MANUAL OF

MODEL CRIMINAL JURY INSTRUCTIONS

FOR THE
DISTRICT COURTS OF THE
NINTH CIRCUIT

Prepared by the Ninth Circuit
Jury Instructions Committee

2010 Edition

Last updated 3/2017

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INTRODUCTION TO 2010 EDITION

This Manual of Model Criminal Jury Instructions ("Manual") has been prepared to help judges communicate more effectively with juries.

The instructions in this Manual are models. They are not mandatory, and must be reviewed carefully before use in a particular case. They are not a substitute for the individual research and drafting that may be required in a particular case, nor are they intended to discourage judges from using their own forms and techniques for instructing juries.

In addition to its ongoing consideration of legislative developments and appellate court decisions that may impact these model instructions, the Jury Instructions Committee (the Committee) welcomes suggestions from judges, staff and practitioners about possible revisions, additions and deletions. After careful assessment and research, the Committee updates and revises instructions from time to time as necessary. Revisions are available online. They are later compiled and published in the printed version of the Manual. The Committee strongly recommends that the online version of any instruction be consulted to be sure an up to date instruction is being considered. The Committee encourages users of this book to make suggestions for further revisions and updates.

This 2010 edition incorporates new and modified instructions. However, the print publication of the Manual necessarily presents a snap-shot of an ongoing research and drafting process. Accordingly, even the most recently dated edition of the Manual does not guarantee that one is using instructions that are up to date. The entire publication and any later changes can be found at the Ninth Circuit's website at this link: http://www.ce9.uscourts.gov/crim. This 2010 edition is current as to instructions approved as of July 2010. To assist users, the Committee has included a table listing the old instruction numbers in the 2003 edition and the corresponding numbers in the 2010 edition.

These model instructions have been reviewed by various members of the federal bench and bar. The Committee extends its thanks to those who reviewed and commented on various parts of the book. The Committee also extends its thanks to former Committee members, Chief District Judge Roger L. Hunt and Judge Stephen G. Larson, for their contributions to this edition and to Ninth Circuit Office of the Circuit Executive staff member Debra Landis for her invaluable diligence, grace and expertise. In addition, the Committee acknowledges with gratitude the singular contributions of Joseph Franaszek, Esq. For many years, Mr. Franaszek has worked with the Committee on a voluntary basis, providing careful research and drafting assistance, as well as a unique "institutional memory" that enables the changing membership of the Committee to understand how existing instructions came to be formulated. Mr. Franaszek has performed an invaluable service to the bench and bar, and has earned the Committee's enduring respect.

CAVEAT

These model jury instructions are written and organized by judges who are appointed to the Ninth Circuit Jury Instructions Committee by the Chief Circuit Judge.

The Ninth Circuit Court of Appeals does not adopt these instructions as definitive. Indeed, occasionally the correctness of a given instruction may be the subject of a Ninth Circuit opinion.

Ninth Circuit Jury Instructions Committee
July 2010

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CRIMINAL INSTRUCTIONS

1. PRELIMINARY INSTRUCTIONS

Instruction

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1.1 DUTY OF JURY

Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. Please do not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be—that is entirely up to you.

Comment

See generally JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 3.3 (2013).

1.2 THE CHARGE—PRESUMPTION OF INNOCENCE

This is a criminal case brought by the United States government. The government charges the defendant with [*specify crime[s] charged*]. The charge[s] against the defendant [is] [are] contained in the indictment. The indictment simply describes the charge[s] the government brings against the defendant. The indictment is not evidence and does not prove anything.

The defendant has pleaded not guilty to the charge[s] and is presumed innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. In addition, the defendant has the right to remain silent and never has to prove innocence or to present any evidence.

[In order to help you follow the evidence, I will now give you a brief summary of the elements of the crime[s] which the government must prove to make its case: [*supply brief statement of elements of crime[s]*].]

Comment

"Although the Constitution does not require jury instructions to contain any specific language, the instructions must convey both that a defendant is presumed innocent until proven guilty and that he may only be convicted upon a showing of proof beyond a reasonable doubt." *Gibson v. Ortiz*, 387 F.3d 812, 820 (9th Cir. 2004), *overruled on other grounds*, *Byrd v. Lewis* 566 F.3d 855 (9th Cir. 2009) (citation omitted). "Any jury instruction that reduces the level of proof necessary for the Government to carry its burden is plainly inconsistent with the constitutionally rooted presumption of innocence." *Id.* The words "unless and until" adequately inform the jury of the presumption of innocence. *United States v. Lopez*, 500 F.3d 840, 847 (9th Cir. 2007).

1.3 WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

(1) the sworn testimony of any witness; [and]

(2) the exhibits which are received in evidence[.] [; and]

[(3) any facts to which the parties agree.]

Comment

"When parties have entered into stipulations as to material facts, those facts will be deemed to have been conclusively established." *United States v. Houston,* 547 F.2d 104, 107 (9th Cir. 1976) (citation omitted).

1.4 WHAT IS NOT EVIDENCE

The following things are *not* evidence, and you must not consider them as evidence in deciding the facts of this case:

(1) statements and arguments of the attorneys;

(2) questions and objections of the attorneys;

(3) testimony that I instruct you to disregard; and

(4) anything you may see or hear when the court is not in session even if what you see or hear is done or said by one of the parties or by one of the witnesses.

Comment

The duty to make objections and the effect of rulings on objections are the subject of a separate instruction. *See* Instruction 1.6 (Ruling on Objections). *See also* Instruction 3.7 (What Is Not Evidence) and the Comment to that instruction.

1.5 DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Comment

"It is the exclusive function of the jury to weigh the credibility of witnesses, resolve evidentiary conflicts and draw reasonable inferences from proven facts. . . . Circumstantial and testimonial evidence are indistinguishable insofar as the jury fact-finding function is concerned, and circumstantial evidence can be used to prove any fact." *United States v. Ramirez-Rodriquez*, 552 F.2d 883, 884 (9th Cir. 1977) (quoting *United States v. Nelson*, 419 F.2d 1237, 1239-41 (9th Cir. 1969)). *See also United States v. Kelly*, 527 F.2d 961, 965 (9th Cir. 1976); and *Payne v. Borg*, 982 F.2d 335, 339 (9th Cir. 1992) (citing *United States v. Stauffer,* 922 F.2d 508, 514 (9th Cir. 1990)).

The Committee believes that an instruction on circumstantial evidence generally eliminates the need to explain the same principle in terms of inferences, and that matters such as flight, resistance to arrest, etc., are generally better left to argument of counsel as examples of circumstantial evidence from which the jury may find another fact. *See United States v. Beltran–Garcia,* 179 F.3d 1200, 1206 (9th Cir. 1999) (in discussing jury instruction regarding inferring intent to possess for distribution from quantity of drugs, the Ninth Circuit stated that "[a]lthough the instructions in this case were not delivered in error, we do not hesitate to point out the 'dangers and inutility of permissive inference instructions.'" (citations omitted)), *cert. denied,* 528 U.S. 1097 (2000). *See also United States v. Rubio–Villareal*, 967 F.2d 294, 300 (9th Cir. 1992) (en banc) (disapproved instructing the jury that knowledge of the presence of drugs in a vehicle may be inferred from the defendant being the driver).

It may be helpful to include an illustrative example in the instruction:

> By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned-on garden hose, may provide an explanation for the water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

1.6 RULING ON OBJECTIONS

There are rules of evidence that control what can be received in evidence. When a lawyer asks a question or offers an exhibit in evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, or the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer would have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence that I told you to disregard.

1.7 CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the witness's opportunity and ability to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case, if any;

(5) the witness's bias or prejudice, if any;

(6) whether other evidence contradicted the witness's testimony;

(7) the reasonableness of the witness's testimony in light of all the evidence; and

(8) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it. What is important is how believable the witnesses are, and how much weight you think their testimony deserves.

Comment

The Committee recommends that the jurors be given some guidelines for determining credibility at the beginning of the trial so that they will know what to look for when witnesses are testifying.

See also Instruction 3.9 (Credibility of Witnesses) for the corresponding instruction to be given at the end of the case.

Approved 1/2016

1.8 CONDUCT OF THE JURY

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

> Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, via text messaging, or any Internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of social media. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, the media or press, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case, and how long you expect the trial to last. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.
>
> Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it[, although I have no information that there will be news reports about this case]; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect each party's right to have this case decided only on evidence that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through the trial process. If you do any research or investigation outside the courtroom, or gain any information through improper communications,

then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case based on information not presented in court, you will have denied the parties a fair trial. Remember, you have taken an oath to follow the rules, and it is very important that you follow these rules.

A juror who violates these restrictions jeopardizes the fairness of these proceedings[, and a mistrial could result that would require the entire trial process to start over]. If any juror is exposed to any outside information, please notify the court immediately.

Comment

This instruction has been updated specifically to instruct jurors against accessing electronic sources of information and communicating electronically about the case, as well as to inform jurors of the potential consequences if a juror violates this instruction. An abbreviated instruction should be repeated before the first recess, and as needed before other recesses. *See* Instruction 2.1 (Cautionary Instruction—First Recess). The practice in federal court of instructing jurors not to discuss the case until deliberations is widespread. *See, e.g., United States v. Pino-Noriega*, 189 F.3d 1089, 1096 (9th Cir. 1999).

Approved 6/2016

1.9 NO TRANSCRIPT AVAILABLE TO JURY

At the end of the trial you will have to make your decision based on what you recall of the evidence. You will not have a written transcript of the trial. I urge you to pay close attention to the testimony as it is given.

Comment

An earlier version of this instruction was modified so as to delete the suggestion that read backs are either unavailable or highly inconvenient. The practice of discouraging read backs has been criticized in *United States v. Damsky*, 740 F.2d 134, 138 (2d Cir. 1984). *See also* JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 5.1.C (2013).

1.10 TAKING NOTES

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note-taking distract you from being attentive. When you leave court for recesses, your notes should be left in the [courtroom] [jury room] [envelope in the jury room]. No one will read your notes.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

Comment

It is well settled in this circuit that the trial judge has discretion to allow jurors to take notes. *United States v. Baker*, 10 F.3d 1374, 1403 (9th Cir. 1993). *See also* JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 3.4 (2013).

1.11 OUTLINE OF TRIAL

The next phase of the trial will now begin. First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The government will then present evidence and counsel for the defendant may cross-examine. Then, if the defendant chooses to offer evidence, counsel for the government may cross-examine.

After the evidence has been presented, [I will instruct you on the law that applies to the case and the attorneys will make closing arguments] [the attorneys will make closing arguments and I will instruct you on the law that applies to the case].

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

1.12 JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION

[A language] [Languages] other than English will be used for some evidence during this trial. [When a witness testifies in another language, the witness will do so through an official court interpreter.] [When recorded evidence is presented in another language, there will be an official court translation of the recording.]

The evidence you are to consider and on which you must base your decision is only the English-language [interpretation] [translation] provided through the official court [interpreters] [translators]. Although some of you may know the non-English language used, you must disregard any meaning of the non-English words that differs from the official [interpretation] [translation].

[You must not make any assumptions about a witness or a party based solely upon the use of an interpreter to assist that witness or party.]

Comment

When "a district court is faced with a jury that includes one or more bilingual jurors and the taped conversations are in a language other than English, restrictions on the jurors who are conversant with the foreign tongue is not only appropriate, it may in fact be essential. Where the translation of a portion of the tape is disputed, both sides have an interest in what information is given to the jury. The rules of evidence and the expert testimony would prove of little use if a self-styled expert in the deliberations were free to give his or her opinion on this crucial issue, unknown to the parties." *United States v. Fuentes-Montijo*, 68 F.3d 352, 355 (9th Cir. 1995). *See also United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998). As to the qualification and designation of interpreters in federal courts, *see* 28 U.S.C. § 1827.

See Instructions 2.8 (Transcript of Recording in Foreign Language) and 2.9 (Foreign Language Testimony) concerning foreign language transcripts and testimony to be given during trial, and Instruction 3.19 (Jury to Be Guided by Official English Language Translation/Interpretation) to be given at the end of the case.

1.13 SEPARATE CONSIDERATION FOR EACH DEFENDANT

Although the defendants are being tried together, you must give separate consideration to each defendant. In doing so, you must determine which evidence in the case applies to each defendant, disregarding any evidence admitted solely against some other defendant[s]. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant[s].

Comment

See Instructions 3.12 (Separate Consideration of Single Count—Multiple Defendants) and 3.13 (Separate Consideration of Multiple Counts—Multiple Defendants) for use at the end of the case.

2. INSTRUCTIONS IN THE COURSE OF TRIAL

Instruction

2.1 Cautionary Instruction—First Recess
2.2 Bench Conferences and Recesses
2.3 Stipulated Testimony
2.4 Stipulations of Fact
2.5 Judicial Notice
2.6 Deposition as Substantive Evidence
2.7 Transcript of Recording in English
2.8 Transcript of Recording in Foreign Language
2.8A Disputed Transcript of Recording in Foreign Language
2.9 Foreign Language Testimony
2.10 Other Crimes, Wrongs or Acts of Defendant
2.11 Evidence for Limited Purpose
2.12 Photos of Defendant, "Mugshots"
2.13 Dismissal of Some Charges Against Defendant
2.14 Disposition of Charge Against Codefendant
2.15 Defendant's Previous Trial

2.1 CAUTIONARY INSTRUCTION—FIRST RECESS

We are about to take our first break. Remember, until the trial is over, do not discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else, and do not allow others to discuss the case with you. This includes discussing the case in Internet chat rooms or through Internet blogs, Internet bulletin boards, emails or text messaging. If anyone tries to communicate with you about the case, please let me know about it immediately. Do not read, watch, or listen to any news reports or other accounts about the trial or anyone associated with it, including any online information. Do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials, and do not make any investigation about the case on your own. Finally, keep an open mind until all the evidence has been presented and you have heard the arguments of counsel, my instructions on the law, and the views of your fellow jurors.

If you need to speak with me about anything, simply give a signed note to the [marshal] [bailiff] [clerk] to give to me.

2.2 BENCH CONFERENCES AND RECESSES

From time to time during the trial, it may become necessary for me to take up legal matters with the attorneys privately, either by having a conference at the bench or, when necessary, by calling a recess.

We will do what we can to keep the number and length of these conferences to a minimum. I may not always grant an attorney's request for a conference.

Comment

Conducting bench conferences is within the discretion of the court. Regarding the defendant's right to be present at bench conferences, *see* JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 1.6 (2013).

2.3 STIPULATED TESTIMONY

The parties have agreed what [*name of witness*]'s testimony would be if called as a witness. You should consider that testimony in the same way as if it had been given here in court.

Comment

There is a difference between stipulating that a witness would give certain testimony and stipulating that the facts to which a witness might testify are true. *United States v. Lambert,* 604 F.2d 594, 595 (8th Cir. 1979); *United States v. Hellman,* 560 F.2d 1235, 1236 (5th Cir. 1977). On the latter, *see* Instruction 2.4 (Stipulations of Fact).

2.4 STIPULATIONS OF FACT

The parties have agreed to certain facts that have been stated to you. You should therefore treat these facts as having been proved.

Comment

"Stipulations freely and voluntarily entered into in criminal trials are as binding and enforceable as those entered into in civil actions." *United States v. Gwaltney,* 790 F.2d 1378, 1386 (9th Cir. 1986). "When parties have entered into stipulations as to material facts, those facts will be deemed to have been conclusively established." *United States v. Houston,* 547 F.2d 104, 107 (9th Cir. 1976) (citations omitted). "[W]hen a stipulation to a crucial fact is entered into the record in open court in the presence of the defendant, and is agreed to by defendant's acknowledged counsel, the trial court may reasonably assume that the defendant is aware of the content of the stipulation and agrees to it through his or her attorney. Unless a criminal defendant indicates objection at the time the stipulation is made, he or she is ordinarily bound by such stipulation." *United States v. Ferreboeuf*, 632 F.2d 832, 836 (9th Cir. 1980). In any event, a trial judge need not make as probing an inquiry as is required by Fed. R. Crim. P. 11 when considering whether a defendant's factual stipulation is knowing and voluntary. *United States v. Miller*, 588 F.2d 1256, 1263-64 (9th Cir. 1978). *See also Old Chief v. United States*, 519 U.S. 172, 186 (1997) (acceptance of a stipulation regarding prior conviction may be appropriate even where government objects under Fed. R. Evid. 403); JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 1.1.B (2013).

2.5 JUDICIAL NOTICE

The court has decided it is not necessary to receive evidence of the fact that [*insert fact noticed e.g.*, the city of San Francisco is north of the city of Los Angeles] [because this fact is of such common knowledge]. You may, but are not required to, accept this fact as true.

Comment

An instruction regarding judicial notice should be given at the time notice is taken. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Although the court must instruct a jury in a civil case to accept as conclusive any fact judicially noticed, "[i]n a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Fed. R. Evid. 201(g). Thus, in *United States v. Chapel*, 41 F.3d 1338 (9th Cir. 1994), the trial court correctly took judicial notice of a bank's FDIC status because the evidence established its status "was not subject to reasonable dispute." *Id*. at 1342. Moreover, the court did not "usurp the jury's fact-finding role by taking judicial notice" when it instructed the jury that "you may accept the court's declaration as evidence and regard as proved the fact or event which has been judicially noticed. You are not required to do so, however, since you are the sole judges of the facts." *Id.*

2.6 DEPOSITION AS SUBSTANTIVE EVIDENCE

When a person is unavailable to testify at trial, the deposition of that person may be used at the trial. 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.

The deposition of [*name of witness*], which was taken on [*date*], is about to be presented to you. You should consider deposition testimony in the same way that you consider the testimony of the witnesses who have appeared before you. [Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.]

Comment

Use this instruction only when the court concludes testimony by deposition may be received as substantive evidence in light of the rules of evidence and the defendant's confrontation rights. The Committee recommends that it be given immediately before a deposition is read. The bracketed last sentence of the instruction would not be used when the deposition is presented by video or audio recording.

See Fed. R. Crim. P. 15.

2.7 TRANSCRIPT OF RECORDING IN ENGLISH

You are about to [hear] [watch] a recording that has been received in evidence. A transcript of the recording is being provided to help you identify speakers and to help you decide what the speakers say. Remember that the recording is the evidence, not the transcript. If you hear something different from what appears in the transcript, what you heard is controlling. Listen carefully; the transcript will not be available during your deliberations.

Comment

See United States v. Franco, 136 F.3d 622, 626 (9th Cir. 1998).

The Committee recommends that this instruction be given immediately before a recording is played so that the jury is alerted to the fact that what they hear is controlling. It need not be repeated if more than one recording is played. However, the judge should remind the jury that the recording and not the transcript is the evidence and that they should disregard anything in the transcript that they do not hear. If the instruction is also to be given as part of the closing instructions, it should be modified appropriately.

2.8 TRANSCRIPT OF RECORDING IN FOREIGN LANGUAGE

You are about to [hear] [watch] a recording in the [*specify the foreign language*] language. A transcript of the recording has been admitted into evidence. The transcript is an official English-language translation of the recording.

Although some of you may know the [*specify the foreign language*] language, it is important that all jurors consider the same evidence. Therefore, you must accept the English translation contained in the transcript even if you would translate it differently.

Comment

The Committee recommends giving this instruction immediately before the jury hears a recorded conversation in a foreign language if the accuracy of the translation is not in issue. As the court noted in *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998):

> The district court also correctly held that the relation between tapes and transcripts changes when the tapes are in a foreign language. When tapes are in English, they normally constitute the actual evidence and transcripts are used only as aids to understanding the tapes; the jury is instructed that if the tape and transcript vary, the tape is controlling. *See United States v. Turner,* 528 F.2d 143, 167-68 (9th Cir. 1975). When the tape is in a foreign language, however, such an instruction is "not only nonsensical, it has the potential for harm where the jury includes bilingual jurors." *United States v. Fuentes-Montijo,* 68 F.3d 352, 355-56 (9th Cir. 1995). We therefore have upheld a trial court's instruction that a jury is not free to disagree with a translated transcript of tape recordings. *See id.*

When the accuracy of the translation is in issue, *see United States v. Rrapi*, 175 F.3d 742, 748 (9th Cir. 1999).

2.8A DISPUTED TRANSCRIPT OF RECORDING IN FOREIGN LANGUAGE

You are about to [hear] [watch] a recording in the [*specify the foreign language*] language. A transcript of the recording has been admitted into evidence. The transcript is an official English-language translation of the recording. The accuracy of the transcript is disputed in this case.

Whether a transcript is an accurate translation, in whole or in part, is for you to decide. In considering whether a transcript accurately describes the words spoken in a conversation, you should consider the testimony presented to you regarding how, and by whom, the transcript was made. You may consider the knowledge, training, and experience of the translator, the audibility of the recording, as well as the nature of the conversation and the reasonableness of the translation in light of all the evidence in the case.

Although some of you may know the [*specify the foreign language*] language, it is important that all jurors consider the same evidence. Therefore, you must not rely in any way on any knowledge you may have of the language spoken on the recording; your consideration of the transcript must be based on the evidence in the case.

Comment

This instruction is appropriate where parties are unable to produce an official transcript or stipulate to a transcript. The court should encourage the parties to produce an official or stipulated transcript of the foreign language recording that satisfies all sides. *United States v. Cruz*, 765 F.2d 1020, 1023 (11th Cir. 1985); *United States v. Wilson*, 578 F.2d 67, 69–70 (5th Cir. 1978). If the parties are unable to do so, then they should submit competing translations of the disputed passages, and each side may submit evidence supporting the accuracy of its version or challenging the accuracy of the other side. *Cruz*, 765 F.2d at 1023; *Wilson*, 578; F.2d at 70; *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998).

Jurors should be instructed to rely only on the English translation, not on any knowledge they may have of the foreign language spoken on the recording. *United States v. Fuentes-Montijo*, 68 F.3d 353, 355 (9th Cir. 1995).

See also Instruction*s* 1.12 (Jury to be Guided by Official English Translation/Interpretation); 2.7 (Transcript of Recording in English); 2.8 (Transcript of Recording in Foreign language); and 2.9 (Foreign Language Testimony).

Approved 8/2012

2.9 FOREIGN LANGUAGE TESTIMONY

You are about to hear testimony of a witness who will be testifying in the [*specify the foreign language*] language. This witness will testify through the official court interpreter. Although some of you may know [*specify the foreign language*] language, it is important that all jurors consider the same evidence. Therefore, you must accept the official English translation of the witness's testimony even if you would translate it differently. In this way, all jurors are considering the same evidence.

Comment

This instruction should be given immediately before the jury hears testimony in a foreign language. *Cf. United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998); *United States v. Fuentes-Montijo*, 68 F.3d 352, 355-56 (9th Cir. 1995).

2.10 OTHER CRIMES, WRONGS OR ACTS OF DEFENDANT

You are about to hear evidence that the defendant committed other [crimes] [wrongs] [acts] not charged here. You may consider this evidence only for its bearing, if any, on the question of the defendant's [intent] [motive] [opportunity] [preparation] [plan] [knowledge] [identity] [absence of mistake] [absence of accident] and for no other purpose. [You may not consider this evidence as evidence of guilt of the crime for which the defendant is now on trial.]

Comment

"Under Federal Rule of Evidence 404(b), evidence of other acts may be admissible to prove, among other things, motive, opportunity, intent, or knowledge. In order for other act evidence to be admissible, (1) the evidence must tend to prove a material issue in the case, (2) the acts must be similar to the offense charged, (3) proof of the other acts must be based upon sufficient evidence, and (4) the acts must not be too remote in time. *See United States v. Montgomery*, 150 F.3d 983, 1000 (9th Cir. 1998)." *United States v. Fuchs*, 218 F.3d 957, 965 (9th Cir. 2000). *See also* Fed. R. Evid. 413 and 414 (Evidence of Similar Crimes in Sexual Assault and Child Molestation Cases).

In *Montgomery*, the Ninth Circuit concluded the trial court's giving of the following limiting instruction supported a finding that admitting the other acts evidence was not an abuse of discretion: "You have heard evidence that defendant [ ] has previously been convicted of conspiracy to manufacture methamphetamine. You may consider that evidence only as it bears on intent, knowledge, or lack of mistake and for no other purpose. You may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial." *Montgomery*, 150 F.3d at 1001.

Such a limiting instruction must be given if requested, Fed. R. Evid. 105, and it may be appropriate to give such an instruction *sua sponte*. Nonetheless, it is "well-settled that where no limiting instruction is requested concerning evidence of other criminal acts, the failure of the trial court to give such an instruction *sua sponte* is not reversible error." *United States v. Multi-Management, Inc.*, 743 F.2d 1359, 1364 (9th Cir. 1984).

2.11 EVIDENCE FOR LIMITED PURPOSE

You are about to hear evidence that [*describe evidence to be received for limited purpose*]. I instruct you that this evidence is admitted only for the limited purpose of [*describe purpose*] and, therefore, you must consider it only for that limited purpose and not for any other purpose.

Comment

Federal Rule of Evidence 105 provides that when evidence is admitted for a limited purpose, the court, when requested, must provide a limiting instruction. Furthermore, the court must provide an appropriate limiting instruction *sua sponte* if failure to do so would affect the defendant's "substantial rights." *See United States v. Armijo*, 5 F.3d 1229, 1232 (9th Cir. 1993). For example, in *United States v. Sauza-Martinez*, 217 F.3d 754, 760 (9th Cir. 2000), the Ninth Circuit held the trial court "had no alternative" but to give the jury a limiting instruction *sua sponte* when a testifying co-defendant's post-arrest statements were admitted as substantive evidence against her under Fed. R. Evid. 801(d)(2)(A), but were not admissible against another co-defendant "under *any* theory" (emphasis in original). Under the circumstances of the case, it was plain error to fail to give the limiting instruction *sua sponte*. *Id.* at 761.

The Committee recommends judges use limiting instructions whenever evidence is received for a limited purpose. "We have repeatedly held that a district court's careful and frequent limiting instructions to the jury, explaining how and against whom certain evidence may be considered, can reduce or eliminate any possibility of prejudice arising from a joint trial." *United States v. Fernandez*, 388 F.3d 1199, 1243 (9th Cir. 2004) (internal citations omitted).

2.12 PHOTOS OF DEFENDANT, "MUGSHOTS"

You have heard evidence that a photo of the defendant was shown to [*name of witness*]. You may consider this evidence only for [*specify admissible purpose*] and not for any other purpose. [Because the government obtains photos of many people from many different sources and for many different purposes, you must not infer the defendant committed this or any other crime from the fact that the government obtained and displayed the defendant's photo.]

Comment

See United States v. Monks, 774 F.2d 945, 954-55 (9th Cir. 1985), in which the Ninth Circuit held the trial court did not abuse its discretion in denying a motion for mistrial after the defendant declined the trial court's offer of a limiting instruction to address a witness's unintentional reference to a photo lineup as "mugshots."

2.13 DISMISSAL OF SOME CHARGES AGAINST DEFENDANT

At the beginning of the trial, I described the charge[s] against the defendant. For reasons that do not concern you, [*specify count[s] or charge[s]*] [is] [are] no longer before you. Do not speculate about why the charge[s] [is] [are] no longer part of this trial.

The defendant is on trial only for the charge[s] of [*remaining count[s]*]. You may consider the evidence presented only as it relates to the remaining count[s].

Comment

See United States v. de Cruz, 82 F.3d 856, 865 (9th Cir. 1996) (concluding that the district court's instruction adequately informed the jury that the dismissed counts were not before them, that the defendant was on trial only for the remaining counts, and that the evidence could only be considered as it related to the remaining charged counts or as it related to the defendant's intent).

2.14 DISPOSITION OF CHARGE AGAINST CODEFENDANT

For reasons that do not concern you, the case against codefendant [*name*] is no longer before you. Do not speculate why. This fact should not influence your verdict[s] with reference to the remaining defendant[s], and you must base your verdict[s] solely on the evidence against the remaining defendant[s].

Comment

Although it is not plain error to give a similar instruction when a codefendant dies after the jury begins to deliberate, it would be advisable under certain circumstances to give a "simple and honest" explanation to a jury as to why a codefendant is no longer in the case, particularly if the codefendant's removal from the case occurred early in the trial. *United States v. Bussell*, 414 F.3d 1048, 1054 (9th Cir. 2005). The later in the trial the codefendant is "removed," the more likely the jury would be influenced by a fact-specific disclosure, especially if the remaining defendant[s] had a close relationship with the withdrawn defendant, and therefore a better approach at that stage might be simply informing the jury that the codefendant "was no longer a defendant in the case." *Id.*

No reference should ordinarily be made in this situation to a plea of guilty by the codefendant. *See, e.g., United States v. Barrientos*, 758 F.2d 1152, 1159-60 (7th Cir. 1985) (when a codefendant becomes absent from a trial for any reason, a trial court should acknowledge the codefendant's absence to the jury and instruct them on their duty to consider the evidence of guilt or innocence as to the remaining defendant without any reference to any implications of the codefendant's absence). *See also United States v. Carraway*, 108 F.3d 745, 755 (7th Cir. 1997); *United States v. Rapp*, 871 F.2d 957, 967-68 (11th Cir. 1989).

See also United States v. Candoli, 870 F.2d 496, 501-02 (9th Cir. 1989) ("flight" instruction on codefendant's midtrial disappearance did not prejudice defendant when instruction did not require jury to consider codefendant's absence as evidence of guilt and provided that evidence of codefendant's flight was not admissible against defendant).

2.15 DEFENDANT'S PREVIOUS TRIAL

You have heard evidence that the defendant has been tried before. Keep in mind, however, that you must decide this case solely on the evidence presented to you in this trial. You are not to consider the fact of a previous trial in deciding this case.

Comment

A preferable practice is to avoid all reference to prior trials.

3. INSTRUCTIONS AT END OF CASE

Instruction

Introductory Comment
3.0 Cover Sheet
3.1 Duties of Jury to Find Facts and Follow Law
3.2 Charge Against Defendant Not Evidence—Presumption of Innocence—Burden of Proof
3.3 Defendant's Decision Not to Testify
3.4 Defendant's Decision to Testify
3.5 Reasonable Doubt—Defined
3.6 What Is Evidence
3.7 What Is Not Evidence
3.8 Direct and Circumstantial Evidence
3.9 Credibility of Witnesses
3.10 Activities Not Charged
3.11 Separate Consideration of Multiple Counts—Single Defendant
3.12 Separate Consideration of Single Count—Multiple Defendants
3.13 Separate Consideration of Multiple Counts—Multiple Defendants
3.14 Lesser Included Offense
3.15 Corruptly—Defined
3.16 Intent to Defraud—Defined
3.17 Possession—Defined
3.18 Corporate Defendant
3.19 Jury to Be Guided by Official English Translation/Interpretation
3.20 On or About—Defined

Introductory Comment

The Federal Rules of Criminal Procedure permit the court to instruct the jury before or after arguments, or at both times. Fed. R. Crim. P. 30(c).

3.0 COVER SHEET

IN THE UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

United States of America,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
	)	No. _____
	)	
_____,	)	
	)	
Defendant.	)	
	)	
_____	)	

JURY INSTRUCTIONS

DATED: _____

_____
UNITED STATES DISTRICT JUDGE

3.1 DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be available in the jury room for you to consult.

It is your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not. You must decide the case solely on the evidence and the law and must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. You will recall that you took an oath promising to do so at the beginning of the case.

You must follow all these instructions and not single out some and ignore others; they are all important. Please do not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return—that is a matter entirely up to you.

Comment

See JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 4.5 (2013).

3.2 CHARGE AGAINST DEFENDANT NOT EVIDENCE—PRESUMPTION OF INNOCENCE—BURDEN OF PROOF

The indictment is not evidence. The defendant has pleaded not guilty to the charge[s]. The defendant is presumed to be innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. In addition, the defendant does not have to testify or present any evidence to prove innocence. The government has the burden of proving every element of the charge[s] beyond a reasonable doubt.

Comment

The trial judge has wide discretion as to whether the jury should be provided with a copy of the indictment for use during jury deliberations. The Ninth Circuit has said that when a district judge permits the jury to have a copy of the indictment, the court should caution the jury that the indictment is not evidence. *See United States v. Utz*, 886 F.2d 1148, 1151–52 (9th Cir. 1989) (permissible to give each juror a copy of the indictment if judge cautions jury that indictment is not evidence).

