

ICJI 201 ROLE OF JUDGE AND JURY

INSTRUCTION NO. _____

You have now heard all the evidence in the case. My duty is to instruct you as to the law.

You must follow all the rules as I explain them to you. You may not follow some and ignore others. Even if you disagree or don't understand the reasons for some of the rules, you are bound to follow them. If anyone states a rule of law different from any I tell you, it is my instruction that you must follow.

ICJI 202 DETERMINING FACTS FROM THE EVIDENCE AND DISREGARDING
NON-EVIDENCE

INSTRUCTION NO. _____

As members of the jury it is your duty to decide what the facts are and to apply those facts to the law that I have given you. You are to decide the facts from all the evidence presented in the case.

The evidence you are to consider consists of:

1. sworn testimony of witnesses;
2. exhibits which have been admitted into evidence; and
3. any facts to which the parties have stipulated.

Certain things you have heard or seen are not evidence, including:

1. arguments and statements by lawyers. The lawyers are not witnesses. What they say in their opening statements, closing arguments and at other times is included to help you interpret the evidence, but is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, follow your memory;
2. testimony that has been excluded or stricken, or which you have been instructed to disregard;
3. anything you may have seen or heard when the court was not in session.

Comment

If no exhibits were admitted into evidence, or if there were no stipulated facts, this instruction should be modified accordingly to avoid confusing the jury.

ICJI 203 CIRCUMSTANTIAL EVIDENCE-"HOLDER" INSTRUCTION OVERRULED

Comment

In *State v. Holder*, 100 Idaho 129, 594 P.2d 639 (1979), the Court held that when the evidence connecting the defendant to the crime was entirely circumstantial, the trial court must, upon the request of the defendant, give an instruction regarding the sufficiency of circumstantial evidence to sustain a conviction. That instruction, which became known as the "Holder" instruction, should no longer be given. *State v. Holder* was overruled by *State v. Humphreys*, 134 Idaho 657, 8 P.3d 652 (2000).

The Holder instruction was as follows:

You cannot find the defendant guilty [of (name of offense(s))] unless the circumstances proved by the evidence are consistent with the theory that the defendant

[is guilty],

[committed] [or] [aided and abetted] [or] [advised and encouraged] [the commission of] [the crime(s) charged] [such crime(s)],

and they cannot be reconciled with any rational theory of the defendant's innocence. If the evidence is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to the defendant's innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and to reject the other which points to the defendant's guilt. [In addition, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt.

[Modified July 2005]

ICJI 204 CONCLUDING REMARKS (HOW TO DELIBERATE)

INSTRUCTION NO.

I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing remarks to you, and then you will retire to the jury room for your deliberations.

The arguments and statements of the attorneys are not evidence. If you remember the facts differently from the way the attorneys have stated them, you should base your decision on what you remember.

The attitude and conduct of jurors at the beginning of your deliberations are important. It is rarely productive at the outset for you to make an emphatic expression of your opinion on the case or to state how you intend to vote. When you do that at the beginning, your sense of pride may be aroused, and you may hesitate to change your position even if shown that it is wrong. Remember that you are not partisans or advocates, but are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

As jurors you have a duty to consult with one another and to deliberate before making your individual decisions. You may fully and fairly discuss among yourselves all of the evidence you have seen and heard in this courtroom about this case, together with the law that relates to this case as contained in these instructions.

During your deliberations, you each have a right to re-examine your own views and change your opinion. You should only do so if you are convinced by fair and honest discussion that your original opinion was incorrect based upon the evidence the jury saw and heard during the trial and the law as given you in these instructions.

Consult with one another. Consider each other's views, and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

However, none of you should surrender your honest opinion as to the weight or effect of evidence or as to the innocence or guilt of the defendant because the majority of the jury feels otherwise or for the purpose of returning a unanimous verdict.

ICJI 205 ALL INSTRUCTIONS NOT NECESSARILY APPLICABLE

INSTRUCTION NO. 205

You have been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions will apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the Court is expressing any opinion as to the facts.

