

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIAN DUTCHER,

Defendant.

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ORDER

15-cr-96-wmc

Attached for the parties' consideration are draft voir dire questions, jury instructions and a verdict form.

Entered this 21<sup>st</sup> day of December, 2015.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge

Voir Dire: United States v. Brian Dutcher, 15-cr-96-wmc

Statement of the case: This is a criminal case, in which the defendant, Brian Dutcher, is charged with knowingly and willfully making true threats to physically injure and to kill President Obama during the President's visit to La Crosse last summer. The defendant has entered a plea of not guilty to these charges against him.

Have any of you heard of this case before today? Would this affect your ability to serve impartially as a juror in this case?

1. Scheduling: this case will begin today and will conclude tomorrow. Are any of you actually unable to sit as jurors because of this schedule?

2. Is there anything about the nature of the charges in this case that might affect your ability to be impartial in this case?

3. The court reads Pattern Jury Instructions of the Seventh Circuit:

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

The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

The defendant is never required to prove his innocence. He is not required to produce any evidence at all. The defendant has an absolute right not to testify. The fact that the defendant does not testify cannot be considered by you in any way in arriving at your verdict.

Would any of you be unable or unwilling to follow these instructions?

4. Ask counsel to introduce themselves, the defendant and the case agent. Ask whether jurors know them.

5. Invite each juror, in turn, to stand and provide the following information:

Name, age, and city or town of residence.

Marital status and number of children, if any.

Current occupation (former if retired).

Current (or former) occupation of your spouse and any adult children.

Any military service, including branch, rank and approximate date of discharge.

Level of education, and major areas of study, if any.

Memberships in any groups or organizations, including any political parties or organizations.

Hobbies and leisure-time activities.

Favorite types of reading material, television shows and radio programs, including any talk radio programs you listen to regularly.

Whether you have bumper stickers on your vehicles, and what they say.

Whether you regularly use the internet to visit sites other than e-mail or personal business, and if so, what types of sites you visit most often.

6. Do any of you in the jury box know each other from before today?

7. Have any of you, your relatives, or close friends ever received threats of harm or violence, regardless whether anyone acted on these threats? [*Sidebar to explore*]. Would this affect your ability to be an impartial juror in a case involving alleged threats to harm the president?

8. Do any of you have any opinions or beliefs about the First Amendment, free speech, or similar topics that might affect your ability to be an impartial juror in a case involving alleged true threats to harm the president? [*Sidebar to explore*]

9. Do any of you have any feelings or opinions about Barack Obama, his election, his presidency, his policies, or his performance that might affect your ability to be an

impartial juror in a case involving alleged threats to harm the president? [*Sidebar to explore*].

10. Other than what you have already told us, do any of you have any strong beliefs or opinions about, or belong to any groups or organizations that concern themselves with \_\_\_\_\_? [*Any suggestions from the parties?*] Would this affect your ability to be an impartial juror in this case?

11. Do any of you, by virtue of past dealings with the United States government, or for any reason, have any bias for or against the government in a criminal case?

12. Have any of you, your relatives, or close friends ever worked for the local, county, state, or federal government? Would this affect your ability to be impartial in this case?

13. Have any of you ever belonged to any organization or group that excluded people because of their race, gender, or religion?

14. Would any of you judge the credibility of a witness who was a law enforcement officer or government employee differently from other witnesses solely because of his or her official position?

15. Would any of you judge the credibility of a witness who had been convicted of a crime in the past differently from other witnesses solely because of this prior conviction?

16. If the defendant were to choose to testify, would any of you judge his credibility differently from other witnesses solely because it was the defendant who was testifying?

17. Have any of you, your relatives, or close friends ever been the victim of any crime? Would this affect your ability to be impartial in this case?

18. Have any of you, your relatives, or close friends ever been a witness in a trial? Is there anything about this experience that might affect your ability to be impartial in this case?

19. Have any of you, your relatives, or close friends ever had any negative experience with any lawyer, any court, or any legal proceeding that would affect your ability to be impartial in this case?

20. How many of you have served previously as a juror in another case? Please tell us in which court you served, approximately when, the type of cases you heard, whether you were foreperson, and the verdicts.

21. If at the conclusion of the trial you were to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of guilty?

22. If at the conclusion of the trial you were not to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of not guilty?

23. The court will instruct you on the law to be applied in this case. You are required to accept and follow the court's instructions in that regard, even though you may disagree with the law. Is there any one of you who cannot accept this requirement?

24. Do you know of any reason whatever, either suggested by these questions or otherwise, why you could not sit as a trial juror with absolute impartiality to all the parties in this case?

## JUROR BACKGROUND INFORMATION

When asked to do so by the court, please stand and provide the following information about yourself:

Name, age, and city or town of residence.