In *United States v. Garcia-Guizar*, 160 F.3d 511, 523 (9th Cir. 1998), the Ninth Circuit held that failure to give a presumption-of-innocence instruction at the end of the case is not plain error. Nonetheless, "it is preferable for the court" to give one "when charging the jury." *Id.* "Although the Constitution does not require jury instructions to contain any specific language," the instructions must convey both that a defendant is presumed innocent until proven guilty and that he may only be convicted upon a showing of proof beyond a reasonable doubt." *Gibson v. Ortiz,* 387 F.3d 812, 820 (9th Cir. 2004), *overruled on other grounds*, *Byrd v. Lewis* 566 F.3d 855 (9th Cir. 2009) (citing *Victor v. Nebraska*, 511 U.S. 1, 5 (1994)). "Any jury instruction that reduces the level of proof necessary for the Government to carry its burden is plainly inconsistent with the constitutionally rooted presumption of innocence." *Id.* The words "unless and until" adequately inform the jury of the presumption of innocence. *United States v. Lopez*, 500 F.3d 840, 847 (9th Cir. 2007).

See also JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 4.6 (2013).

3.3 DEFENDANT'S DECISION NOT TO TESTIFY

A defendant in a criminal case has a constitutional right not to testify. You may not draw any inference of any kind from the fact that the defendant did not testify.

Comment

Although the Committee recommends this instruction be given in every criminal case in which the defendant does not testify, "[i]t may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection." *Lakeside v. Oregon*, 435 U.S. 333, 340-41 (1978). If the instruction is requested by the defendant, it must be given. *Carter v. Kentucky*, 450 U.S. 288 (1981); *see also United States v. Soto*, 519 F.3d 927, 930 (9th Cir. 2008).

3.4 DEFENDANT'S DECISION TO TESTIFY

The defendant has testified. You should treat this testimony just as you would the testimony of any other witness.

Comment

See Instruction 3.3 (Defendant's Decision Not to Testify) if the defendant does not testify.

3.5 REASONABLE DOUBT—DEFINED

Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Comment

The Ninth Circuit has held that giving the language of this model instruction "did not constitute plain error." *United States v. Ruiz*, 462 F.3d 1082, 1087 (9th Cir. 2006) (citing *United States v. Nelson*, 66 F.3d 1036, 1045 (9th Cir. 1995)). *Accord United States v. Soto-Zuniga*, 837 F.3d 992, 1004 (9th Cir. 2016) (rejecting challenge to this instruction and noting that Ninth Circuit has repeatedly upheld use of this instruction). In *United States v. Gomez*, 725 F.3d 1121, 1131 (9th Cir. 2013), the Ninth Circuit approved the conditional language in this model instruction regarding a jury's duty in a criminal case. Nonetheless, "[t]he Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Id.* (citing *United States v. Artero*, 121 F.3d 1256, 1258 (9th Cir. 1997)). In addition, the Ninth Circuit has expressly approved a reasonable doubt instruction that informs the jury that the jury must be "firmly convinced" of the defendant's guilt. *United States v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir. 1992).

In *Victor v. Nebraska*, 511 U.S. 1, 5 (1994), the Court held that any reasonable doubt instruction must (1) convey to the jury that it must consider only the evidence, and (2) properly state the government's burden of proof. *See also Gibson v. Ortiz*, 387 F.3d 812, 820 (9th Cir. 2004), *overruled on other grounds by Byrd v. Lewis*, 566 F.3d 855 (9th Cir. 2009), and *United States v. Ramirez*, 136 F.3d 1209, 1213-14 (9th Cir. 1998).

Approved 12/2016

3.6 WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

(1) the sworn testimony of any witness; [and]

(2) the exhibits received in evidence[.] [; and]

[(3) any facts to which the parties have agreed.]

Comment

"When parties have entered into stipulations as to material facts, those facts will be deemed to have been conclusively established." *United States v. Houston,* 547 F.2d 104, 107 (9th Cir. 1976).

3.7 WHAT IS NOT EVIDENCE

In reaching your verdict you may consider only the testimony and exhibits received in evidence. The following things are not evidence and you may not consider them in deciding what the facts are:

1. Questions, statements, objections, and arguments by the lawyers are not evidence. The lawyers are not witnesses. Although you must consider a lawyer's questions to understand the answers of a witness, the lawyer's questions are not evidence. Similarly, what the lawyers have said in their opening statements, [will say in their] closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers state them, your memory of them controls.

2. Any testimony that I have excluded, stricken, or instructed you to disregard is not evidence. [In addition, some evidence was received only for a limited purpose; when I have instructed you to consider certain evidence in a limited way, you must do so.]

3. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Comment

See Comment to Instruction 2.11 (Evidence for Limited Purpose) regarding case law on limiting instructions.

"A jury's exposure to extrinsic evidence deprives a defendant of the rights to confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment." *Raley v. Ylst*, 470 F.3d 792, 803 (9th Cir. 2006) (citing *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995)).

Supplemental instructions to the jury may be proper when counsel's arguments to the jury are legally erroneous or inflammatory. *See United States v. Blixt*, 548 F.3d 882, 890 (9th Cir. 2008).

3.8 DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which you can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Comment

"[I]t is the exclusive function of the jury to weigh the credibility of witnesses, resolve evidentiary conflicts and draw reasonable inferences from proven facts. Circumstantial and testimonial evidence are indistinguishable insofar as the jury fact-finding function is concerned, and circumstantial evidence can be used to prove any fact." *United States v. Ramirez-Rodriquez*, 552 F.2d 883, 884 (9th Cir. 1977) (citations omitted). *See also United States v. Kelly*, 527 F.2d 961, 965 (9th Cir. 1976); and *Payne v. Borg*, 982 F.2d 335, 339 (9th Cir. 1992).

The Committee believes that an instruction on circumstantial evidence generally eliminates the need to explain the same principle in terms of inferences. Thus, the Committee recommends against giving instructions on matters such as flight, resistance to arrest, a missing witness, failure to produce evidence, false or inconsistent exculpatory statements, failure to respond to accusatory statements, and attempts to suppress or tamper with evidence. These matters are generally better left to argument of counsel as examples of circumstantial evidence from which the jury may find another fact. *See United States v. Beltran–Garcia,* 179 F.3d 1200, 1206 (9th Cir. 1999) (in discussing jury instruction regarding inferring intent to possess for distribution from quantity of drugs, the Ninth Circuit stated that "[a]lthough the instructions in this case were not delivered in error, we do not hesitate to point out the 'dangers and inutility of permissive inference instructions.'" (citations omitted)), *cert. denied*, 528 U.S. 1097 (2000). *See also United States v. Rubio–Villareal*, 967 F.2d 294, 300 (9th Cir. 1992) (en banc) (Ninth Circuit disapproved of instructing the jury that knowledge of the presence of drugs in a vehicle may be inferred from the defendant being the driver).

It may be helpful to include an illustrative example in the instruction. If so, consider the following:

> By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned-on garden hose, may provide an explanation for the water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

3.9 CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the witness's opportunity and ability to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case, if any;

(5) the witness's bias or prejudice, if any;

(6) whether other evidence contradicted the witness's testimony;

(7) the reasonableness of the witness's testimony in light of all the evidence; and

(8) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

3.10 ACTIVITIES NOT CHARGED

You are here only to determine whether the defendant is guilty or not guilty of the charge[s] in the indictment. The defendant is not on trial for any conduct or offense not charged in the indictment.

Comment

When evidence has been introduced during trial pursuant to Fed. R. Evid. 404(b), also use Instruction 4.3 (Other Crimes, Wrongs or Acts of Defendant).

When conduct necessary to satisfy an element of the offense is charged in the indictment and the government's proof at trial includes uncharged conduct that would satisfy the same element, the court should instruct the jury that it must find the conduct charged in the indictment before it may convict. *See United States v. Ward*, 747 F.3d 1184, 1191 (9th Cir. 2014) (reversible error to permit jury to convict on counts of aggravated identity theft against two victims named in indictment based on evidence presented at trial of uncharged conduct against identity-theft victims not named in indictment).

Approved 6/2014

3.11 SEPARATE CONSIDERATION OF MULTIPLE COUNTS—SINGLE DEFENDANT

A separate crime is charged against the defendant in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Comment

Use this instruction when there is one defendant charged with multiple counts. If the case involves multiple defendants and multiple counts, use Instruction 3.13 (Separate Consideration of Multiple Counts—Multiple Defendants) instead. If more than one defendant is charged with the same crime, use Instruction 3.12 (Separate Consideration of Single Count—Multiple Defendants).

When the counts are satisfactorily distinguished in the jury charge, the jury will be presumed to have followed instructions and not to have confused the evidence pertinent to the individual counts. *United States v. Parker*, 432 F.2d 1251, 1254 (9th Cir. 1970).

3.12 SEPARATE CONSIDERATION OF SINGLE COUNT—MULTIPLE DEFENDANTS

A separate crime is charged against each defendant. The charges have been joined for trial. You must consider and decide the case of each defendant separately. Your verdict as to one defendant should not control your verdict as to any other defendant.

All the instructions apply to each defendant [unless a specific instruction states that it applies to only a specific defendant].

Comment

Use this instruction when there is more than one defendant charged with the same crime. If the case involves multiple defendants and multiple counts, use Instruction 3.13 (Separate Consideration of Multiple Counts—Multiple Defendants) instead. If one defendant has been charged with multiple counts, use Instruction 3.11 (Separate Consideration of Multiple Counts—Single Defendant).

3.13 SEPARATE CONSIDERATION OF MULTIPLE COUNTS—MULTIPLE DEFENDANTS

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

All the instructions apply to each defendant and to each count [unless a specific instruction states that it applies only to a specific [defendant] [count]].

Comment

Use this instruction when there is more than one defendant charged with multiple counts. If the case involves multiple defendants charged with the same count, use Instruction 3.12 (Separate Consideration of Single Count—Multiple Defendants) instead. If one defendant has been charged with multiple counts, use Instruction 3.11 (Separate Consideration of Multiple Counts—Single Defendant).

3.14 LESSER INCLUDED OFFENSE

The crime of [*specify crime charged*] includes the lesser crime of [*specify lesser included crime*]. If (1) [any] [all] of you are not convinced beyond a reasonable doubt that the defendant is guilty of [*specify crime charged*]; and (2) all of you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime of [*specify lesser included crime*], you may find the defendant guilty of [*specify lesser included crime*].

In order for the defendant to be found guilty of the lesser crime of [*specify lesser included crime*], the government must prove each of the following elements beyond a reasonable doubt:

[*List elements of lesser included crime.*]

Comment

When a lesser included offense instruction is appropriate, a defendant has the right to elect whether all or only some of the jurors must not be convinced beyond a reasonable doubt of guilt of the greater offense. *United States v. Warren*, 984 F.2d 325, 330-31 (9th Cir. 1993); *United States v. Jackson*, 726 F.2d 1466, 1468-70 (9th Cir. 1984).

Pursuant to Fed. R. Crim. P. 31(c), "A defendant may be found guilty of . . . an offense necessarily included in the offense charged." Moreover, a defendant in a capital case has a due process right to a lesser included offense instruction when the facts would allow the jury to impose a life sentence rather than death. *Beck v. Alabama*, 447 U.S. 625 (1980). The Ninth Circuit has not yet decided whether a defendant's right to a lesser included instruction in a noncapital case springs solely from Fed. R. Crim. P. 31(c) or also from the Fifth Amendment Due Process Clause. *United States v. Torres-Flores*, 502 F.3d 885, 887 n.3 (9th Cir. 2007).

Whether an offense is a lesser included offense of a charged crime is a question of law. *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007). "A defendant is entitled to an instruction on a lesser-included offense if the law and evidence satisfy a two-part test: 1) 'the elements of the lesser offense are a subset of the elements of the charged offense.' *Schmuck v. United States*, 489 U.S. 705, 716 (1989); and 2) 'the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit [her] of the greater,' *Keeble v. United States*, 412 U.S. 205, 208 (1973)." *Arnt*, 474 F.3d at 1163. *See United States v. Hernandez*, 476 F.3d 791 (9th Cir. 2007) (reversible error in prosecution for intent to distribute methamphetamine not to instruct on lesser offense of possession of controlled substances when evidence would permit a rational jury to find defendant guilty of lesser offense and acquit him of the greater offense); *United States v. Torres-Flores*, 502 F.3d at 887 (trial court appropriately refused lesser included offense instruction when jury could not have convicted on the lesser offense without also finding all elements of the greater offense); and *United States v. Rivera-Alonzo*, 584 F.3d 829, 835 (9th Cir. 2009) (although simple assault is lesser included offense of both 8- and 20-year felonies described in 18 U.S.C. § 111, defendant was not entitled to lesser included offense instruction when there is "undisputed evidence of physical contact" that precludes conviction on simple assault).

3.15 CORRUPTLY—DEFINED

Comment

Consult each statute that uses the term "corruptly" for the meaning of the term because "corruptly" is capable of different meanings in different statutory contexts.

For example:

In a prosecution under 18 U.S.C. § 1512(b)(2)(A) or (B) (making it a crime to "knowingly . . . or corruptly persuade[ ] another person . . . with intent to . . . cause [the] person" to "withhold" or "alter" documents for use in "an official proceeding"), the term "corruptly" must reflect some consciousness of wrongdoing. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704-06 (2005).

In a prosecution under 26 U.S.C. § 7212(a) (making it a crime to "corruptly" endeavor to intimidate or impede the administration of tax laws), "the district court correctly instructed the jury that 'corruptly' means 'performed with the intent to secure an unlawful benefit for oneself or another.'" *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005) (citing *United States v. Workinger,* 90 F.3d 1409, 1414 (9th Cir. 1996)).

In a prosecution under 18 U.S.C. § 201(b)(2)(B) (making it a crime to "corruptly" receive something of value in return for being influenced in the performance of an official act), the district court properly rejected a defendant's requested instruction that would have required the government to prove an official acts "corruptly" when the official uses his official position to commit or aid in the commission of fraud. *United States v. Leyva,* 282 F.3d 623, 625 (9th Cir. 2002).

In *United States v. Sanders*, 421 F.3d 1044 (9th Cir. 2005), the Ninth Circuit noted it had not yet ruled as to whether a defendant violates 18 U.S.C. § 1512(b) when he "corruptly persuades" others to invoke their Fifth Amendment right to remain silent. *Id.* at 1050-51. Section 1512 does not apply when a defendant's efforts to persuade a witness to exercise a legal right or privilege not to testify are not "corrupt." *United States v. Doss*, 630 F.3d 1181, 1189-90 (9th Cir. 2011). "[T]here is a difference in approach among the circuits about whether merely attempting to persuade a witness to withhold cooperation or not to disclose information to law enforcement officials—as opposed to actively lying—falls within the ambit of § 1512(b)." *United States v. Khatami*, 280 F.3d 907, 913 (9th Cir. 2002).

In a prosecution under 18 U.S.C. § 1512(c) (making it a crime corruptly to obstruct, influence or impede any official proceeding, or attempt to do so), the district court did not err by failing to include the words "evil" and "wicked" in its instructions defining the word "corruptly." *United States v. Watters*, 717 F.3d 733, 735 (9th Cir. 2013)).

Approved 12/2015

3.16 INTENT TO DEFRAUD—DEFINED

An intent to defraud is an intent to deceive or cheat.

Comment

In *United States v. Shipsey*, 363 F.3d 962, 967-68 (9th Cir.), *cert. denied*, 543 U.S. 1004 (2004), the Ninth Circuit explicitly approved the language of this instruction and, because the trial court gave this instruction, the panel held that "no good faith instruction was necessary at all." *Id. See also United States v. Crandall*, 525 F.3d 907, 911-12 (9th Cir. 2008), in which the Ninth Circuit rejected a contention based on *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704-06 (2005), an obstruction of justice case, that intent to deceive requires proof of "consciousness of wrongdoing" in a prosecution for mail or wire fraud and said that the Ninth Circuit model instruction that was given "adequately covered the defense theory of lack of intent."

As to whether the defendant acted in good faith, and therefore did not act with an intent to defraud, *see United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993), in which the Ninth Circuit approved the following instruction in a case involving the crime of bank fraud:

> You may determine whether a defendant had an honest, good faith belief in the truth of the specific misrepresentations alleged in the indictment in determining whether or not the defendant acted with intent to defraud. However, a defendant's belief that the victims of the fraud will be paid in the future or will sustain no economic loss is no defense to the crime.

3.17 POSSESSION—DEFINED

A person has possession of something if the person knows of its presence and has physical control of it, or knows of its presence and has the power and intention to control it.

[More than one person can be in possession of something if each knows of its presence and has the power and intention to control it.]

Comment

The Committee believes this instruction is all-inclusive, and there is no need to attempt to distinguish further between actual and constructive possession and sole and joint possession.

The Ninth Circuit has approved language similar to that contained in this instruction. *United States v. Cain*, 130 F.3d 381, 382-84 (9th Cir. 1997).

In the event the case involves use or possession of a firearm under 18 U.S.C. § 924(c), *see* Instructions 8.71 (Firearms—Using, Carrying, or Brandishing in Commission of Crime of Violence or Drug Trafficking Crime) and 8.72 (Firearms—Possession in Furtherance of Crime of Violence or Drug Trafficking Crime). *See also United States v. Johnson*, 459 F.3d 990, 998 (9th Cir. 2006) (citing with approval an out-of-circuit case rejecting premise that "passing control" of a firearm does not constitute possession).

3.18 CORPORATE DEFENDANT

The fact that a defendant is a corporation should not affect your verdict. Under the law a corporation is considered a person and all persons are equal before the law. Corporations are entitled to the same fair and conscientious consideration by you as any other person.

3.19 JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION

The [*specify the foreign language*] language has been used during this trial.

The evidence you are to consider is only that provided through the official court [interpreters] [translators]. Although some of you may know the [*specify the foreign language*] language, it is important that all jurors consider the same evidence. Therefore, you must accept the evidence presented in the English [interpretation] [translation] and disregard any different meaning.

Comment

When there is no dispute as to the accuracy of the translation of evidence in a foreign language, the jury may be instructed that "it is not free to disagree with a translated transcript of a tape recording." *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998) (to hold otherwise would be "nonsensical"). *See also United States v. Fuentes-Montijo*, 68 F.3d 352, 355-56 (9th Cir. 1995). When the accuracy of a foreign language translation is disputed, *see United States v. Rrapi,* 175 F.3d 742, 748 (9th Cir. 1999).

3.20 ON OR ABOUT—DEFINED

The indictment charges that the offense alleged [in Count_____] was committed "on or about" a certain date.

Although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in [Count _____of] the indictment, it is not necessary for the government to prove that the offense was committed precisely on the date charged.

Comment

See United States v. Loya, 807 F.2d 1483, 1493-94 (9th Cir. 1987) (approving similarly worded "on or about" jury instruction).

If the defendant asserts an alibi defense, this instruction should be coordinated with Instruction 6.1 (Alibi). *See Id.* If the case involves a continuing offense or theory of defense, this instruction will need to be modified. *See*, *e.g.*, the Comment to Instruction 6.4 (Insanity).

Approved 6/2015

4. CONSIDERATION OF PARTICULAR EVIDENCE

Instruction

Introductory Comment
4.1 Statements by Defendant
4.2 Silence in the Face of Accusation
4.3 Other Crimes, Wrongs or Acts of Defendant
4.4 Character of Defendant
4.5 Character of Victim
4.6 Impeachment, Prior Conviction of Defendant
4.7 Character of Witness for Truthfulness
4.8 Impeachment Evidence—Witness
4.9 Testimony of Witnesses Involving Special Circumstances—Immunity, Benefits, Accomplice, Plea
4.10 Government's Use of Undercover Agents and Informants
4.11 Eyewitness Identification
4.12 Child Witness
4.13 Missing Witness
4.14 Opinion Evidence, Expert Witness
4.14A Dual Role Testimony
4.15 Summaries Not Received in Evidence
4.16 Charts and Summaries in Evidence
4.17 Flight/Concealment of Identity
4.18 Lost or Destroyed Evidence

Introductory Comment

The Committee believes that instructions on particular kinds of evidence should be avoided as much as possible. General instructions on direct and circumstantial evidence and on credibility of witnesses should in most instances suffice, obviating the need for more specific instructions. *See, for example, United States v. Holmes*, 229 F.3d 782, 787-88 (9th Cir. 2000); *United States v. Ketola,* 478 F.2d 64, 66 (9th Cir. 1973).

However, instructions on particular kinds of evidence may be necessary in two circumstances. First, when evidence is admissible for one purpose but not another, a limiting instruction may be required by Fed. R. Evid. 105. Second, certain specific instructions (including those specified in Instructions 4.9, 4.10, 4.11, and 4.14) may need to be given when requested, and may be advisable even if not requested. *See United States v. Bernard*, 625 F.2d 854, 857 (9th Cir. 1980) (holding that the failure to give a requested accomplice instruction was prejudicial error where the accomplice's testimony was important to the case).

The Committee believes that an instruction on circumstantial evidence generally eliminates the need to explain the same principle in terms of inferences. Thus, the Committee recommends against giving instructions on matters such as flight, resistance to arrest, a missing witness, failure to produce evidence, false or inconsistent exculpatory statements, failure to respond to accusatory statements, and attempts to suppress or tamper with evidence. These matters are generally better left to argument of counsel as examples of circumstantial evidence from which the jury may find another fact. *See United States v. Beltran–Garcia*, 179 F.3d 1200, 1206 (9th Cir. 1999) (in discussing jury instruction regarding inferring intent to possess for distribution from quantity of drugs, the Ninth Circuit stated that "[a]lthough the instructions in this case were not delivered in error, we do not hesitate to point out the 'dangers and inutility of permissive inference instructions.'" (citations omitted)), *cert. denied*, 528 U.S. 1097 (2000). *See also United States v. Rubio–Villareal*, 967 F.2d 294, 300 (9th Cir. 1992) (en banc) (Ninth Circuit disapproved of instructing the jury that knowledge of the presence of drugs in a vehicle may be inferred from the defendant being the driver).

4.1 STATEMENTS BY DEFENDANT

You have heard testimony that the defendant made a statement. It is for you to decide (1) whether the defendant made the statement, and (2) if so, how much weight to give to it. In making those decisions, you should consider all the evidence about the statement, including the circumstances under which the defendant may have made it.

Comment

This instruction uses the word "statement" in preference to the more pejorative term, "confession." The word "confession" implies an ultimate conclusion about the significance of a defendant's statement, which should be left for the jury to determine. The language of this instruction was expressly approved in *United States v. Hoac*, 990 F.2d 1099, 1108 n.4 (9th Cir. 1993).

When voluntariness of a confession is an issue, the instruction is required by 18 U.S.C. § 3501(a), providing that after a trial judge has determined a confession to be admissible, the judge "shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." *See also United States v. Dickerson*, 530 U.S. 428, 432 (2000) (holding that *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny govern the admissibility of an accused person's statement during custodial interrogation and could not be in effect overruled by § 3501). Section 3501(e) defines "confession" as "any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing." *See Hoac*, 990 F.2d at 1107 (where a defendant raises a genuine issue at trial concerning the voluntariness of a statement, the trial court is obligated by statute to instruct the jury concerning the weight to be accorded that statement). Failure to give the required instruction may constitute plain error. *Id.* at 1109.

4.2 SILENCE IN THE FACE OF ACCUSATION

Comment

A silence in the face of accusation instruction is a permissive inference instruction and, as such, the Committee recommends that it generally not be given.

Former Instruction 4.2 in the MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT (2003) read as follows:

> Evidence has been introduced that statements accusing the defendant of the crime charged in the indictment were made, and that the statements were neither denied nor objected to by the defendant. If you find that the defendant actually was present and heard and understood the statements, and that they were made under such circumstances that the statements would have been denied if they were not true, then you may consider whether the defendant's silence was an admission of the truth of the statements.

This prior instruction recites the factual findings the court must make in order to admit into evidence silence in the face of accusation. Generally, the sufficiency of these findings by the court is not the subject of a jury instruction. The significance of the silence should be left for the jury to determine without further instructions. Where there are factual issues that relate to the instruction, it may be appropriate to give the instruction if requested by the defendant. The text of the instruction is based on judicial interpretation and application of that rule. *See, e.g., United States v. McKinney*, 707 F.2d 381, 384 (9th Cir. 1983); *United States v. Sears*, 663 F.2d 896, 904-05 (9th Cir. 1981); *United States v. Giese*, 597 F.2d 1170, 1195–96 (9th Cir. 1979).

Where a defendant is in custody, silence in the face of an accusatory statement does not constitute an admission of the truth of the statements. *Doyle v. Ohio,* 426 U.S. 610, 617-19 (1976). Such evidence should not be received, and no instruction will be necessary. *Arnold v. Runnels*, 421 F.3d 859, 869 (9th Cir. 2005). On the other hand, when the accusatory statement is not made by a law enforcement official or when the defendant is not in custody, the instruction may be helpful.

4.3 OTHER CRIMES, WRONGS OR ACTS OF DEFENDANT

You have heard evidence that the defendant committed other [crimes] [wrongs] [acts] not charged here. You may consider this evidence only for its bearing, if any, on the question of the defendant's [intent] [motive] [opportunity] [preparation] [plan] [knowledge] [identity] [absence of mistake] [absence of accident] and for no other purpose. [You may not consider this evidence as evidence of guilt of the crime for which the defendant is now on trial.]

Comment

See Fed. R. Evid. 404(b). Evidence of other crimes, wrongs or acts may be admissible for one purpose but not another; therefore, this instruction is required by Fed. R. Evid. 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.") *See also* Instruction 4.6 and the Comment thereto (Impeachment, Prior Conviction of Defendant), and the Comment to Instruction 2.10 (Other Crimes, Wrongs or Acts of Defendant).

The Ninth Circuit has approved this instruction. *See United States v. Lloyd*, 807 F.3d 1128, 1167 (9th Cir. 2015) (rejecting argument that "not charged here" improperly implies other acts that could have been charged); *United States v. Hardrick*, 766 F.3d 1051, 1056 (9th Cir. 2014).

Approved 3/2016

4.4 CHARACTER OF DEFENDANT

Comment

The Committee believes that the trial judge need not give an instruction on the character of the defendant when such evidence is admitted under Fed. R. Evid. 404(a)(1) because it adds nothing to the general instructions regarding the consideration and weighing of evidence. *See United States v. Karterman*, 60 F.3d 576, 579 (9th Cir. 1995) (refusal of trial court to instruct on character of defendant was not plain error where "the district court instructed the jury to 'consider all of the evidence introduced by all parties,' to 'carefully scrutinize all the testimony given,' and to consider 'every matter in evidence which tends to show whether a witness is worthy of belief.'"); *see also* Fed. R. Evid. 404(a)(1).

Former Instruction 4.4 in the MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT (2003) read as follows:

> You have heard evidence of the defendant's character for [*e.g.*, truthfulness, peacefulness, honesty, *etc.*]. In deciding this case, you should consider that evidence together with and in the same manner as all the other evidence in the case.

4.5 CHARACTER OF VICTIM

You have heard evidence of specific instances of the victim's character for [*specify character trait*]. You may consider this evidence in determining whether the victim acted in conformance with that character trait at the time of the offense charged against the defendant in this case. In deciding this case, you should consider the victim's character evidence together with and in the same manner as all the other evidence in this case.

Comment

Generally, character evidence is inadmissible, but it may be admitted for a particular purpose. *See* Fed. R. Evid. 404(a)(2), and if sexual conduct of the victim is at issue, *see* Fed. R. Evid. 412. This instruction is a form of limiting instruction. *See* Fed. R. Evid. 105. When extrinsic evidence corroborating a defendant's testimony about a victim's prior acts of violence is admitted pursuant to Fed. R. Evid. 404(a)(2), this instruction should be modified accordingly. *United States v. Saenz*, 179 F.3d 686, 687-89 (9th Cir. 1999); *United States v. James*, 169 F.3d 1210, 1214 (9th Cir. 1999). *See also United States v. Keiser*, 57 F.3d 847, 853 (9th Cir. 1995) ("The fact that [Fed. R. Evid. 404(a)(2)] is an exception to the rule against introduction of character evidence to imply that a person acted in conformity with that character on a particular occasion suggests that the very purpose of victim character evidence is to suggest to the jury that the victim did indeed act in conformity with his violent character at the time of the alleged crime against him.").

4.6 IMPEACHMENT, PRIOR CONVICTION OF DEFENDANT

You have heard evidence that the defendant has previously been convicted of a crime. You may consider that evidence only as it may affect the defendant's believability as a witness. You may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial.

Comment

See Fed. R. Evid. 609 (Impeachment by Evidence of Conviction of Crime). The court must give such a limiting instruction if requested by the defendant. Fed. R. Evid. 105 (Limited Admissibility). However, the failure of a trial court to give such an instruction *sua sponte* is not reversible error. *United States v. Multi-Management, Inc.*, 743 F.2d 1359, 1364 (9th Cir. 1984).

If past crimes of the defendant are to be used for another purpose—such as proving an element of a habitual offender charge, or establishing intent—that limited purpose should similarly be identified. *See* Instruction 4.3 (Other Crimes, Wrongs or Acts of Defendant).

4.7 CHARACTER OF WITNESS FOR TRUTHFULNESS

Comment

The Committee believes that the trial judge need not give an instruction on the character of a witness for truthfulness because it adds nothing to the general instructions on witness credibility. As to these instructions, *see* Instructions 1.7 and 3.9.

Former Instruction 4.7 in the MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT (2003) read as follows:

> You have heard evidence of the character for truthfulness of [*name of witness*], a witness. You may consider this evidence along with other evidence in deciding whether or not to believe that witness's testimony and how much weight to give to it.

Character and reputation are not two separate types of evidence. Reputation is one means of proving character. Opinion evidence is another. Regarding admissibility of character evidence, *see* Fed. R. Evid. 607 (Who May Impeach), 608 (Evidence of Character and Conduct of Witness) and 609 (Impeachment By Evidence of Conviction of Crime).

4.8 IMPEACHMENT EVIDENCE—WITNESS

You have heard evidence that [*name of witness*], a witness, [*specify basis for impeachment*]. You may consider this evidence in deciding whether or not to believe this witness and how much weight to give to the testimony of this witness.

Comment

Fed. R. Evid. 608 (Evidence of Character and Conduct of Witness) and 609 (Impeachment By Evidence of Conviction of Crime) place restrictions on the use of instances of past conduct and convictions to impeach a witness, and Fed. R. Evid. 105 (Limited Admissibility) gives a defendant the right to request a limiting instruction explaining that the use of this evidence is limited to credibility of the witness.

4.9 TESTIMONY OF WITNESSES INVOLVING SPECIAL CIRCUMSTANCES—IMMUNITY, BENEFITS, ACCOMPLICE, PLEA

You have heard testimony from [*name of witness*], a witness who

[received immunity. That testimony was given in exchange for a promise by the government that [the witness will not be prosecuted] [the testimony will not be used in any case against the witness]];

[received [benefits] [compensation] [favored treatment] from the government in connection with this case];

[[admitted being] [was alleged to be] an accomplice to the crime charged. An accomplice is one who voluntarily and intentionally joins with another person in committing a crime];

[pleaded guilty to a crime arising out of the same events for which the defendant is on trial. This guilty plea is not evidence against the defendant, and you may consider it only in determining this witness's believability].

For [this] [these] reason[s], in evaluating the testimony of [*name of witness*], you should consider the extent to which or whether [his] [her] testimony may have been influenced by [this] [any of these] factor[s]. In addition, you should examine the testimony of [*name of witness*] with greater caution than that of other witnesses.

Comment

The instruction to consider accomplice testimony with "greater caution" is appropriate regardless of whether the accomplice's testimony favors the defense or prosecution. *United States v. Tirouda*, 394 F.3d 683, 687-88 (9th Cir. 2005), *cert. denied*, 547 U.S. 1005 (2006). The Committee recommends giving this instruction whenever it is requested.

4.10 GOVERNMENT'S USE OF UNDERCOVER AGENTS AND INFORMANTS

You have heard testimony from [an undercover agent] [an informant] who was involved in the government's investigation in this case. Law enforcement officials may engage in stealth and deception, such as the use of informants and undercover agents, in order to investigate criminal activities. Undercover agents and informants may use false names and appearances and assume the roles of members in criminal organizations.

Comment

This instruction should be given when the entrapment defense is being asserted. Furthermore, the Ninth Circuit held it was not plain error to give this instruction in the absence of an entrapment defense instruction when the defendant contended the government agent acted improperly. *United States v. Hoyt*, 879 F.2d 505, 510 (9th Cir. 1989), *amended on other grounds*, 888 F.2d 1257 (1989). This instruction has been described as an accurate statement of the law. *United States v. Carona*, 630 F.3d 917, 924 (9th Cir. 2011).