ICJI 206 INSTRUCTIONS AND EXHIBITS

INSTRUCTION NO. 206

The original instructions and the exhibits will be with you in the jury room. They are part of the official court record. For this reason please do not alter them or write or mark on them in any way. [Some of the exhibit(s) have been sealed in bags or containers that allow you to view them. Do not open or remove the contents of these exhibits.] If you have any questions about the handling or use of the exhibits, submit those questions in writing to me through the bailiff.

The instructions are numbered for convenience in referring to specific instructions. There may or may not be a gap in the numbering of the instructions. If there is, you should not concern yourselves about such gap.

COMMENT

The bracketed sentence should be used when exhibitis have been admitted that include dangerous or contraband materials, such as controlled substances or exhibits that contain physiological evidence.

ICJI 207 PRESIDING JUROR

INSTRUCTION NO.

Upon retiring to the jury room, select one of you as a presiding officer, who will preside over your deliberations. It is that person's duty to see that discussion is orderly; that the issues submitted for your decision are fully and fairly discussed; and that every juror has a chance to express himself or herself upon each question.

In this case, your verdict must be unanimous. When you all arrive at a verdict, the presiding officer will sign it and you will return it into open court.

Your verdict in this case cannot be arrived at by chance, by lot, or by compromise.

If, after considering all of the instructions in their entirety, and after having fully discussed the evidence before you, the jury determines that it is necessary to communicate with me, you may send a note by the bailiff. You are not to reveal to me or anyone else how the jury stands until you have reached a verdict or unless you are instructed by me to do so.

A verdict form suitable to any conclusion you may reach will be submitted to you with these instructions.

ICJI 208 "ON OR ABOUT"-EXPLAINED

INSTRUCTION NO. _____

It is alleged that the crime charged was committed ["on or about"] [on] a certain date. If you find the crime was committed, the proof need not show that it was committed on that precise date.

[It need only show that the crime was committed on or after [statute of limitation bar date].]

Comment

I.C. s 19-1414; *State v. Mundell*, 66 Idaho 297, 158 P.2d 818 (1945). The last bracketed portion should be given if the statute of limitation is raised as a defense.

ICJI 220 VERDICT FORM-SINGLE COUNT

INSTRUCTION NO. ____

[INSERT COURT AND CASE CAPTION]

We, the Jury, unanimously find the defendant [name]:

Not Guilty

Guilty

Dated this _____ day of _____, 20 .

Presiding Officer

Comment

Use this verdict form when only one offense has been charged and there are no included offenses or special circumstances to be established. Otherwise use ICJI 221 and ICJI 222 or ICJI 223 and ICJI 224.

ICJI 221 INSTRUCTION ON USING VERDICT FORM -- MULTIPLE COUNTS AND SPECIAL CIRCUMSTANCE

INSTRUCTION NO. _____

It is for you, the jury, to determine from all the evidence in this case, applying the law as given in these instructions, whether defendant is guilty or not guilty of the offense[s] charged or of any included offense.

With respect to the facts alleged in [Count I of] the [Information] [Complaint], the offense of [offense charged] includes the offense[s] of [list included offenses]. It is possible for you to return [on Count I] any one, but only one of the following verdicts:

GUILTY of [offense charged in Count I].

GUILTY of [name next serious included offense].

NOT GUILTY [of COUNT I].

[Repeat the preceding paragraph as many times as necessary to cover all counts charged and all included offenses.]

When you are deliberating you should first consider the crime charged. You should consider the included offense[s in the order listed] only in the event the state has failed to convince you beyond a reasonable doubt of the defendant's guilt with respect to the crime charged [and each preceding included offense].

[If you have found the defendant guilty of (list offenses) you must answer the following question:

Did [**defendant's name**] (describe special circumstance, i.e. personally use a deadly weapon) in the commission of the (Count I) crime of which you have found (him) (her) guilty?

[The state has the burden of proving the truth of this allegation beyond a reasonable doubt. If you have a reasonable doubt that it is true, you must find it to be not true.

[You will include a special finding on that question in your verdict, using the form that will be supplied for that purpose.]

