

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

**Criminal Case No. 08-cr-00318-JLK**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**1. WAYNE D. BREITAG,**

**Defendant.**

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**JURY INSTRUCTIONS**

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## INSTRUCTION NO. 1

### **Preliminary Instruction - How Trial Will Proceed**

Members of the Jury:

In a moment I will give you some detailed instructions on this case and how you will go about reaching your decision. But first I will explain generally how this trial will proceed.

This criminal case has been brought by the United States government. I will sometimes refer to the government as the prosecution. The government is represented by Assistant United States Attorney Greg Holloway and Trial Attorney Jim Nelson. The defendant, Wayne D. Breitag, is represented by his lawyer, Richard Russman.

An Indictment is the legal document in which the government lists the criminal acts, or "Counts," with which it is charging the defendant. It can be filled with legal terms and citations to statutes and regulations, and it is not necessary to read it to you verbatim.

The Indictment in this case charges Mr. Breitag with one Count of importing wildlife parts into the United States contrary to law, and two Counts of false labeling of wildlife. The particular elements of each Count will be described to you in more detail later. The charges made by the government against the defendant are not evidence of guilt or anything else. Likewise, Mr. Breitag pleaded not guilty to the charges and is therefore presumed innocent, but his plea also is not evidence. Mr. Breitag may not be found guilty of any charge unless all twelve of you unanimously find that the government has proved

every material element of the charge beyond a reasonable doubt.

The first step in the trial begins with your selection as jurors. The second step is my reading of the jury instructions to you. Next will be the opening statements. The government in its opening statement will tell you what evidence it intends to put before you. Just as the Indictment is not evidence, neither is the opening statement. Its purpose is to help you understand what the evidence will be. It is a road map to show you what is ahead.

After the government's opening statement, Mr. Breitag's attorney will make an opening statement. Likewise, his opening statement is not evidence, but is intended to inform you of Mr. Breitag's defenses against the charges.

Evidence will be presented from which you will have to determine the facts. You are the judges of the facts. The evidence will consist of witness testimony, documents and other things received into the record as exhibits, and any facts about which the government and the defendant agree or I tell you to accept as true. How much weight to give to the evidence is always up to you.

The government will offer its evidence first. After the government's evidence, Mr. Breitag may present evidence, but he is not required to do so. I remind you that Mr. Breitag is presumed innocent and it is the government that must prove his guilt beyond a reasonable doubt. If Mr. Breitag submits evidence, the government may introduce rebuttal evidence.

At times during the trial, a lawyer may make an objection to a question asked by

another lawyer, or to an answer by a witness. This means that the lawyer is requesting that I make a decision on a particular rule of law. Do not draw any conclusion from such objections or from my rulings on the objections. If I sustain an objection to a question, the witness may not answer it. Do not attempt to guess what answer might have been given if I had allowed the answer. If I overrule the objection, treat the answer as any other. If I tell you not to consider a particular statement, you may not refer to that statement in your later deliberations. Similarly, if I tell you to consider a particular piece of evidence for a specific purpose, you may consider it only for that purpose. Each of you is responsible for making sure that no juror bases a decision on matters not in evidence.

During the course of the trial I may have to interrupt the proceedings to confer with the attorneys about the rules of law that should apply. Sometimes we will talk briefly, at the bench. But some of these conferences may take more time, so I will excuse you from the courtroom. I will try to avoid such interruptions whenever possible, but please be patient even if the trial seems to be moving slowly because conferences often actually save time in the end.

You are to consider all the evidence received in this trial and only the evidence received at trial. It will be up to you to decide what evidence to believe and how much of any witness's testimony to accept or reject. After you have heard all the evidence on both sides, the government and the defense will each be given time for their final arguments. These arguments are not evidence. After these closing arguments, I will again instruct you on the rules of law you are to use in reaching your verdicts, and then you will retire to

decide your verdicts. You will have copies of the instructions with you throughout the trial and in the jury room.

During the course of the trial I may ask a question of a witness. If I do, that does not indicate I have any opinion about the facts in the case but am only trying to bring out facts that you may consider. From time to time during the trial I may also direct your attention to particular instructions of law.

Ordinarily, the attorneys will develop all the relevant evidence that will be necessary for you to reach your verdicts. However, in rare situations, one of you may believe a question is critical to reaching a decision on a necessary element of the case. In that situation, you may write out a question and provide it to the courtroom deputy at the next recess. I will then consider that question with the lawyers. If it is determined to be a proper and necessary question, I will ask it. If I do not ask it, I will explain why an answer cannot be given.

