differently. Innocent  
17 misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect  
18 of a discrepancy, however, always consider whether it pertains to a matter of importance, or an  
19 insignificant detail, and consider whether the discrepancy results from innocent error or from  
20 intentional falsehood.

Instruction No. \_\_\_\_\_

1           Prior conviction of a crime that is a felony is one of the circumstances you may consider in  
2 determining the credibility of a witness.

Instruction No. \_\_\_\_\_

3           During this trial, you have heard evidence of acts of the defendant(s) (name or names) which  
4 may be similar to those charged in the indictment, but which were committed on other occasions.  
5 You must not consider any of this evidence in deciding if the defendant(s) committed the acts charged  
6 in the indictment. You may, however, consider this evidence for other, very limited purposes.

7           If you find beyond a reasonable doubt from other evidence in this case that the defendant(s)  
8 did commit the acts charged in the indictment, then you may consider evidence of the similar acts  
9 allegedly committed on other occasions to determine:

- 10           (1)    whether the defendant(s) had the state of mind or intent necessary to commit the  
11                crimes charged in the indictment;
- 12           (2)    whether the defendant(s) had a motive or the opportunity to commit the acts charged  
13                in the indictment; or
- 14           (3)    whether the defendant(s) committed the acts charged in the indictment knowingly and  
15                not by accident or mistake.

16           These are the limited purposes for which any evidence of other similar acts may be considered.

Instruction No. \_\_\_\_\_

1           In a moment I'm going to give you a verdict form and go over that with you. That form will  
2 indicate to you which charges are involved in this case. It is important that you give separate  
3 consideration to each crime charged against (the/each) defendant.

Instruction No. \_\_\_\_\_

4           During the trial items were received into evidence as exhibits. Any or all of these exhibits will  
5 be sent into the jury room if you request. Examine the exhibits if you think it would help you in your  
6 deliberations.

Instruction No. \_\_\_\_\_

7           The crime(s) charged in this case (is/are) as follows:

Instruction No. \_\_\_\_\_

8           It is your duty as jurors to talk with one another and to deliberate in the jury room. You  
9 should try to reach an agreement if you can. Each of you must decide the case for yourself, but only  
10 after consideration of the evidence with the other members of the jury. While this is going on, do  
11 not hesitate to re-examine your own opinions and change your mind if you are convinced that you  
12 were wrong. But do not give up your honest beliefs solely because the others think differently, or  
13 merely to get the case over with. In a very real way you are judges, judges of the facts. Your only  
14 interest is to determine whether the Government has proved the defendant guilty beyond a reasonable  
15 doubt.

1           When you go to the jury room to begin considering the evidence in this case, you should first  
2 select one of the members of the jury to act as your foreperson. This person will help to guide your  
3 discussions in the jury room. Once you are there, if you need to communicate with me, the  
4 foreperson will send a written message to me. However, don't ever tell me how you stand as to your  
5 verdict, numerically or otherwise. As I mentioned several times, the decision you reach must be  
6 unanimous, you must all agree.

7           Mr. Bailiff, I'm going to ask you to give each of the members of the jury a copy of the verdict  
8 form, and then I'm going to talk with you about that. After we discuss the verdict form, ladies and  
9 gentlemen, I'm also going to collect them from you so you'll only take one verdict form to the jury  
10 room with you. But I wanted you to have these to look at while we're discussing it. There is a  
11 listing of the counts of the indictment with a short description of the crime charged against (each/the)  
12 defendant in that count. I will also send to the jury room with you a copy of the indictment. And  
13 again, I remind you that the indictment is not evidence of anything. It is simply a charge. And when  
14 you have reached a decision, and the verdict form is completed, you should have the foreperson sign  
15 the verdict form at the end, put the date on it, and tell the Bailiff you are ready to return to the  
16 courtroom.