

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSE A. MEDINA-MENDOZA,

Defendant.

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JURY INSTRUCTIONS

12-cr-33-bbc

II. POST TRIAL INSTRUCTIONS

Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law.

All of the introductory instructions that I gave you at the beginning of this trial still are in effect. I will give you copies of those instructions to take back to the jury room with you.

You have received evidence of a statement said to be made by the defendant to \_\_\_\_\_. You must decide whether the defendant did make the statement. If you find that the defendant did make the statement, then you must decide what weight, if any, you believe the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning the defendant himself, and the circumstances under which the statement was made.

In deciding the believability of witnesses, you should judge defendant's testimony in the same way as you judge the testimony of any other witness.

The defendant has an absolute right not to testify. In arriving at your verdict, you must not consider the fact that the defendant did not testify.

You have heard evidence of acts of the defendant other than those charged in the indictment. Specifically, \_\_\_\_\_. You may consider this evidence only on the questions of \_\_\_\_\_. You should consider this evidence only for this limited purpose.

You have heard evidence that \_\_\_\_\_ have been convicted of crimes. You may consider this evidence only in deciding whether the testimony of any of these witnesses is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

You have heard [reputation/opinion] evidence about the character trait of \_\_\_\_\_ for truthfulness [or untruthfulness]. You should consider this evidence in deciding the weight that you will give to \_\_\_\_\_'s testimony.

You have heard [reputation and/or opinion] evidence about the defendant's character trait for [truthfulness, peacefulness, etc]. You should consider character evidence together with all the other evidence in the case and in the same way.

You have heard evidence that before the trial, witnesses made statements that may be inconsistent with their testimony here in court. If you find that it is inconsistent, you may consider the earlier statement only in deciding the truthfulness and accuracy of that witness's testimony in this trial. You may not use it as evidence of the truth of

the matters contained in that prior statement. If that statement was made under oath, you may also consider it as evidence of the truth of the matters contained in that prior statement.

A statement made by the defendant before trial that is inconsistent with the defendant's testimony here in court may be used by you as evidence of the truth of the matters contained in it, and also in deciding the truthfulness and accuracy of the defendant's testimony in this trial.

\_\_\_\_\_ has admitted lying under oath. You may give his testimony such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

You have heard testimony that \_\_\_\_\_ have received benefits from the government in connection with this case. Specifically, \_\_\_\_\_ You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

You have heard testimony from \_\_\_\_\_ who each stated that he or she was involved in the commission of the alleged crime charged against the defendant. You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

The witnesses \_\_\_\_\_ have pleaded guilty to a crime arising out of the same allegations for which the defendant is now on trial. You may give

the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care. Moreover, the guilty pleas of these defendants cannot to be considered as evidence against the defendant[s] on trial now.

The witnesses \_\_\_\_\_ have received immunity; that is, a promise from the government that any testimony or other information he or she provided would not be used against him in a criminal case. You may give the testimony of these witnesses such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

You must consider with caution and great care the testimony of any witness who is currently addicted to drugs. It is up to you to determine whether the testimony of a drug addict has been affect by drug use or the need for drugs.

The witnesses \_\_\_\_\_ gave opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness' qualifications and all of the other evidence in the case.

Certain summaries are in evidence. They truly and accurately summarize the contents of voluminous books, records or documents, and should be considered together with and in the same way as all other evidence in the case.

Certain summaries are in evidence. Their accuracy has been challenged by the defendant. Thus, the original materials upon which the exhibits are based have also been admitted into evidence so that you may determine whether the summaries are accurate.

You have heard recorded conversations. These recorded conversations are proper evidence and you may consider them, just as any other evidence. When the recordings were played during the trial, you were furnished transcripts of the recorded conversations prepared by government agents. The recordings are the evidence, and the transcripts were provided to you only as a guide to help you follow as you listen to the recordings. The transcripts are not evidence of what was actually said or who said it. It is up to you to decide whether the transcripts correctly reflect what was said and who said it. If you noticed any difference between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read. And if after careful listening, you could not hear or understand certain parts of the recordings, you must ignore the transcripts as far as those parts are concerned.

### **THE INDICTMENT**

The indictment in this case is the formal method of accusing the defendant of offenses and placing the defendant on trial. It is not evidence against the defendant and it does not create any inference of guilt.

The defendant is charged in the indictment as follows:

### **COUNT 1**

On or about February 16, 2012, in the Western District of Wisconsin, the defendant, Jose A. Medina-Mendoza, being an alien illegally and unlawfully in the United States,

knowingly and unlawfully possessed in or affecting commerce a Taurus, Model PT92AF, 9mm pistol, serial number TCX65102, this firearm having previously traveled in interstate commerce.

## COUNT 2

On or about February 16, 2012, in the Western District of Wisconsin, the defendant, Jose A. Medina-Mendoza, being an unlawful user of marijuana, a Schedule I controlled substance, knowingly and unlawfully possessed in or affecting commerce a Taurus, Model PT92AF, 9mm pistol, serial number TCX65102, this firearm having previously traveled in interstate commerce.