Marital or partnership status and number of children, if any.

Current occupation (former if retired).

Current (or former) occupation of your spouse or partner and any adult children.

Any military service, including branch, rank and approximate date of discharge.

Level of education, and major areas of study, if any.

Memberships in any groups or organizations, including any political parties or organizations.

Hobbies and leisure-time activities.

Favorite types of reading material, television shows and radio programs, including any talk radio programs you listen to regularly.

Whether you have bumper stickers on your vehicles, and what they say.

Whether you regularly use the internet to visit sites other than e-mail or personal business, and if so, what types of sites you visit most often.

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIAN DUTCHER,

Defendant.

JURY INSTRUCTIONS

15-cr-51-96-wmc

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**I. INTRODUCTORY INSTRUCTIONS**

Members of the jury, we are about to begin the trial of this case. I will begin by describing to you your duties as jurors and giving you instructions concerning this case.

**FUNCTIONS OF THE COURT AND THE JURY**

One of my duties as the judge in this case is to decide all questions of law and procedure. In these preliminary instructions, during trial, and at the end of the trial, I will instruct you on the rules of law that you must follow in making your decision. The instructions that I give you at the end of the trial will be more detailed than the instructions that I am giving you now.

You have two duties as jurors. Your first duty is to decide the facts from the evidence that you see and hear in court. Your second duty is to take the law as I give it to you, apply it to the facts, and decide if the government has provided the defendant's guilt beyond a reasonable doubt.

You must perform these duties fairly and impartially. Do not let sympathy, prejudice, fear, or public opinion influence you.

You should not take anything that I say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

### **THE CHARGES**

The charges against the defendant are in a document called an indictment. You will have a copy of the indictment during your deliberations.

The indictment in this case charges the defendant with knowingly and willfully making statements that were true threats to physically injure and to kill President Obama during the President's visit to La Crosse last summer.

The indictment is simply the formal way of telling the defendant what crimes he is accused of having committed. The indictment is not evidence that the defendant is guilty. It does not even raise a suspicion of guilty.

*Question to counsel: do we need a First Amendment instruction in the preliminary instructions as a placeholder?*

### **PRESUMPTION OF INNOCENCE**

The defendant is presumed innocent of both of the charges. This presumption continues throughout the case. 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.

### **BURDEN OF PROOF**



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

The defendant is never required to prove his innocence. He is not required to produce any evidence at all.

### **HOW THE TRIAL WILL PROCEED**

We are now ready to begin the trial. The trial will proceed in this manner:

First, an attorney for each side will make an opening statement. An opening statement is not evidence. Rather, it is a preview and an explanation from an attorney as to what that attorney expects the evidence will show.

After opening statements, you will hear the evidence.

After the evidence has been presented, I will instruct you on the law that applies to this case, then the attorneys will make closing arguments. Closing arguments are not evidence. Rather, they are an opportunity for each side to explain to you what they think the evidence has shown and to persuade you how to apply the law to this evidence.

After that, you will go to the jury room to deliberate on your verdict.

The trial day usually will run from 9:00 a.m. until 5:30 p.m. You will have at least an hour for lunch and two additional short breaks, one in the morning and one in the afternoon.

### **THE EVIDENCE**

You may consider only the evidence that you see and hear in court. You may not consider anything that you may or see or hear outside of court, including anything from a newspaper, television, radio, the internet, or from any other source.

The evidence includes only what the witnesses say when they are testifying under oath, the exhibits that I allow into evidence, and any facts to which the parties stipulate. A stipulation is an agreement that certain facts are true.

Nothing else is evidence. Any statements and any arguments that the lawyers make are not evidence. If what a lawyer says is different from the evidence as you hear or see it, then the evidence is what counts. The lawyers' questions and objections likewise are not evidence.

A lawyer has a duty to object if he or she thinks that a question or evidence is improper. When an objection is made, then I will be required to rule on the objection. If I sustain an objection to a question that a lawyer asks, then you must not speculate as to what the answer might have been. If I strike testimony or an exhibit from the record, or if I tell you to disregard something, then you must not consider it.

Pay close attention to the evidence as it is being presented. During your deliberations, you will have any exhibits that I allow into evidence, but you will not have a transcript of the testimony. You will have to make your decision based on what you recall of the evidence.

### **CONSIDERING THE EVIDENCE**

Give the evidence whatever weight you believe it deserves. Use your common sense in weighing the evidence, and consider the evidence in light of your own every day experience. You are allowed to draw reasonable inferences from facts. In other words, you may look at one fact and conclude from it that another fact exists. Any inferences you make must be reasonable and must be based on the evidence in the case.

## **DIRECT AND CIRCUMSTANTIAL EVIDENCE**

You may have heard the terms “direct evidence” and “circumstantial evidence.” Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves a fact.