Approved 4/2011

4.11 EYEWITNESS IDENTIFICATION

You have heard testimony of eyewitness identification. In deciding how much weight to give to this testimony, you may consider the various factors mentioned in these instructions concerning credibility of witnesses.

In addition to those factors, in evaluating eyewitness identification testimony, you may also consider:

(1) the capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation, including lighting and distance;

(2) whether the identification was the product of the eyewitness's own recollection or was the result of subsequent influence or suggestiveness;

(3) any inconsistent identifications made by the eyewitness;

(4) the witness's familiarity with the subject identified;

(5) the strength of earlier and later identifications;

(6) lapses of time between the event and the identification[s]; and

(7) the totality of circumstances surrounding the eyewitness's identification.

Comment

Generally, the Ninth Circuit has not required a cautionary instruction regarding eyewitness testimony. *See People of the Territory of Guam v. Dela Rosa*, 644 F.2d 1257, 1261 (9th Cir. 1981); *United States v. Cassasa*, 588 F.2d 282, 285 (9th Cir. 1978). Since 1989, the Committee has recommended against the giving of an eyewitness identification instruction because it believes that the general witness credibility instruction is sufficient. *See*, *e.g.*, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT, Instruction 4.13 (1989). If the district court determines that an eyewitness identification instruction is appropriate, in addition to the general witness credibility instruction, the Committee recommends that this instruction be given.

The Ninth Circuit has approved the giving of a comprehensive eyewitness jury instruction where the district court has determined that proffered expert witness testimony regarding eyewitness identification should be excluded. *See*, *e.g.*, *United States v. Hicks*, 103 F.3d 837, 847 (9th Cir. 1996), *overruled on other grounds, United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008) ("The district court may exercise its discretion to exclude expert testimony if it finds that . . . the trier of fact . . . [would] be better served through a . . . comprehensive jury instruction."); *United States v. Rincon*, 28 F.3d 921, 925-26 (9th Cir. 1994).

4.12 CHILD WITNESS

Comment

The Committee recommends that the trial judge give no instruction on the credibility of a child witness because it adds nothing to the general instructions on witness credibility. As to these instructions, *see* Instructions 1.7 and 3.9.

In *People of Territory of Guam v. McGravey,* 14 F.3d 1344, 1348 (9th Cir. 1994), the Ninth Circuit stated that "the better view is . . . that a 'trial judge retains discretion to determine whether the jury should receive a special instruction with respect to the credibility of a young witness, and if so, the nature of that instruction.'"(citation omitted). *See also United States v. Pacheco*, 154 F.3d 1236, 1239 (10th Cir. 1998) (holding that the general witness credibility instruction provided the jury with adequate guidance in evaluating child's testimony).

4.13 MISSING WITNESS

Comment

"A missing witness instruction is proper only if from all the circumstances an inference of unfavorable testimony from an absent witness is a natural and reasonable one." *United States v. Bramble*, 680 F.2d 590, 592 (9th Cir. 1982). The court has the discretion to give a missing witness instruction or to leave the matter to the argument of counsel. *See United States v. Kojayan*, 8 F.3d 1315, 1317 n.2, 1320-21 (9th Cir. 1993).

"A missing witness instruction is appropriate if two requirements are met: (1) '[t]he party seeking the instruction must show that the witness is peculiarly within the power of the other party' and (2) 'under the circumstances, an inference of unfavorable testimony [against the non-moving party] from an absent witness is a natural and reasonable one.'" *United States v. Ramirez*, 714 F.3d 1134, 1137 (9th Cir. 2013) (quoting *United States v. Leal-Del Carmen*, 697 F.3d 964, 974-75 (9th Cir. 2013)). It was reversible error to deny a missing witness instruction when an alien witness was deported to Mexico by the government, knowing that the witness would testify favorably for the defense. *Leal-Del Carmen,* 697 F.3d at 975. *See generally United States v. Tisor*, 96 F.3d 370, 377 n.3 (9th Cir. 1996) (quoting, without approving, a missing witness instruction).

Even when a missing witness instruction is not given, a judge may not forbid a jury from drawing a negative inference from a party's failure to call a witness. *Ramirez*, 714 F.3d at 1139 ("By instructing the jurors to disregard any uncertainty about why the prosecution didn't call a witness—who might have been the *key* witness—the court improperly inserted itself into the jury room and interfered with the jury's role as a factfinder.").

Approved 7/2013

4.14 OPINION EVIDENCE, EXPERT WITNESS

You [have heard] [are about to hear] testimony from [*name*] who [testified] [will testify] to opinions and the reasons for [his] [her] opinions. This opinion testimony is allowed because of the education or experience of this witness.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Comment

See Fed. R. Evid. 701-05. *See also United States v. Mendoza*, 244 F.3d 1037, 1048 (9th Cir. 2001) (instruction should be given when requested by the defendant).

This instruction avoids labeling the witness as an "expert." If the court refrains from designating the witness as an "expert," this will "ensure[] that trial courts do not inadvertently put their stamp of authority" on a witness's opinion and will protect against the jury's being "overwhelmed by the so-called 'experts.'" *See* Fed. R. Evid. 702 advisory committee's note (2000) (quoting Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994).

In addition, Fed. R. Evid. 703 (as amended in 2000) provides that facts or data that are the basis for an expert's opinion but are otherwise inadmissible may nonetheless be disclosed to the jury if the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. Even in the absence of a request, it may be plain error for the trial court to fail to give an instruction sufficient to explain to the jury that the otherwise inadmissible evidence should not be considered for its truth but only to assess the strength of the expert's opinions. *See United States v. Torralba-Mendia*, 784 F.3d 652, 659 (9th Cir. 2015); *United States v. Vera*, 770 F.3d 1232 (9th Cir. 2014).

Further, the "interpretation of clear statements is not permissible, and is barred by the helpfulness requirement of both Fed. R. Evid. 701 and Fed. R. Evid. 702." *Vera*, 770 F.3d at 1246 (emphasis in original) (quotation marks and citation omitted).

This instruction also may be given as a limiting instruction at the time testimony is received.

Approved 9/2015

4.14A DUAL ROLE TESTIMONY

You [have heard] [are about to hear] testimony from [*name*] who [testified] [will testify] to both facts and opinions and the reasons for [his] [her] opinions.

Fact testimony is based on what the witness saw, heard or did. Opinion testimony is based on the education or experience of the witness.

As to the testimony about facts, it is your job to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. [Take into account the factors discussed earlier in these instructions that were provided to assist you in weighing the credibility of witnesses.]

As to the testimony about the witness's opinions, this opinion testimony is allowed because of the education or experience of this witness. Opinion testimony should be judged like any other testimony. You may accept all of it, part of it, or none of it. You should give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Comment

If a witness testifies to both facts and opinions, a cautionary instruction on the dual role of such a witness must be given. This situation can arise, for example, when a law enforcement witness testifies as both a fact witness and as an opinion witness. *See United States v. Torralba-Mendia*, 784 F.3d 652, 659 (9th Cir. 2015); *United States v. Vera*, 770 F.3d 1232, 1246 (9th Cir. 2014). In a criminal case, omitting such a cautionary or curative instruction is plain error, even if no party requests such an instruction or affirmatively opposes it. *See Vera*, 770 F.3d 1232 at 1246 (holding that court's failure to instruct jury on how to evaluate agent's dual role testimony prejudiced defendant when agent testified as both expert witness and lay, or fact, witness); *see also Torralba-Mendia*, 784 F.3d at 659 (noting holding in *Vera* and finding error in district court's omission of dual role instruction differentiating between lay and expert testimony). Indeed, in *Torralba-Mendia*, the government proposed such an instruction, the defendant objected and the court declined to give the instruction; the Ninth Circuit found plain error. *Id*.

The court might also consider bifurcating a witness's testimony, separating a witness's percipient, or factual, testimony from the witness's expert opinions. *See United States v. Anchrum*, 590 F.3d 795, 803-04 (9th Cir. 2009) (holding that district court "avoided blurring the distinction between [the case agent's] distinct role as a lay witness and his role as an expert witness" when it "clearly separated [the agent's] testimony into a first 'phase' consisting of his percipient observations, and a second 'phase' consisting of his credentials in the field of drug trafficking and expert testimony regarding the modus operandi of drug traffickers").

In addition, if an opinion witness is allowed to present otherwise inadmissible evidence under Fed. R. Evid. 703, an additional instruction may be needed. *See* Comment to Instruction 4.14. Also, when an opinion witness presents both expert opinion testimony and lay opinion

testimony, as happened in *Vera*, further instructions may be needed.

Approved 9/2015

4.15 SUMMARIES NOT RECEIVED IN EVIDENCE

During the trial, certain charts and summaries were shown to you in order to help explain the evidence in the case. These charts and summaries were not admitted in evidence and will not go into the jury room with you. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

Comment

This instruction applies only when the charts and summaries are not admitted in evidence and are used for demonstrative purposes. *See United States v. Krasn*, 614 F.2d 1229, 1238 (9th Cir. 1980). If the charts and summaries are admitted in evidence, it may be appropriate to instruct the jury using Instruction 4.16 (Charts and Summaries in Evidence). *See also* JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 3.10.A (2013).

4.16 CHARTS AND SUMMARIES IN EVIDENCE

Certain charts and summaries have been admitted in evidence. Charts and summaries are only as good as the underlying supporting material. You should, therefore, give them only such weight as you think the underlying material deserves.

Comment

See Fed. R. Evid. 1006.

Use this instruction when charts and summaries are admitted in evidence. If charts and summaries are not admitted in evidence, use Instruction 4.15 (Summaries Not Received in Evidence).

This instruction may be unnecessary if there is no dispute as to the accuracy of the chart or summary.

4.17 FLIGHT/CONCEALMENT OF IDENTITY

Comment

The Committee generally recommends against giving specific inference instructions in such areas as flight or concealment of identity because the general instruction on direct and circumstantial evidence is sufficient (*see* Introductory Comment to this chapter). Also, caution is warranted because evidence of flight can be consistent with innocence. *United States v. Dixon*, 201 F.3d 1223, 1232 (9th Cir. 2000). Where sufficient facts support such an inference, the Ninth Circuit has not foreclosed the use of such an instruction. *See United States v. Blanco*, 392 F.3d 382, 395-97 (9th Cir. 2004) (flight); *United States v. Silverman*, 861 F.2d 571, 580-82 (9th Cir. 1988) (concealment of identity).

4.18 LOST OR DESTROYED EVIDENCE

Comment

An instruction concerning evidence lost or destroyed by the government is appropriate when the balance "between the quality of the Government's conduct and the degree of prejudice to the accused" weighs in favor of the defendant. *United States v. Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir. 1979) (en banc) (Kennedy, J., concurring), *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008); *see United States v. Sivilla*, 714 F.3d 1168, 1173 (9th Cir. 2013). The government bears the burden of justifying its conduct, and the defendant bears the burden of demonstrating prejudice. *Id.* In evaluating the government's conduct, a court should consider whether the evidence was lost or destroyed while in the government's custody, whether it acted in disregard of the defendant's interests, whether it was negligent, whether the prosecuting attorneys were involved, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification. *Id.* (citing *Loud Hawk*, 628 F.2d at 1152). Factors relevant to prejudice to the defendant include the centrality and importance of the evidence to the case, the probative value and reliability of secondary or substitute evidence, the nature and probable weight of the factual inferences and kinds of proof lost to the accused, and the probable effect on the jury from the absence of the evidence. *Id.* at 1173-74 (citing *Loud Hawk*, 628 F.2d at 1152). While a showing of bad faith on the part of the government is required to warrant the dismissal of a case based on lost or destroyed evidence, it is not required for a remedial jury instruction. *Id.* at 1170.

5. RESPONSIBILITY

Instruction

5.1 Aiding and Abetting
5.2 Accessory After the Fact
5.3 Attempt
5.4 Specific Intent
5.5 Willfully
5.5A Maliciously
5.6 Knowingly—Defined
5.7 Deliberate Ignorance
5.8 Presumptions
5.9 Advice of Counsel

5.1 AIDING AND ABETTING

A defendant may be found guilty of [*specify crime charged*], even if the defendant personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To prove a defendant guilty of [*specify crime charged*] by aiding and abetting, the government must prove each of the following beyond a reasonable doubt:

First, [*specify crime charged*] was committed by someone;

Second, the defendant aided, counseled, commanded, induced or procured that person with respect to at least one element of [*specify crime charged*];

Third, the defendant acted with the intent to facilitate [*specify crime charged*]; and

Fourth, the defendant acted before the crime was completed.

It is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit [*specify crime charged*].

A defendant acts with the intent to facilitate the crime when the defendant actively participates in a criminal venture with advance knowledge of the crime [and having acquired that knowledge when the defendant still had a realistic opportunity to withdraw from the crime].

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

Comment

Use this instruction with an instruction on the elements of the underlying substantive crime.

The Supreme Court has stated that the federal aiding and abetting statute has two primary components : "a person is liable under § 2 if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014). The defendant's conduct need not facilitate each and every element of the crime; a defendant can be convicted as an aider and abettor even if the defendant's conduct "relates to only one (or some) of a crime's phases or elements." *Id.* at 1246–47. The intent requirement is satisfied when a person actively participates in a criminal venture with advance knowledge of the circumstances constituting the elements of the charged offense. *Id.* at 1248–49; *see also United States v. Goldtooth*, 754 F.3d 763, 769 (9th Cir. 2014) (reversing defendants' convictions for aiding and abetting robbery on Indian reservation because there was no evidence that defendants had foreknowledge that robbery was to occur).

In *Rosemond*, the defendant was charged with aiding and abetting the crime of using a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. § 924(c). The Supreme Court held that the government need not necessarily prove that the defendant took action with respect to any firearm, so long as the government proves that the defendant facilitated another element—drug trafficking. *Rosemond*, 134 S. Ct. at 1247. It was necessary, however, that the government prove that the defendant had advance knowledge of the firearm. *Id.* at 1249–50. *See* Instruction 8.71 (Firearms—Using or Carrying in Commission of Crime of Violence or Drug Trafficking Crime).

If, as in *Rosemond*, there is an issue as to when the defendant learned of a particular circumstance that constitutes an element of the crime, the judge should further instruct the jury that the defendant must have learned of the circumstance at a time when the defendant still had a realistic opportunity to withdraw from the crime. *See Rosemond*, 134 S. Ct. at 1251–52 & n.10 (instruction telling jury to consider whether Rosemond "knew his cohort used a firearm" was erroneous because instruction "failed to convey that Rosemond had to have advance knowledge . . . that a confederate would be armed" such that "he c[ould] realistically walk away").

Aiding and abetting is not a separate and distinct offense from the underlying substantive crime, but is a different theory of liability for the same offense. *United States v. Garcia*, 400 F.3d 816, 820 (9th Cir. 2005). An aiding and abetting instruction is proper even when the indictment does not specifically charge that theory of liability , because all indictments are read as implying that theory in each count. *United States v. Vaandering*, 50 F.3d 696, 702 (9th Cir. 1995); *United States v. Armstrong*, 909 F.2d 1238, 1241-42 (9th Cir. 1990); *United States v. Jones*, 678 F.2d 102, 104 (9th Cir. 1982). *See also United States v. Gaskins*, 849 F.2d 454, 459 (9th Cir. 1988); *United States v. Sayetsitty,* 107 F.3d 1405, 1412 (9th Cir. 1997).

A person may be convicted of aiding and abetting despite the prior acquittal of the principal. *Standefer v. United States,* 447 U.S. 10, 20 (1980); *United States v. Mejia-Mesa*, 153 F.3d 925, 930 (9th Cir. 1998). Moreover, the principal need not be named or identified; it is necessary only that the offense was committed by somebody and that the defendant intentionally did an act to help in its commission. *Mejia-Mesa*, 153 F.3d at 930 (citing *Feldstein v. United States,* 429 F.2d 1092, 1095 (9th Cir. 1970)).

The defendant's deliberate ignorance of the actions taken by another person who commits a crime is sufficient to satisfy the knowledge required for the offense of aiding and abetting that crime. *United States v. Nosal*, 844 F.3d 1024, 1039-40 (9th Cir. 2016) (approving an instruction that the defendant acted "knowingly" if he "was aware of a high probability that [other employees] had gained unauthorized access to a computer . . . or misappropriated trade secrets . . . without authorization . . . and deliberately avoided learning the truth."). For a definition of "deliberate ignorance," *see* Instruction 5.7 (Deliberate Ignorance).

No specific unanimity instruction on the issue of who acted as principal or aider and abettor is necessary, *id.*, nor does the jury need to reach unanimous agreement on the manner (e.g., "procured," "aided," "abetted," "counseled," "induced," or "commanded") by which the defendant provided assistance. *United States v. Kim*, 196 F.3d 1079, 1083 (9th Cir. 1999).

The last paragraph of this instruction has been expressly approved in *Vaandering*, 50 F.3d at 702. It may be unnecessary to give the last paragraph if there is no dispute as to the identity of the principal and the aider and abettor.

Approved 3/2017

5.2 ACCESSORY AFTER THE FACT

The defendant is charged with having been an accessory after the fact to the crime of [*specify crime charged*]. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knew that [*name of principal*] had committed the crime of [*specify crime charged*]; and

Second, the defendant assisted [*name of principal*] with the specific purpose or design to hinder or prevent that person's [apprehension] [trial] [or] [punishment].

Comment

When there is substantial evidence that the defendant participated in the principal offense before its completion, an instruction on this distinct offense need not be given. *United States v. Panza*, 612 F.2d 432, 441 (9th Cir. 1979); *United States v. Jackson,* 448 F.2d 963, 971 (9th Cir. 1971).

Knowledge that the principal committed the offense charged may be inferred from circumstantial evidence. *United States v. Mills*, 597 F.2d 693, 697 (9th Cir. 1979). Accordingly, an instruction requiring "positive knowledge in contrast to imputed or implied knowledge" should not be given, but the jury should be instructed that the accessory after the fact must know of the principal's actions and act with the "specific purpose or design" to hinder or prevent the principal's apprehension, trial or punishment. *Id.*

5.3 ATTEMPT

The defendant is charged in the indictment with attempting to commit [*specify crime charged*]. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to [*specify elements of crime charged*]; and

Second, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Comment

Where this Manual provides a model instruction covering attempt to commit a specific offense, such instruction should be used instead of this generic attempt instruction. This instruction is appropriate only when a defendant is accused of attempting to commit a crime for which there is no specific model instruction.

This Manual contains model instructions for attempt to commit the following specific offenses:

Arson (Instruction 8.1);
Passing counterfeit obligations (Instruction 8.28);
Passing forged endorsement on check, bond or security of U.S. (Instruction 8.34);
Smuggling goods (Instruction 8.35);
Passing false papers though customhouse (Instruction 8.36);
Escape (Instruction 8.45);
Murder (Instruction 8.111);
Kidnapping (Instructions 8.117 and 8.119);
Bank fraud (Instructions 8.126 and 8.128);
Mail theft (Instruction 8.139);
Extortion (Instructions 8.142 and 8.143);
Robbery (Instruction 8.143A);
Interstate or Foreign Travel in Aid of Racketeering Enterprise (Instruction 8.144);
Financial transaction to promote unlawful activity (Instruction 8.146);
Laundering monetary instruments (Instruction 8.147);
Transporting funds to promote unlawful activity (Instruction 8.148);
Transporting monetary instruments for purpose of laundering (Instruction 8.149);
Violent Crime in Aid of Racketeering Enterprise (Instruction 8.151);
Bank robbery (Instruction 8.163);
Aggravated sexual abuse (Instructions 8.165, 8.167, and 8.169);
Sexual abuse (Instructions 8.171, 8.173, 8.175 and 8.177);
Transporting for prostitution; persuading to travel for prostitution (Instructions 8.191 and

8.192);
Offenses involving aliens—illegal transportation, harboring, and illegal reentry (Instructions 9.1, 9.2, 9.3, 9.5, and 9.7);
Controlled substance offenses (Instructions 9.17, 9.20, 9.22, 9.24 and 9.26); and
Forcible rescue of seized property (Instruction 9.43).

"To attempt a federal crime is not, of itself, a federal crime. Attempt is only actionable when a specific federal criminal statute makes it impermissible to attempt to commit the crime." *United States v. Anderson*, 89 F.3d 1306, 1314 (6th Cir. 1996) (citations omitted). *See also United States v. Hopkins*, 703 F.2d 1102, 1104 (9th Cir. 1983) ("There is no general federal 'attempt' statute. A defendant therefore can only be found guilty of an attempt to commit a federal offense if the statute defining the offense also expressly proscribes an attempt." (citations omitted)). However, many federal statutes defining crimes also expressly proscribe attempts.

"[A]ttempt is a term that at common law requires proof that the defendant had the specific intent to commit the underlying crime and took some overt act that was a substantial step toward committing that crime." *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1192 (9th Cir. 2000) (en banc). To be a substantial step "actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007). Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

"[A] person may be convicted of an attempt to commit a crime even though that person may have actually completed the crime." *United States v. Rivera-Relle*, 333 F.3d 914, 921 (9th Cir.), *cert. denied*, 540 U.S. 977 (2003).

5.4 SPECIFIC INTENT

Comment

The Committee recommends avoiding instructions that distinguish between "specific intent" and "general intent." The Ninth Circuit has stated: "Both the manual [on jury trial procedures] accompanying the Model Instructions and our case law discourage the use of generic intent instructions." *United States v. Bell*, 303 F.3d 1187, 1191 (9th Cir. 2002). The "preferred practice" is to give an intent instruction that reflects the intent requirements of the offense charged. *Id*.

If the statute at issue is silent regarding the necessary mens rea of the crime, the court should examine the statute's legislative history. *United States v. Nguyen*, 73 F.3d 887, 891 (9th Cir. 1995). *See also United States v. Barajas-Montiel,*185 F.3d 947, 952 (9th Cir. 1999) (following *Nguyen* and holding that criminal intent is required for conviction of the felony offenses of 8 U.S.C. § 1324(a)(2)(B)). If the court perceives an ambiguity regarding Congress's intent to require a mens rea, the court should read such a requirement into the statute. *Nguyen,* 73 F.3d at 890-91. *Accord, United States v. Johal*, 428 F.3d 823, 826 (9th Cir. 2005) (requirement of some mens rea for conviction of a crime is "firmly embedded").

Most attempt crimes require specific intent. *See United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1192 (9th Cir. 2000) (en banc) (crime of attempted illegal reentry, for example, is a specific intent offense).

5.5 WILLFULLY

Comment

As the Supreme Court has observed, "willful" is a word of "many meanings" and "its construction [is] often . . . influenced by its context." *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994). Accordingly, Ninth Circuit cases have defined "willful" in different terms depending on the particular crime charged. *See, e.g.*, *United States v. Lloyd*, 807 F.3d 1128, 1166 (9th Cir. 2015) (in criminal prosecution for selling unregistered securities in violation of 15 U.S.C. § 77e, "willfully" does not require actor to have known conduct was unlawful (citing *Reyes*, 577 F.3d 1069)); *United States v. Anguiano-Morfin*, 713 F.3d 1208, 1210 (9th Cir. 2013) (in prosecution for falsely claiming United States citizenship, defendant's subjective belief is dispositive on issue of willfulness); *United States v. Berry*, 683 F.3d 1015, 1021 (9th Cir. 2012) (in prosecution for social security fraud, "willfully" connotes "culpable state of mind"); *United States v. Reyes*, 577 F.3d 1069, 1080 (9th Cir. 2009) (in prosecution for securities fraud, "willfully" means "intentionally undertaking an act that one knows to be wrongful; 'willfully' in this context does *not* require that the actor know specifically that the conduct was unlawful," quoting *United States v. Tarallo*, 380 F.3d 1174, 1188 (9th Cir. 2004) (emphasis in original)). *See also United States v. Easterday*, 564 F.3d 1004, 1006 (9th Cir. 2009) (for crime of failure to pay employee payroll taxes, "willful" defined as "a voluntary, intentional violation of a known legal duty"); *United States v. Awad*, 551 F.3d 930, 939 (9th Cir. 2009) (in health care fraud case, "willful" act is one undertaken with "bad purpose" with knowledge that conduct was unlawful); *but see United States v. Ajoku*, 718 F.3d 882 (9th Cir. 2013), *judgment vacated*, 134 S. Ct. 1872 (Mem.) (U.S. April 21, 2014). After the Solicitor General confessed error, the Supreme Court vacated the decision of the Ninth Circuit in *Ajoku*. As a result, in cases alleging a false statement to a government agency in violation of 18 U.S.C. § 1001, as well as cases alleging a false statement relating to health care matters in violation of 18 U.S.C. § 1035, the government must prove, among other things, that a defendant acted deliberately and with knowledge both that the statement was untrue and that his or her conduct was unlawful.

As the meaning of "willfully" necessarily depends on particular facts arising under the applicable statute, the Committee has not provided a generic instruction defining that term. In the context of tax crimes, however, *see* Instruction 9.42 (Willfully—Defined).

Approved 3/2016

5.5A MALICIOUSLY

Comment

There is no uniform definition of the term "maliciously." When a statute provides a definition of a term, that definition controls. However, when a statute does not define a term, the term will generally be interpreted "by employing the ordinary, contemporary, and common meaning of the words that Congress used." *United States v. Kelly*, 676 F.3d 912, 917 (9th Cir. 2012), quoting *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998). Furthermore, when a term "has accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of the term." *Kelly*, 676 F.3d at 917 (in prosecution under 18 U.S.C. § 1363, government was not required to prove that defendant harbored any "malevolence or ill-will"). One acts "maliciously" when he or she has only the intent to do the prohibited act and has no justification or excuse. *Id*.

Approved 7/2013

5.6 KNOWINGLY—DEFINED

An act is done knowingly if the defendant is aware of the act and does not [act] [fail to act] through ignorance, mistake, or accident. [The government is not required to prove that the defendant knew that [his] [her] acts or omissions were unlawful.] You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Comment

The second sentence of this instruction should not be given when an element of the offense requires the government to prove that the defendant knew that what the defendant did was unlawful. *See United States v. Liu*, 731 F.3d 982, 994-95 (9th Cir. 2013) (criminal copyright infringement); *United States v. Santillan*, 243 F.3d 1125, 1129 (9th Cir. 2001) (violation of Lacey Act); *United States v. Turman*, 122 F.3d 1167, 1169 (9th Cir. 1997) (money laundering case).

Approved 2/2014

5.7 DELIBERATE IGNORANCE

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant:

1. was aware of a high probability that [*e.g.*, drugs were in the defendant's automobile], and

2. deliberately avoided learning the truth.

You may not find such knowledge, however, if you find that the defendant actually believed that [*e.g.* no drugs were in the defendant's automobile], or if you find that the defendant was simply careless.

Comment

In *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (en banc), the Ninth Circuit revived its decision in *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc), on which the language of this instruction is based. In so doing, the en banc court reiterated that in deciding whether to give a deliberate ignorance instruction along with an instruction on actual knowledge, "the district court must determine whether the jury could rationally find willful blindness even though it has rejected the government's evidence of actual knowledge. If so, the court may also give a *Jewell* instruction." *Heredia*, 483 F.3d at 922; *see also United States v. Ramos-Atondo*, 732 F.3d 1113, 1120, 1124 (9th Cir. 2013) (deliberate ignorance instruction may be given in conspiracy case); *United States v. Yi*, 704 F.3d 800, 805 (9th Cir. 2013) (approving modified version of Instruction 5.7 when defendant knew of high probability of asbestos in condominium ceilings and deliberately avoided learning truth).

In the event the court determines to give a *Jewell* instruction, "it must, at a minimum contain the two prongs of suspicion and deliberate avoidance." *Heredia* at 483 F.3d at 924. As the Ninth Circuit explained:

> We conclude, therefore, that the two-pronged instruction given at defendant's trial met the requirements of *Jewell* and, to the extent some of our cases have suggested more is required, *see* page 920 *supra*, they are overruled. A district judge, in the exercise of his discretion, may say more to tailor the instruction to the particular facts of the case. Here, for example, the judge might have instructed the jury that it could find Heredia did not act deliberately if it believed that her failure to investigate was motivated by safety concerns. Heredia did not ask for such an instruction and the district judge had no obligation to give it sua sponte. Even when defendant asks for such a supplemental instruction, it is within the district court's broad discretion whether to comply.

Id. at 920-21. Accordingly, the government need not prove that the reason for the defendant's deliberate avoidance was to obtain a defense against prosecution. *Id*.

Approved 2/2014

5.8 PRESUMPTIONS

Comment

The Committee recommends that extreme caution be used in instructing the jury regarding presumptions. "A jury instruction cannot relieve the State of the burden of proving beyond a reasonable doubt a crucial element of the criminal offense." *Patterson v. Gomez*, 223 F.3d 959, 962 (9th Cir. 2000). Accordingly, "if a 'reasonable juror could have given the presumption conclusive or persuasion-shifting effect,' the instruction is unconstitutional." *Id.* (quoting *Sandstrom v. Montana*, 442 U.S. 510, 519 (1979)).

5.9 ADVICE OF COUNSEL

One element that the government must prove beyond a reasonable doubt is that the defendant had the unlawful intent to [*specify applicable unlawful act*]. Evidence that the defendant in good faith followed the advice of counsel would be inconsistent with such an unlawful intent. Unlawful intent has not been proved if the defendant, before acting, made full disclosure of all material facts to an attorney, received the attorney's advice as to the specific course of conduct that was followed, and reasonably relied on that advice in good faith.

Comment

A defendant who reasonably relies on the advice of counsel may "not be convicted of a crime which involves wilful and unlawful intent." *Williamson v. United States*, 207 U.S. 425, 453 (1908). Advice of counsel is not a separate and distinct defense but rather is a circumstance indicating good faith which the trier of fact is entitled to consider on the issue of intent. *Bisno v. United States*, 299 F.2d 711, 719 (9th Cir. 1961). A defendant is entitled to an instruction concerning the advice of counsel if it has some foundation in the evidence. *United States v. Ibarra-Alcarez*, 830 F.2d 968, 973 (9th Cir. 1987). In order to assert advice of counsel, a defendant must have made a full disclosure of all material facts to his or her attorney, received advice as to the specific course of conduct that he or she followed, and relied on the advice in good faith. *United States v. Munoz*, 233 F.3d 1117, 1132 (9th Cir. 2000).

6. SPECIFIC DEFENSES

Instruction

Introductory Comment
6.1 Alibi
6.2 Entrapment
6.2A Sentencing Entrapment
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6.4 Insanity
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6.10 Mere Presence
6.11 Public Authority or Government Authorization Defense

Introductory Comment

A defendant is entitled to have the jury instructed on his or her theory of defense, as long as the theory has support in the law and some foundation in the evidence. *United States v. Perdomo-Espana*, 522 F.3d 983, 986-87 (9th Cir. 2008). But the instruction need not be given in the form requested, nor if it merely duplicates what the jury has already been told. *United States v. Lopez-Alvarez*, 970 F.2d 583, 597 (9th Cir. 1992).

There appears to be some conflict in Ninth Circuit case law as to when a district court must sua sponte instruct the jury on a specific defense. *Compare United States v. Bear*, 439 F.3d 565, 568 (9th Cir. 2006) (when a defendant actually presents and relies on a theory of defense at trial (in this case, a public authority defense), "the judge must instruct the jury on that theory even where such an instruction was not requested") with *United States v. Lillard*, 354 F.3d 850, 855 (9th Cir. 2003) ("In the absence of a request from the defendant, the omission of an alibi instruction cannot be plain error.").

The unanimity requirement extends to affirmative defenses. *See, e.g.*, *United States v. Ramirez*, 537 F.3d 1075, 1084 (9th Cir. 2008). In most cases the general unanimity instruction in Instruction 7.1 (Duty to Deliberate) should suffice. *See United States v. Nobari*, 574 F.3d 1065, 1081 (9th Cir. 2009); *United States v. Kim*, 196 F.3d 1079, 1082 (9th Cir. 1999). However, "a specific unanimity instruction is required if it appears that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts." *United States v. Lyons*, 472 F.3d 1055, 1068 (9th Cir. 2007). *See also* Instruction 7.9 (Specific Issue Unanimity).

6.1 ALIBI

Evidence has been admitted that the defendant was not present at the time and place of the commission of the crime charged in the indictment. The government has the burden of proving beyond a reasonable doubt the defendant was present at that time and place.

If, after consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, you must find the defendant not guilty.

Comment

See Fed. R. Crim. P. 12.1 (Notice of Alibi) as to a defendant's notice of defense.