If you would like to take notes during the trial, you may. On the other hand, you are not required to take notes. If you decide to take notes, be careful not to get so involved in note taking that you become distracted, and remember that your notes will not necessarily reflect exactly what was said, so your notes should be used only as memory aids. Therefore, you should not give your notes precedence over your independent recollection of the evidence. You should also not be unduly influenced by the notes of other jurors. If you do take notes leave them in the jury room at night and do not discuss the contents of your notes until you begin deliberations.

During the course of the trial, you should not talk with any witness, or with Mr. Breitag, or with any of the lawyers at all. Also, you should not discuss the merits of this case among yourselves until you have gone to the jury room to make your decision at the end of the trial. It is important that you wait until all the evidence is received and you have again heard my instructions on the controlling rules of law before you deliberate among yourselves. In other words, keep an open mind and form no opinions until you can consider all the evidence and the instructions of law together.

During the course of the trial you will receive all the evidence you legally may consider to decide the case. Gathering any information on your own that you think might be helpful is against the law and would be a violation of your oath. Do not engage in any outside reading on this case, even including dictionaries or a bible, do not attempt to visit any places mentioned in the case, and do not in any other way try to learn about the case outside the courtroom. Part of my job is to protect you from outside influences. Your job is to confine your decisions to what takes place in this courtroom.

I wish I did not have to dwell on this topic, but recent events around the United States and recent technologies require me to point out that some common practices and habits many of you enjoy are strictly forbidden in your role as jurors. You may not, under any circumstances, have your cell phones, blackberries, iphones or the like on when court is in session. Whether you are here or away from the court during recess you may not “google, twitter, tweet, text message, blog, post” or anything else with those gadgets about or concerning anything to do with this case. To do so could cause a mistrial, meaning all

of our efforts would have been wasted and we would have to start all over again with a new trial before a new jury. If you were to cause a mistrial by violating these orders, you could be subject to paying all the costs of these proceedings and perhaps punished for contempt of court. What you may do is advise anyone who needs to know, such as family members, employers, employees, schools, teachers, or daycare providers that you are a juror in a case and the judge has ordered you not to discuss it until you have reached a verdict and been discharged from the case. At that point you will be free to discuss this case or investigate anything about it to your heart's delight.

Fairness to all concerned requires that all of us connected with this case deal with the same information and with nothing other than the same information. The reason for this is that your decision in this case must be made solely on the evidence presented at the trial. Finally, I note that the court reporter is making stenographic notes of everything that is said. This is basically to assist any appeals. You will *not* have a typewritten copy of the testimony available for your use during deliberations. On the other hand, any exhibits admitted at trial will be available to you during your deliberations.

## **INSTRUCTION NO. 2**

### **Instructions are Binding**

In any jury trial there are, in effect, two judges. I am one of the judges; you are the other. I am the judge of the law. You, as jurors, are the judges of the facts.

It is my duty to preside over the trial and decide what evidence is proper for your consideration. When I exclude evidence, I am saying that evidence may not legally be considered by you. I am not telling you what is true or not true. It is your responsibility to decide that based on the evidence that you can legally consider.

It is also my duty to explain to you the rules of law that you must follow and apply in arriving at your verdicts. In explaining the rules of law that you must follow, I will first give you some general instructions that apply in every criminal case--for example, instructions about burden of proof and insights that may help you to judge the believability of witnesses. Then I will give you some specific rules of law that apply to this particular case and, finally, I will explain the procedures you should follow in your deliberations, and the possible verdicts you may return. These instructions will be given to you for use in the trial and in the jury room, so you may, but need not, take notes.

## INSTRUCTION NO. 3

### **Duty to Follow All Instructions**

You, as jurors, are the judges of the facts. But in determining what actually happened – that is, in reaching your decision as to the facts – it is your sworn duty to follow all of the rules of law as I explain them to you.

You may not disregard or give special attention to any one instruction, or question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

In your deliberations you must see to it that no one else on the jury ignores the instructions or attempts to decide the case on anything other than the law and the evidence. It is always to be born in mind that our collective commitment is to equal justice under the law. Matters of race, creed, color, nationality and gender have no place in this process. To the best of your ability you are to judge others as you would want others to judge you under the law I give you. The very heart of justice is that all apply the same law to the same evidence and leave our personal desires out of it.

You should not read into these instructions, or anything else I may have said or done, any suggestion as to what your verdict should be. That is entirely up to you.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took.