The defendant has entered a plea of not guilty to these charges.

The defendant is not on trial for any act or any conduct not charged in the indictment.

The defendant is presumed to be innocent of the charges against him. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged.

The government has the burden of proving the defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case.

The defendant is never required to prove his innocence or to produce any evidence at all.

The indictment charges that the offense was committed "on or about" a certain date. The government must prove that the offenses happened reasonably close to those dates but it is not required to prove that the alleged offenses happened on those exact dates.

#### ELEMENTS OF THE OFFENSE: COUNT 1

To sustain the charge against the defendant in Count 1, the government must prove these elements:

(1) On and before February 16, 2012 the defendant was an alien illegally and unlawfully in the United States;

(2) On or about February, 2012, the defendant knowingly possessed the firearm charged in Count 1; and

(3) This firearm had traveled in interstate commerce prior to defendant's possession of it.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty of Count 1.

If, on the other hand, you find from your consideration of all the evidence that any one of these elements has not been proved beyond a reasonable doubt, then you must find the defendant not guilty of Count 1.

#### ELEMENTS OF THE OFFENSE: COUNT 2

To sustain the charge against the defendant in Count 2, the government must prove these elements:

(1) On and before February 16, 2012 the defendant was an unlawful user of marijuana;

(2) On or about February 16, 2012, the defendant knowingly possessed the firearm charged in Count 2; and

(3) This firearm had traveled in interstate commerce prior to defendant's possession of it.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty of Count 2.

If, on the other hand, you find from your consideration of all the evidence that any one of these elements has not been proved beyond a reasonable doubt, then you must find the defendant not guilty of Count 2.

## DEFINITIONS

The term “**knowingly**” means that the defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake or accident. Knowledge may be proved by a defendant's conduct and by all the facts and circumstances surrounding the case.

**Possession** of an object is the ability to control it. Possession may exist even when a person is not in physical contact with the object, but knowingly has the power and intention to exercise direction or control over it, either directly or through others.



*[Question to counsel: do we need or want definitional instructions on “alien unlawfully in the United States? If so, what are your suggested instructions and citations?]*

For the purposes of the charge in Count 2, the defendant was an “**unlawful user of marijuana**” if he used marijuana on a regular and ongoing basis during a period of time that included February 16, 2012, the date charged in Count 2. A one-time use of marijuana is not enough to be an “unlawful user.” The government is not required to prove that the defendant used marijuana on a particular day or within a matter of days before the possession of a firearm. The government is not required to prove that the defendant was under the influence of marijuana at the exact time he possessed a firearm.

*[See United States v. Richard, \_\_\_ F.3d \_\_\_, 2009 WL3367632 (10<sup>th</sup> Cir., Oct. 21, 2009); United States v. Mashore, \_\_\_ F.3d \_\_\_, 2009 WL 3236290 (4<sup>th</sup> Cir. Oct. 9, 2009); United States v. Burchard, 580 F.3d 341, 345-50 (6<sup>th</sup> Cir. 2009); United States v. Johnson, 572 F.3d 449, 453 (8<sup>th</sup> Cir. 2009). See also United States v. Bennett, 329 F.3d 769, 776-77 and n.4 (10 Cir. 2003) (for § 922(g)(3), drug use must be contemporaneous with weapon possession but need not be simultaneous with it) and United States v. Nevarez, 251 F.3d 28, 30-31 (2<sup>nd</sup> Cir. 2001) (defendant’s use of a controlled substance must be “ongoing and contemporaneous” with his commission of the offense), both cited with approval in United States v. Grap, 403 F.3d 439, 446 (7<sup>th</sup> Cir. 2005).]*

**Travel in interstate commerce** means that the firearm has traveled from a different state into Wisconsin prior to February 16, 2012.

## **DELIBERATIONS**

Upon retiring to the jury room, select one of your number as your presiding juror. This person will preside over your deliberations and will be your representative here in court.

A verdict form has been prepared for you. [Court reads the verdict form.]

Take this form to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in, date and sign the form.

Each count of the indictment charges the defendant with having committed a separate offense. Each count and the evidence relating to it should be considered separately, and a separate verdict should be returned as to each count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to the other count.

Although you have seen that the trial is being recorded by a court reporter, you should not expect to be able to use trial transcripts in your deliberations. You will have to rely on your own memories.

The verdict must represent the considered judgment of each juror. Whether your verdict is guilty or not guilty, it must be unanimous. You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But do not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement consistent with the individual judgment of each juror. You are impartial judges of the facts. Your only interest is to determine whether the government has proved its case beyond a reasonable doubt.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing, and the court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court. You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case. You must not reveal to any person, including the court, your numerical split on any verdict question until you have reached a unanimous verdict on every count.