It is error to refuse a request for an alibi instruction when there is evidence to support this theory. *United States v. Lillard*, 354 F.3d 850, 855 (9th Cir. 2003); *United States v. Hairston*, 64 F.3d 491, 495 (9th Cir. 1995); *United States v. Zuniga,* 6 F.3d 569, 571 (9th Cir. 1993). It does not matter which party introduces the alibi evidence; the instruction should be given even if the alibi evidence is "weak, insufficient, inconsistent or of doubtful credibility." *Hairston*, 64 F.3d at 495 (citations omitted). However, the failure to give an alibi instruction sua sponte is not plain error. *Lillard*, 354 F.3d at 855-56.

6.2 ENTRAPMENT

The defendant contends that [he] [she] was entrapped by a government agent. The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped. The government must prove either:

1. the defendant was predisposed to commit the crime before being contacted by government agents, or

2. the defendant was not induced by the government agents to commit the crime.

When a person, independent of and before government contact, is predisposed to commit the crime, it is not entrapment if government agents merely provide an opportunity to commit the crime. In determining whether the defendant was predisposed to commit the crime before being approached by government agents, you may consider the following:

1. whether the defendant demonstrated reluctance to commit the offense;

2. the defendant's character and reputation;

3. whether government agents initially suggested the criminal activity;

4. whether the defendant engaged in the criminal activity for profit; and

5. the nature of the government's inducement or persuasion.

In determining whether the defendant was induced by government agents to commit the offense, you may consider any government conduct creating a substantial risk that an otherwise innocent person would commit an offense, including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship.

Comment

A defendant need not concede that he or she committed the crime to be entitled to an entrapment instruction. *United States v. Derma*, 523 F.2d 981, 982 (9th Cir. 1975); *cf. United States v. Paduano*, 549 F.2d 145, 148 (9th Cir. 1977). Only slight evidence raising the issue of entrapment is necessary for submission of the issue to the jury. *United States v. Gurolla*, 333 F.3d 944, 951 (9th Cir. 2003). When there is evidence of entrapment, an additional element should be added to the instruction on the substantive offense: for example, "Fourth, the defendant was not entrapped."

The government is not required to prove both lack of inducement and predisposition. *United States v. McClelland*, 72 F.3d 717, 722 (9th Cir. 1995) ("If the defendant is found to be predisposed to commit a crime, an entrapment defense is unavailable regardless of the

inducement."); *United States v. Simas*, 937 F.2d 459, 462 (9th Cir. 1991) (in absence of inducement, evidence of lack of predisposition is irrelevant and the failure to give a requested entrapment instruction is not error).

There are a number of Ninth Circuit cases describing the five factors that should be considered when determining "predisposition." *See*, *e.g.*, *United States v. Mohamud*, 843 F.3d 420, 432-35 (9th Cir. 2016); *United States v. Gurolla*, 333 F.3d at 956, *United States v. Jones*, 231 F.3d 508, 518 (9th Cir. 2000).

The government must prove that the defendant was predisposed to commit the crime *prior* to being approached by a government agent. *Jacobson v. United States*, 503 U.S. 540, 553 (1992). However, evidence gained after government contact with the defendant can be used to prove that the defendant was predisposed before the contact. *Id.* at 550-53. *See also United States v. Burt*, 143 F.3d 1215, 1218 (9th Cir. 1998) (previous Ninth Circuit Entrapment Instruction 6.02 erroneous "because it failed to state clearly the government's burden of establishing 'beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by the [g]overnment agents.'") (citing *Jacobson*). The Ninth Circuit has stated that an entrapment instruction should avoid instructing the jury that a person is not entrapped if the person was "already" willing to commit the crime because of the ambiguity resulting therefrom. *United States v. Kim*, 176 F.3d 1126, 1128 (9th Cir. 1993).

The final paragraph of the instruction, explaining inducement, appears repeatedly in the case law. *See, e.g., United States v. Williams*, 547 F.3d 1187, 1197 (9th Cir. 2008) (quoting *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir. 1994)).

See United States v. Spentz, 653 F.3d 815, 819-20 (9th Cir. 2011) (no abuse of discretion in denying defendant's request for entrapment jury instruction when only inducement for committing crime, other than being afforded opportunity to do so, is typical benefit from engaging in criminal act such as proceeds from robbery). When a case presents a *Spentz* issue, the Ninth Circuit has suggested adding the following language:

> It is not entrapment if a person is tempted into committing a crime solely on the hope of obtaining ill-gotten gain; that is often the motive to commit a crime. However, in deciding whether a law enforcement officer induced the defendant to commit the crime, the jury may consider all of the factors that shed light on how the officers supposedly persuaded or pressure the defendant to commit the crime.

United States v. Cortes, 732 F.3d 1078, 1087 (9th Cir. 2013).

When the propriety of a government agent's conduct is an issue, *see* Instruction 4.10 (Government's Use of Undercover Agents and Informants).

Approved 3/2017

6.2A SENTENCING ENTRAPMENT

Comment

Sentencing entrapment is a separate defense from entrapment and, in appropriate cases, an issue for the jury. When a defendant contends that he or she was entrapped as to the quantity of drugs involved in the crime, *see United States v. Cortes*, 757 F.3d 850, 864 (9th Cir. 2014), and *United States v. Yuman-Hernandez*, 712 F.3d 474-75 (9th Cir. 2013).

Approved 4/2014

6.3 ENTRAPMENT DEFENSE— WHETHER PERSON ACTED AS GOVERNMENT AGENT

The defendant contends [he] [she] was entrapped by a government agent. Whether or not [*name of witness*] was acting as a government agent in connection with the crimes charged in this case, and if so, when that person began acting as a government agent, are questions for you to decide. In deciding those questions you should consider that, for purposes of entrapment, someone is a government agent when the government authorizes, directs, and supervises that person's activities and is aware of those activities. To be a government agent, it is not enough that someone has previously acted or been paid as an informant by other state or federal agencies, or that someone expects compensation for providing information.

In determining whether and when someone was acting as a government agent, you must look to all the circumstances existing at the time of that person's activities in connection with the crimes charged in this case, including but not limited to the nature of that person's relationship with the government, the purposes for which it was understood that person might act on behalf of the government, the instructions given to that person about the nature and extent of permissible activities, and what the government knew about those activities and permitted or used.

Comment

The Ninth Circuit has explicitly approved the factors articulated in the second paragraph of this instruction. *See United States v. Jones*, 231 F.3d 508, 517 (9th Cir. 2000).

When the propriety of a putative government agent's conduct is an issue, *see* Instruction 4.10 (Government's Use of Undercover Agents and Informants).

Compare United States v. Tallmadge, 829 F.2d 767, 774 (9th Cir. 1987) (licensed firearms dealer held to be government agent; "we believe that a buyer has the right to rely on the representations of a licensed firearms dealer, who has been made aware of all the relevant historical facts, that a person may receive and possess a weapon if his felony conviction has been reduced to a misdemeanor"), *with United States v. Rodman*, 776 F.3d 638, 643 (9th Cir. 2015) (licensed firearms dealer could not rely on entrapment by estoppel defense even if told by another licensed firearms dealer that removing serial numbers from machine guns and then placing numbers on other guns for sale was legal because other licensed firearms dealer was in no better position than defendant to determine legality of scheme).

Approved 3/2015

6.4 INSANITY

The defendant contends [he] [she] was insane at the time of the crime. Insanity is a defense to the charge. The sanity of the defendant at the time of the crime charged is therefore a question you must decide.

A defendant is insane only if at the time of the crime charged:

1. The defendant had a severe mental disease or defect; and

2. As a result, the defendant was unable to appreciate the nature and quality or the wrongfulness of [his] [her] acts.

The defendant has the burden of proving the defense of insanity by clear and convincing evidence. Clear and convincing evidence of insanity means that it is highly probable that the defendant was insane at the time of the crime. Proof by clear and convincing evidence is a lower standard of proof than proof beyond a reasonable doubt.

You may consider evidence of defendant's mental condition before or after the crime to decide whether defendant was insane at the time of the crime. Insanity may be temporary or extended.

Your finding on the question of whether the defendant was insane at the time of the crime must be unanimous.

Comment

The insanity defense and the burden of proof are set forth in 18 U.S.C. § 17. Clear and convincing evidence requires that the existence of a disputed fact be highly probable. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). When an affirmative defense of insanity is submitted to the jury, unanimity is required on both questions of guilt and sanity. "[A] jury united as to guilt but divided as to an affirmative defense (such as insanity) is necessarily a hung jury." *United States v. Southwell*, 432 F.3d 1050, 1055 (9th Cir. 2005).

A special verdict is required to resolve an insanity defense. *See* 18 U.S.C. § 4242(b).

When asserting an insanity defense to a continuing offense, such as illegal reentry under 8 U.S.C. § 1326(a), a defendant must prove that he or she was legally insane for "virtually the entire duration" of his or her crime. *See United States v. Alvarez-Ulloa*, 784 F.3d 558, 568 (9th Cir. 2015) (approving supplemental jury instruction in 8 U.S.C. § 1326(a) prosecution informing jury that insanity defense is negated if defendant ceased being insane for period long enough that he could have reasonably left United States, but knowingly remained).

Approved 6/2015

6.5 DURESS, COERCION OR COMPULSION (LEGAL EXCUSE)

The defendant contends [he] [she] acted under [duress] [coercion] [compulsion] at the time of the crime charged. [Duress] [coercion] [compulsion] legally excuses the crime of [*specify crime charged*].

The defendant must prove [duress] [coercion] [compulsion] by a preponderance of the evidence. A preponderance of the evidence means that you must be persuaded that the things the defendant seeks to prove are more probably true than not true. This is a lesser burden of proof than the government's burden to prove beyond a reasonable doubt each element of [*specify crime charged*].

A defendant acts under [duress] [coercion] [compulsion] only if at the time of the crime charged:

1. there was a present, immediate, or impending threat of death or serious bodily injury to [the defendant] [a family member of the defendant] if the defendant did not [commit] [participate in the commission of] the crime;

2. the defendant had a well-grounded fear that the threat of death or serious bodily injury would be carried out; [and]

3. the defendant had no reasonable opportunity to escape the threatened harm[.] [; and]

[4. the defendant surrendered to authorities as soon as it was safe to do so.]

If you find that each of these things has been proved by a preponderance of the evidence, you must find the defendant not guilty.

Comment

The fourth element should be used only in cases of prison escape. *See United States v. Solano*, 10 F.3d 682, 683 (9th Cir. 1993). "[I]n order to be entitled to an instruction on duress or necessity as a defense to the crime charged, an escapee must first offer evidence justifying his continued absence from custody as well as his initial departure." *United States v. Bailey*, 444 U.S. 394, 408 (1980).

In *Dixon v. United States*, 548 U.S. 1, 7 (2006), the Supreme Court held that when a statute is silent on the question of an affirmative defense and when the affirmative defense does not negate an essential element of the offense, the burden is on the defendant to prove the elements of the defense by a preponderance of the evidence. *Id.* ("Like the defense of necessity, the defense of duress does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to "avoid liability . . . because coercive conditions or necessity negates a conclusion of

guilt even though the necessary mens rea was present.") (quoting *Bailey*, 444 U.S. at 402).

Use this instruction when the defendant alleges that he or she committed the alleged criminal act under duress, coercion or compulsion. *See United States v. Meraz-Solomon*, 3 F.3d 298, 299 (9th Cir. 1993) (in prosecution for importation of cocaine, burden is on defendant to prove duress, coercion or compulsion by a preponderance of the evidence). A defendant is not obligated to admit guilt to a crime as a precondition for raising the affirmative defense of duress. *See United States v. Haischer*, 780 F.3d 1277, 1284 n.1 (9th Cir. 2015) (clarifying that defendant does not have to admit knowing or intentional commission of crime to assert duress defense).

A defendant is not entitled to present a duress defense to the jury unless the defendant has made a prima facie showing of duress in a pre-trial offer of proof. *United States v. Vasquez-Landaver*, 527 F.3d 798, 802 (9th Cir. 2008). The phrase "present, immediate, or impending threat" in the first element of the instruction was used in *Vasquez-Landaver*, 527 F.3d at 802.

Duress is not a defense to murder, nor will it mitigate murder to manslaughter. *United States v. LaFleur*, 971 F.2d 200, 206 (9th Cir. 1991).

Approved 6/2015

6.6 NECESSITY (LEGAL EXCUSE)

The defendant contends that [he] [she] acted out of necessity. Necessity legally excuses the crime charged.

The defendant must prove necessity by a preponderance of the evidence. A preponderance of the evidence means that you must be persuaded that the things the defendant seeks to prove are more probably true than not true. This is a lesser burden of proof than the government's burden to prove beyond a reasonable doubt each element of [*specify crime charged*].

A defendant acts out of necessity only if at the time of the crime charged:

1. the defendant was faced with a choice of evils and chose the lesser evil;

2. the defendant acted to prevent imminent harm;

3. the defendant reasonably anticipated [his] [her] conduct would prevent such harm; [and]

4. there were no other legal alternatives to violating the law[.] [; and]

[5. the defendant surrendered to authorities as soon as it was safe to do so.]

If you find that each of these things has been proved by a preponderance of the evidence, you must find the defendant not guilty.

Comment

To be entitled to an instruction on necessity as a defense to the crime charged, an escapee must first offer evidence justifying his continued absence from custody. *See United States v. Bailey*, 444 U.S. 394, 413 (1980). The bracketed fifth element should be used in cases of escape only.

This defense traditionally covers situations "where physical forces beyond [an] actor's control rendered illegal conduct as the less of two evils." *United States v. Perdomo-Espana*, 522 F.3d 983, 987 (9th Cir. 2008) (*quoting Bailey*, 444 U.S. at 409-10). The defense of necessity is usually invoked when the defendant acted in the interest of the general welfare. *United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984). The defendant is not entitled to submit the defense of necessity to the jury unless the proffered evidence, construed most favorably to the defendant, establishes all the elements of the defense. *United States v. Cervantes-Flores*, 421 F.3d 825, 829 (9th Cir. 2005); *see also United States v. Chao Fan Xu*, 706 F.3d 965, 988 (9th Cir. 2013) ("Fear of prosecution for crimes committed is not an appropriate reason to claim necessity."). The defendant's proffered necessity defense is analyzed through an objective

framework. *Perdomo-Espana*, 522 F.3d at 987.

Approved 4/2013

6.7 JUSTIFICATION (LEGAL EXCUSE)

The defendant contends that [his] [her] conduct was justified. Justification legally excuses the crime charged.

The defendant must prove justification by a preponderance of the evidence. A preponderance of the evidence means that you must be persuaded that the things the defendant seeks to prove are more probably true than not true. This is a lesser burden of proof than the government's burden to prove beyond a reasonable doubt each element of [*specify crime charged*].

A defendant's conduct was justified only if at the time of the crime charged:

1. the defendant was under an unlawful and present threat of death or serious bodily injury;

2. the defendant did not recklessly place [himself] [herself] in a situation where [he] [she] would be forced to engage in criminal conduct;

3. the defendant had no reasonable legal alternative; and

4. there was a direct causal relationship between the conduct and avoiding the threatened harm.

If you find that each of these things has been proved by a preponderance of the evidence, you must find the defendant not guilty.

Comment

In *United States v. Gomez*, 92 F.3d 770 (9th Cir. 1996), the Ninth Circuit set forth the four elements needed in order to make out a justification offense. *Id.* at 775; *see also United States v. Wafered*, 122 F.3d 787, 790 (9th Cir. 1997). In *Gomez*, the Ninth Circuit held that the defendant presented evidence, that if believed, would have supported a justification defense. *Gomez*, 92 F.3d at 778 (defendant, a convicted felon, armed himself with a shotgun after receiving several death threats as a result of the government's identification of him as a government informant).

Approved 4/2013

6.8 SELF–DEFENSE

The defendant has offered evidence of having acted in self-defense. Use of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonably necessary under the circumstances.

Force likely to cause death or great bodily harm is justified in self-defense only if a person reasonably believes that such force is necessary to prevent death or great bodily harm.

The government must prove beyond a reasonable doubt that the defendant did not act in reasonable self-defense.

Comment

The Ninth Circuit has found that the first two paragraphs of this instruction adequately inform the jury of defendant's defense where "[t]he court also instructed the jury that the prosecution bore the burden of proving beyond a reasonable doubt that the defendant had not acted in reasonable self-defense." *United States v. Keiser*, 57 F.3d 847, 850-52 (9th Cir. 1995). *See also United States v. Morsette*, 622 F.3d 1200, 1202 (9th Cir. 2010) ("the model jury instruction remains correct").

Failure of the trial court to instruct the jury that the government has the burden of disproving self-defense is reversible error. *United States v. Pierre*, 254 F.3d 872, 876 (9th Cir. 2001). When there is evidence of self-defense, an additional element should be added to the instruction on the substantive offense: for example, "Fourth, the defendant did not act in reasonable self-defense."

A defendant is entitled to a self-defense instruction when "there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility." *United States v. Sanchez-Lima,* 161 F.3d 545, 549 (9th Cir. 1998).

The jury must unanimously reject the defendant's self-defense theory in order to find the defendant guilty. *United States v. Ramirez*, 537 F.3d 1075, 1083 (9th Cir. 2008).

See also Comment to Instruction 4.5 (Character of Victim) for a discussion of the admissibility of the victim's character where self-defense is claimed.

6.9 INTOXICATION—DIMINISHED CAPACITY

Evidence has been admitted that the defendant may have [been intoxicated] [suffered from diminished capacity] at the time that the crime charged was committed.

You may consider evidence of the defendant's [intoxication] [diminished capacity] in deciding whether the government has proved beyond a reasonable doubt that the defendant acted with the intent required to commit [*specify crime charged*].

Comment

A defense based on voluntary intoxication is available only for specific intent crimes. *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1195 (9th Cir. 2000); *United States v. Dare*, 425 F.3d 634, 641 n.3 (9th Cir. 2005) ("Voluntary intoxication is not a defense to a general intent offense."), *cert. denied*, 548 U.S. 915 (2006).

Likewise, diminished capacity is a defense only when a specific intent is at issue. *United States v. Twine*, 853 F.2d 676 (9th Cir. 1988). The diminished capacity defense is concerned with whether the defendant possessed the ability to attain the culpable state of mind which defines the crime. *Id.* at 678.

6.10 MERE PRESENCE

Mere presence at the scene of a crime or mere knowledge that a crime is being committed is not sufficient to establish that the defendant committed the crime of [*specify crime charged*]. The defendant must be a participant and not merely a knowing spectator. The defendant's presence may be considered by the jury along with other evidence in the case.

Comment

Such a "mere presence" instruction is unnecessary if the government's case is not solely based on the defendant's presence and the jury has been instructed on the elements of the crime. *See United States v. Tucker*, 641 F.3d 1110 (9th Cir. 2011); *see also United States v. Gooch*, 506 F.3d 1156, 1160 (9th Cir. 2007).

Approved 7/2011

6.11 PUBLIC AUTHORITY OR GOVERNMENT AUTHORIZATION DEFENSE

The defendant contends that [[if] [although]] [[he] [she]] committed the acts charged in the indictment, [he] [she] did so at the request of a government agent. Government authorization of the defendant's acts legally excuses the crime charged.

The defendant must prove by a preponderance of the evidence that [he] [she] had a reasonable belief that [he] [she] was acting as an authorized government agent to assist in law enforcement activity at the time of the offense charged in the indictment. A preponderance of the evidence means that you must be persuaded that the things the defendant seeks to prove are more probably true than not true. This is a lesser burden of proof than the government's burden to prove beyond a reasonable doubt each element of [*specify crime charged*].

If you find that the defendant has proved that [he] [she] reasonably believed that [he] [she] was acting as an authorized government agent as provided in this instruction, you must find the defendant not guilty of [*specify crime charged*].

Comment

In *United States v. Doe*, 705 F.3d 1134 (9th Cir. 2013), the Ninth Circuit held that a defendant had the burden of proving the public authority defense by a preponderance of the evidence because the defense did not serve to negate any of the elements of the crimes with which the defendant was charged. *Id.* at 1146. The court quoted the Seventh Circuit in explaining "when a statute is silent on the question of affirmative defenses and when the affirmative defense does not negate an essential element of the offense, we must presume that the common law rule that places the burden of persuasion on the defendant reflects the intent of Congress." *Id.* at 1147 (quoting *United States v. Jumah*, 493 F.3d 868, 873 (7th Cir. 2007)); *see Dixon v. United States*, 548 U.S. 1, 13-14 (2006). However, the *Doe* court cautioned that "[t]his is not to suggest that there is a *per se* rule that the public authority defense must always be proven by the defendant by a preponderance of the evidence. To the contrary, the burden of proof for the public authority defense depends on both the statute at issue and the facts of the specific case." *Id*. "[W]hen confronted with an affirmative defense, the court must always look closely to the statutory language of the specific offense charged and determine (1) whether the public authority defense negates an element of the charged offense that the Government must prove beyond a reasonable doubt and (2) whether Congress intended to alter the common law rules governing the public authority defense [in the statute at issue]." *Id.* (citation omitted).

See Fed. R. Crim. P. 12.3 (Notice of Defense Based Upon Public Authority) regarding giving notice of the defense. The failure to comply with Rule 12.3 allows the court to exclude the testimony of any undisclosed witness except the defendant, regarding the public authority defense. *United States v. Bear*, 439 F.3d 565, 568 n.1 (9th Cir. 2006). The public authority defense was properly used when the defendant reasonably believed that a government agent authorized her to engage in illegal acts. *Id.* at 568. It is plain error for the court not to instruct

on the public authority defense sua sponte when the defendant actually presents and relies on that theory of defense. *Id*. at 568-70.

Approved 4/2013

7. JURY DELIBERATIONS

Instruction

7.1 Duty to Deliberate
7.2 Consideration of Evidence—Conduct of the Jury
7.3 Use of Notes
7.4 Jury Consideration of Punishment
7.5 Verdict Form
7.6 Communication With Court
7.7 Deadlocked Jury
7.8 Script for Post-*Allen* Charge Inquiry
7.9 Specific Issue Unanimity
7.10 Readback or Playback
7.11 Continuing Deliberations After Juror Is Discharged and Not Replaced
7.12 Resumption of Deliberations After Alternate Juror Is Added

7.1 DUTY TO DELIBERATE

When you begin your deliberations, elect one member of the jury as your [presiding juror] [foreperson] who will preside over the 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 verdict, 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 the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Comment

Ordinarily, the "general unanimity instruction suffices to instruct the jury that they must be unanimous on whatever specifications form the basis of the guilty verdict." *United States v. Lyons*, 472 F.3d 1055, 1068 (9th Cir. 2007) (quoting *United States v. Kim*, 196 F.3d 1079, 1082 (9th Cir. 1999)). A specific unanimity instruction is required if it appears that there is a "genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts." *Id*. (citing *United States v. Anguiano*, 873 F.2d 1314, 1319 (9th Cir. 1989)) (internal quotation marks omitted). A specific unanimity instruction may also be necessary in certain circumstances to avoid constitutional error. *See United States v. Ramirez*, 537 F.3d 1075, 1083 (9th Cir. 2008) (trial court appropriately instructed jury it must unanimously reject self-defense theory in order to find defendant guilty). For further discussion of when a specific unanimity instruction is needed, *see* Comment at 7.9 (Specific Issue Unanimity).

7.2 CONSIDERATION OF EVIDENCE—CONDUCT OF THE JURY

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

> Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any Internet chat room, blog, website or other feature. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.
>
> Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions jeopardizes the fairness of these proceedings[, and a mistrial could result that would require the entire trial process to start over]. If any juror is exposed to any outside information, please notify the court immediately.

7.3 USE OF NOTES

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

7.4 JURY CONSIDERATION OF PUNISHMENT

The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

7.5 VERDICT FORM

A verdict form has been prepared for you. [*Explain verdict form as needed.*] After you have reached unanimous agreement on a verdict, your [presiding juror] [foreperson] should complete the verdict form according to your deliberations, sign and date it, and advise the [clerk] [bailiff] that you are ready to return to the courtroom.

7.6 COMMUNICATION WITH COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the [clerk] [bailiff], signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing, and I will respond to the jury concerning the case only in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, on any question submitted to you, including the question of the guilt of the defendant, until after you have reached a unanimous verdict or have been discharged.

Comment

In *United States v. Southwell,* 432 F.3d 1050, 1052-53 (9th Cir. 2005), the Ninth Circuit noted:

> "The necessity, extent and character of additional [jury] instructions are matters within the sound discretion of the trial court." *Wilson v. United States*, 422 F.2d 1303, 1304 (9th Cir. 1970) (per curiam). That discretion is abused, however, when the district court fails to answer a jury's question on a matter that is not fairly resolved by the court's instructions. Because it is not always possible, when instructing the jury, to anticipate every question that might arise during deliberations, "the district court has the responsibility to eliminate confusion when a jury asks for clarification of a particular issue." *United States v. Hayes,* 794 F.2d 1348, 1352 (9th Cir. 1986); *see also Bollenbach v. United States,* 326 U.S. 607, 612-13 (1946) ("When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.").

7.7 DEADLOCKED JURY

Members of the jury, you have advised that you have been unable to agree upon a verdict in this case. I have decided to suggest a few thoughts to you.

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict if each of you can do so without violating your individual judgment and conscience. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become persuaded that it is wrong. However, you should not change an honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the mere purpose of returning a verdict.

All of you are equally honest and conscientious jurors who have heard the same evidence. All of you share an equal desire to arrive at a verdict. Each of you should ask yourself whether you should question the correctness of your present position.

I remind you that in your deliberations you are to consider the instructions I have given you as a whole. You should not single out any part of any instruction, including this one, and ignore others. They are all equally important.

You may now retire and continue your deliberations.

Comment

The Committee recommends caution when considering whether to give a supplemental instruction (sometimes known as an "*Allen* charge") to encourage a deadlocked jury to reach a verdict. *See United States v. Evanston*, 651 F.3d 1080, 1085-88 (9th Cir. 2011) (extraordinary caution to be exercised when giving an "*Allen* charge").

As the Ninth Circuit explained in *United States v. Berger*, 473 F.3d 1080, 1089 (9th Cir. 2007):

> The term "*Allen* charge" is the generic name for a class of supplemental jury instructions given when jurors are apparently deadlocked; the name derives from the first Supreme Court approval of such an instruction in *Allen v. United States,* 164 U.S. 492, 501-02 (1896). In their mildest form, these instructions carry reminders of the importance of securing a verdict and ask jurors to reconsider potentially unreasonable positions. In their stronger forms, these charges have been referred to as "dynamite charges," because of their ability to "blast" a verdict out of a deadlocked jury.

Allen "charges are proper 'in all cases except those where it's clear from the record that the charge had an impermissibly coercive effect on the jury.'" *United States v. Banks,* 514 F.3d 959, 974 (9th Cir. 2008) (quoting *United States v. Ajiboye,* 961 F.2d 892, 893 (9th Cir. 1992)).

In assessing the coerciveness of an *Allen* charge, the Ninth Circuit considers "(1) the form of the instruction, (2) the time the jury deliberated after receiving the charge as compared to the total time of deliberation, and (3) any other indicia of coerciveness." *United States v. Freeman*, 498 F.3d 893, 908 (9th Cir. 2007) (citing *United States v. Daas,* 198 F.3d 1167, 1179-80 (9th Cir. 1999)); *see also Warfield v. Alaniz*, 569 F.3d 1015, 1029 (9th Cir. 2009) (weekend interval between "standard" *Allen* charge and resumed deliberations "probably would have diluted any coercive effect.")

The form of this instruction is a "neutral form" of the *Allen* charge, that is, "in a form not more coercive than that in *Allen.*" *United States v. Beattie*, 613 F.2d 762, 765 (9th Cir. 1980); *see also United States v. Steele*, 298 F.3d 906, 911 (9th Cir. 2002). Nonetheless, it is reversible error to give even a neutral *Allen* charge that has a coercive effect on the jury's deliberations:

> If the trial judge gives an *Allen* charge after inquiring into the numerical division of the jury, "the charge is per se coercive and requires reversal." *Ajiboye,* 961 F.2d at 893-94. "Even when the judge ... is inadvertently told of the jury's division, reversal is necessary if the holdout jurors could interpret the charge as directed specifically at them-that is, if the judge knew which jurors were the holdouts *and* each holdout juror knew that the judge knew he was a holdout." *Id.* at 894 (citing *United States v. Sae-Chua*, 725 F.2d 530, 532 (1984)).

United States v. Williams, 547 F.3d 1187, 1205 (9th Cir. 2008) (reversing conviction after neutral *Allen* charge when "hold-out" juror knew her identity was known by the court). *See Evanston*, 651 F.3d at 1085-88 (reversible error to allow supplemental closing arguments to deadlocked jury after court has given *Allen* instruction and inquired as to reason for deadlock).

Before giving any supplemental jury instruction to a deadlocked jury, the Committee also recommends the court review JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES §§ 5.4 and 5.5 (2013).

Approved 1/2012

7.8 SCRIPT FOR POST-*ALLEN* CHARGE INQUIRY

Comment

If the jury indicates that it is deadlocked after an *Allen* charge is given, the Committee recommends polling the jury to confirm that they "cannot agree on a verdict on one or more counts," Fed. R. Crim. P. 31(b)(3), and, thus, that there is a basis to declare a mistrial. As the Ninth Circuit noted in *Brazzel v. Washington*, 491 F.3d 976, 982 (9th Cir. 2007):

> A hung jury occurs when there is an irreconcilable disagreement among the jury members. A "high degree" of necessity is required to establish a mistrial due to the hopeless deadlock of jury members. *See Arizona v. Washington,* 434 U.S. 497, 506, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). The record should reflect that the jury is "genuinely deadlocked." *Richardson v. United States*, 468 U.S. 317, 324-25 (1984) (explaining that when a jury is genuinely deadlocked, the trial judge may declare a mistrial and require the defendant to submit to a second trial); *see also Selvester* [*v. United States*], 170 U.S. at 270 ("But if, on the other hand, after the case had been submitted to the jury they reported their inability to agree, and the court made record of it and discharged them, such discharge would not be equivalent to an acquittal, since it would not bar the further prosecution."). . . .

In *United States v. Hernandez-Guardado*, 228 F.3d 1017 (9th Cir. 2000), the court noted that in determining whether to declare a mistrial because of jury deadlock, relevant factors for the district court to consider "include the jury's collective opinion that it cannot agree, the length of the trial and complexity of the issues, the length of time the jury has deliberated, whether the defendant has objected to a mistrial, and the effects of exhaustion or coercion on the jury." *Id*. at 1029 (citing *United States v. Cawley*, 630 F.2d 1345, 1348-49 (9th Cir. 1980)). "The most critical factor is the jury's own statement that it is unable to reach a verdict." *Cawley*, 630 F.2d at 1349. "Without more, however, such a statement is insufficient to support a declaration of a mistrial." *Hernandez-Guardado*, 228 F.3d at 1029. "On receiving word from the jury that it cannot reach a verdict, the district court must question the jury to determine independently whether further deliberations might overcome the deadlock." *Id*.

A suggested script for this purpose follows:

> "*To the* [*Presiding Juror*] [*Foreperson*]: In your opinion, is the jury [[hopelessly deadlocked] [unable to agree on a verdict]] [as to one or more counts]?"
>
> "*To all jurors*: If any of you disagree with the [Presiding Juror's] [Foreperson's] answer, please tell me now."

If the response to the first question is "yes," then ask:

> "Is there a reasonable probability that the jury can reach a unanimous verdict if sent back to the jury room for further deliberation?"

If the response is "no," then ask the entire panel the following:

> "[*To all jurors]*: Without stating where any juror stands, do any of you believe there is a reasonable probability that the jury can reach a unanimous verdict if sent back to the jury room for further deliberation?"

See also JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 5.5 (2013).

7.9 SPECIFIC ISSUE UNANIMITY

Comment

Ordinarily, the "general unanimity instruction suffices to instruct the jury that they must be unanimous on whatever specifications form the basis of the guilty verdict." *United States v. Lyons*, 472 F.3d 1055, 1068 (9th Cir. 2007) (quoting *United States v. Kim*, 196 F.3d 1079, 1082 (9th Cir. 1999)).