## INSTRUCTION NO. 4

### **Presumption of Innocence - Burden of Proof - Reasonable Doubt**

The charges against Mr. Breitag are not evidence of guilt. Indeed, Mr. Breitag is presumed by the law to be innocent. The law does not require Mr. Breitag to prove his innocence or produce any evidence at all. The government has the burden of proving Mr. Breitag guilty beyond a reasonable doubt, and if it fails to do so, you must find Mr. Breitag not guilty.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of Mr. Breitag's guilt. There are few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning Mr. Breitag's guilt. A reasonable doubt is a doubt based on reason and common sense after careful and impartial consideration of all the evidence in the case. It is a doubt based on the evidence and not on a hunch, a guess or a whim.

If, based on your consideration of the evidence, you are firmly convinced that Mr. Breitag is guilty of any crime charged, you must find him guilty of that crime. If on the other hand, you think there is a real possibility that the government failed to prove his guilt, you must give him the benefit of the doubt and find him not guilty. There are three crimes, or "Counts," charged in this case and each must be considered separately.

## INSTRUCTION NO. 5

### **What is Evidence, What is not Evidence**

You must make your decision based only on the evidence that you see and hear [saw and heard] here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

The evidence in this case includes only what the witnesses say [said] while they are [were] testifying under oath, the exhibits that I allow [allowed] into evidence, the stipulations that the lawyers agree [agreed] to and I accept [accepted], and the facts that I judicially notice [noticed]. Judicial notice is my recognition of commonly accepted facts such as time, date and place, as well as matters such as existing government regulations.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.

During the trial, I will not [did not] let you hear the answers to some of the questions that the lawyers ask. I may also rule [also ruled] that you cannot see some of the exhibits that the lawyers want you to see. And sometimes I may order [ordered] you to disregard things that you saw or heard, or I may strike [struck] things from the record. You must completely ignore all of these things. Do not even think about them. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

## INSTRUCTION NO. 6

### **Evidence - Direct and Circumstantial - Inferences**

Generally speaking, two types of evidence are available from which you may properly determine the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, that is, the proof of a chain of facts which point to the existence or non-existence of certain other facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence. The law requires that you find the facts in accord with all the evidence in the case, both direct and circumstantial.

While you must consider only the evidence in this case, you are permitted to draw reasonable inferences from the testimony and exhibits, inferences you feel are justified in the light of common experience. An inference is a conclusion that reason and common sense may lead you to draw from facts which have been proved.

By permitting such reasonable inferences, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in this case.

## INSTRUCTION NO. 7

### **Credibility of Witnesses**

It is your job to decide whether the government has proved the guilt of Mr. Breitag beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or “believability” of each witness and the weight to be given to the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses who testify in this case. This includes Mr. Breitag, if he chooses to testify.

You should think about the testimony of each witness you hear [have heard] and decide whether you believe all or any part of what each witness has [had] to say, and how important that testimony is [was]. In making that decision, I suggest that you ask yourself a few questions: Did the witness impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome in this case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness clearly see or hear the things about which he/she testified? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? When weighing the conflicting testimony, you should consider whether the discrepancy has to do with a material fact or with an unimportant detail. And you should keep in mind that innocent misrecollection —

like failure of recollection — is not uncommon.

If he testifies, the testimony of Mr. Breitag should be weighed and his credibility evaluated in the same way as that of any other witness.

In reaching a conclusion on a particular point, or ultimately in reaching a verdict in this case, do not make any decisions simply because there were more witnesses on one side than on the other. Look to the quality rather than the quantity of the testimony.

## INSTRUCTION NO. 8

### **Impeachment by Prior Conviction - (witness other than Defendant)**

The testimony of a witness may be discredited or impeached by showing that the witness previously has been convicted of a felony – that is, of a crime punishable by imprisonment for a term of years – or of a crime of dishonesty or false statement. A prior conviction does not mean that a witness is not qualified to testify, but is merely on circumstance that you may consider in determining the credibility of the witness. You decide how much weight, if any, to give any prior felony conviction or crime of dishonesty that was used in this case to impeach a witness.

## INSTRUCTION NO. 9

### **Accomplice – Co-Defendant – Plea Agreement**

The government [will call] [called] as witnesses alleged accomplices of Mr. Breitag who participated in the same alleged crimes. The government has entered into plea agreements with the accomplices, providing for a reduced charge or recommendation of a lesser sentence than the accomplice might otherwise receive. Plea bargaining is lawful and the rules by which we are all governed expressly provide for it.