Comment

This instruction should be used with verdict form, ICJI 222. This instruction can and should be modified to reflect all included offenses, counts and special circumstances. This instruction

should not be used to determine special circumstances which require a bifurcated trial, e.g., felony DUI. See ICJI 1008 and ICJI 1009.

Both instructions ICJI 221 and ICJI 223 are designed to accomplish the same task, i.e., informing the jury how to fill out a verdict form containing multiple counts, lesser included offenses or requiring the jury to answer whether special circumstances exist. These two instructions are alternative methods. The court should use whichever one seems best suited for the task, together with the companion verdict, ICJI 222 or ICJI 224.

ICJI 222 VERDICT FORM -- MULTIPLE COUNTS AND SPECIAL CIRCUMSTANCE

INSTRUCTION NO. _____

[INSERT COURT AND CASE CAPTION]

We, the Jury, unanimously find the defendant [defendant's name],

[COUNT I]

(MARK ONLY ONE OF THE FOLLOWING [COUNT I] VERDICTS)

GUILTY of [offense charged in Count I].

GUILTY of [name next serious included offense].

NOT GUILTY [of COUNT I].

[If you have found **[defendant's name]** guilty of any offense [in Count I], you must answer the following question. If you found **[defendant's name]** not guilty (of Count I), you do not have to answer the question but should (proceed to the Count II portion of this verdict form) (sign the verdict form and tell the bailiff you are done)].

[Count I Part II Question

Did **[defendant's name]** (describe special circumstance, i.e. personally use a deadly weapon in the commission of the (Count I) crime of which you have found (him) (her) guilty?

YES: _____ **NO:** _____]

[Repeat the format for Count I as many times as necessary to include all counts]

Dated this _____ day of _____, 20 ____ .

Presiding Officer

Comment

Use this verdict form with ICJI 221. This verdict form can and should be modified to reflect all included offenses, counts and special circumstances. This verdict form should not be used to determine special circumstances which require a bifurcated trial, e.g., felony DUI. See ICJI 1008 and ICJI 1009.

ICJI 223 INSTRUCTION ON USE OF VERDICT FORM WITH QUESTIONS

INSTRUCTION NO. _____

In this case you will return a verdict, consisting of a series of questions. Although the explanations on the verdict form are self-explanatory, they are part of my instructions to you. I will now read the verdict form to you. It states:

"We, the Jury, for our verdict, unanimously answer the question(s) submitted to us as follows:

QUESTION NO. 1: Is [defendant's name] guilty or not guilty of [Name of offense charged]?

Not Guilty _____ **Guilty** _____

If you unanimously answered Question No. 1 "**Guilty**", then you should simply sign the verdict form and advise the bailiff. If you unanimously answered Question No. 1 "**Not Guilty**", then proceed to answer Question No. 2.

QUESTION NO. 2: Is [defendant's name] guilty or not guilty of [Name next serious included offense]?

Not Guilty _____ **Guilty (7)6d**

If you unanimously answered Question No. 2 "**Guilty**", then you should simply sign the verdict form and advise the bailiff. If you unanimously answered Question No. 2 "**Not Guilty**", then proceed to answer Question No. 3.

QUESTION NO. 3: Is [defendant's name] guilty or not guilty of [Name next serious included offense]?

Not Guilty _____ **Guilty** _____ "

The verdict form then has a place for it to be dated and signed. You should sign the verdict form as explained in another instruction.

Comment

The questions on this verdict form can be repeated as many times as necessary. The questions and responses should be inserted in the appropriate verdict form, ICJI 224.

If a special circumstance must be found, i.e. use of a deadly weapon that can be added as an additional direction and question as follows:

QUESTION NO. 1: Is [defendant's name] guilty or not guilty of [name of offense charged]?

Not Guilty _____ **Guilty** _____

If you unanimously answered Question No. 1 "**Guilty**", then you must skip to Question No. 3 and answer that question. If you unanimously answered Question No. 1 "**Not Guilty**", then proceed to answer Question No. 2.

QUESTION NO. 2: Is [defendant's name] guilty or not guilty of [name of next serious offense]?

Not Guilty _____ **Guilty** _____

If you unanimously answered Question No. 2 "**Guilty**", then you must next answer Question No. 3. If you unanimously answered Question No. 2 "**Not Guilty**", then you should simply sign the verdict form and advise the bailiff.