For example, direct evidence that it was raining outside is testimony by a witness that she was outside in the rain. Indirect evidence that it was raining outside is testimony by a witness that she saw someone enter the room carrying a wet umbrella.

You are to consider both direct and circumstantial evidence. The law does not say that one is better than the other. It is up to you to decide how much weight to give to any evidence, whether direct or circumstantial.

## **CREDIBILITY OF WITNESSES**

Part of your job as jurors is to decide how believable each witness is, and how much weight to give each witness’s testimony. You may accept all of what a witness says, or part of it, or none of it.

Some factors you may consider are: the witness’s age, intelligence, and memory; the witness’s ability and opportunity to see, hear or know the things that the witness testified about; the witness’s demeanor while testifying; whether the witness had any bias, prejudice or other reason to lie or to slant his or her testimony; inconsistent statements or conduct by the witness; and the believability of the witness’s testimony in light of the other evidence presented. You may also consider any other factors that shed light on the believability of each witness’s testimony.

### **NUMBER OF WITNESSES**

Do not make any decisions by simply counting the number of witnesses who testified about a certain point. What is important is how believable you think each witness was and how much weight you think each witness's testimony deserves.

### **ATTORNEYS MAY INTERVIEW WITNESSES**

It is proper for an attorney to interview any witness in preparation for trial.

### **THE DEFENDANT HAS A RIGHT NOT TO TESTIFY**

The defendant has an absolute right not to testify or to present evidence. You must not consider in any way the fact that the defendant may choose not to testify. You should not even discuss it in your deliberations.

### **JUROR NOTE TAKING**

You will be permitted to take notes during the trial if you wish. Take notes only if you want to and if you think that they will help you remember the evidence when you are deliberating. Do not let notetaking interfere with your important duties of listening carefully to all of the evidence and of evaluating the credibility of the witnesses. If you take notes, you may use them during deliberations to help you remember what happened during the trial. You should use your notes only as an aid to your memory. The notes are not evidence. All of you should rely on your own independent recollection of the evidence. You should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impressions of each juror.

### **NO COMMUNICATION DURING THE TRIAL**

During recesses you should keep in mind the following instructions:

First, do not discuss the case either among yourselves or with anyone else during the course of the trial. The parties have a right to expect that you will keep an open mind throughout the trial. You should not reach any conclusions about this case until you have heard all of the evidence, you have heard the lawyers' closing arguments, you have received my instructions on the law, and you have retired to deliberate with the other members of the jury about your verdict.

I must warn you, in particular, against commenting about the trial in an e-mail or a blog or Twitter. There have been news accounts recently about cases that have had to be re-tried because a member of the jury communicated electronically about the case during the trial. You can imagine what this would mean in the cost of a re-trial, the inconvenience to your fellow jurors whose work would have gone for nothing and the stress experienced by the defendant.

Second, do not permit any third person to discuss the case in your presence. If anyone tries to talk to you despite your telling him not to, report that fact to the court as soon as you are able. Do not discuss the event with your fellow jurors or discuss with them any other fact that you believe you should bring to the attention of the court.

Third, although it is a normal human tendency to talk with people with whom one is thrown in contact, please do not talk to any of the parties or their attorneys or the witnesses. By this I mean not only do not talk about the case, but do not talk at all, even to pass the time of day. This is the only way the parties can be sure of the absolute fairness and impartiality they are entitled to expect from you as jurors.

Fourth, do not read about the case on the Internet, in newspapers, or listen to radio or television broadcasts about the trial. If a headline catches your eye, do not examine the article further. Media accounts may be inaccurate and may contain matters that are not proper for your consideration. You must base your verdict solely on the evidence produced in court.

Fifth, no matter how interested you may become in the facts of the case, you must not do any independent research, investigation or experimentation. Don't look up materials on the internet or in other sources.

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIAN DUTCHER,

Defendant.

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JURY INSTRUCTIONS

15-cr-96-wmc

**II. POST TRIAL JURY 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.

**CONSIDERATION OF THE EVIDENCE**

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 statements said to be made by the defendant to

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You must decide whether the defendant did make these statements. If you find that the defendant did make any of these statements, then you must decide what weight, if any, you believe each 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 or present evidence. In arriving at your verdict, you must not consider the fact that the defendant did not testify or present evidence. You should not even discuss it in your deliberations.

You have heard evidence that the defendant committed acts other than the ones charged in the indictment. Specifically, \_\_\_\_\_. Before using this evidence, you must decide whether it is more likely than not that the defendant did the acts that are not charged in the indictment. If you decide that he did, then you may consider this evidence to help you decide \_\_\_\_\_. You may not consider this evidence for any other purpose. Keep in mind that the defendant in all trial here for wire fraud, not for these other acts.