An alleged accomplice, including one who has entered into a plea agreement with the government, is not prohibited from testifying. On the contrary, the testimony of an alleged accomplice may, by itself, support a guilty verdict. You should receive this type of testimony with caution, however, and weigh it with great care. As with all witnesses, you are the judges of the facts which you find by deciding the credibility of each witness. The fact that an accomplice has entered a guilty plea to the offense charged is not evidence of the guilt of any other person, including Mr. Breitag.

## INSTRUCTION NO. 10

### **Voluntariness of Statement by Defendant**

Evidence that Mr. Breitag made a statement after the commission of crimes charged in this case but not made in court should always be considered by you with caution and weighed with care. Any such statement should be disregarded entirely unless you find by a preponderance of all the evidence that the statement was made knowingly and voluntarily.

In determining whether any such statement was knowingly and voluntarily made you should, for example, consider the age, gender, training, education, occupation, and physical and mental condition of the person making the statement, and any evidence concerning his treatment while under interrogation if the statement was made in response to questioning by government officials, and all other circumstances in evidence surrounding the making of the statement.

If, after considering all this evidence, you conclude by a preponderance of the evidence that the defendant's statement was made knowingly and voluntarily, you may give such weight to the statement as you feel it deserves under all the circumstances.

## INSTRUCTION NO. 11

### **Absence of Witness**

If it is peculiarly within the power of either the government or the defense to produce a witness who could give relevant testimony on an issue in the case, failure to call that witness may give rise to an inference that this testimony would have been unfavorable to that party. No such conclusion should be drawn by you, however, with regard to a witness who is equally available to both parties or where the testimony of that witness would be merely repetitive or cumulative.

You must always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

## INSTRUCTION NO. 12

### **Expert Witness**

Scientific, technical, or other specialized knowledge may assist you in understanding the evidence or in determining a fact in issue. A witness who has knowledge, skill, experience, training or education, may testify and state an opinion concerning such matters.

You are not required to accept such an opinion. You should consider opinion testimony just as you consider other testimony in this trial. Give opinion testimony as much weight as you think it deserves, considering the education and experience of the witness, the soundness of the reasons given for the opinion, and other evidence in the trial.

INSTRUCTION NO. 13

**Summaries and Charts – Not Received in Evidence**

Certain charts and summaries may be [have been] shown to you to help explain the evidence in this case. Their only purpose is to help explain the evidence. These charts and summaries are not evidence or proof of any facts.

## INSTRUCTION NO. 14

### **Jan Swart Deposition Testimony**

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded. When a person is unavailable to testify at trial, the deposition of that person may be used at trial.

In this case, the deposition of Jan Swart was taken on December 19, 2008. That deposition was recorded on digital video. The video recording of Jan Swart's deposition testimony is being shown to you because Jan Swart resides outside the country and is unavailable to testify at trial. You should consider deposition testimony, presented to you in court in lieu of live testimony, in the same way as if the witness had been present to testify.

## INSTRUCTION NO. 15

### **The Charges**

Mr. Breitag is charged with three separate crimes, or “Counts”:

Count One charges Mr. Breitag with unlawful importation of a leopard skin into the United States in violation of Section 545 of title 18 of the United States Code, entitled “Smuggling goods into the United States.” The government contends Mr. Breitag violated Section 545 by knowingly importing a leopard hide into the United States contrary to law by not first obtaining a valid import permit for the leopard hide from the United States Fish and Wildlife Service. Alternatively, the government contends Mr. Breitag violated Section 545 by aiding and abetting someone to import the leopard hide in the same unlawful way.

Counts Two and Three charge Mr. Breitag with separate violations of the Lacey Act, codified at Title 16 of the United States Code, Sections 3372 and 3373, which prohibits the making or submission of a false record or label for merchandise, like a leopard skin, to be imported into the United States from a foreign country. Specifically, in Count Two, the government contends Mr. Breitag submitted a permit application falsely stating he had hunted and killed a leopard in Zimbabwe when he actually hunted and killed the leopard in South Africa. In Count Three, the government contends Mr. Breitag submitted a permit application, or alternatively that Mr. Breitag aided and abetted someone else to submit a permit application, that falsely reported that another individual had hunted and killed the leopard in Zimbabwe, when it was actually he who hunted and killed the leopard in South Africa.