QUESTION NO. 3: [Example: Did [defendant's name] personally use a deadly weapon in the commission of the crime of which you have found [him] [her] guilty?]

YES: _____ **NO:** _____

Additional Comment

Both instructions ICJI 221 and ICJI 223 are designed to accomplish the same task, i.e., informing the jury how to fill out a verdict form containing multiple counts, lesser included offenses or requiring the jury to answer whether special circumstances exist. These two instructions are alternative methods. The court should use whichever one seems best suited for the task, together with the companion verdict, ICJI 222 or ICJI 224.

ICJI 224 VERDICT FORM WITH QUESTIONS

INSTRUCTION NO. _____

[INSERT COURT AND CASE CAPTION]

We, the Jury, duly impaneled and sworn to try the above-entitled action, for our verdict, unanimously answer the question(s) submitted to us as follows:

QUESTION NO. 1: Is [defendant's name] guilty or not guilty of [name of offense charged]?

Not Guilty _____ **Guilty** _____

If you unanimously answered Question No. 1 "**Guilty**", then you must skip to Question No. 3 and answer that question. If you unanimously answered Question No. 1 "**Not Guilty**", then proceed to answer Question No. 2.

QUESTION NO. 2: Is [defendant's name] guilty or not guilty of [name of next serious offense]?

Not Guilty _____ **Guilty** _____

If you unanimously answered Question No. 2 "**Guilty**", then you must next answer Question No. 3. If you unanimously answered Question No. 2 "**Not Guilty**", then you should simply sign the verdict form and advise the bailiff.

QUESTION NO. 3: [Example: Did [defendant's name] personally use a deadly weapon in the commission of the crime of which you have found [him] [her] guilty?]

YES: _____ **NO:** _____

DATED this _____ day of _____, 20__ .

Presiding Officer

Comment

Use this verdict form with ICJI 223.

ICJI 225 INCLUDED OFFENSES -- TRANSITION

INSTRUCTION NO. _____

If your unanimous verdict is that the defendant is not guilty of _____, you must acquit [him] [her] of that charge. In that event, you must next consider the included offense of _____

[Repeat as needed.]

Comment

I.C. s 19-2132.

This instruction is intended to be inserted at the beginning of the instruction on the elements of an included offense.

The Committee used the phrase "included offense" rather than "lesser included offense" because an included offense is not always lesser in terms of punishment. *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983).

A trial court does not have a duty to instruct *sua sponte* on an included offense. A trial court is required to instruct the jury on included offenses only if: (1) one of the parties requests the instruction, and (2) a reasonable view of the evidence would support a finding that the defendant committed the included offense but did not commit the greater offense. *State v. Porter*, 130 Idaho 772, 948 P.2d 127 (1997); I.C. s 19-2132.

An offense is an included offense if it meets the requirements of either the "statutory theory" or the "pleading theory."

(1) The statutory theory focuses solely upon the statutory definitions of the two offenses. An offense is an included offense if, considering only the statutory definitions of both crimes, you could not commit the charged offense without also committing the included offense. This would occur in either of two situations:

(a) All of the statutory elements of the included offense are statutory elements of the charged offense. For example, voluntary manslaughter is an included offense of second degree murder because second degree murder contains all of the elements of manslaughter plus the additional element of malice. *State v. Atwood*, 105 Idaho 315, 669 P.2d 204 (Ct. App. 1983). Conversely, under the statutory theory robbery would not be an included offense of felony murder even where the murder was committed during the course of a robbery because the statutory definition of felony murder does not always require the commission of a robbery. There are other felonies upon which felony murder can be based. *Sivak v. State*, 112 Idaho 197, 731 P.2d 192 (1986).

(b) The charged offense could not be committed without committing the included offense, even though all of the elements of the included offense are not elements of the charged offense. For example, if the victim is under sixteen years of age, lewd and lascivious conduct is an included offense of statutory rape because the defendant's conduct leading up to the rape would constitute the crime of lewd and lascivious conduct as well. *State v. Petty*, 73 Idaho 136, 248 P.2d 218 (1952); *State v. Gilman*, 105 Idaho 891, 673 P.2d 1085 (Ct. App. 1983). None of the elements of the two offenses are identical, however.