You may not use this evidence to infer that the accused has a certain character trait and that the accused acted in conformity with that trait with respect to the offenses charged in this case. The issue is not whether the accused is of good or bad character but whether the government has proven the charges beyond a reasonable doubt.

You have heard evidence that \_\_\_\_\_ have been convicted of crimes. You may consider this evidence only in deciding the believability of his or her testimony. You may not consider this evidence for any other purpose. The other



convictions are not evidence of whether the defendant is guilty of any crime he is charged with in this case.

You have heard evidence that the defendant has been convicted of crimes. You may consider this evidence only in deciding the believability of his testimony. You may not consider it for any other purpose.

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 [a witness/witnesses], namely \_\_\_\_\_, who gave opinions and testimony about \_\_\_\_\_. You do not have to accept this

witness's opinions or testimony. You should judge this witness's opinions and testimony the same way that you judge the testimony of any other witness. In deciding how much weight to give these opinions and testimony, you should consider how he reached his [opinions/conclusions], and the factors that I have described for determining the believability of testimony.

## **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 July 1, 2015, in the Western District of Wisconsin, the defendant, Brian Dutcher, knowingly and willfully made a threat to take the life of, and to inflict bodily harm upon the President of the United States. Specifically, while at the La Crosse Public Library, 800 Main Street, La Crosse, Wisconsin, the defendant told a library security officer that he was in La Crosse to shoot the president.

### **COUNT 2**

On or about June 30, 2015, in the Western District of Wisconsin, the defendant, Brian Dutcher, knowingly and willfully made a threat to take the life of, and to inflict bodily harm upon the President of the United States. Specifically, the defendant made postings on his Facebook profile, including a posting that read, "that's it! Thursday I will be in La Crosse. Hopefully I will get a clear shot at the

pretend president. Killing him is our CONSTITUTIONAL DUTY!"

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 offenses were committed "on or about" certain dates. 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 CHARGES**

To sustain the charge against the defendant in either Count 1 or Count 2, the government must prove these elements:

(1) On or about the date charged in the count that you are considering, the defendant made a statement that was a true threat either to take the life of President Obama or to cause bodily injury to President Obama; and

(2) The defendant made this statement knowingly and willfully.

If you find from your consideration of all the evidence that the government has proved both of these elements beyond a reasonable doubt as to the count that you are considering, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove either one of these elements beyond a reasonable doubt that you are considering, then you must find the defendant not guilty of that count.

As to the first element in each count, the government does not need to prove that the statement that the defendant made was both a true threat to take the life of President Obama *and* a true threat to cause bodily injury to President Obama. The government only needs to prove in each count that the defendant that the statement was a true threat to do one of these things. Before you may find that the government has met its burden of proof on this element in the count that you are considering, you must unanimously agree on at least one of these two types of true threat.

As to the first element of each count, a **true threat** is a statement that is a serious expression of an intent to commit an act of unlawful violence to a particular person. Idle or careless talk, political hyperbole, or something said in a careless or joking matter does not constitute a true threat. A true threat is not protected by the First Amendment. In proving that a statement is a true threat, the government is not

required to prove that the defendant actually intended to physically injure or kill President Obama, or that he had the capacity to do so. [*United States v. Parr*, 545 F.3d 491, 496-97 (7<sup>th</sup> Cir. 2008), quotes & citations omitted.]

As to the second element of each count, 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.

As to the second element of each count, the term **willfully** means that the defendant either actually intended his statement to be a true threat, or that he knew that other people reasonably would view his statement as a true threat but he made the statement anyway. [*Elonis v. United States*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 2001, 2012. [*Alternative to second clause*: or that the defendant consciously disregarded the risk that his statement would be interpreted as a true threat. *See id.* at 2015-16 (Alito, J., concurring in part and dissenting in part.)]

## 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 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.

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 defendant has been accused of more than one crime. The number of charges is not evidence of guilty and should not influence your decision.

You must consider each charge and the evidence concerning each charge separately. Your decision on one charge, whether it is guilty or not guilty, should not influence your decision on the other charge.

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.

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIAN DUTCHER,

Defendant.

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VERDICT

15-cr-96-wmc

COUNT 1

We, the Jury in the above-entitled cause, find the defendant, Brian Dutcher,

\_\_\_\_\_  
("Guilty" or "Not Guilty")

of the offense charged in Count 1 of the indictment.

COUNT 2

We, the Jury in the above-entitled cause, find the defendant, Brian Dutcher,

\_\_\_\_\_  
("Guilty" or "Not Guilty")

of the offense charged in Count 2 of the indictment.

\_\_\_\_\_  
Presiding Juror

Madison, Wisconsin

Date: \_\_\_\_\_