## INSTRUCTION NO. 16

### **Introduction to Import Requirements - what is “Contrary to Law” - the “Convention on International Trade in Endangered Species of Wild Fauna and Flora”**

Because you will hear a lot about permitting requirements and what actions by wild game hunters are or are not “contrary to law,” it is important that you understand what that law is. In this case, the legality or illegality of Mr. Breitag’s actions is governed by an international treaty, which the United States has signed and Congress has ratified, which is implemented by the government through the Endangered Species Act of 1973. I will now give you an overview of this treaty, which is entitled the “Convention on International Trade in Endangered Species of Wild Fauna and Flora” but called the “CITES treaty” for short:

1. The United States, South Africa, Zimbabwe, and approximately 170 other countries are members of a multilateral treaty called the “Convention on International Trade in Endangered Species of Wild Fauna and Flora.” The Convention, also known as the CITES treaty, requires its members to regulate the international trade in species considered at risk of over-exploitation. By agreement of the parties, such species are listed on “appendices,” based on the level of protection needed. International trade in species listed on these appendices (and their body parts or products made therefrom) is monitored and regulated by permits and quotas. The permit restrictions apply to live and dead specimens, as well as the skins, parts and products made in whole or in part from a listed species.

2. The CITES treaty is implemented in the United States by the Endangered Species Act of 1973, which directs the U.S. Fish and Wildlife Service to administer the treaty. The Endangered Species Act provides, in relevant part, at Title 16, United States Code, Section 1538(c) as follows:

(1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention. . . .

“Trade,” in this context, includes importation into the United States.

3. Wildlife species in danger of extinction and which are, or may be, affected by trade (tigers, pandas, elephants and all species of sea turtles, for example) are listed on Appendix I of CITES. At all times relevant to this case, the leopard (Panthera pardus) has been listed on Appendix I of the CITES treaty. CITES allows very limited trade in Appendix I species for scientific and research purposes. International trade in Appendix I species for “primarily commercial purposes” is prohibited.

4. Federal regulations provide that in order to import Appendix I species into the United States from a foreign country, the importer must first obtain a United States import permit from the U.S. Fish and Wildlife Service. The importer must also obtain a valid export permit issued by the country of origin, or a valid re-export certificate issued by the country of re-export if the Appendix I species was sent somewhere else from the country

of origin before being imported to the United States.

5. Federal regulations require that, in order to obtain a CITES import permit for a sport-hunted leopard, a hunter must submit an application, online or on paper, to the Fish and Wildlife Service's Division of Management Authority, before or after the hunt, which identifies the hunter, the number of leopards (up to two per year) to be hunted (or which were hunted), and the country and place (area, region, or ranch and nearest city) where each leopard was, or will be, hunted. The applicant must certify that he or she has obtained all of the required foreign government approvals to conduct the proposed activity. The applicant must sign and date the application and certify its completeness and accuracy.

6. Regulations further require that the Division of Management Authority confirm the information contained in CITES import permit applications for obvious illegality, and to confirm that the applicant is not legally ineligible to obtain a CITES import permit. The Division attempts to determine that the importation of the wildlife will not be detrimental to the survival of the species. For leopards, this means certifying that the yearly export quota for sport-hunted leopards in the relevant country will not be exceeded if the permit is granted. If these findings are satisfactory, the Division issues a CITES import permit authorizing the applicant to import the animal or animal part from the country where it was hunted (Country of Origin) as listed in the application.

7. Regulations also require that the terms of the import permit (such as date and time of the hunt, country of origin for the CITES-protected animal, number and kinds of

animals that may be imported, and associated activities) be strictly or narrowly interpreted. That means import permits authorize only the specifically enumerated things they describe; they do not authorize “similar” or “related” matters outside the specific permit language.

8. The CITES import permit is often issued before the hunt and does not confer on the permit holder permission to hunt the animal in the foreign country; nor does it affect another country’s authority to issue or deny an export permit. Each import permit for a sport-hunted leopard further requires that a metal self-locking tag be affixed to the leopard hide “which indicates the state of export, the number of the specimen in relation to the annual quota, and the calendar year to which the quota applies.” The hide must also be accompanied by a valid foreign export permit or re-export certificate from the country of shipment which references the information on the locking metal tag.

9. Federal regulations also provide that a CITES import permit is valid for one year from the date of issuance, but may be renewed by submitting an application for such renewal within 30 days of the permit’s expiration. Renewal permit applications also require the applicant to confirm that the identification of the hunter, CITES-protected species to be hunted, and the Country of Origin for the animal are true and correct. If the information provided in the original application is no longer correct, the applicant must provide updated information.