(2) The pleading theory focuses upon the charging language in the complaint, indictment, or information. Under the pleading theory, an offense is an included offense if:

(a) The offense is alleged in the complaint, indictment, or information as being the manner or means by which the charged offense was committed. For example, in *State v. Anderson*, 82 Idaho 293, 352 P.2d 972 (1960), driving while under the influence and reckless driving were included offenses in the charge of negligent homicide because the information charging the defendant with negligent homicide alleged that he committed such offense by driving while under the influence of alcohol and in a reckless manner.

(b) The offense is alleged in the complaint, indictment, or information as being an element of the charged offense. For example, under the pleading theory robbery would be an included offense of felony murder if it was alleged in the indictment or information that the murder occurred during the commission of a robbery. *Sivak v. State*, supra.

The Idaho Appellate Courts had previously recognized a third category of included offenses in which the evidence at trial showed the commission of a lesser similar offense. *State v. Boyenger*, 95 Idaho 396, 509 P.2d 1317 (1973) (the crime of receiving money or property by false pretenses was held to be an included offense of the crime of false or fraudulent use of a credit card); *State v. Mason*, 111 Idaho 660, 726 P.2d 772 (Ct. App. 1986) (exhibiting a deadly weapon was held to be an included offense of the crime of aggravated assault). This third category of included offenses has since been rejected. *State v. Rosencrantz*, 130 Idaho 666, 946 P.2d 628 (1997) (eluding and reckless driving were not included offenses of aggravated DUI); *State v. Curtis*, 130 Idaho 522, 944 P.2d 119 (1997) (inattentive driving is not an included offense of DUI).

There can be more than one included offense. *State v. Olsen*, 103 Idaho 278, 674 P.2d 734 (1982) (trial court correctly instructed the jury regarding six offenses included in the charged offense).

The charged offense gives the defendant presumptive notice of any included offense. *State v. Padilla*, 101 Idaho 713, 620 P.2d 286 (1980); *State v. Gilman*, supra.

ICJI 230 JURY DEADLOCK -- DYNAMITE INSTRUCTION

Comment

In *State v. Flint*, 114 Idaho 806, 761 P.2d 1158 (1988), the Supreme Court held that the giving of a "dynamite" instruction was reversible error. Overruling prior decisions which had approved the giving of such an instruction, a majority of the Court stated: "Our review of applicable case law, sound policy considerations, and personal experiences from the perspective of both bench and bar, convinces us that the future use of dynamite instructions is not consistent with the orderly administration of criminal justice." 114 Idaho at 812, 761 P.2d at 1164.

ICJI 231 SUBSTITUTION OF JUROR AFTER DELIBERATIONS BEGIN

INSTRUCTION NO. _____

One of your number has been excused and replaced with an alternate juror.

The state and the defendant each have a right to a verdict reached only after full participation of the [twelve] [six] jurors who ultimately return the verdict.

This right may be assured in this case only if the jury begins its deliberations again from the beginning.

You are therefore instructed to set aside and disregard all past deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place.

You shall now retire for your deliberations in accordance with all the instructions previously given.

ICJI 232 POST VERDICT JURY INSTRUCTION

INSTRUCTION NO. _____

You have now completed your duties as jurors in this case and are discharged with the sincere thanks of this Court. The question may arise as to whether you may discuss this case with the attorneys or with anyone else. For your guidance, the Court instructs you that whether you talk to the attorneys, or to anyone else, is entirely your own decision. It is proper for you to discuss this case, if you wish to, but you are not required to do so, and you may choose not to discuss the case with anyone at all. If you choose to, you may tell them as much or as little as you like, but you should be careful to respect the privacy and feelings of your fellow jurors. Remember that they understood their deliberations to be confidential. Therefore, you should limit your comments to your own perceptions and feelings. If anyone persists in discussing the case over your objection, or becomes critical of your service, either before or after any discussion has begun, please report it to me.