Nonetheless, a specific unanimity instruction is required if it appears that there is a "genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts." *Id*. (citing *United States v. Anguiano*, 873 F.2d 1314, 1319 (9th Cir. 1989)) (internal quotation marks omitted); *compare United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983) (finding that unanimity instruction regarding specific conspiracy should have been given in light of proof of multiple conspiracies) with *Kim,* 196 F.3d 1079 (no abuse of discretion to refuse to give specific unanimity instruction when the defendant was charged with a single crime based on a single set of facts and where prohibited acts were merely alternative means by which the defendant may be held criminally liable for the underlying substantive offense). Thus, the Committee recommends the court consider the need for a specific unanimity instruction to avoid juror confusion if (1) the evidence is factually complex, (2) the indictment is broad or ambiguous, or (3) the jury's questions indicate that it may be confused. *See Anguiano*, 873 F.2d at 1319-21. When the evidence establishes multiple conspiracies, failure to give a specific unanimity instruction may be plain error and the court may have a duty to *sua sponte* give the instruction requiring the jurors to unanimously agree on which conspiracy the defendant participated in. *United States v. Lapier*, 796 F.3d 1090 (9th Cir. 2015) (failure to give specific unanimity instruction was plain error because half of jury could have found defendant guilty of joining one conspiracy while other half of jury could have found defendant guilty of joining second, completely independent conspiracy).

A specific unanimity instruction may also be necessary to avoid constitutional error. For example, when self-defense is at issue, a jury must unanimously reject the defense in order to convict. *United States v. Ramirez*, 537 F.3d 1075, 1083 (9th Cir. 2008) (approving instruction that included specific unanimity within the self-defense instruction consistent with this instruction and Instruction 6.8 (Self-Defense)); *see also Richardson v. United States*, 526 U.S.813 (1999) (continuing-criminal-enterprise prosecution requires unanimity as to the specific violations that make up a "continuing series of violations"); *but see United States v. Nobari*, 574 F.3d 1065, 1081 (9th Cir. 2009) (although unanimity is required to reject an affirmative defense, a specific unanimity instruction is not required for most affirmative defenses).

A specific unanimity instruction is not required, however, to distinguish an aiding-and-abetting theory of liability from the underlying substantive crime. *United States v. Garcia*, 400 F.3d 816, 820 (9th Cir. 2005). Nor is one required as to a particular false promise in a mail fraud case or as to a particular theory of liability underlying a "scheme to defraud" so long as jurors are unanimous that the defendant committed the underlying substantive offense. *Lyons*, 472 F. 3d at 1068-69. Likewise, jurors do not need to agree unanimously as to which particular act or

actions constituted a substantial step toward the commission of a crime in a prosecution for an attempt to commit a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010). Further, when a defendant is charged with "a single continuous act of possession," jurors need not reach unanimous agreement on the pieces of evidence they find persuasive in establishing that possession. *United States v. Ruiz*, 710 F.3d 1077, 1081-82 (9th Cir. 2013); *see also United States v. Mancuso*, 718 F.3d 780, 792-93 (9th Cir. 2013).

When a specific unanimity instruction is necessary, the Committee recommends including in the substantive instruction the phrase " . . .with all of you agreeing [as to the particular matter requiring unanimity]." *See United States v. Garcia-Rivera*, 353 F. 3d 788, 792 (9th Cir. 2003) (unanimity instruction "fatally ambiguous" when jury could have understood they were required to decide unanimously only that possession occurred during *any* of three times enumerated).

Approved 9/2015

7.10 READBACK OR PLAYBACK

Comment

If during jury deliberations a request is made by the jury or juror for a readback of a portion or all of a witness's testimony, and the court in exercising its discretion determines after consultation with legal counsel that a readback should be allowed, the committee recommends the following admonition be given in open court with both sides and the defendant present:

> Because a request has been made for a [readback] [playback] of the testimony of [*witness's name*] it is being provided to you, but you are cautioned that all [readbacks] [playbacks] run the risk of distorting the trial because of overemphasis of one portion of the testimony. [Therefore, you will be required to hear all the witness's testimony on direct and cross-examination, to avoid the risk that you might miss a portion bearing on your judgment of what testimony to accept as credible.] [Because of the length of the testimony of this witness, excerpts will be [read] [played].] The [readback] [playback] could contain errors. The [readback] [playback] cannot reflect matters of demeanor [, tone of voice,] and other aspects of the live testimony. Your recollection and understanding of the testimony controls. Finally, in your exercise of judgment, the testimony [read] [played] cannot be considered in isolation, but must be considered in the context of all the evidence presented.

In *United States v. Newhoff*, 627 F.3d 1163 (9th Cir. 2010), the court underscored the need to take certain precautionary steps when an excerpt or entire testimony of a witness is requested by a deliberating jury. The court endorsed the "general rule" that when such a request is made and the trial court, in exercising its discretion, grants the request after consultation with the parties, it should require the jury to hear the readback in open court, with counsel for the parties and the defendant present after giving the admonition set out above, unless the defendant has waived the right to be present.

Approved 12/2012

7.11 CONTINUING DELIBERATIONS AFTER JUROR IS DISCHARGED AND NOT REPLACED

[One] [some] of your fellow jurors [has] [have] been excused from service and will not participate further in your deliberations. You should not speculate about the reason the [juror is] [jurors are] no longer present.

You should continue your deliberations with the remaining jurors. Do not consider the opinions of the excused [juror] [jurors] as you continue deliberating. All the previous instructions given to you, including the unanimity requirement for a verdict, remain in effect.

Comment

The trial court, upon written stipulation by the parties or on its own for good cause, may permit a jury of fewer than 12 persons to return a verdict. Fed. R. Crim. P. 23(b). It may also substitute an alternate juror. *See* Instruction 7.12 (Resumption of Deliberations After Alternate Juror Added).

Approved 12/2012

7.12 RESUMPTION OF DELIBERATIONS AFTER ALTERNATE JUROR IS ADDED

[An alternate juror has] [Alternate jurors have] been substituted for the excused [juror] [jurors]. You should not speculate about the reason for the substitution.

You must start your deliberations anew. This means you should disregard entirely any deliberations taking place before the alternate [juror was] [jurors were] substituted and consider freshly the evidence as if the previous deliberations had never occurred.

Although starting over may seem frustrating, please do not let it discourage you. It is important that each juror have a full and fair opportunity to explore his or her views and respond to the views of others so that you may come to a unanimous verdict. All the previous instructions given to you, including the unanimity requirement for a verdict, remain in effect.

Comment

The court must ensure that the alternate did not discuss the case with anyone after the original jury retired, and it must instruct the reconstituted jury to begin its deliberations "anew." Fed. R. Crim. P. 24(c).

The trial court, upon written stipulation by the parties or on its own for good cause, may permit a jury of fewer than 12 persons to return a verdict. Fed. R. Crim. P. 23(b). *See* Instruction 7.11 (Continuing Deliberations After Juror Is Discharged and Not Replaced). The court may also substitute an alternate juror. Fed. R. Crim. P. 24(c).

Approved 12/2012

8. OFFENSES UNDER TITLE 18

Instruction
Introductory Comment

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Introductory Comment

As noted in the Introduction, this Manual is not intended to supply a set of universally applicable pattern instructions or to provide authoritative statements of law. The model instructions in the following sections are intended principally to set forth the elements of the offense in plain language consistent with the applicable statute. It is expected that judges will modify these models to adapt them to the facts and circumstances of the case before them and to take into account what is and is not in issue in the case. It may also be appropriate to supplement these instructions with some additional explanatory instructions addressed to particular evidence or contentions in the case. The model instructions, besides supplying text and form for the basic instruction on the elements, should be helpful in drafting or modifying other needed instructions in plain language and in a form conducive to maximum comprehension.

8.1 ARSON OR ATTEMPTED ARSON
(18 U.S.C. § 81)

The defendant is charged in [Count _____ of] the indictment with [attempted] arson in violation of Section 81 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [[intentionally set fire to or burned] [intended to set fire to or burn]] [*specify building*];

Second, [*specify building*] was located on [*specify place of federal jurisdiction*]; [and]

Third, the defendant acted wrongfully and without justification[.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

[If you decide that the defendant is guilty, you must then decide whether the government has proved beyond a reasonable doubt that [the building was regularly used by people as a place in which to live and sleep] [a person's life was placed in jeopardy].]

Comment

If the charge is conspiracy to commit the crime, use Instruction 8.2 (Conspiracy to Commit Arson).

As to the second element of the instruction regarding federal jurisdiction, "special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7. While federal jurisdiction over the place may be determined as a matter of law, the locus of the offense within that place is an issue for the jury. *United States v. Gipe,* 672 F.2d 777, 779 (9th Cir. 1982).

For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.2 CONSPIRACY TO COMMIT ARSON
(18 U.S.C. § 81)

The defendant is charged in [Count _____ of] the indictment with conspiracy to commit arson in violation of Section 81 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, beginning on or about [*date*], and ending on or about [*date*], there was an agreement between two or more persons to commit arson; and

Second, the defendant became a member of the conspiracy knowing of its object and intending to help accomplish it.

As used in this instruction "arson" is the intentional setting of a fire to or burning [*specify building*] located on [*specify place of federal jurisdiction*], which is wrongful and without justification.

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit arson.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

[If you decide that the defendant is guilty, you must then decide whether the government has proved beyond a reasonable doubt that [the building was regularly used by people as a place in which to live and sleep] [a person's life was placed in jeopardy].]

Comment

"Special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7. While federal jurisdiction over the place may be determined as a matter of law, the locus of the offense within that place is an issue for the jury. *United States v. Gipe,* 672 F.2d 777, 779 (9th Cir. 1982).

See Comment to Instruction 8.20 (Conspiracy—Elements). Because 18 U.S.C. § 81 does

not expressly require proof of an overt act, the third element of Instruction 8.20 (overt act) is not included in this instruction. *United States v. Shabani*, 513 U.S. 10, 15-17 (1994) (holding that under "the plain language of the statute and settled interpretive principles," proof of an overt act is not necessary for violation of drug conspiracy statute, 21 U.S.C. § 846). *See also United States v. Montgomery*, 150 F.3d 983, 997-98 (9th Cir. 1998) (recognizing that reasoning in *Shabani* obviates need for proof of an overt act in furtherance of conspiracy under 21 U.S.C. § 963).

8.3 ASSAULT ON FEDERAL OFFICER OR EMPLOYEE (18 U.S.C. § 111(a))

The defendant is charged in [Count _____ of] the indictment with assault on a federal officer in violation of Section 111(a) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant forcibly assaulted [*name of federal officer or employee*]; [and]

Second, the defendant did so while [*name of federal officer or employee*] was engaged in, or on account of [his] [her] official duties[.] [; and]

[Third, the defendant [made physical contact] [acted with the intent to commit another felony].]

There is a forcible assault when one person intentionally strikes another, or willfully attempts to inflict injury on another, or intentionally threatens another coupled with an apparent ability to inflict injury on another which causes a reasonable apprehension of immediate bodily harm.

Comment

When the crime is charged under the enhanced penalty provisions of 18 U.S.C. § 111(b), use Instruction 8.4 (Assault on Federal Officer [With a Deadly or Dangerous Weapon] [Which Inflicts Bodily Injury]).

See 18 U.S.C. § 1114 for the definition of federal officer or employee referenced in 18 U.S.C. § 111.

The third element is to be used only when the charge is a felony. A felony charge requires actual physical contact or action with the intent to commit another felony.

A reasonable apprehension of immediate bodily harm is determined with reference to a reasonable person aware of the circumstances known to the victim, not with reference to all circumstances, including circumstances unknown to the victim. *United States v. Acosta-Sierra*, 690 F.3d 1111, 1121 (9th Cir. 2012).

The statutory language states that the crime can be committed by one who "forcibly assaults, resists, opposes, impedes, intimidates or interferes," but the Ninth Circuit has held that regardless of the circumstances, the conduct is not criminal unless it includes an assault. *United States v. Chapman*, 528 F.3d 1215, 1221 (9th Cir. 2008). Similarly, the court has held that a proper instruction may not reduce the concept of force or threatened force to the mere appearance of physical intimidation. *United States v. Harrison*, 585 F.3d 1155, 1160 (9th Cir. 2009).

There is no requirement that an assailant be aware that the victim is a federal officer. *United States v. Feola,* 420 U.S. 671, 684 (1975); *see also United States v. Mobley*, 803 F.3d 1105, 1109 (9th Cir. 2015) (citing *Feola* and holding that defendant's lack of knowledge as to victim's status as federal officer was "irrelevant to establishing the wrongfulness of the defendant's conduct" in prosecution for assault of federal officer). If the defendant denies knowledge that the person assaulted was a federal officer and claims to have acted in self-defense, Instruction 8.5 (Assault on Federal Officer or Employee—Defenses) should be used.

Violation of § 111 is a general intent crime in this circuit. *United States v. Jim*, 865 F.2d 211, 215 (9th Cir. 1989). Among other things, this means that voluntary intoxication is not a defense. *Id.*

Approved 12/2015

8.4 ASSAULT ON FEDERAL OFFICER OR EMPLOYEE [WITH A DEADLY OR DANGEROUS WEAPON] [WHICH INFLICTS BODILY INJURY] (18 U.S.C. § 111(b))

The defendant is charged in [Count _____ of] the indictment with assault on a federal officer in violation of Section 111(b) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant forcibly assaulted [*name of federal officer or employee*];

Second, the defendant did so while [*name of federal officer or employee*] was engaged in, or on account of [his] [her] official duties; and

Third, the defendant [used a deadly or dangerous weapon] [inflicted bodily injury].

There is a forcible assault when one person intentionally strikes another, or willfully attempts to inflict injury on another, or intentionally threatens another coupled with an apparent ability to inflict injury on another which causes a reasonable apprehension of immediate bodily harm.

[A [*specify weapon*] is a deadly or dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury.]

Comment

See 18 U.S.C. § 1114 for the definition of federal officer or employee referenced in 18 U.S.C. § 111.

The statutory language states that the crime can be committed by one who "forcibly assaults, resists, opposes, impedes, intimidates or interferes," but the Ninth Circuit has held that regardless of the circumstances, the conduct is not criminal unless it includes an assault. *United States v. Chapman*, 528 F.3d 1215, 1221 (9th Cir. 2008).

There is no requirement that an assailant be aware that the victim is a federal officer. *United States v. Feola,* 420 U.S. 671, 684 (1975); *see also United States v. Mobley*, 803 F.3d 1105, 1109 (9th Cir. 2015) (citing *Feola* and holding that defendant's lack of knowledge as to victim's status as federal officer was "irrelevant to establishing the wrongfulness of the defendant's conduct" in prosecution for assault of federal officer). If the defendant denies knowledge that the person assaulted was a federal officer and claims to have acted in self-defense, Instruction 8.5 (Assault on Federal Officer or Employee—Defenses) should be used.

A reasonable apprehension of immediate bodily harm is determined with reference to a reasonable person aware of the circumstances known to the victim, not with reference to all circumstances, including circumstances unknown to the victim. *United States v. Acosta-Sierra*,

690 F.3d 1111, 1121 (9th Cir. 2012).

Violation of § 111 is a general intent crime in this circuit. *United States v. Jim*, 865 F.2d 211, 215 (9th Cir. 1989). Among other things, this means that voluntary intoxication is not a defense, *id.*, and that § 111(b) does not require an intent to cause the bodily injury. *United States v. Garcia-Camacho*, 122 F.3d 1265, 1269 (9th Cir. 1997).

Approved 12/2015

8.5 ASSAULT ON FEDERAL OFFICER OR EMPLOYEE—DEFENSES

The defendant asserts that [he] [she] acted in self-defense. It is a defense to the charge if (1) the defendant did not know that [*name of federal officer or employee*] was a federal [officer] [employee], (2) the defendant reasonably believed that use of force was necessary to defend oneself against an immediate use of unlawful force, and (3) the defendant used no more force than appeared reasonably necessary in the circumstances.

Force which is likely to cause death or great bodily harm is justified in self-defense only if a person reasonably believes that such force is necessary to prevent death or great bodily harm.

In addition to proving all the elements of the crime beyond a reasonable doubt, the government must also prove beyond a reasonable doubt either (1) that the defendant knew that [*name of federal officer or employee*] was a federal [officer] [employee] or (2) that the defendant did not reasonably believe force was necessary to defend against an immediate use of unlawful force or (3) that the defendant used more force than appeared reasonably necessary in the circumstances.

Comment

In *United States v. Feola,* 420 U.S. 671, 684 (1975), the Supreme Court held that there is no "requirement that an assailant be aware that his victim is a federal officer" but went on to point out that there could be circumstances where ignorance of the official status of the person assaulted might justify a defendant acting in self-defense. "The jury charge in such a case, therefore, should include (1) an explanation of the essential elements of a claim of self-defense, and (2) an instruction informing the jury that the defendant cannot be convicted *unless* the government proves, beyond a reasonable doubt, *either* (a) that the defendant knew that the victim was a federal agent, *or* (b) that the defendant's use of deadly force would not have qualified as self-defense even if the agent had, in fact, been a private citizen." *United States v. Alvarez,* 755 F.2d 830, 847 (11th Cir. 1985) (emphasis in original).

In *United States v. Span*, 970 F.2d 573 (9th Cir. 1992), the Ninth Circuit upheld this instruction. The court cautioned, however, that "the model instruction would be inappropriate in a case where a defendant's theory of the case is self-defense against the use of *excessive* force by a federal law enforcement officer." *Id.* at 577 (emphasis in original). In such a case, the instruction must be modified appropriately.

8.6 ASSAULT WITH INTENT TO COMMIT MURDER OR OTHER FELONY (18 U.S.C. §§ 113(a)(1) and (2))

The defendant is charged in [Count _____ of] the indictment with assault with intent to commit [*specify felony*] in violation of Section 113(a)[(1)][(2)] of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant assaulted [*name of victim*] by intentionally [[striking] [wounding]] [[him] [her]] [using a display of force that reasonably caused [him] [her] to fear immediate bodily harm];

Second, the defendant did so with the intent to commit [*specify felony*]; and

Third, the assault took place on [*specify place of federal jurisdiction*].

Comment

Assaults proscribed by 18 U.S.C. § 113 are those committed "within the special maritime and territorial jurisdiction of the United States." *See* 18 U.S.C. § 7 for the definition of "special maritime and territorial jurisdiction of the United States."

When the assault consists of a display of force, it must actually cause reasonable apprehension of immediate bodily harm; fear is a necessary element. *United States v. Skeet,* 665 F.2d 983, 986 n.1 (9th Cir. 1982).

Assault with intent to commit murder is a specific intent crime. *United States v. Jones*, 681 F.2d 610, 611 (9th Cir. 1982).

Approved 9/2016

8.7 ASSAULT WITH DANGEROUS WEAPON
(18 U.S.C. § 113(a)(3))

The defendant is charged in [Count _____ of] the indictment with assault with a dangerous weapon in violation of Section 113(a)(3) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant assaulted [*name of victim*] by intentionally [[striking] [wounding]] [[him] [her]] [using a display of force that reasonably caused [him] [her] to fear immediate bodily harm];

Second, the defendant acted with the intent to do bodily harm to [*name of victim*];

Third, the defendant used a dangerous weapon; and

Fourth, the assault took place on [*specify place of federal jurisdiction*].

[A [*specify weapon*] is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury.]

Comment

See Comment to Instruction 8.4 (Assault on Federal Officer or Employee [With a Deadly or Dangerous Weapon] [Which Inflicts Bodily Injury]).

See United States v. Smith, 561 F.3d 934, 938-40 (9th Cir. 2009) (en banc) (discussing prior version of jury instruction).

The use of bare hands only to perpetrate an assault did not constitute use of a "dangerous weapon" and therefore could not support a conviction under 18 U.S.C. § 113(a)(3). *United States v. Rocha*, 598 F.3d 1144, 1153-58 (9th Cir. 2010).

The statutory definition of assault with a dangerous weapon, 18 U.S.C. § 113(a)(3), includes "without just cause or excuse." However, the existence of "just cause or excuse" is an affirmative defense, and the government does not have the burden of pleading or proving its absence. *United States v. Guilbert,* 692 F.2d 1340, 1343 (11th Cir. 1982).

8.8 SIMPLE ASSAULT OF PERSON UNDER AGE 16
(18 U.S.C. § 113(a)(5))

The defendant is charged in [Count _____ of] the indictment with assaulting a person who has not attained the age of 16 years in violation of Section 113(a)(5) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant assaulted [*name of victim*] by intentionally using a display of force that reasonably caused [him] [her] to fear immediate bodily harm;

Second, [*name of victim*] was under the age of 16 years at the time of the assault; and

Third, the assault took place on [*specify place of federal jurisdiction*].

Comment

When the assault consists of a display of force, it must actually cause reasonable apprehension of immediate bodily harm; fear is a necessary element. *United States v. Skeet*, 665 F.2d 983, 986 n.1 (9th Cir. 1982).

8.9 ASSAULT RESULTING IN SERIOUS BODILY INJURY (18 U.S.C. § 113(a)(6))

The defendant is charged in [Count _____ of] the indictment with assault resulting in serious bodily injury in violation of Section 113(a)(6) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant assaulted [*name of victim*] by intentionally [[striking] [wounding]] [him] [her];

Second, as a result, [*name of victim*] suffered serious bodily injury; and

Third, the assault took place on [*specify place of federal jurisdiction*].

"Serious bodily injury" means bodily injury that involves (1) a substantial risk of death; (2) extreme physical pain; (3) protracted and obvious disfigurement; or (4) protracted loss or impairment of the function of a body part, organ, or mental faculty.

Comment

See Comment to Instruction 8.3 (Assault on Federal Officer or Employee) concerning general intent.

The definition of "serious bodily injury" in the last paragraph of the instruction is the statutory definition in 18 U.S.C. §§ 113(b)(2) and 1365(h)(3).

Proof of battery supports conviction of assault. *United States v. Lewellyn*, 481 F.3d 695, 697 (9th Cir.), *cert. denied*, 552 U.S. 864 (2007).

At common law, criminal battery is shown if the defendant's conduct is reckless. *United States v. Loera*, 923 F.2d 725, 728 (9th Cir. 1991). A defendant can be convicted of assault resulting in serious bodily injury if a battery is proved.

8.10 ASSAULT OF PERSON UNDER AGE 16 RESULTING IN SUBSTANTIAL BODILY INJURY (18 U.S.C. § 113(a)(7))

The defendant is charged in [Count _____ of] the indictment with assaulting a person who has not attained the age of 16 years resulting in substantial bodily injury in violation of Section 113(a)(7) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant assaulted [*name of victim*] by intentionally [[striking] [wounding]] [him] [her];

Second, as a result, [*name of victim*] suffered substantial bodily injury;

Third, [*name of victim*] was under the age of 16 years at the time of the assault; and

Fourth, the assault took place on [*specify place of federal jurisdiction*].

"Substantial bodily injury" means a temporary but substantial disfigurement, or a temporary but substantial loss or impairment of the function of any bodily member, organ or mental faculty.

Comment

The definition of "substantial bodily injury" in the last paragraph of the instruction is the definition given in 18 U.S.C. § 113(b)(1).

8.10A ASSAULT BY STRANGULATION OR SUFFOCATION (18 U.S.C. § 113(a)(7))

The defendant is charged in [Count _____ of] the indictment with assault by strangulation in violation of Section 113(a)(8) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant assaulted a [spouse] [intimate partner][, or] [dating partner] by [strangling] [suffocating] [, or] [attempting to [strangle] [or] [suffocate]] [him/her];

Second, the assault took place on [*specify place of federal jurisdiction*]. ["Spouse"] ["intimate partner"] [or] ["dating partner"] includes any of the following:

(1) a spouse or former spouse of the defendant; or
(2) a person who shares a child in common with the defendant; or
(3) a person who cohabits or has cohabited as a spouse with the abuser; or
(4) a person who is or has been in a social relationship of a romantic or intimate nature with the defendant; or
(5) [*insert definition of person similarly situated to a spouse who is protected by the domestic or family violence laws of the state or tribal jurisdiction in which the injury occurred or where the victim resides*].

["Intimate partner" [also] means a person who is or has been in a social relationship of a romantic or intimate nature with the abuser. You may determine whether such a relationship existed by considering (a) the length of the relationship; (b) the type of relationship; and (c) the frequency of interaction between the defendant and [*name of victim*].]

["Dating partner" means a person who is or has been in a social relationship of a romantic or intimate nature with the abuser. You may determine whether such a relationship existed by considering (a) the length of the relationship; (b) the type of relationship; and (c) the frequency of interaction between the defendant and [*name of victim*].]

["Strangling" means intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck.]

["Suffocating" means intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth of the person, the nose of the person, or both, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.]

The government is not required to prove that the defendant intended to kill the victim or cause [him/her] to suffer prolonged injury. It also is not required to prove that the victim suffered any visible injury.

Comment

The definitions of "strangling" and "suffocating" in the instruction are the statutory

definitions in 18 U.S.C. §§ 113(b)(4) and 113(b)(5).

The definitions of "spouse," "intimate partner," and "dating partner" are the statutory definitions in 18 U.S.C. § 2266, which is incorporated into 18 U.S.C. § 113(b)(3).

Assault by strangulation is a general intent crime. *United States v. Lamott*, ___ F.3d ___, No. 15-30012, 2016 WL 4088752, at *4 (9th Cir. Aug. 2, 2016).

Approved 9/2016

8.11 BANKRUPTCY FRAUD—SCHEME OR ARTIFICE TO DEFRAUD (18 U.S.C. § 157)

The defendant is charged in [Count _____ of] the indictment with bankruptcy fraud in violation of Section 157 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant devised or intended to devise a scheme or plan to defraud;

Second, the defendant acted with the intent to defraud;

Third, the defendant's act was material; that is, it had a natural tendency to influence, or was capable of influencing the acts of an identifiable person, entity, or group; and

Fourth, the defendant [filed a petition] [filed a document in a proceeding] [made a false or fraudulent representation, claim or promise concerning or in relation to a proceeding] under a Title 11 bankruptcy proceeding to carry out or attempt to carry out an essential part of the scheme.

It does not matter whether the document, representation, claim or promise was itself false or deceptive so long as the bankruptcy proceeding was used as a part of the scheme or plan to defraud, nor does it matter whether the scheme or plan was successful or that any money or property was obtained.

Comment

Unlike the historic bankruptcy crimes described in 18 U.S.C. § 152, bankruptcy fraud under § 157 concerns a fraudulent scheme outside the bankruptcy which uses the bankruptcy as a means of executing or concealing the fraud or artifice. *United States v. Milwitt*, 475 F.3d 1150, 1155-56 (9th Cir. 2007) (bankruptcy fraud requires a specific intent to defraud an identifiable victim or class of victims of the identified fraudulent scheme).

This statute is modeled after the mail and wire fraud statutes and therefore requires a specific intent to defraud or deceive. *Id*. (citing *United States v. Bonallo*, 858 F.2d 1427, 1433 (9th Cir. 1988)).

8.11A OFFICIAL ACT— DEFINED
(18 U.S.C. § 201(a)(3))

"Official act" means any decision or action on a matter involving the formal exercise of governmental power. The matter must be pending, or be able by law to be brought, before a public official, and the official act must result in the making of a specific decision, taking of a specific action, or making of a specific omission.

[The official's decision or action may include using [his][her] official position to exert pressure on another official to perform an official act, or to advise another official, knowing or intending that such advice will form the basis for an official act by another official.]

[Merely arranging a meeting, hosting an event, or giving a speech, do not qualify as the taking of a specific action.]

Comment

This instruction is based on 18 U.S.C. § 201(a)(3) as construed in *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

When using this instruction with Model Instruction 8.143 (Hobbs Act—Extortion or Attempted Extortion Under Color of Official Right), change the term "official act" to "official action."

Approved 12/2016

8.12 BRIBERY OF PUBLIC OFFICIAL
(18 U.S.C. § 201(b)(1))

The defendant is charged in [Count _____ of] the indictment with bribing a public official in violation of Section 201(b)(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [gave] [offered] [promised] something of value, [*specify the thing of value*], to [*name of public official*]; and

Second, the defendant acted corruptly, that is, with the intent to [influence an official act by the [*name of public official*]] [influence the [*name of public official*] to commit or allow a fraud on the United States] [induce the [*name of public official*] to do or to omit to do an act in violation of [his] [her] lawful duty][.] [; and]

[Third, [*name of public official*] was a public official.]

Comment

The crime of bribery requires "corrupt intent," a higher degree of intent than is required under the provision outlawing gratuities to public officials. *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 822 (9th Cir. 1985). Under the bribery sections of § 201, the term "corruptly" refers to the "defendant's intent to be influenced to perform an act in return for financial gain." *United States v. Leyva*, 282 F.3d 623, 626 (9th Cir. 2002) (citing *United States v. Strand*, 574 F.2d 993, 995-96 (9th Cir. 1978)).

The "thing of value" given, offered, or promised to a public official is an element of the bribery charge. It is recommended that the instruction specifically describe the thing of value just as it is described in the indictment to avoid a variance. *United States v. Choy*, 309 F.3d 602, 607 (9th Cir. 2002). Where the defense asserts that the thing given, offered, or promised had no value, the jury must be asked to determine whether it had value. S*ee also United States v. Renzi,* 769 F.3d 731, 744-45 (9th Cir. 2014) (holding that a "recommendation is just that—a recommendation. Neither the pattern jury instruction nor any controlling precedent requires the district court to identify the thing of value, especially where variance from the indictment is not at issue").

If there is any question in the case about the "official" character of the action sought by the defendant, give Instruction 8.11A (Official Act—Defined). "Public official" is defined in 18 U.S.C. § 201(a)(1); § 201(b)(1) also applies to a person selected to be a public official. Actual power to do what defendant wants is not an *element.* "[A] person may be convicted of bribery even though the action requested is not within the official's power to perform." *Chen*, 754 F.2d at 825.

Omit the bracketed third element of this instruction when the recipient's status as a public official is not in dispute. Depending on the facts in evidence, it may be appropriate to amend this instruction with language requiring specific jury unanimity (*e.g.*, "with all of you agreeing as to what the defendant intended the public official to do in return for the bribe"). *See*

Instruction 7.9 (Specific Issue Unanimity).

Approved 12/2016

8.13 RECEIVING BRIBE BY PUBLIC OFFICIAL
(18 U.S.C. § 201(b)(2))

The defendant is charged in [Count _____ of] the indictment with [soliciting] [receiving] [or] [agreeing to receive] a bribe in violation of Section 201(b)(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was a public official;

Second, the defendant [solicited] [received] [agreed to receive] something of value, [*specify the thing of value*], in return for [being influenced in the performance of an official act] [being influenced to commit or allow a fraud on the United States] [being persuaded to do or not to do an act in violation of defendant's official duty]; and

Third, the defendant acted corruptly, that is, intending to be influenced [in the performance of an official act] [to commit or allow a fraud on the United States] [to do or to omit to do an act in violation of the defendant's official duty].

Comment

"Public official" is defined in 18 U.S.C. § 201(a)(1); § 201(b)(2) also applies to a person selected to be a public official. *See also* Comment to Instruction 8.12 (Bribery of Public Official). The plain language of 18 U.S.C. 201(b)(2)(B) requires only that the public official accept a thing of value in exchange for perpetrating a fraud; therefore the use of an official position is not an element of the offense under § 201(b)(2)(B). *United States v. Leyva*, 282 F.3d 623, 625-26 (9th Cir. 2002).

If there is any question in the case about the "official" character of the action sought by the defendant, give Instruction 8.11A (Official Act—Defined).

Under § 201(b)(2)(B), a public official acts "corruptly" when he or she accepts or receives, or agrees to accept or receive a thing of value, in return for being influenced with the specific intent that, in exchange for the thing of value, some act would be influenced. *Leyva*, 282 F.3d at 626 (9th Cir. 2002).

Depending on the facts in evidence, it may be appropriate to amend this instruction with language requiring specific jury unanimity (*e.g.*, "with all of you agreeing as to what the public official intended to do in return for the bribe"). *See* Instruction 7.9 (Specific Issue Unanimity).

Approved 12/2016

8.14 BRIBERY OF WITNESS
(18 U.S.C. § 201(b)(3))

The defendant is charged in [Count _____ of] the indictment with bribery of a witness in violation of Section 201(b)(3) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [*name of witness*] was to be a witness under oath at a [*specify proceeding*];

Second, the defendant [gave] [offered] [promised] something of value, [*specify the thing of value*], to [*name of witness*]; and

Third, the defendant acted corruptly, that is, with the intent to influence [[the testimony of [*name of witness*]] [[*name of witness*] to be absent from the proceeding].

Comment

It is recommended that the instruction specifically describe the thing of value just as it is described in the indictment to avoid a variance. *United States v. Choy*, 309 F.3d 602, 607 (9th Cir. 2002).

Depending on the facts in evidence, it may be appropriate to amend this instruction with language requiring specific jury unanimity (*e.g.*, "with all of you agreeing as to what the defendant intended the witness to do in return for the bribe"). *See* Instruction 7.9 (Specific Issue Unanimity).