**INSTRUCTION NO. 17**

**COUNT ONE - 18 U.S.C. § 545  
Unlawful Importation - Smuggling goods into the United States**

To find Mr. Breitag guilty on Count One of the Indictment for unlawful importation, you must find that the government has proved each of the following elements beyond a reasonable doubt:

*First:* Mr. Breitag knowingly imported or brought into the United States a leopard hide;

*Second:* the importing of the leopard hide was “contrary to law” because Mr. Breitag did not first obtain a valid CITES import permit for the leopard hide issued by the United States Fish and Wildlife Service; and

*Third:* Mr. Breitag knew the importation was “contrary to law.”

If you unanimously find from your consideration of all the evidence that the government has proved each of these essential elements beyond a reasonable doubt, then you must find Mr. Breitag guilty of the offense charged in Count One.

If you find the government has failed to prove any one or more of these essential elements beyond a reasonable doubt, then you must find Mr. Breitag not guilty of the offense charged in Count One.

INSTRUCTION NO. 18

**Count Two - Lacey Act False Labeling - 16 U.S.C. § 3372**

In order to find Mr. Breitag guilty of Count Two of the Indictment for false labeling or identification of wildlife intended to be imported to the United States from a foreign country, you must find that the government has proved each of the following elements beyond a reasonable doubt:

*First:* Mr. Breitag knowingly made or submitted a false CITES Import Permit Application form stating he had hunted and killed a leopard in Zimbabwe when, in fact, he had hunted and killed the leopard in South Africa; and

*Second:* The leopard hide had been or was intended to be imported to the United States from a foreign country.

If you unanimously find from your consideration of all the evidence that the government has proved both of these essential elements beyond a reasonable doubt, then you must find Mr. Breitag guilty of the offense charged in Count Two.

If you find the government has failed to prove one or both of these essential elements beyond a reasonable doubt, then you must find Mr. Breitag not guilty of the offense charged in Count Two.

## INSTRUCTION NO. 19

### Count Three - Lacey Act False Labeling - 16 U.S.C. § 3373

In order to find Mr. Breitag guilty of Count Three of the Indictment for false labeling or identification of wildlife intended to be imported to the United States from a foreign country, you must find that the government has proved each of the following elements beyond a reasonable doubt:

*First:* Mr. Breitag knowingly made or submitted a false CITES Import Permit Application form stating that another individual had hunted and killed a leopard in Zimbabwe when, in fact, Mr. Breitag had hunted and killed the leopard in South Africa; and

*Second:* The leopard hide had been or was intended to be imported to the United States from a foreign country.

If you unanimously find from your consideration of all the evidence that the government has proved both of these essential elements beyond a reasonable doubt, then you must find Mr. Breitag guilty of the offense charged in Count Three.

If you find the government has failed to prove one or both of these essential elements beyond a reasonable doubt, then you must find Mr. Breitag not guilty of the offense charged in Count Three.

## **INSTRUCTION NO. 20**

### **“Knowingly” - Defined**

An act is done knowingly if a person is aware of the act and does not act through ignorance, mistake or accident. You may consider evidence of Mr. Breitag’s words, acts, or omissions, along with all the other evidence, in deciding whether he acted knowingly.

The knowledge that a person possesses at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind. In determining the issue of what a person knew or what a person intended at a particular time, you may consider any statements made or acts done or omitted by that person and all other facts and circumstances received in evidence which may aid in your determination of that person’s knowledge.

Although knowledge on the part of Mr. Breitag cannot be established merely by demonstrating that he was negligent, careless or foolish; knowledge can be inferred if Mr. Breitag deliberately blinded himself to the existence of a fact.

You may also infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts to find from the evidence received during this trial.

## **INSTRUCTION NO. 21**

### **“False” - Defined**

The word “false” means contrary to the truth. As used in the law, the word “false” generally means more than an innocent mistake or a simple error of fact.

A statement or representation is “false” if it was untrue when made and was then known to be untrue by the person making it or causing it to be made. A statement or representation is “false” if it was untrue when made and was made or caused to be made with reckless indifference as to its truth or falsity.

**INSTRUCTION NO. 22**

**“On or About”**

Mr. Breitag is charged with having committed a crime “on or about” a certain date. This means that the government must prove beyond a reasonable doubt that Mr. Breitag committed the crimes reasonably near the dates charged.

## INSTRUCTION NO. 23

### **Aiding and Abetting a Crime - 18 U.S.C. § 2**

Counts One and Three of the Indictment also charge a violation of Title 18 of the United States Code, Section 2, which provides that: “Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” This law makes it a crime intentionally to help someone else commit a crime.

To find Mr. Breitag guilty of a crime under the aiding and abetting statute, 18 U.S.C. § 2, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

*First:* someone other than Mr. Breitag committed the charged crime, and

*Second:* Mr. Breitag intentionally associated himself in some way with the crime and intentionally participated in it as he would in something he wished to bring about. This means that the government must prove that Mr. Breitag consciously shared the other person’s knowledge of the underlying criminal act and intended to help him.

Mr. Breitag need not perform the underlying criminal act, be present when it is performed, or be aware of the details of its commission to be guilty of aiding and abetting. But a general suspicion that an unlawful act may occur or that something criminal is happening is not enough. Mere presence at the scene of a crime and knowledge that a crime is being committed are also not sufficient to establish aiding and abetting.

## INSTRUCTION NO. 24

### **Aiding and Abetting - Unanimity - Explained**

Count One charges Mr. Breitag with having unlawfully imported a leopard hide himself, but, as you have just heard, in the alternative charges that if someone else actually unlawfully imported the leopard hide, that Mr. Breitag is guilty of the crime as an aider and abetter. Similarly, Count Three of the Indictment charges Mr. Breitag with a Lacey Act violation, but in the alternative charges that if someone else actually committed the violation, that Mr. Breitag is guilty of the crime as an aider and abetter.

The government is not required to prove all of the means or methods it alleges constitute crimes in Counts One and Three. However, each of you must agree with each of the other jurors that the same means or methods alleged in each Count were, in fact, engaged in or employed by Mr. Breitag in committing the crime charged in that Count. For example, you cannot base a conviction on Count One based on mixed findings where some of you find Mr. Breitag committed the crime and others find he aided and abetted the crime and together you say he is guilty of the crime.

In other words, you need not unanimously agree on every means or method alleged, but, in order to convict, you must unanimously agree upon at least one such means or method as one that Mr. Breitag engaged in.

INSTRUCTION NO. 25

**Consider each count separately**

Each Count is a separate crime. You must therefore consider each Count, and the evidence pertaining to it, separately. The fact that you may find Mr. Breitag guilty or not guilty as to one of the Counts should not control your verdict as to any other count.

INSTRUCTION NO. 26

**Consider only crime charged**

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or crime not charged in the Indictment.

It is not up to you to decide whether anyone who is not on trial in this case should be prosecuted for the crime charged. The fact that another person *also* may be guilty is no defense to a criminal charge.

The question of the possible guilt of others should not enter your thinking as you decide whether this defendant has been proved guilty of the crime charged.

INSTRUCTION NO. 27

**Punishment**

If you find Mr. Breitag guilty, it will be my duty to decide what the punishment will be as provided by law. You should not discuss or consider any possible punishment in any way while deciding your verdict.

## INSTRUCTION NO. 28

### **Jury - Deliberations**

After the parties have made their closing arguments and I have instructed you for the final time, a court official will escort you to the jury room so you can begin your deliberations. You will have a copy of the instructions and verdict form that I will have just read, and any exhibits admitted into evidence will also be placed in the jury room for your review.

When you go to the jury room, you must elect your Presiding Juror. He or she will preside over your deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdicts, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it with your fellow jurors, and listened to the views of your fellow jurors. I offer some suggestions on how you might do this in the next jury instruction, entitled “Jury - The Deliberations Process.”

One thing you must do in your deliberations is follow these jury instructions and the verdict form. Not only will your deliberations be more productive if you understand the legal principles on which any verdict must be based, but for a verdict to be valid, you must follow the instructions throughout your deliberations. Remember, you are the judges of the facts, and you are bound by your oath to follow the law stated in these instructions. Your deliberations will be secret. You will never have to explain your verdicts to anyone.

If you need to communicate with me during your deliberations, the Presiding Juror should write a message and give it to the Court Security Officer. I will reply in writing or bring you back into the court to respond to your message. Under no circumstances should you reveal to me, the Court Security Officer or anyone else not on the jury where you stand or what your vote might be until you have reached your verdicts or I have discharged you.

Please bear in mind that a response takes considerable time and effort. I must first notify the attorneys to return to court. Then I must confer with them, consider their arguments and, decide upon the correct answer. In some instances further research might be required.