8.15 RECEIVING BRIBE BY WITNESS
(18 U.S.C. § 201(b)(4))

The defendant is charged in [Count _____ of] the indictment with soliciting a bribe in violation of Section 201(b)(4) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was to be a witness under oath at a [*specify proceeding*];

Second, the defendant [solicited] [received] [agreed to receive] something of value, [*specify the thing of value*], in return for being [influenced in the defendant's testimony] [absent from the proceeding]; and

Third, the defendant acted corruptly, that is, in return for [being influenced in [his] [her] testimony] [absenting [himself] [herself] from the proceeding].

Comment

It is recommended that the instruction specifically describe the thing of value just as it is described in the indictment to avoid a variance. *United States v. Choy*, 309 F.3d 602, 607 (9th Cir. 2002).

Depending on the facts in evidence, it may be appropriate to amend this instruction with language requiring specific jury unanimity (*e.g.*, "with all of you agreeing as to what the witness intended to do in return for the bribe"). *See* Instruction 7.9 (Specific Issue Unanimity).

8.16 ILLEGAL GRATUITY TO PUBLIC OFFICIAL (18 U.S.C. § 201(c)(1)(A))

The defendant is charged in [Count _____ of] the indictment with [giving] [offering] [or] [promising] an illegal gratuity in violation of Section 201(c)(1)(A) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant [gave] [offered] [promised] something of value, [*specify the thing of value*] to a [*specify public official*]; and

Second, the defendant acted for or because of an official act performed or to be performed by the [*specify public official*].

Comment

It is recommended that the instruction specifically describe the thing of value just as it is described in the indictment to avoid a variance. *United States v. Choy*, 309 F.3d 602, 607 (9th Cir. 2002).

To establish a violation of 18 U.S.C. § 201(c)(1)(A), the government must prove a link between a thing of value conferred upon a public official and a specific "official act" for or because of which it was given. *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 414 (1999).

If there is any question in the case about the "official" character of the action sought by the defendant, give Instruction 8.11A (Official Act—Defined).

The distinguishing features of the crimes of "bribery" and "illegal gratuity" are their intent elements. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" a specific official act. Bribery requires a specific intent to give or receive something of value in exchange for an official act. An illegal gratuity may constitute a reward for some future act the public official will take (and may already have determined to take) or for an act already taken. *Sun-Diamond Growers*, 526 U.S. at 404–05. The gratuity offenses are lesser included offenses of the parallel bribery offenses. *See United States v. Crutchfield,* 547 F.2d 496, 500 (9th Cir. 1977); *United States v. Brewster*, 506 F.2d 62, 71–72 (D.C. Cir. 1974).

Depending on the facts in evidence, it may be appropriate to amend this instruction with language requiring specific jury unanimity (*e.g.*, "with all of you agreeing as to what the defendant intended the public official to do in return for the gratuity"). *See* Instruction 7.9 (Specific Issue Unanimity).

Approved 12/2016

8.17 RECEIVING ILLEGAL GRATUITY BY PUBLIC OFFICIAL (18 U.S.C. § 201(c)(1)(B))

The defendant is charged in [Count _____ of] the indictment with [soliciting] [receiving] [agreeing to receive] an illegal gratuity in violation of Section 201(c)(1)(B) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was [*specify public official*]; and

Second, the defendant [[solicited] [received] [agreed to receive]] something of value, [*specify the thing of value*], personally for or because of an official act [performed] [to be performed] by the defendant.

Comment

It is recommended that the instruction specifically describe the thing of value just as it is described in the indictment to avoid a variance. *United States v. Choy*, 309 F.3d 602, 607 (9th Cir. 2002).

See Comment to Instruction 8.16 (Illegal Gratuity to Public Official).

Depending on the facts in evidence, it may be appropriate to amend this instruction with language requiring specific jury unanimity (*e.g.*, "with all of you agreeing as to what the public official intended to do in return for the gratuity"). *See* Instruction 7.9 (Specific Issue Unanimity).

"Public official" is defined in 18 U.S.C. § 201(a)(1); § 201(c)(1)(B) also applies to a former public official and a person selected to be a public official.

If there is any question in the case about the "official" character of the action sought by the defendant, give Instruction 8.11A (Official Act—Defined).

Approved 12/2016

8.18 ILLEGAL GRATUITY TO WITNESS
(18 U.S.C. § 201(c)(2))

The defendant is charged in [Count _____ of] the indictment with [giving] [offering] [promising] an illegal gratuity in violation of Section 201(c)(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove beyond a reasonable doubt that the defendant [gave] [offered] [promised] something of value, [*specify the thing of value*], to [*name of witness*] [for testimony to be given under oath by [him] [her] in [*specify proceeding*]] [because of testimony given under oath by [*name of witness*] at/in [*specify proceeding*]] [for being absent from [*specify proceeding*] so that [he] [she] could not testify as a witness].

Comment

It is recommended that the instruction specifically describe the thing of value just as it is described in the indictment to avoid a variance. *United States v. Choy*, 309 F.3d 602, 607 (9th Cir. 2002).

See Comment to Instruction 8.16 (Illegal Gratuity to Public Official).

Section 201(c)(2) does not prohibit the government from paying fees, housing, expenses, and cash rewards to a cooperating witness so long as the payment does not recompense any corruption of the truth of testimony. *United States v. Ihnatenko*, 482 F.3d 1097, 1100 (9th Cir.), *cert. denied*, 552 U.S. 904 (2007). Section 201(c)(2) also does not prohibit the government from providing immigration benefits or leniency, immunity from prosecution, or leniency to a cooperating witness. *See United States v. Feng*, 277 F.3d 1151, 1154 (9th Cir. 2002) (immigration benefits); *United States v. Smith*, 196 F.3d 1034, 1038–40 (9th Cir. 1999) (immunity); *United States v. Mattarolo*, 209 F.3d 1153, 1160 (9th Cir. 2000) (leniency).

Depending on the facts in evidence, it may be appropriate to amend this instruction with language requiring specific jury unanimity (*e.g.*, "with all of you agreeing as to what the defendant" intended the witness to do in return for the gratuity"). *See* Instruction 7.9 (Specific Issue Unanimity).

8.19 RECEIVING ILLEGAL GRATUITY BY WITNESS (18 U.S.C. § 201(c)(3))

The defendant is charged in [Count _____ of] the indictment with [soliciting] [receiving] [agreeing to receive] an illegal gratuity in violation of Section 201(c)(3) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove beyond a reasonable doubt that the defendant [solicited] [received] [agreed to receive] something of value, [*specify the thing of value*], [for testimony to be given under oath by the defendant as a witness in [*specify proceeding*]] [because of testimony given under oath by the defendant as a witness at/in [*specify proceeding*]] [for being absent from [*specify proceeding*] so that the defendant could not testify as a witness].

Comment

See Comment to Instructions 8.12 (Bribery of Public Official), 8.16 (Illegal Gratuity to Public Official), and 8.18 (Illegal Gratuity to Witness).

Depending on the facts in evidence, it may be appropriate to amend this instruction with language requiring specific jury unanimity (*e.g.*, "with all of you agreeing as to what the witness intended to do in return for the gratuity"). *See* Instruction 7.9 (Specific Issue Unanimity).

8.20 CONSPIRACY—ELEMENTS

The defendant is charged in [Count _____ of] the indictment with conspiring to _____ in violation of Section _____ of Title ___ of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, beginning on or about [*date*], and ending on or about [*date*], there was an agreement between two or more persons to commit at least one crime as charged in the indictment; [and]

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it[.] [; and]

[Third, one of the members of the conspiracy performed at least one overt act [on or after [*date*]] for the purpose of carrying out the conspiracy.]

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

[An overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The government is not required to prove that the defendant personally did one of the overt acts.]

Comment

When the charged offense is conspiracy to defraud the United States (or any agency thereof) under the "defraud clause" of 18 U.S.C. § 371, use Instruction 8.21 (Conspiracy to Defraud the United States) in place of this general conspiracy instruction.

"To prove a conspiracy under 18 U.S.C. § 371, the government must establish: (1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime." *United States v. Kaplan*, 836 F.3d 1199, 1212 (9th Cir. 2016) (citation and internal quotation marks omitted). "The agreement need not be explicit; it is sufficient if the conspirators knew or had reason to know of the scope of the conspiracy and that their own benefits depended on the success of the venture." *United States v. Montgomery*, 384 F.3d 1050, 1062 (9th Cir. 2004) (citing *United States v. Romero,* 282 F.3d 683, 687 (9th Cir. 2002)). A conspiracy may exist even if some members of the conspiracy cannot complete the offense, so long as the object of the conspiracy is that at least one conspirator complete the offense. *Ocasio v. United States*, 136 S.Ct. 1423, 1429-32 (2016).

With respect to the first element in this instruction, if other jury instructions do not set out the elements of the crimes alleged to be objects of the conspiracy, the elements must be included in this or an accompanying instruction. *United States v. Alghazouli*, 517 F.3d 1179, 1189 (9th Cir. 2008). Nevertheless, conspiracy to commit a crime "does not require completion of the intended underlying offense." *United States v. Iribe*, 564 F.3d 1155, 1160–61 (9th Cir. 2009).

To prove an agreement to commit a crime, it is not sufficient for the government to prove that the defendant committed the crime in question. It must prove that the defendant agreed with at least one other person to commit that crime. *United States v. Loveland*, 825 F.3d 555 (9th Cir. 2016). "An agreement to commit a crime can be explicit or tacit, and can be proved by direct or circumstantial evidence, including inferences from circumstantial evidence." *Kaplan*, 836 F.3d at 1212 (quotation marks and citation omitted).

Use the third element in this instruction only if the applicable statute requires proof of an overt act, *e.g.*, 18 U.S.C. § 371 (first clause) or 18 U.S.C. § 1511(a) (conspiracy to obstruct state or local law enforcement), but omit the third element when the applicable statute does not require proof of an overt act. *See Whitfield v. United States,* 543 U.S. 209, 212-15 (2005) (proof of overt act not necessary for conspiracy to commit money laundering); and *United States v. Shabani,* 513 U.S. 10, 15-16 (1994) (proof of overt act not necessary for conspiracy to violate drug statutes).

As long as jurors agree that the government has proven each element of a conspiracy, they need not unanimously agree on the particular overt act that was committed in furtherance of the agreed-upon conspiracy. *See United States v. Gonzalez*, 786 F.3d 714, 718-19 (9th Cir. 2015) (rejecting defendant's argument that district court erred in failing to instruct jury that it must unanimously agree on which acts constituted conspiracy to murder underlying a VICAR charge).

When there is evidence that an overt act occurred outside the applicable limitations period, include the bracketed material within the third element. *See United States v. Fuchs*, 218 F.3d 957, 961-62 (9th Cir. 2000) (plain error not to require jury to find that overt act occurred within statute of limitations).

See Instruction 7.9 (Specific Issue Unanimity). When the evidence establishes multiple conspiracies, failure to give a specific unanimity instruction may be plain error and the court

may have a duty to *sua sponte* give the instruction requiring the jurors to unanimously agree on which conspiracy the defendant participated in. *United States v. Lapier*, 796 F.3d 1090 (9th Cir. 2015) (failure to give specific unanimity instruction was plain error because half of jury could have found defendant guilty of joining one conspiracy while other half of jury could have found defendant guilty of joining second, completely independent conspiracy).

The Supreme Court has held that "[a] conspiracy does not automatically terminate simply because the Government, unbeknownst to some of the conspirators, has 'defeated' the conspiracy's 'object'." *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003).

When the charged offense is a drug conspiracy under 21 U.S.C. § 846, use Instruction 9.19A (Buyer-Seller Relationship) in place of this general conspiracy instruction. Instruction 9.19A (Buyer-Seller Relationship) may be modified for non-drug conspiracies.

Approved 12/2016

8.21 CONSPIRACY TO DEFRAUD THE UNITED STATES
(18 U.S.C. § 371 "Defraud Clause")

The defendant is charged in [Count _____ of] the indictment with conspiring to defraud the United States by obstructing the lawful functions of [*specify government agency*] by deceitful or dishonest means in violation of Section 371 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, beginning on or about [*date*], and ending on or about [*date*], there was an agreement between two or more persons to defraud the United States by obstructing the lawful functions of [*specify government agency*] by deceitful or dishonest means as charged in the indictment;

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

Third, one of the members of the conspiracy performed at least one overt act [on or after [*date*]] for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.

An agreement to defraud is an agreement to deceive or to cheat.

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

An overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The government is not required to prove that the defendant personally did one of the overt acts.

Comment

Use this instruction when the charged offense is conspiracy to defraud the United States under the "defraud clause" of 18 U.S.C. § 371; otherwise use Instruction 8.20 (Conspiracy—Elements).

In *United States v. Caldwell,* 989 F.2d 1056 (9th Cir. 1993), the Ninth Circuit held that defrauding the government under 18 U.S.C. § 371 "means obstructing the operation of any government agency by any 'deceit, craft or trickery, or at least by means that are dishonest.'" *Id.* at 1058-59. Thus, an instruction that permitted conviction if a defendant merely agreed to defraud the United States by obstructing the Internal Revenue Service in ascertaining and collecting taxes, but did not require proof of deceit or dishonesty, was insufficient and required reversal. To "convict someone under the 'defraud clause' of 18 U.S.C. § 371, the government need only show (1) he entered into an agreement (2) to obstruct a lawful function of the government (3) by deceitful or dishonest means and (4) at least one overt act in furtherance of the conspiracy." *Id.; accord United States v. Rodman*, 776 F.3d 638, 642 (9th Cir. 2015). Moreover, the conspiracy "need not aim to deprive the government of property," and neither "the conspiracy's goal nor the means used to achieve it" need to be illegal. *Caldwell*, 989 F.2d at 1058-59.

If the evidence supports an argument the defendant did not act with the requisite intent to defraud because of a good faith misunderstanding about the requirements of law, consider modifying the fifth paragraph of the instruction as follows:

> An agreement to defraud is an agreement to deceive or to cheat, but one who acts on an honest and good faith misunderstanding as to the requirements of the law does not act with an intent to defraud simply because [his] [her] understanding of the law is wrong or even irrational. Nevertheless, merely disagreeing with the law does not constitute a good faith misunderstanding of the law because all persons have a duty to obey the law whether or not they agree with it.

This language is derived by analogy to cases recognizing a "good faith" defense when the government must prove a defendant "willfully" violated tax laws. *See* Instruction 9.42 (Willfully—Defined) for violations of 26 U.S.C. §§ 201, 7203, 7206, and 7207; *but see United States v. Hickey*, 580 F. 3d 922, 931 (9th Cir. 2009) (no good faith instruction needed when jury properly instructed on intent to defraud).

Approved 3/2015

8.22 MULTIPLE CONSPIRACIES

You must decide whether the conspiracy charged in the indictment existed, and, if it did, who at least some of its members were. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you may find that some other conspiracy existed. Similarly, if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

Comment

Use this instruction when the indictment charges a single conspiracy and the evidence indicates two or more possible conspiracies. *See United States v. Perry*, 550 F.2d 524, 533 (9th Cir. 1997).

This instruction obviates the need for further instructions on multiple conspiracies. *United States v. Si*, 343 F.3d 1116, 1126-27 (9th Cir. 2003). Given in combination with a proper conspiracy instruction, this instruction is adequate to cover a multiple conspiracy defense. *United States v. Bauer,* 84 F.3d 1549, 1560-61 (9th Cir. 1996).

8.23 CONSPIRACY—KNOWLEDGE OF AND ASSOCIATION WITH OTHER CONSPIRATORS

A conspiracy may continue for a long period of time and may include the performance of many transactions. It is not necessary that all members of the conspiracy join it at the same time, and one may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names, identities, or locations of all of the other members.

Even though a defendant did not directly conspire with [the other defendant] [or] [other conspirators] in the overall scheme, the defendant has, in effect, agreed to participate in the conspiracy if the government proves each of the following beyond a reasonable doubt that:

(1) the defendant directly conspired with one or more conspirators to carry out at least one of the objects of the conspiracy;

(2) the defendant knew or had reason to know that other conspirators were involved with those with whom the defendant directly conspired; and

(3) the defendant had reason to believe that whatever benefits the defendant might get from the conspiracy were probably dependent upon the success of the entire venture.

It is not a defense that a person's participation in a conspiracy was minor or for a short period of time.

Comment

A person may be a member of a conspiracy even though the person does not know all of the purposes of or participants in the conspiracy. *United States v. Escalante,* 637 F.2d 1197, 1200 (9th Cir. 1980); *United States v. Kearney,* 560 F.2d 1358, 1362 (9th Cir. 1977).

A single conspiracy can be established even though it took place during a long period of time during which new members joined and old members dropped out. *United States v. Green,* 523 F.2d 229, 233 (2d Cir. 1975). *See also United States v. Perry*, 550 F.2d 524, 528 (9th Cir. 1997) (holding that the law of conspiracy does not require the government "to prove that all of the defendants met together at the same time and ratified the illegal scheme"); *United States v. Thomas*, 586 F.2d 123, 132 (9th Cir. 1978) (holding that proof that the defendant "knew he was plotting in concert with others to violate the law was sufficient to raise the necessary inference that he joined in the overall agreement").

To prove a conspiracy "the evidence must show that 'each defendant knew, or had reason to know, that his benefits were probably dependent on the success of the entire operation.'" *United States v. Duran*, 189 F.3d 1071, 1080 (9th Cir. 1999) (quoting *United States v. Kearney*, 560 F.2d 1358, 1362 (9th Cir. 1977)).

8.24 WITHDRAWAL FROM CONSPIRACY

Once a person becomes a member of a conspiracy, that person remains a member until that person withdraws from it. One may withdraw by doing acts which are inconsistent with the purpose of the conspiracy and by making reasonable efforts to tell the co-conspirators about those acts. You may consider any definite, positive step that shows that the conspirator is no longer a member of the conspiracy to be evidence of withdrawal.

If you find that the government has proved beyond a reasonable doubt each element of a conspiracy and that the defendant was a member of the conspiracy, the burden is on the defendant to prove by a preponderance of the evidence that [he] [she] withdrew from the conspiracy before the overt act—on which you all agreed—was committed by some member of the conspiracy. A preponderance of the evidence means that you must be persuaded that the things the defendant seeks to prove are more probably true than not true. This is a lesser burden of proof than the government's burden to prove beyond a reasonable doubt each element of the conspiracy and that the defendant was a member of the conspiracy.

If you find that the defendant withdrew from the conspiracy, you must find the defendant not guilty of [*specify crime charged*].

Comment

This instruction has been modified to place the burden on the defendant to prove by a preponderance of the evidence his or her withdrawal from the conspiracy. The earlier version of the instruction placed the burden on the government to prove that the defendant did not withdraw from the conspiracy before the overt act was committed by some member of the conspiracy. In *Smith v. United States*, 133 S. Ct. 714 (2013), the Court held that "establishing individual withdrawal was a burden that rested firmly on the defendant regardless of when the purported withdrawal took place." *Id*. at 719.

Use this instruction only when the conspiracy charged in the indictment requires proof of an overt act. If the statute of limitations is a defense to a conspiracy requiring proof of an overt act, the instruction should be modified to require the defendant to prove withdrawal before the limitations period begins. *Id.* at 717 ("A defendant who withdraws outside the relevant statute-of-limitations period has a complete defense to prosecution.").

Approved 4/2013

8.25 CONSPIRACY—LIABILITY FOR SUBSTANTIVE OFFENSE COMMITTED BY CO-CONSPIRATOR (*PINKERTON* CHARGE)

Each member of the conspiracy is responsible for the actions of the other conspirators performed during the course and in furtherance of the conspiracy. If one member of a conspiracy commits a crime in furtherance of a conspiracy, the other members have also, under the law, committed that crime.

Therefore, you may find the defendant guilty of [*specify crime*] as charged in Count _____ of the indictment if the government has proved each of the following elements beyond a reasonable doubt:

First, a person named in Count _____ of the indictment committed the crime of [*specify crime*] as alleged in that count;

Second, the person was a member of the conspiracy charged in Count _____ of the indictment;

Third, the person committed the crime of [*specify crime*] in furtherance of the conspiracy;

Fourth, the defendant was a member of the same conspiracy at the time the offense charged in Count _____ was committed; and

Fifth, the offense fell within the scope of the unlawful agreement and could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement.

Comment

The *Pinkerton* charge derives its name from *Pinkerton v. United States*, 328 U.S. 640 (1946), which held that a defendant could be held liable for a substantive offense committed by a co-conspirator as long as the offense occurred within the course of the conspiracy, was within the scope of the agreement, and could reasonably have been foreseen as a necessary or natural consequence of the unlawful agreement. *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1202 (9th Cir. 2000).

When this instruction is appropriate, it should be given in addition to Instruction 8.20 (Conspiracy—Elements).

This instruction is based upon *United States v. Alvarez-Valenzuela*, 231 F.3d at 1202-03, in which the Ninth Circuit approved of the 1997 version of Instruction 8.5.5

(Conspiracy—*Pinkerton* Charge), and *United States v. Montgomery*, 150 F.3d 983, 996-97 (9th Cir. 1998). *See also United States v. Gadson*, 763 F.3d 1189 (9th Cir. 2014).

This instruction was found adequate in a case in which three separate conspiracies were charged. *See United States v. Moran*, 493 F.3d 1002 (9th Cir. 2007). However, given the potential for ambiguity where more than one conspiracy is charged, the court should consider giving separate *Pinkerton* instructions for each conspiracy charged.

Approved 3/2015

8.26 CONSPIRACY—*SEARS* CHARGE

Before being convicted of conspiracy, an individual must conspire with at least one co–conspirator. There can be no conspiracy when the only person with whom the defendant allegedly conspired was a government [agent] [informer] who secretly intended to frustrate the conspiracy.

Comment

This instruction is based upon *Sears v. United States,* 343 F.2d 139, 142 (5th Cir. 1965), which held that "there can be no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy." This rule has been adopted in the Ninth Circuit. *United States v. Romero*, 282 F.3d 683, 689 (9th Cir. 2002) (citing earlier cases).

8.27 COUNTERFEITING
(18 U.S.C. § 471)

The defendant is charged in [Count _____ of] the indictment with counterfeiting in violation of Section 471 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [[falsely made] [forged] [counterfeited] [altered]] [*specify obligation or security of United States*]; and

Second, the defendant acted with intent to defraud.

To be counterfeit, [*specify item*] must have a likeness or resemblance to the genuine [*specify obligation or security of United States*].

Comment

For a definition of "intent to defraud," *see* Instruction 3.16 (Intent to Defraud—Defined).

See United States v. Johnson, 434 F.2d 827, 829 (9th Cir. 1970), regarding the requirement for likeness or resemblance to the genuine obligation or security.

8.28 PASSING COUNTERFEIT OBLIGATIONS
(18 U.S.C. § 472)

The defendant is charged in [Count _____ of] the indictment with [[passing] [uttering] [publishing] [selling]] [[attempting to [pass] [utter] [publish] [sell]] a counterfeit obligation in violation of Section 472 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [[passed] [uttered] [published] [sold]] [[attempted to [pass] [utter] [publish] [sell]] a [[falsely made] [forged] [counterfeit] [altered]] [*specify obligation or security of United States*];

Second, the defendant knew that the [*specify obligation or security of United States*] was [falsely made] [forged] [counterfeited] [altered]; [and]

Third, the defendant acted with the intent to defraud[.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

To be counterfeit, a bill must have a likeness or resemblance to the genuine [*specify obligation or security of United States*].

Comment

For a definition of "intent to defraud," *see* Instruction 3.16 (Intent to Defraud—Defined).

An utterance has been described as tantamount to an offer. *United States v. Chang*, 207 F.3d 1169, 1174 (9th Cir. 2000).

For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of the crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.29 CONNECTING PARTS OF GENUINE INSTRUMENTS (18 U.S.C. § 484)

The defendant is charged in [Count _____ of] the indictment with connecting parts of two or more [*specify genuine instrument*] in violation of Section 484 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant connected together parts of two or more [*specify genuine instrument*] issued under the authority of [*specify issuer*]; and

Second, the defendant did so with the intent to defraud.

Comment

For a definition of "intent to defraud," *see* Instruction 3.16 (Intent to Defraud—Defined).

8.30 FALSELY MAKING, ALTERING, FORGING OR COUNTERFEITING A WRITING TO OBTAIN MONEY FROM UNITED STATES (18 U.S.C. § 495)

The defendant is charged in [Count _____ of] the indictment with falsely making, altering, forging, or counterfeiting [*specify writing*] in violation of Section 495 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [falsely made] [altered] [forged] [counterfeited] [*specify writing*]; and

Second, the defendant did so for the purpose [of obtaining or receiving] [enabling another person to obtain or receive] money from [the United States] [an officer of the United States] [an agent of the United States].

8.31 UTTERING OR PUBLISHING FALSE WRITING
(18 U.S.C. § 495)

The defendant is charged in [Count _____ of] the indictment with [uttering] [publishing] as true a false writing with the intent to defraud the United States in violation of Section 495 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [uttered] [published] as true a [falsely made] [altered] [forged] [counterfeit] [*specify writing*];

Second, the defendant knew that the [*specify writing*] was [falsely made] [altered] [forged] [counterfeited]; and

Third, the defendant acted with the intent to defraud the United States.

Comment

For a definition of "intent to defraud," *see* Instruction 3.16 (Intent to Defraud—Defined).

An utterance has been described as tantamount to an offer. *United States v. Chang*, 207 F.3d 1169, 1174 (9th Cir. 2000).

8.32 TRANSMITTING OR PRESENTING FALSE WRITING TO DEFRAUD UNITED STATES (18 U.S.C. § 495)

The defendant is charged in [Count _____ of] the indictment with [transmitting] [presenting] a false writing in support of or in relation to an account or claim with intent to defraud the United States. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [transmitted] [presented] a [falsely made] [altered] [forged] [counterfeit] [*specify writing*] to an [office] [officer] of the United States;

Second, the defendant knew that the [*specify writing*] was [falsely made] [altered] [forged] [counterfeit];

Third, the [*specify writing*] was [transmitted] [presented] in support of [*specify account or claim*];

Fourth, the defendant acted with intent to defraud the United States; and

Fifth, the [*specify writing*] was material to action on the [*specify account or claim*]; that is, the [*specify writing*] had a natural tendency to influence, or was capable of influencing, action on the [*specify account or claim*].

Comment

For a definition of "intent to defraud," *see* Instruction 3.16 (Intent to Defraud—Defined).

In *Neder v. United States*, 527 U.S. 1, 22-23 (1999), the Court explained that materiality is a necessary aspect of the legal concept of fraud which is incorporated into criminal statutes concerning fraud unless the statute says otherwise (holding materiality of falsehood must be proved in prosecution under bank, mail and wire fraud statutes). The common law test for materiality in the false statement statutes, as reflected in the fifth element of this instruction, is the preferred formulation. *United States v. Peterson*, 538 F.3d 1064, 1072 (9th Cir. 2008).

8.33 FORGING ENDORSEMENT ON TREASURY CHECK, BOND OR SECURITY OF UNITED STATES (18 U.S.C. § 510(a)(1))

The defendant is charged in [Count _____ of] the indictment with forging or falsely making [an endorsement] [a signature] on a Treasury [check] [bond] [security] of the United States in violation of Section 510 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant falsely made or forged [an endorsement] [a signature] on a Treasury [check] [bond] [security] of the United States; and

Second, the defendant did so with intent to defraud.

Comment

For a definition of "intent to defraud," *see* Instruction 3.16 (Intent to Defraud—Defined).

8.34 PASSING FORGED ENDORSEMENT ON TREASURY CHECK, BOND OR SECURITY OF UNITED STATES (18 U.S.C. § 510(a)(2))

The defendant is charged in [Count _____ of] the indictment with [passing] [uttering] [publishing] [[attempting to [pass] [utter] [publish]] a Treasury [check] [bond] [security] of the United States in violation of Section 510 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [passed] [uttered] [published] [[attempted to [pass] [utter] [publish]] a Treasury [check] [bond] [security] of the United States which bore a falsely made or forged [endorsement] [signature]; [and]

Second, the defendant did so with intent to defraud[.] [; and]

[Third, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

Comment

For a definition of "intent to defraud," *see* Instruction 3.16 (Intent to Defraud—Defined).

For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of the crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

An utterance has been described as tantamount to an offer. *United States v. Chang*, 207 F.3d 1169, 1174 (9th Cir. 2000).

8.35 SMUGGLING GOODS
(18 U.S.C. § 545)

The defendant is charged in [Count _____ of] the indictment with [smuggling] [attempting to smuggle] in violation of Section 545 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [smuggled] [attempted to smuggle] merchandise into the United States without declaring the merchandise for invoicing as required by United States Customs law;

Second, the defendant knew that the merchandise was of a type that should have been declared; [and]

Third, the defendant acted willfully with intent to defraud the United States[.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

Comment

See Comment in 5.5 (Willfully).

This instruction may be used when the defendant is charged with the crime of smuggling goods or attempting to smuggle goods. The bracketed fourth element should be used when defendant is charged with an attempt to smuggle goods. For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of the crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

This instruction relates to the first clause of the first paragraph of 18 U.S.C. § 545. If the charge is based on the second clause of the first paragraph, use Instruction 8.36 (Passing False Papers Through Customhouse). Instructions 8.37 (Importing Merchandise Illegally) and 8.38 (Receiving, Concealing, Buying or Selling Smuggled Merchandise) concern violations of the second paragraph of § 545.

See United States v. Garcia-Paz, 282 F.3d 1212, 1214-15 (9th Cir. 2002) (court properly instructed jury that marijuana constitutes "merchandise" for purposes of 18 U.S.C. § 545).

8.36 PASSING FALSE PAPERS THROUGH CUSTOMHOUSE (18 U.S.C. § 545)

The defendant is charged in [Count _____ of] the indictment with [passing] [attempting to pass] a [[false] [forged] [fraudulent]] [*specify writing*] in violation of Section 545 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [[passed] [attempted to pass]] [*specify writing*] through a customhouse of the United States;

Second, the defendant knew that the [*specify writing*] was [false] [forged] [fraudulent];

Third, the defendant acted willfully with intent to defraud the United States; [and]

Fourth, the [*specify writing*] had a natural tendency to influence, or was capable of influencing, action by the United States[.] [; and]

[Fifth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

Comment

See Comment in 5.5 (Willfully).

This instruction may be used when the defendant is charged with the crime of passing false papers through a customhouse. The bracketed fifth element should be used when defendant is charged with an attempt to do so. For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of the crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

This instruction relates to the second clause of the first paragraph of 18 U.S.C. § 545. If the charge is based on the first clause of the first paragraph, use Instruction 8.35 (Smuggling Goods). Instructions 8.37 (Importing Merchandise Illegally) and 8.38 (Receiving, Concealing, Buying or Selling Smuggled Merchandise) concern violations of the second paragraph of § 545.

In *Neder v. United States*, 527 U.S. 1 (1999), the Court explained that materiality is a

necessary aspect of the legal concept of fraud which is incorporated into criminal statutes concerning fraud unless the statute says otherwise. *Id*. at 22-23 (holding materiality of falsehood must be proved in prosecution under bank, mail and wire fraud statutes). The common law test for materiality in the false statement statutes, as reflected in the third element of this instruction, is the preferred formulation. *United States v. Peterson*, 538 F.3d 1064, 1072 (9th Cir. 2008).

8.37 IMPORTING MERCHANDISE ILLEGALLY
(18 U.S.C. § 545)

The defendant is charged in [Count _____ of] the indictment with [[fraudulently] [knowingly]] [[importing] [bringing]] into the United States merchandise in violation of Section 545 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove beyond a reasonable doubt that the defendant [[fraudulently] [knowingly]] [[imported] [brought]] merchandise into the United States contrary to [*specify law*].

Comment

This instruction deals with the first clause of the second paragraph of 18 U.S.C. § 545. If the charge is a violation of the second clause of the second paragraph, use Instruction 8.38 (Receiving, Concealing, Buying or Selling Smuggled Merchandise). Instructions 8.35 (Smuggling Goods) and 8.36 (Passing False Papers Through Customhouse) deal with violations of the first paragraph of § 545.

The term "law" in § 545 includes a regulation as well as a statute, but only when there is a statute which specifies that a violation of the regulation is a crime. *United States v. Alghazouli*, 517 F.3d 1179, 1183 (9th Cir. 2008).

See United States v. Garcia-Paz, 282 F.3d 1212, 1214-15 (9th Cir. 2002) (court properly instructed jury that marijuana constitutes "merchandise" for purposes of 18 U.S.C. § 545).