A verdict form has been prepared for your convenience. The Presiding Juror will write the unanimous answers of the jury in the spaces provided on the verdict form. At the conclusion of your deliberations, the Presiding Juror should date and sign the verdict form, and then all the other jurors should sign the verdict form. The Presiding Juror should then advise the Court Security Officer stationed outside the jury room that you have reached your verdicts.

## INSTRUCTION NO. 29

### **Jury - The Deliberations Process**

Once you have elected your Presiding Juror as directed by the previous instruction, you are free to proceed as you agree is appropriate. Therefore, I am not directing you how to proceed, but I offer the following suggestions that other juries have found helpful so that you can proceed in an orderly fashion, allowing full participation by each juror, and arrive at verdicts that are satisfactory to each of you.

First, it is the responsibility of the Presiding Juror to encourage good communication and participation by all jurors and to maintain fairness and order. Your Presiding Juror should be willing and able to facilitate productive discussions even when disagreements and controversy arise.

Second, the Presiding Juror should let each of you speak and be heard before expressing his or her own views.

Third, the Presiding Juror should never attempt to promote nor permit anyone else to promote his or her personal opinions by coercion or intimidation or bullying of others.

Fourth, the Presiding Juror should make certain that the deliberations are not rushed to reach a conclusion.

If the Presiding Juror you select does not meet these standards, he or she should voluntarily step down or be replaced by a majority vote.

After you select a Presiding Juror you should consider electing a secretary who will tally the votes, help keep track of who has or hasn't spoken on the various issues, make

certain that all of you are present whenever deliberations are under way and otherwise assist the Presiding Juror.

Some juries are tempted to start by holding a preliminary vote on the case to “see where we stand.” It is most advisable, however, that no vote be taken before a full discussion is had on the issue to be voted on, otherwise you might lock yourself into a certain view before considering alternative and possibly more reasonable interpretations of the evidence. Experience has also shown that such early votes frequently lead to disruptive, unnecessarily lengthy, inefficient debate and ineffective decision-making. Instead, I suggest the Presiding Juror begin your deliberations by directing the discussion to establishing informal ground rules for how you will proceed. These rules should assure that you will focus upon, analyze and evaluate the evidence fairly and efficiently and that the viewpoints of each of you are heard and considered before any decisions are made. No one should be ignored. You may agree to discuss the case in the order of the questions presented in the special verdict form or in chronological order or according to the testimony of each witness. Whatever order you select, however, it is advisable to be consistent and not jump from one topic to another.

To move the process of deliberation along in the event you reach a controversial issue, it is wise to pass it temporarily and move on to the less controversial ones and then come back to it. You should then continue through each issue in the order you have agreed upon unless a majority of you agrees to change the order.

It is very helpful, but certainly not required of you, that all votes be taken by secret

ballot. This will help you focus on the issues and not be overly influenced by personalities. Each of you should also consider any disagreement you have with another juror or jurors as an opportunity for improving the quality of your decisions and therefore should treat each other with respect. Any differences in your views should be discussed calmly and, if a break is needed for that purpose, it should be taken.

Each of you should listen attentively and openly to one another before making any judgment. This is sometimes called “active listening” and it means that you should not listen with only one ear while thinking about a response. Only after you have heard and understood what the other person is saying should you think about a response. Obviously, this means that, unlike TV talk shows, you should try very hard not to interrupt. If one of your number is going on and on, it is the Presiding Juror who should suggest that the point has been made and it is time to hear from someone else.

You each have a right to your individual opinions, but you should be open to persuasion. When you focus your attention and best listening skills, others will feel respected and, even while they may disagree, they will respect you. It helps if you are open to the possibility that you might be wrong or at least that you might change your mind about some issues after listening to other views.

Misunderstanding can undermine your efforts. Seek clarification if you do not understand or if you think others are not talking about the same thing. From time to time the Presiding Juror should set out the items on which you agree and those on which you have not yet reached agreement.

In spite of all your efforts, it is indeed possible that serious disagreements may arise. In that event, recognize and accept that “getting stuck” is often part of the decision-making process. It is easy to fall into the trap of believing that there is something wrong with someone who is not ready to move toward what may be an emerging decision. Such a belief is not helpful. It can lead to focusing on personalities rather than the issues. It is best to be patient with one another. At such times slower is usually faster. There is a tendency to set deadlines and seek to force decisions. Providing a break or more time and space, however, often helps to shorten the overall process.

You may wish from time to time to express your mutual respect and repeat your resolve to work through any differences. With such a commitment and mutual respect, you will most likely render verdicts that leave each of you satisfied that you have indeed rendered justice.