8.38 RECEIVING, CONCEALING, BUYING OR SELLING SMUGGLED MERCHANDISE (18 U.S.C. § 545)

The defendant is charged in [Count _____ of] the indictment with [[receiving] [concealing] [buying] [selling]] [[facilitating [the transportation] [concealment] [sale] of]] smuggled merchandise in violation of Section 545 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, merchandise had been brought into the United States contrary to [*specify law*]; and

Second, the defendant [[received] [concealed] [bought] [sold]] [[facilitated the [transportation] [concealment] [sale] of]] the merchandise knowing that it had been brought into the United States contrary to law.

Comment

This instruction relates to the second clause of the second paragraph of 18 U.S.C. § 545. If the charge is a violation of the first clause of the second paragraph, use Instruction 8.37 (Importing Merchandise Illegally). Instructions 8.35 (Smuggling Goods) and 8.36 (Passing False Papers Through Customhouse) deal with violations of the first paragraph of § 545.

The term "law" in § 545 includes a regulation as well as a statute, but only when there is a statute which specifies that a violation of the regulation is a crime. *United States v. Alghazouli*, 517 F.3d 1179, 1183 (9th Cir. 2008).

See United States v. Garcia-Paz, 282 F.3d 1212, 1214-15 (9th Cir. 2002) (court properly instructed jury that marijuana constitutes "merchandise" for purposes of 18 U.S.C. § 545).

8.39 THEFT OF GOVERNMENT MONEY OR PROPERTY (18 U.S.C. § 641)

The defendant is charged in [Count _____ of] the indictment with theft of government [money] [property] in violation of Section 641 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [[embezzled] [stole] [converted to defendant's use] [converted to the use of another]] [money] [property of value] with the intention of depriving the owner of the use or benefit of the [money] [property];

Second, the [money] [property] belonged to the United States; and

Third, the value of the [money] [property] was more than $1,000.

Comment

This instruction deals with the first paragraph of 18 U.S.C. § 641. Instruction 8.40 (Receiving Stolen Government Money or Property) deals with the second paragraph of § 641.

Theft of money or property having a value of $1,000 or less is a misdemeanor. 18 U.S.C. § 641. If the crime charged is a misdemeanor, the third element of this instruction should be omitted.

Knowledge that stolen property belonged to the United States is not an element of the offense. *Baker v. United States,* 429 F.2d 1278, 1279 (9th Cir. 1970).

See United States v. Campbell, 42 F.3d 1199, 1205 (9th Cir. 1994) (government must prove that defendant stole property with the intention of depriving the owner of the use or benefit of the property).

8.40 RECEIVING STOLEN GOVERNMENT MONEY OR PROPERTY (18 U.S.C. § 641)

The defendant is charged in [Count _____ of] the indictment with [[receiving] [concealing] [retaining]] [[embezzled] [stolen] [converted]] government [money] [property] in violation of Section 641 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [[received] [concealed] [retained]] [[money] [property of value]];

Second, the [money] [property] belonged to the United States;

Third, the defendant knew that the [money] [property] had been [embezzled] [stolen] [converted];

Fourth, the defendant intended to convert the [money] [property] to [his] [her] own use or gain; and

Fifth, the value of the [money] [property] was more than $1,000.

Comment

See Comment to Instruction 8.39 (Theft of Government Money or Property).

Approved 7/2011

8.41 THEFT, EMBEZZLEMENT OR MISAPPLICATION OF BANK FUNDS (18 U.S.C. § 656)

The defendant is charged in [Count _____ of] the indictment with [theft] [embezzlement] [misapplication] of bank funds in violation of Section 656 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was a [*specify position held*] of the [*specify financial institution*];

Second, the defendant knowingly and willfully [stole] [embezzled] [misapplied] funds or credits belonging to the bank or entrusted to its care in excess of $1,000;

Third, the defendant acted with the intent to injure or defraud the [*specify financial institution*];

Fourth, the [*specify financial institution*] was [*specify Section 656 status*]; and

Fifth, the amount of money taken was more than $1,000.

The fact that the defendant may have intended to repay the funds at the time they were taken is not a defense.

Comment

Although not found in the statute, "intent to injure or defraud" has been held to be an essential element of the crime. *United States v. Stozek*, 783 F.2d 891, 893 (9th Cir. 1986). "Intent to defraud may be inferred from a defendant's reckless disregard of the bank's interests." *United States v. Castro*, 887 F.2d 994 (9th Cir. 1989) (citing *Stozek*, 783 F.2d at 893).

If the crime charged is a misdemeanor, the fifth element of this instruction should be omitted.

8.42 EMBEZZLEMENT OR MISAPPLICATION BY OFFICER OR EMPLOYEE OF LENDING, CREDIT OR INSURANCE INSTITUTION (18 U.S.C. § 657)

Comment

The Committee recommends that when a defendant is accused of embezzlement or willful misapplication in violation of 18 U.S.C. § 657, Instruction 8.41 (Theft, Embezzlement or Misapplication of Bank Funds) should be used with appropriate modifications. Section 656 and Section 657 contain the same elements. *United States v. Musacchio*, 968 F.2d 782, 787 n.6 (9th Cir. 1991).

8.43 THEFT FROM INTERSTATE OR FOREIGN SHIPMENT (18 U.S.C. § 659)

The defendant is charged in [Count _____ of] the indictment with theft from [an interstate] [a foreign] shipment in violation of Section 659 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant stole the property described in the indictment from a shipment in [interstate] [foreign] commerce; [and]

Second, the defendant did so with the intent to convert the property to [his] [her] own use[.] [; and]

[Third, the property had a value of $1,000 or more.]

Property is moving as or is [a part of] a shipment in [interstate] [foreign] commerce if the point of origin is in one [state] [country] and the destination is another [state] [country]. Property is moving as [an interstate] [a foreign] shipment at all points between the point of origin and the final destination, regardless of any temporary stop while awaiting transshipment or otherwise.

Comment

This instruction deals with theft from a shipment in interstate or foreign commerce subject to the first paragraph of 18 U.S.C. § 659. If the charge under the first paragraph of § 659 is based on conduct other than theft, modify the instruction accordingly.

If the charge alleges that the value of the property was $1,000 or more, use the third element; otherwise it should be omitted.

8.44 ESCAPE FROM CUSTODY
(18 U.S.C. § 751(a))

The defendant is charged in [Count _____ of] the indictment with escape from custody in violation of Section 751(a) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was in the custody of [*specify custodian*];

Second, the defendant was in custody by virtue of [*specify reason for or type of custody*]; and

Third, the defendant knowingly and voluntarily left custody without permission.

Comment

An intent to avoid confinement is not an element of escape. *United States v. Bailey*, 444 U.S. 394, 408 (1980).

Section 751(a) provides a maximum punishment of one year in prison for certain types of custody, such as custody imposed by virtue of an arrest for a misdemeanor, and a maximum punishment of five years in prison for other types of custody, such as custody imposed by virtue of a felony arrest. It is therefore necessary to include the type of custody in the instruction. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (other than fact of prior conviction, any fact which increases statutory maximum must be submitted to jury).

8.45 ATTEMPTED ESCAPE
(18 U.S.C. § 751(a))

The defendant is charged in [Count _____ of] the indictment with attempted escape in violation of Section 751(a) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was in the custody of [*specify custodian*];

Second, the defendant was in custody by virtue of [*specify reason for or type of custody*];

Third, the defendant intended to escape from custody; and

Fourth, the defendant did something that was a substantial step toward escaping from custody.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Comment

See Comment to Instruction 8.44 (Escape from Custody).

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.46 ASSISTING ESCAPE
(18 U.S.C. § 752(a))

The defendant is charged in [Count _____ of] the indictment with assisting escape in violation of Section 752(a) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [*name of escapee*] was in the custody of [*specify custodian*] by virtue of [*specify reason for or type of custody*];

Second, [*name of escapee*] [[left] [attempted to leave]] [his] [her] custody, without permission;

Third, the defendant knew that [*name of escapee*] did not have permission to leave; and

Fourth, the defendant assisted [*name of escapee*] in [leaving] [attempting to leave].

Comment

Section 752(a) provides a maximum punishment of one year in prison for certain types of custody, such as custody imposed by virtue of an arrest for a misdemeanor, and a maximum punishment of five years in prison for other types of custody, such as custody imposed by virtue of a felony arrest. It is therefore necessary to include the type of custody in the instruction. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (other than prior conviction, any fact which increases statutory maximum must be submitted to jury).

8.47 THREATS AGAINST THE PRESIDENT
(18 U.S.C. § 871)

Comment

The Committee has withdrawn the previously adopted and published jury instruction for violations of 18 U.S.C. § 871, (threats against the president). In reversing a defendant's conviction for violating 18 U.S.C. § 875(c) (transmitting in interstate or foreign commerce any communication containing a threat to kidnap any person or injure any person), the Supreme Court has held that the mens rea of a crime involved in communicating a threat is established through proof that the defendant makes a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat. *Elonis v. United States*, 135 S. Ct. 2001 (2015). *Elonis* rejected the rule applied in the Ninth Circuit that "[w]hether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." *United States v. Keyser*, 704 F.3d 631, 638 (9th Cir. 2012) (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)). The withdrawn instruction incorporated an element that also used an objective standard when viewing whether the communication was a threat. While this crime is not identical in its elements to the more general crime under 18 U.S.C. § 875(c), a court may want to consider whether the legal analysis regarding the mens rea element in *Elonis* applies to the more specific crime of threats against the President.

Approved 10/2015

8.47A MAILING THREATENING COMMUNICATIONS—THREATS TO KIDNAP OR INJURE (18 U.S.C. § 876(c))

The defendant is charged in [Count _____] of the indictment with mailing threatening communications in violation of Section 876(c) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [mailed] [arranged to have mailed] a [letter] [*insert other form of communication*] addressed to [*insert name or title of natural person*] containing a threat to [kidnap] [injure] any person.

Second, such [*insert form of communication*] was transmitted for the purpose of issuing a threat, or with knowledge that the [*insert form of communication*] would be viewed as a threat.

The government need not prove that the defendant intended to carry out the threat.

Comment

This instruction is based on *United States v. Keyser,* 704 F.3d 631 (9th Cir. 2012), *United States v. Havelock*, 664 F.3d 1284 (9th Cir. 2012), *United States v. King*, 122 F.3d 808 (9th Cir.1997), *United States v. Twine*, 853 F.2d 676 (9th Cir. 1988), and *United States v. Sirhan*, 504 F.2d 818, 820 (9th Cir. 1974). While the Ninth Circuit has not offered comprehensive guidance concerning the requirements for conviction under 18 U.S.C. § 876, these cases are instructive.

Under 18 U.S.C. § 876, the threatening communications must be addressed to a natural person. *Havelock*, 664 F.3d at 1286. "[I]n order to determine whom a threatening communication is 'addressed to,' a court may consult the directions on the outside of the envelope or the packaging, the salutation line, if any, and the contents of the communication." *Id*. at 1296. A general title such as "manager" is sufficient to meet this requirement. *Keyser*, 704 F.3d at 641.

Whether a particular statement may be considered a threat is not governed by an objective standard. The mens rea of the crime involved in communicating a threat is established through proof that a defendant makes a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat. *See Elonis v. United States*, 135 S. Ct. 2001 (2015) (involving violation of 18 U.S.C. § 875(c), transmitting in interstate or foreign commerce threat to kidnap or threat to injure person).

There are two specific intent elements in 18 U.S.C. § 876. The defendant must have both "knowingly" transmitted the communication and subjectively intended to threaten. *Twine*, 853 F.2d at 680; *Keyser*, 704 F.3d at 638 ("In order to be subject to criminal liability for a threat, the speaker must subjectively intend to threaten."). However, the defendant need not have expected the threats to gain him a benefit, or have had the intent or ability to actually carry out the threat. *Planned Parenthood of the Columbia/Williamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1076 n.9 (9th Cir. 2002); *King*, 122 F.3d at 809.

Approved 9/2015

8.47B TRANSMITTING A COMMUNICATION CONTAINING A THREAT TO KIDNAP OR INJURE (18 U.S.C. § 875(c))

The defendant is charged in [Count _____] of the indictment with transmitting in [interstate commerce] [foreign commerce] a threatening communication to a person in violation of Section 875(c) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly transmitted in [interstate commerce] [foreign commerce] a [*insert form of communication*] containing a threat to [kidnap] [injure] [*insert name or title of natural person*].

Second, such [*insert form of communication*] was transmitted for the purpose of issuing a threat, or with knowledge that the [*insert form of communication*] would be viewed as a threat.

The government need not prove that the defendant intended to carry out the threat.

Comment

Whether a particular statement may be considered a threat is not governed by an objective standard. The mens rea of the crime involved in communicating a threat is established through proof that a defendant makes a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat. *See Elonis v. United States*, 135 S.Ct. 2001 (2015) (involving violation of 18 U.S.C. § 875(c), transmitting in interstate or foreign commerce any threat to kidnap any person or threat to injure the person of another).

Approved 9/2015

8.48 EXTORTIONATE CREDIT TRANSACTIONS
(18 U.S.C. § 892)

The defendant is charged in [Count _____ of] the indictment with making an extortionate extension of credit in violation of Section 892 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly extended credit to [*name of debtor*]; and

Second, at the time the credit was extended, the defendant as a creditor and [*name of debtor*] as a debtor both understood that delay or failure in making repayment could result in the use of violence or other criminal means to harm the person, reputation, or property of some person.

8.49 FALSE IMPERSONATION OF CITIZEN OF UNITED STATES (18 U.S.C. § 911)

The defendant is charged in [Count _____ of] the indictment with misrepresenting [himself] [herself] to be a citizen of the United States. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant directly and falsely represented [himself] [herself] to be a citizen of the United States;

Second, the defendant was not a citizen of the United States at that time;

Third, the defendant made such false representation willfully, that is, the misrepresentation was voluntarily and deliberately made; and

Fourth, the false representation was made to someone who had good reason to make inquiry into defendant's citizenship status.

Comment

In *United States v. Anguiano-Morfin*, 713 F.3d 1208 (9th Cir. 2013), the Ninth Circuit explained that, when a defendant charged with falsely impersonating a United States citizen relies on the defense that he genuinely believed that he was a United States citizen, the "best course" is to instruct the jury that the government must prove beyond a reasonable doubt that the defendant knew that his claim to United States citizenship was false, and that a "reasonable doubt as to whether the defendant knew his claim to United States citizenship was false" must result in an acquittal. *Id*. at 1210. The Ninth Circuit explained that in such cases the jury instructions should make clear that the defendant's subjective belief is the dispositive issue. *Id*.

In *United States v. Karaouni*, 379 F.3d 1139, 1144 (9th Cir. 2004), the Ninth Circuit held that the representation must be "direct" and that a statement from which United States citizenship could be inferred is insufficient. "Willfully" requires proof "that the misrepresentation was deliberate and voluntary." *Id.* at 1142. The fourth element is required by Ninth Circuit case law limiting the reach of the statute to avoid First Amendment overbreadth issues. *Id.* at 1142 n.7.

Approved 7/2013

8.50 FALSE IMPERSONATION OF FEDERAL OFFICER OR EMPLOYEE (18 U.S.C. § 912)

The defendant is charged in [Count _____ of] the indictment with fraud while impersonating a federal officer or employee in violation of Section 912 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant falsely pretended to be an [officer] [employee] acting under the authority of [the United States] [*specify federal department, agency or officer*]; and

Second, the defendant [acted as such] [in such pretended character demanded or obtained [*specify thing of value*]].

Comment

Two options are afforded for the second element because 18 U.S.C. § 912 states two offenses. It has been held to be duplicitous to charge both falsely acting as a federal officer and demanding or obtaining money while falsely acting as a federal officer in a single count. *United States v. Aguilar*, 756 F.2d 1418, 1422 (9th Cir. 1985).

To review the intent element of 18 U.S.C. § 912, *see United States v. Tomsha-Miguel*, 766 F.3d 1041, 1046-47 (9th Cir. 2014).

To review the First Amendment limits on criminal laws that penalize false speech, *see United States v. Swisher*, 811 F.3d 299, 315-16 (9th Cir. 2016).

Revised 3/2017

8.51 FIREARMS

Comment

Definitions of many of the terms used in the firearms statutes are found in 18 U.S.C. § 921 and 26 U.S.C. § 5845. The Committee recommends that definitional instructions be used sparingly. Many of the terms defined are of common significance and really require no definition. Some examples are "pistol," "rifle," "importer," and "manufacturer." While jurors will readily recognize that one who is engaged in the business of buying and selling firearms is a dealer, they probably do not know that one engaged in the business of repairing firearms is also a dealer, 18 U.S.C. § 921(a)(11)(B), and in that case a definition would be necessary.

The most effective way to avoid definitions relating to firearms is to use the most specific designation available. For example, assume that a defendant is being tried for transporting a rocket having a propellant charge of more than four ounces in violation of 18 U.S.C. § 922(a)(4). Examples of the ways the judge might instruct the jury on one of the elements are as follows:

(1) "The defendant transported a firearm." It will then be necessary to have an additional instruction that a rocket having a propellant charge of more than four ounces is a firearm. *See* 18 U.S.C. § 921(a)(3)(D) (defining "firearm" as including "destructive device") and 18 U.S.C. § 921(a)(4)(A)(iii) (defining "destructive device" as including a "rocket having a propellant charge of more than four ounces); or

(2) "The defendant transported a destructive device." Even here, it will then be necessary to instruct that a rocket having a propellant charge of more than four ounces is a destructive device. *Id.*; or

(3) "The defendant transported a rocket having a propellant charge of more than four ounces." Using the third alternative, no additional instruction is necessary.

8.52 FIREARMS—FUGITIVE FROM JUSTICE DEFINED (18 U.S.C. § 921(a)(15))

A fugitive from justice is a person who has fled from any state to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.

Comment

This instruction is appropriate when a firearms offense involves a fugitive from justice. *See* 18 U.S.C. § 922(d)(2) and (g)(2).

8.53 FIREARMS—DEALING, IMPORTING OR MANUFACTURING WITHOUT LICENSE (18 U.S.C. § 922(a)(1)(A) and (B))

The defendant is charged in [Count _____ of] the indictment with [dealing] [importing] [manufacturing] firearms without a license, in violation of Section 922(a)(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was willfully engaged in the business of [dealing in] [importing] [manufacturing] firearms within the dates specified in the indictment; and

Second, the defendant did not then have a license as a firearms [dealer] [importer] [manufacturer].

Comment

The government must prove beyond a reasonable doubt that the defendant engaged in a greater degree of activity than the occasional sale of a hobbyist or collector, and that the defendant devoted time, attention and labor to selling firearms as a trade or business with the intent of making profits through the repeated purchase and sale of firearms. *See United States v. King*, 735 F.3d 1098, 1106 (9th Cir. 2013) (citing Instruction 8.53). For a person to engage in the business of dealing in firearms, it is not necessary to prove an actual sale of firearms. *Id.* at 1107 n.8.

Willfully, as used in this statute, requires proof that the defendant knew that his or her conduct was unlawful, but does not require proof that the defendant knew of the federal licensing requirement. *Bryan v. United States*, 524 U.S. 184, 198-99 (1998).

Approved 2/2014

8.54 FIREARMS—SHIPMENT OR TRANSPORTATION TO A PERSON NOT LICENSED AS A DEALER, IMPORTER, MANUFACTURER OR COLLECTOR (18 U.S.C. § 922(a)(2))

The defendant is charged in [Count _____ of] the indictment with the [shipment] [transportation] of a firearm to a person not licensed as a [dealer] [importer] [manufacturer] [collector] of firearms, in violation of Section 922(a)(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was a licensed firearms [dealer] [importer] [manufacturer] [collector];

Second, the defendant willfully [shipped] [transported] a [*specify firearm*] [[from one state to another] [between a foreign nation and the United States]]; and

Third, the defendant [shipped] [transported] the [*specify firearm*] to a person who was not licensed as a firearms [dealer] [importer] [manufacturer] [collector].

Comment

See Comment to Instruction 8.49 (False Impersonation of Citizen of United States).

While § 922(a)(2) also prohibits shipment or transportation of a firearm to a person not licensed as a firearms collector, a firearms collector's license authorizes transactions only in curio and relic firearms. *See* 18 U.S.C. § 923(b); 27 C.F.R. §§ 478.41(c) and (d), 478.50 and 478.93. Moreover, the prohibition in § 922(a)(2) does not apply to returning a firearm or replacing a firearm of the same kind or type to a person from whom it was received. It also does not prohibit depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who is authorized to receive such firearms for use in connection with that person's official duty. *See* 18 U.S.C. § 922(a)(2)(A) and (B).

8.55 FIREARMS—TRANSPORTING OR RECEIVING IN STATE OF RESIDENCE (18 U.S.C. § 922(a)(3))

The defendant is charged in [Count _____ of] the indictment with [transporting] [receiving] a firearm [into] [in] the state of his residence in violation of Section 922(a)(3) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was not licensed as a firearms [dealer] [importer] [manufacturer] [collector]; and

Second, the defendant willfully [transported into] [received in] the state in which the defendant resided a [*specify firearm*] that the defendant purchased or otherwise obtained outside that state.

Comment

See Comment in 8.51 (Firearms) and Comment to Instruction 8.54 (Shipment or Transportation to a Person Not Licensed as a Dealer, Importer, Manufacturer or Collector). *See also* exceptions at 18 U.S.C. § 922(a)(3).

8.56 FIREARMS—UNLAWFUL TRANSPORTATION OF DESTRUCTIVE DEVICE, MACHINE GUN, SHORT–BARRELED SHOTGUN OR SHORT–BARRELED RIFLE (18 U.S.C. § 922(a)(4))

The defendant is charged in [Count _____ of] the indictment with the unlawful transportation of a [destructive device] [machine gun] [short-barreled shotgun] [short-barreled rifle] in violation of Section 922(a)(4) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was not licensed as a firearms [dealer] [importer] [manufacturer] [collector];

Second, the defendant knowingly transported a [*specify destructive device or firearm*] [[from one state to another] [between a foreign nation and the United States]]; and

Third, that the defendant did so without specific authorization by the Attorney General of the United States.

Comment

See Comment in 8.51 (Firearms) and Comment to Instruction 8.54 (Shipment or Transportation to a Person Not Licensed as a Dealer, Importer, Manufacturer or Collector).

The term "destructive device" is defined in 18 U.S.C. § 921(a)(4)(A)-(C) as:

> (A) any explosive, incendiary, or poison gas (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses;
> (B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and
> (C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

8.57 FIREARMS—UNLAWFUL DISPOSITION BY UNLICENSED DEALER (18 U.S.C. § 922(a)(5))

The defendant is charged in [Count _____ of] the indictment with the unlawful disposition of a firearm in violation of Section 922(a)(5) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant willfully [sold] [traded] [gave] [transported] [delivered] [transferred] a [*specify firearm*] to [*name of unlicensed dealer*];

Second, neither the defendant nor [*name of unlicensed dealer*] was licensed as a firearm [dealer] [importer] [manufacturer] [collector]; and

Third, the defendant knew or had reasonable cause to believe that [*name of unlicensed dealer*] was not a resident of the same state in which the defendant resided.

Comment

See Comment in 8.51 (Firearms) and Comment to Instruction 8.54 (Shipment or Transportation to a Person Not Licensed as a Dealer, Importer, Manufacturer or Collector).

8.58 FIREARMS—FALSE STATEMENT OR IDENTIFICATION IN ACQUISITION OR ATTEMPTED ACQUISITION (18 U.S.C. § 922(a)(6))

The defendant is charged in [Count _____ of] the indictment with [making a false statement] [giving false identification] in [[acquiring] [attempting to acquire]] [*specify firearm*] in violation of Section 922(a)(6) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [*specify seller*] was a licensed firearms [dealer] [importer] [manufacturer] [collector];

Second, in connection with [acquiring] [attempting to acquire] a [*specify firearm*] from [*specify seller*], the defendant [made a false statement] [furnished or exhibited false identification];

Third, the defendant knew the [statement] [identification] was false; and

Fourth, the false [statement] [identification] was material; that is, the false [statement] [identification] had a natural tendency to influence, or was capable of influencing [*specify seller*] into believing that the [*specify firearm*] could be lawfully sold to the defendant.

Comment

As to the fourth element of this instruction, the identity of the "actual" buyer is material to the lawfulness of the sale of a firearm. A "straw" buyer's false indication on ATF gun sales Form 4473 that he is the "actual" buyer is material, even if the true buyer was legally eligible to own the firearm. *Abramski v. United States*, 134 S. Ct. 2259, 2273 (2014).

Approved 2/2015

8.59 FIREARMS—UNLAWFUL SALE OR DELIVERY (18 U.S.C. § 922(b)(1)–(3))

The defendant is charged in [Count _____ of] the indictment with unlawfully [selling] [delivering] a firearm in violation of Section 922(b)[(1)][(2)][(3)] of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was licensed as a firearms [dealer] [importer] [manufacturer] [collector];

Second, the defendant willfully [[sold] [delivered]] [*specify firearm*] to [*specify unauthorized purchaser*]; and

Third, the defendant knew or had reasonable cause to believe that [[*specify unauthorized purchaser*] was less than eighteen years of age]] [[purchase or possession of the firearm by [*specify unauthorized purchaser*] would be in violation of [*applicable state law or published ordinance*]] [[*specify unauthorized purchaser*] did not reside in the same state in which the defendant's place of business was located]].

Comment

See Comment in 8.51 (Firearms).

If ammunition is for or the firearm is a shotgun or rifle, it is unlawful to sell or deliver it to a person the licensee knows or has reason to believe is under 18; the minimum age is 21 if the ammunition is for or the firearm is a shotgun or rifle. 18 U.S.C. § 922(b)(1).

Section 922(b)(3) has been interpreted to mean that a dealer licensed in one state, who attends a gun show in another state, may display and possess guns, negotiate price, and receive money for guns as long as the transfer of the firearm is through a licensee of the state in which the gun show is located who fills out the appropriate forms. *United States v. Ogles*, 406 F.3d 586, 590 (9th Cir. 2005), *adopted by* 440 F.3d 1095, 1099 (9th Cir. 2006) (en banc).

8.60 FIREARMS—UNLAWFUL SALE OR DELIVERY WITHOUT SPECIFIC AUTHORITY (18 U.S.C. § 922(b)(4))

The defendant is charged in [Count _____ of] the indictment with [selling] [delivering] a [destructive device] [machine gun] [short-barreled shotgun] [short-barreled rifle] without specific authority in violation of Section 922(b)(4) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was licensed as a firearms [dealer] [importer] [manufacturer] [collector];

Second, the defendant willfully [[sold] [delivered]] [*specify destructive device or firearm*] to [*name of purchaser*]; and

Third, the defendant did so without specific authorization by the Attorney General of the United States.

Comment

See Comment in 8.51 (Firearms).

The term "destructive device" is defined in 18 U.S.C. § 921(a)(4)(A)-(C) as:

(A) any explosive, incendiary, or poison gas (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses;
(B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and
(C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

8.61 FIREARMS—UNLAWFUL SALE
(18 U.S.C. § 922(d))

The defendant is charged in [Count _____ of] the indictment with selling [a firearm] [ammunition] in violation of Section 922(d) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly sold [*specify firearm*] [*specify ammunition*] to [*name of unauthorized purchaser*]; and

Second, the defendant knew or had reasonable cause to believe that [*name of unauthorized purchaser*] was [*specify applicable prohibited status from 18 U.S.C. § 922(d)(1)-(9)*].

Comment

See Comment in 8.51 (Firearms).

Section 922(d) makes it unlawful "to sell or otherwise dispose" of a firearm or ammunition. The instruction is written only in terms of a sale. If the facts are that the defendant "otherwise disposed" of the firearm or ammunition (for example, by gift or trade), the instruction should be modified accordingly.

Section 922(d)(1) makes it unlawful to sell or otherwise dispose of a firearm to a person who "is under indictment for, or has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." The Committee recommends that the specific crime be stated in the instruction. *Cf.* Comment to Instruction 8.65 (Firearms—Unlawful Possession—Convicted Felon). Whether a particular crime is punishable by imprisonment for a term exceeding one year is a matter of law.

For a definition of "fugitive from justice," see Instruction 8.52 (Firearms—Fugitive From Justice Defined).

Approved 12/2015

8.62 FIREARMS—DELIVERY TO CARRIER WITHOUT WRITTEN NOTICE (18 U.S.C. § 922(e))

The defendant is charged in [Count _____ of] the indictment with delivery of a firearm to a carrier without written notice in violation of Section 922(e) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [delivered] [caused to be delivered] to [*specify carrier*] a package or other container in which there was [*specify firearm*] [*specify ammunition*];

Second, the package or container was to be [[shipped] [transported]] [[from one state to another] [between a foreign nation and the United States]];

Third, the package or container was to be [shipped] [transported] to a person who was not licensed as a firearms dealer, manufacturer, importer, or collector; and

Fourth, the defendant did not give written notice to [*specify carrier*] that there was [*specify firearm*] [*specify ammunition*] in the package or container.

Comment

See Comment in 8.51 (Firearms).

8.63 FIREARMS—UNLAWFUL RECEIPT
(18 U.S.C. § 922(g))

The defendant is charged in [Count _____ of] the indictment with receiving [a firearm] [ammunition] in violation of Section 922(g) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly received [*specify firearm*] [*specify ammunition*];

Second, the [*specify firearm*] [*specify ammunition*] had been [[shipped] [transported]] [[from one state to another] [between a foreign nation and the United States]]; and

Third, at the time the defendant received the [*specify firearm*] [*specify ammunition*], the defendant [*specify applicable prohibited status from 18 U.S.C. § 922(g)(1)-(9)*].

If a person knowingly takes possession of [a firearm] [ammunition], [he] [she] has "received" it.

Comment

See Comment in 8.51 (Firearms).

Under 18 U.S.C. § 922(g) individuals falling into certain categories, such as fugitives from justice, are prohibited from receiving, shipping or transporting firearms or ammunition. This instruction covers receipt; for shipment or transportation, *see* Instruction 8.64 (Firearms—Unlawful Shipment or Transportation), and for possession, *see* Instruction 8.65 (Firearms—Unlawful Possession).

To establish "knowingly" under the first element, the government need not prove the defendant's knowledge of the law, only "that the defendant consciously possessed [received, shipped, or transported] what he knew to be a firearm." *United States v. Beasley*, 346 F.3d 930, 934 (2003). Moreover, a defendant prosecuted under § 922(g)(1) need not be aware that he or she is a felon or that the firearm or ammunition traveled in interstate commerce. *United States v. Stone*, 706 F.3d 1145, 1147 (9th Cir. 2013) (defendant's "knowledge of ammunition's [or firearm's] interstate connection is irrelevant"); *United States v. Montero-Camargo*, 177 F.3d 1118, 1120, *amended on other grounds by* 183 F.3d 1172 (9th Cir. 1999) ("[K]nowledge of one's felon status is not an element of the crime of being a felon in possession of a firearm or ammunition under 18 U.S.C. § 922(g)(1)"); *United States v. Miller*, 105 F.3d 552, 555 (9th Cir. 1997) ("We agree with the decisions from other circuits that the § 924(a) knowledge requirement

applies only to the possession element of § 922(g)(1), not to the interstate nexus or to felon status"). *See also United States v. Nevils*, 598 F.3d 1158, 1168-70 (9th Cir. 2010) (en banc) (finding sufficient evidence that sleeping defendant had knowing possession of firearms).

The third element refers to 18 U.S.C. § 922(g)(1)-(9), which sets forth nine categories of individuals prohibited from receiving, shipping, transporting, or possessing firearms and ammunition. Those categories are: (1) convicted felons; (2) fugitives from justice; (3) unlawful users and addicts of controlled substances defined in 21 U.S.C. § 802; (4) individuals who have been adjudicated as mentally ill or who have been committed to a mental institution; (5) aliens without authorization to be in the United States, and (subject to certain exceptions set forth at 18 U.S.C. § 922(y)(2)) aliens lawfully in the United States but with non-immigrant visas; (6) individuals who have been dishonorably discharged from the Armed Forces; (7) individuals who have renounced their citizenship; (8) individuals who have renounced their citizenship; (8) individuals who are subject to certain restraining orders issued after the individuals have been provided notice and opportunity to be heard and supported by specific factual findings that the individuals represent a credible threat to their intimate partners or children; and (9) individuals who have been convicted in any court of a misdemeanor crime of domestic violence.

If the defendant is charged under § 922(g)(1) (convicted felon), the instruction should be modified if the defendant stipulates to the third element of the offense rather than have evidence of prior convictions presented to the jury. *See Old Chief v. United States*, 519 U.S. 172, 189 (1997) (reversible error to allow government to prove nature of prior conviction when defendant offers to stipulate to the prior conviction). If the defendant so stipulates, the third element should be modified as follows:

> Third, at the time the defendant [received] [shipped] [transported] [possessed] the [*specify firearm*] [*specify ammunition*], the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year. The defendant stipulates that on [*date*], the defendant was convicted of a crime punishable by imprisonment for a term exceeding one year.

If the defendant does not stipulate to the third element, the following instruction should be given:

> Third, at the time the defendant [received] [shipped] [transported] [possessed] the [*specify firearm*] [*specify ammunition*], the defendant had been convicted of [*specify prior felony*], which is a crime punishable by imprisonment for a term exceeding one year.

A conviction in a foreign court does not satisfy the element of prior conviction under § 922(g)(1). *Small v. United States*, 544 U.S. 385, 387 (2005).

For a definition of "fugitive from justice" as used in § 922(g)(2), *see* Instruction 8.52 (Firearms—Fugitive From Justice Defined).

Despite some indication in the case law that aliens who have been released on bail pending deportation or pending a removal hearing, but who have filed applications to legalize their immigration status, are not subject to the prohibition of § 922(g)(5), such a conclusion is incorrect under current versions of removability statutes. *See United States v. Latu*, 479 F.3d 1153, 1158 (9th Cir. 2007).

The term "misdemeanor crime of domestic violence" used in § 922(g)(9) is separately defined in § 921(a)(33)(A). The Supreme Court has interpreted that definition to include two requirements: first, the crime must have as an element "the use or attempted use of physical force, or the threatened use of a deadly weapon," and second, the victim of the offense must have been in a specified domestic relationship with the defendant. *United States v. Hayes*, 555 U.S. 415, 421 (2009). The first requirement, the use or attempted use of force, or threatened use of a deadly weapon, must be an element of the underlying offense. *Id.* Conversely, the second requirement, the domestic relationship, need not be an element of the underlying offense. A conviction under a statute that does not require a domestic relationship may thus be a misdemeanor crime of domestic violence if the government proves that the "prior conviction was, in fact, for an offense . . . committed by the defendant against a spouse or other domestic victim." *Id.* (internal quotation marks omitted).

In determining whether a statute has as an element the "use . . . of physical force" for purposes of § 922(g)(9), the Supreme Court has held that "Congress incorporated the common-law meaning of 'force'—namely, offensive touching—in § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence.'" *United States v. Castleman*, 134 S. Ct. 1405, 1410 (2014). Accordingly, the statute under which the defendant is convicted need not prohibit *violent* force, so long as it prohibits "the degree of force that supports a common-law battery conviction." *Id.* at 1413; *see id.* at 1413–14 (holding that Tennessee statute prohibiting "intentionally or knowingly caus[ing] bodily injury" to family or household member necessarily has as element use of physical force in common-law sense).

Approved 6/2014

8.64 FIREARMS—UNLAWFUL SHIPMENT OR TRANSPORTATION (18 U.S.C. § 922(g))

The defendant is charged in [Count _____ of] the indictment with [[shipping] [transporting]] [[a firearm] [ammunition]] in violation of Section 922(g) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [[shipped] [transported]] [[*specify firearm*] [*specify ammunition*]] [[from one state to another] [between a foreign nation and the United States]]; and

Second, at the time of [shipment] [transportation] the defendant was [*specify applicable prohibited status from 18 U.S.C. § 922(g)(1)-(9)*].

Comment

See Comment in 8.51 (Firearms).

For a discussion of "knowingly" and of the nine categories of prohibited status set forth in 18 U.S.C. § 922(g)(1)-(9), *see* Comment to Instruction 8.63 (Firearms—Unlawful Receipt).

Approved 6/2014

8.65 FIREARMS—UNLAWFUL POSSESSION
(18 U.S.C. § 922(g))

The defendant is charged in [Count _____ of] the indictment with the possession of [a firearm] [ammunition] in violation of Section 922(g) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly possessed [*specify firearm*] [*specify ammunition*];

Second, the [*specify firearm*] [*specify ammunition*] had been [[shipped] [transported]] [[from one state to another] [between a foreign nation and the United States]]; and

Third, at the time the defendant possessed the [*specify firearm*] [*specify ammunition*], the defendant [*specify applicable prohibited status from 18 U.S.C. § 922(g)(1)-(9)*].

Comment

See Comment in 8.51 (Firearms).

For a discussion of "knowingly" and of the nine categories of prohibited status set forth in 18 U.S.C. § 922(g)(1)-(9), *see* Comment to Instruction 8.63 (Firearms—Unlawful Receipt). For a definition of "possession," *see* Instruction 3.17 (Possession—Defined).

Depending on the facts in evidence, it may be appropriate to amend this instruction with language requiring specific jury unanimity as to when the possession occurred. *See* Instruction 7.9 (Specific Issue Unanimity) and *United States v. Garcia-Rivera*, 353 F.3d 788, 792 (9th Cir. 2003). For instance, an indictment may allege that the possession occurred at some point within an imprecise time frame. In such a case, and if there was evidence that the defendant possessed the weapon or ammunition on more than one occasion during the interval, the jury should be instructed to find unanimously as follows: "You must unanimously agree that the possession occurred on or about a particular date." In such a case, it is advisable to require the jurors to answer a special interrogatory specifying the date(s) upon which all agreed that the possession occurred.

The Ninth Circuit does not recognize an "innocent possession" affirmative defense. *See United States v. Johnson*, 459 F.3d 990, 995-98 (9th Cir. 2006).

Although brief handling of a weapon does not always satisfy the element of possession, a short length of possession does not preclude conviction. *Compare United States v. Teemer*, 394 F.3d 59, 63 (9th Cir. 2005), *with United States v. Kearns*, 61 F.3d 1422, 1425 (9th Cir. 1995). The commission of the crime requires no "act" other than the knowing possession of a firearm or ammunition by someone not authorized to do so. *United States v. Beasley*, 346 F.3d 930, 934 (9th Cir. 2003).

Constructive or joint possession may satisfy the possession element. To show constructive possession, the government must prove a connection between the defendant and the firearm or ammunition sufficient "to support the inference that the defendant exercised dominion and control over" it. *United States v. Carrasco*, 257 F.3d 1045, 1049 (9th Cir. 2001) (internal quotation marks and citation omitted). *See generally*, *United States v. Tucker*, 641 F.3d 1110 (9th Cir. 2011). Similarly, joint control of the premises where the firearm or ammunition was found may be sufficient to establish possession where a defendant "has knowledge of the weapon and both the power and the intention to exercise dominion and control over it." *Carrasco*, 257 F.3d at 1049 (internal quotation marks and citation omitted).

For a defendant to be convicted of multiple counts under 18 U.S.C. § 922(g)(1) for possession of multiple firearms and/or ammunition, the government must prove that the firearms and/or ammunition at issue were acquired or possessed at different times or stored in different places. *United States v. Keen*, 96 F.3d 425, 432 n.11 (9th Cir. 1996); *United States v. Wiga*, 662 F.2d 1325, 1336 (9th Cir. 1981). If a defendant is charged with multiple counts, the jury should be instructed to make a finding of fact as to separate acquisition or possession. *United States v. Ankeny*, 502 F.3d 829, 838 (9th Cir. 2007); *United States v. Szalkiewicz*, 944 F.2d 653, 653-54 (9th Cir. 1991) (per curiam). A possible instruction could be:

> If you have found the defendant guilty of Count I, you may not find [[him][her]] guilty of Count II unless you also find that the government has proven beyond a reasonable doubt that the [firearm[s]] [and] [ammunition] charged in Counts I and II [[were][was]] acquired or possessed at different times, or stored in different places.

Approved 6/2016

8.65A FIREARMS—UNLAWFUL POSSESSION—CONVICTED FELON (18 U.S.C. § 922(g)(1))

The defendant is charged in [Count _____ of] the indictment with the possession of [a firearm] [ammunition] in violation of Section 922(g)(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly possessed [*specify firearm*] [*specify ammunition*];

Second, the [*specify firearm*] [*specify ammunition*] had been [[shipped] [transported]] [[from one state to another] [between a foreign nation and the United States]]; and

[Third, at the time the defendant possessed the [*specify firearm*] [*specify ammunition*], the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year. The defendant stipulates that on [*date*], the defendant was convicted of a crime punishable by imprisonment for a term exceeding one year.]

or

[Third, at the time the defendant possessed the [*specify firearm*] [*specify ammunition*], the defendant had been convicted of [*specify prior felony*], which is a crime punishable by imprisonment for a term exceeding one year.]

Comment

For a discussion of "knowingly," *see* Comment to Instruction 8.63 (Firearms—Unlawful Receipt). For a discussion of possession, *see* Comment to Instruction 8.65 (Firearms—Unlawful Possession). *See also* Instruction 3.17 (Possession—Defined).

Defendants frequently stipulate to the third element of the offense rather than have evidence of the prior convictions presented to the jury. *See Old Chief v. United States*, 519 U.S. 172, 189 (1997) (reversible error to allow government to prove nature of prior conviction when defendant offers to stipulate to the prior conviction).

If multiple 18 U.S.C. § 922(g)(1) counts are charged, *see* the Comment to Instruction 8.65 (Firearms—Unlawful Possession).

Approved 6/2016

8.66 FIREARMS—UNLAWFUL POSSESSION—DEFENSE OF JUSTIFICATION

The defendant claims that [he] [she] was justified in committing the crime of [*specify unlawful possession offense charged*]. Justification is a defense to that charge. The defendant is justified in committing the crime of [*specify unlawful possession offense charged*] if:

First, the defendant was under unlawful and present threat of death or serious bodily injury;

Second, the defendant did not recklessly place [himself] [herself] in a situation where he would be forced to engage in criminal conduct;

Third, the defendant had no reasonable legal alternative; and

Fourth, there was a direct causal relationship between the criminal activity and the avoidance of the threatened harm.

The defendant has the burden of proving each of the elements of this defense by a preponderance of the evidence.

Comment

The defense usually arises when a defendant is charged with being a felon in possession of a firearm. It is based on the theory that criminal conduct may be justified if necessary to prevent a greater wrong. The defendant is entitled to the instruction when there is any foundation in the evidence. However, a mere scintilla of evidence supporting a theory of justification is not sufficient. *United States v. Wofford*, 122 F.3d 787, 789 (9th Cir. 1997). The justification instruction should be given only in exceptional circumstances. *United States v. Gomez*, 92 F.3d 770, 790-91 (9th Cir. 1996).

The burden is on the defendant to prove the elements of the defense. *United States v. Beasley*, 346 F3d 930, 935 (9th Cir. 2003). Where the defendant is involved in illegal activities and his or her fear is a result of engaging in those activities, the justification defense is not permitted. *United States v. Phillips*, 149 F.3d 1026, 1030 (9th Cir. 1998).

8.67 FIREARMS—TRANSPORTATION OR SHIPMENT OF STOLEN FIREARM (18 U.S.C. § 922(i))

The defendant is charged in [Count _____ of] the indictment with [[transporting] [shipping]] [[a stolen [*specify firearm*] [stolen ammunition]] in violation of Section 922(i) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [[transported] [shipped]] [[a stolen [*specify firearm*] [stolen *specify ammunition*]] [[from one state to another] [between a foreign nation and the United States]]; and

Second, the defendant knew or had reasonable cause to believe that the [*specify firearm*] [*specify ammunition*] had been stolen.

8.68 FIREARMS—TRANSPORTATION, SHIPMENT, POSSESSION OR RECEIPT IN COMMERCE WITH REMOVED OR ALTERED SERIAL NUMBER (18 U.S.C. § 922(k))

The defendant is charged in [Count _____ of] the indictment with [transporting] [shipping] [receiving] [possessing] a firearm which had the serial number removed, obliterated or altered in violation of Section 922(k) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knew that [he] [she] had [transported] [shipped] [received] [possessed] a [*specify firearm*] [[from one state to another] [between a foreign nation and the United States]];

Second, the serial number of the [*specify firearm*] had been removed, obliterated or altered; and

Third, the defendant knew that the serial number had been removed, obliterated or altered.

Comment

A serial number is "altered" if the serial number is changed in a manner that makes it appreciably more difficult to discern; it need not make tracing the gun impossible or extraordinarily difficult. *United States v. Carter*, 421 F.3d 909, 916 (9th Cir. 2005).

8.69 FIREARMS—SHIPMENT OR TRANSPORTATION BY PERSON UNDER INDICTMENT FOR FELONY (18 U.S.C. § 922(n))

The defendant is charged in [Count _____ of] the indictment with [[shipping] [transporting]] [[a firearm] [ammunition]] while under indictment for a felony in violation of Section 922(n) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was under indictment for [*specify felony*]; and

Second, the defendant willfully [[shipped] [transported]] [[*specify firearm*] [*specify ammunition*]] [[from one state to another] [between a foreign nation and the United States]].

Comment

The willfulness requirement is not found in the statutory text of § 922(n); rather, it is found in the relevant statutory sentencing provision, § 924(a)(1)(D). *See Dixon v. United States*, 548 U.S. 1, 5 n.3 (2006).

8.70 FIREARMS—RECEIPT BY PERSON UNDER INDICTMENT FOR FELONY (18 U.S.C. § 922(n))

The defendant is charged in [Count _____ of] the indictment with receiving [a firearm] [ammunition] while under indictment for a felony in violation of Section 922(n) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was under indictment for [*specify felony*]; and

Second, the defendant willfully received [*specify firearm*] [*specify ammunition*] that had been shipped or transported [from one state to another] [between a foreign nation and the United States].

Comment

Federal law prohibits receipt of a firearm by anyone charged with a felony, whether under state or federal law, or whether by indictment or information. *See* 18 U.S.C. § 921(a)(14) (defining "indictment" as including information).

8.71 FIREARMS—USING, CARRYING, OR BRANDISHING IN COMMISSION OF CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME (18 U.S.C. § 924(c))

The defendant is charged in [Count ____ of] the indictment with [using] [carrying] [brandishing] a firearm during and in relation to [*specify applicable crime of violence or drug trafficking crime*] in violation of Section 924(c) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant committed the crime of [*specify crime*] as charged in [Count ____ of] the indictment, which I instruct you is a [crime of violence] [drug trafficking crime]; and

Second, the defendant knowingly [used] [carried] [brandished] the [*specify firearm*] during and in relation to that crime.

[A defendant "used" a firearm if [he] [she] actively employed the firearm during and in relation to [*specify crime*].]

[A defendant "carried" a firearm if [he] [she] knowingly possessed it and held, moved, conveyed or transported it in some manner on [his] [her] person or in a vehicle.]

[A defendant "brandished" a firearm if [he] [she] displayed all or part of the firearm, or otherwise made the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm was directly visible to that person.]

A defendant [used] [carried] [brandished] a firearm "during and in relation to" the crime if the firearm facilitated or played a role in the crime.

Comment

In *United States v. Thongsy*, 577 F.3d 1036, 1043 n.5 (9th Cir. 2009), the Ninth Circuit held that the former version of this instruction "should be revised to clarify there are two ways to prove an offense under § 924(c): the defendant either (1) used or carried a firearm 'during and in relation to' a crime or (2) possessed a firearm 'in furtherance of' a crime." Use this instruction when the defendant is charged with using, carrying, or brandishing a firearm during and in relation to a crime. When the defendant is charged with possessing a firearm in furtherance of a crime, use Instruction 8.72 (Firearms—Possession in Furtherance of Crime of Violence or Drug Trafficking Crime).

The trial judge may want to consider having separate instructions regarding using and brandishing a firearm, depending on how the case is charged.

If the crime of violence or drug trafficking crime is not charged in the same indictment, the elements of the crime must also be listed and the jury must be instructed that each element must be proved beyond a reasonable doubt.

The Supreme Court has construed the term "use" to require proof that "the defendant actively employed the firearm during and in relation to the predicate crime." *Bailey v. United States*, 516 U.S. 137, 150 (1995). "The active-employment understanding of 'use' certainly includes brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm." *Id.* at 148. "[A] reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a 'use,' just as the silent but obvious and forceful presence of a gun on a table can be a 'use.'" *Id.* Although a person uses a firearm when he or she trades it for drugs, *Smith v. United States*, 508 U.S. 223, 241 (1993), a person does not "use" a firearm when he or she receives it in trade for drugs, *Watson v. United States*, 552 U.S. 74, 83 (2007).

The Supreme Court has construed the term "carry" to include carrying on a person or vehicle. *Muscarello v. United States*, 524 U.S. 125, 130-33 (1998). "'Carry' implies personal agency and some degree of possession . . . ." *Id.* at 134. However, the firearm need not be "immediately accessible." *Id.* at 138; *see also id.* at 126-27 (carrying "applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies"); *United States v. Long*, 301 F.3d 1095, 1106 (9th Cir. 2002).

"[T]he term 'brandish' means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person." 18 U.S.C. § 924(c)(4). The "brandishing" of a firearm is a type of "use", but carries a greater penalty. *Compare id.* § 924(c)(1)(A)(i) (setting statutory minimum penalty for "use" at five years) *with id.* § 924(c)(1)(A)(ii) (setting statutory minimum penalty for "brandishing" at seven years). *See also United States v. Carter*, 560 F.3d 1107, 1114 (9th Cir. 2009) (remanding for re-sentencing when it was unclear whether court found the defendant "used" or "brandished" a firearm).

Discharging a firearm is another type of "use" that carries a penalty greater than that for brandishing. *See* 18 U.S.C. § 924(c)(1)(A)(iii) (setting statutory minimum penalty for "discharge" of a firearm at ten years).Therefore, when discharging is alleged, this instruction should be modified accordingly. The statute does not contain a definition of the term

"discharge." The Supreme Court has held that discharge of a firearm does not require proof of intent to discharge. *Dean v. United States*, 556 U.S. 568, 577 (2009) (discharge of firearm does not require separate proof of intent; "10-year mandatory minimum applies if a gun is discharged in the course of a violent or drug trafficking crime, whether on purpose or by accident").

Whether the defendant brandished or discharged a firearm is a question that must be submitted to the jury and found beyond a reasonable doubt. *See Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) (holding that "any fact that increases the mandatory minimum [sentence] is an 'element' that must be submitted to the jury").

Similarly, whether the defendant used, carried, or brandished any of the firearm types listed in 18 U.S.C. § 924(c)(1)(B) is an element of a separate, aggravated crime to be proved to the jury beyond a reasonable doubt. *Castillo v. United States*, 530 U.S. 120, 131 (2000); *United States v. O'Brien*, 560 U.S. 218, 231-35 (2010) (fact that firearm is a machinegun is an element of offense to be proved to jury beyond a reasonable doubt). In appropriate cases, a special interrogatory may be used to determine the jury's findings as to whether the defendant used, carried, or brandished particular firearm types listed in 18 U.S.C. § 924(c)(1)(B). *See Castillo*, 530 U.S. at 128.

Whether a particular crime is a crime of violence is a question of law. *See United States v. Amparo*, 68 F.3d 1222, 1226 (9th Cir. 1995) (crime of violence); 18 U.S.C. § 924(c)(2) (drug trafficking crime).

See United States v. Potter, 630 F.3d 1260, 1261 (9th Cir. 2011) (defendant charged under § 924(c)(1)(A) was not entitled to a "Second Amendment defense" instruction).

Approved 4/2014

8.72 FIREARMS—POSSESSION IN FURTHERANCE OF CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME (18 U.S.C. § 924(c))

The defendant is charged in [Count _____ of] the indictment with possessing a firearm in furtherance of [*specify applicable crime of violence or drug trafficking crime*] in violation of Section 924(c) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant committed the crime of [*specify crime*] [as charged in Count _____ of] the indictment, which I instruct you is a [crime of violence] [drug trafficking crime];

Second, the defendant knowingly possessed the [*specify firearm*]; and

Third, the defendant possessed the firearm in furtherance of the crime of [*specify crime*].

A person "possesses" a firearm if the person knows of its presence and has physical control of it, or knows of its presence and has the power and intention to control it.

Comment

In *United States v. Thongsy*, 577 F.3d 1036, 1043 n.5 (9th Cir. 2009), the Ninth Circuit held that the former version of this instruction "should be revised to clarify there are two ways to prove an offense under § 924(c): the defendant either (1) used or carried a firearm 'during and in relation to' a crime or (2) possessed a firearm 'in furtherance of' a crime." Use this instruction when the defendant is charged with possessing a firearm in furtherance of a crime. When the defendant is charged with using or carrying a firearm during and in relation to a crime, use Instruction 8.71 (Firearms—Using or Carrying in Commission of Crime of Violence or Drug Trafficking Crime).

The definition of possession is taken from Instruction 3.17 (Possession—Defined). *See also Thongsy*, 577 F.3d at 1041 (defining constructive possession). The joint possession language from Instruction 3.17 may be used if appropriate to the circumstances of the case.

A district court does not err in failing separately to define "in furtherance of" in its instruction to the jury on possession of a firearm in furtherance of a drug trafficking crime. *United States v. Lopez*, 477 F.3d 1110, 1115-16 (9th Cir.), *cert. denied*, 552 U.S. 855 (2007) (instruction that separately listed requirements of possession and possession in furtherance of the crime eliminated the possibility that rational juror would convict defendant upon finding mere

possession). "The question whether possession of a firearm is 'in furtherance of' a crime is a 'fact-based inquiry into the nexus between possession of the firearm and the drug crime.'" *Thongsy*, 577 F.3d at 1041 (citation omitted); *see United States v. Mahan*, 586 F.3d 1185, 1187-89 & n.3 (9th Cir. 2009) (holding that a defendant who receives guns in exchange for drugs possesses those guns "in furtherance of" his drug trafficking offense).

If the crime of violence or drug trafficking crime is not charged in the same indictment, the elements of the crime must also be listed and the jury must be instructed that each element must be proved beyond a reasonable doubt. *See United States v. Mendoza*, 11 F.3d 126 (9th Cir. 1993).

In appropriate cases, a special interrogatory may be used to determine the jury's findings as to whether the defendant possessed the particular firearm types listed in 18 U.S.C. § 924(c)(1). *See Castillo v. United States*, 530 U.S. 120, 128 (2000); *United States v. O'Brien*, 560 U.S. 218, 231-33 (2010) (fact that firearm is machinegun is element of offense to be proved to jury beyond reasonable doubt).

Whether a particular crime is a crime of violence is a question of law. *See United States v. Amparo*, 68 F.3d 1222, 1226 (9th Cir. 1995) (crime of violence); 18 U.S.C. § 924(c)(2) (drug trafficking crime).

See United States v. Potter, 630 F.3d 1260, 1261 (9th Cir. 2011) (defendant charged under Section 924(c)(1)(A) was not entitled to a "Second Amendment defense" instruction).

Approved 4/2011

8.73 FALSE STATEMENT TO GOVERNMENT AGENCY (18 U.S.C. § 1001)

The defendant is charged in [Count _____ of] the indictment with knowingly and willfully [making a false statement] [using a document containing a false statement] in a matter within the jurisdiction of a governmental agency or department in violation of Section 1001 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [made a false statement] [used a writing that contained a false statement] in a matter within the jurisdiction of the [*specify government agency or department*];

Second, the defendant acted willfully; that is, the defendant acted deliberately and with knowledge both that the statement was untrue and that his or her conduct was unlawful; and

Third, the statement was material to the activities or decisions of the [*specify government agency or department*]; that is, it had a natural tendency to influence, or was capable of influencing, the agency's decisions or activities.

Comment

The Ninth Circuit has held the common law test for materiality, as reflected in the last sentence of this instruction, is the standard to use when false statement statutes such as 18 U.S.C. § 1001 are charged. *United States v. Peterson*, 538 F.3d 1064, 1072 (9th Cir. 2008) (citing *United States v. Gaudin*, 515 U.S. 506, 509 (1995)). "The false statement need not have actually influenced the agency, and the agency need not rely on the information in fact for it to be material." *United States v. Serv. Deli Inc.*, 151 F.3d 938, 941 (9th Cir. 1998); *see also United States v. King*, 735 F.3d 1098, 1108 (9th Cir. 2013).

No mental state is required with respect to the fact that a matter is within the jurisdiction of a federal agency, and the false statement need not be made directly to the government agency. *United States v. Green*, 745 F.2d 1205, 1208-10 (9th Cir. 1984). There is no requirement that the defendant acted with the intention of influencing the government agency. *United States v. Yermian*, 468 U.S. 63, 73 & n.13 (1984). The initial determination whether the matter is one within the jurisdiction of a department or agency of the United States—apart from the issue of materiality—should be made by the court as a matter of law. *United States v. F.J. Vollmer & Co., Inc.*, 1 F.3d 1511, 1518 (7th Cir. 1993).

To make a false statement "willfully" under Section 1001, the defendant must have both the specific intent to make a false statement and the knowledge that his or her conduct was unlawful. The requirement that the defendant knew that his or her conduct was unlawful is based on the Supreme Court's decision vacating and remanding the Ninth Circuit's decision in *United States v. Ajoku*, 718 F.3d 882 (9th Cir. 2013), after the Solicitor General confessed error. *Ajoku v. United States,* 134 S. Ct. 1872 (Mem.) (U.S. April 21, 2014). Specific intent does not require evil intent but only that the defendant act deliberately and knowingly. *See United States v. Heuer*, 4 F.3d 723, 732 (9th Cir. 1993).

Materiality must be demonstrated by the government, *United States v. Oren,* 893 F.2d 1057, 1063 (9th Cir. 1990); *United States v. Talkington,* 589 F.2d 415, 416 (9th Cir. 1978), and must be submitted to the jury. *Gaudin*, 515 U.S. at 506. Actual reliance is not required. *Talkington,* 589 F.2d at 417. The materiality test applies to each allegedly false statement submitted to the jury. *Id.*

Depending on the facts in evidence, it may be appropriate to amend this instruction with language requiring specific jury unanimity (*e.g.*, "with all of you agreeing as to which statement was false and material"). *See* Instruction 7.9 (Specific Issue Unanimity).

Approved 6/2014

8.74 FALSE STATEMENT TO A BANK OR OTHER FEDERALLY INSURED INSTITUTION (18 U.S.C. § 1014)

The defendant is charged in [Count _____ of] the indictment with making a false statement to a federally insured [*specify institution*] for the purpose of influencing the [*specify institution*] in violation of Section 1014 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [made a false statement or report] [willfully overvalued any land, property or security] to a federally insured [*specify institution*];

Second, the defendant made the false statement or report to the [*specify institution*] knowing it was false; and

Third, the defendant did so for the purpose of influencing in any way the action of the [*specify institution*].

It is not necessary, however, to prove that the [*specify institution*] involved was, in fact, influenced or misled, or that [*specify institution*] was exposed to a risk of loss. What must be proved is that the defendant intended to influence the [*specify institution*] by the false statement.

Comment

See generally Comment to Instruction 8.73 (False Statement to Government Agency). Materiality is not an element of the crime of knowingly making a false statement to a federally insured bank in violation of 18 U.S.C. § 1014. *United States v. Wells*, 519 U.S. 482, 496-97 (1997). Compare bank fraud under § 1344(2) where materiality is an element. *United States v. Nash*, 115 F.3d 1431 (9th Cir. 1997). *See* Instruction 8.127 (Bank Fraud—Scheme to Defraud by False Promises).

Depending on the facts in evidence, it may be appropriate to amend this instruction with language requiring specific jury unanimity. *See* Instruction 7.9 (Specific Issue Unanimity).

Federally insured status is an element of the crime. *United States v. Davoudi*, 172 F.3d 1130, 1133 (9th Cir. 1999).

Proof of a risk of loss to a financial institution is not an element of the crime. *United States v. Taylor*, 808 F.3d 1202, 1205 (9th Cir. 2015).

Approved 3/2016

8.75 FRAUD IN CONNECTION WITH IDENTIFICATION DOCUMENTS—PRODUCTION (18 U.S.C. § 1028(a)(1))

The defendant is charged in [Count _____ of] the indictment with producing without legal authority [an identification document] [an authentication feature] [a false identification document] in violation of Section 1028(a)(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly produced [an identification document] [an authentication feature] [a false identification document];

Second, the defendant produced the [identification document] [authentication feature] [false identification document] without lawful authority; and

[Third, the [identification document] [authentication feature] [false identification document] was or appeared to be issued by or under authority of [the United States] [*specify issuing authority*].]

or

[Third, the production of the [identification document] [authentication feature] [false identification document] was in or affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country.]

or

[Third, in the course of production, the [identification document] [authentication feature] [false identification document] was transported in the mail.]

Comment

The first and second elements are drawn from 18 U.S.C. § 1028(a)(2); the alternative third elements are drawn from 18 U.S.C. § 1028(c)(1), (c)(3)(A) and (c)(3)(B).

Section 1028(d) provides definitions for the terms: "identification document," "authentication feature," "false identification document," "issuing authority," and "produce."

Section 1028(b) provides for various enhanced statutory maximum penalties in certain circumstances such as when particular types of identification documents are involved or when their use occurs in connection with certain other criminal conduct. In the event that such enhanced penalties are charged, a special verdict form may need to be submitted to the jury regarding the presence or absence of such facts.

When a defendant presents false information to a government agent, it is unnecessary to show that the government agent who actually produced the identification document intended to commit identification fraud. *United States v. Lee*, 602 F.3d 974, 976 (9th Cir. 2010).

Approved 12/2010

8.76 FRAUD IN CONNECTION WITH IDENTIFICATION DOCUMENTS—TRANSFER (18 U.S.C. § 1028(a)(2))

The defendant is charged in [Count _____ of] the indictment with transferring [an identification document] [an authentication feature] [a false identification document] in violation of Section 1028(a)(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly transferred [an identification document] [an authentication feature] [a false identification document];

Second, the defendant knew the [identification document] [authentication feature] [false identification document] was [stolen] [produced without lawful authority]; and

[Third, the [identification document] [authentication feature] [false identification document] was or appeared to be issued by or under the authority of [the United States] [*specify issuing authority*].]

or

[Third, the production of the [identification document] [authentication feature] [false identification document] was in or affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country.]

or

[Third, in the course of production, the [identification document] [authentication feature] [false identification document] was transported in the mail.]

Comment

The first and second elements are drawn from 18 U.S.C. § 1028(a)(2); the alternative third elements are drawn from 18 U.S.C. § 1028(c)(1), (c)(3)(A) and (c)(3)(B).

Section 1028(d) provides definitions for the terms: "identification document," "authentication feature," "false identification document," "issuing authority," and "transfer."

Section 1028(b) provides for various enhanced statutory maximum penalties in certain circumstances such as when particular types of identification documents are involved or when their use occurs in connection with certain other criminal conduct. In the event that such enhanced penalties are charged, a special verdict form may need to be submitted to the jury regarding the presence or absence of such facts.

8.77 FRAUD IN CONNECTION WITH IDENTIFICATION DOCUMENTS—POSSESSION OF FIVE OR MORE DOCUMENTS (18 U.S.C. § 1028(a)(3))

The defendant is charged in [Count _____ of] the indictment with possessing five or more [identification documents] [authentication features] [false identification documents] for unlawful use or transfer in violation of Section 1028(a)(3) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly possessed five or more [identification documents] [authentication features] [false identification documents];

Second, the defendant intended to [use] [transfer] unlawfully those [identification documents] [authentication features] [false identification documents]; and

[Third, the [identification document] [authentication feature] [false identification document] was or appeared to be issued by or under the authority of [the United States] [*specify issuing authority*].]

or

[Third, the production of the [identification document] [authentication feature] [false identification document] was in or affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country.]

or

[Third, in the course of production, the [identification document] [authentication feature] [false identification document] was transported in the mail.]

[In determining whether the defendant possessed five or more identification documents, you should not count any that were issued lawfully for the use of the defendant.]

Comment

The first and second elements are drawn from 18 U.S.C. § 1028(a)(2); the alternative third elements are drawn from 18 U.S.C. § 1028(c)(1), (c)(3)(A) and (c)(3)(B).

Section 1028(d) provides definitions for the terms: "identification document," "authentication feature," "false identification document," "issuing authority," and "transfer."

Section 1028(b) provides for various enhanced statutory maximum penalties in certain circumstances such as when particular types of identification documents are involved or when their use occurs in connection with certain other criminal conduct. In the event that such enhanced penalties are charged, a special verdict form may need to be submitted to the jury regarding the presence or absence of such facts.

8.78 FRAUD IN CONNECTION WITH IDENTIFICATION DOCUMENTS—POSSESSION OF IDENTIFICATION DOCUMENT TO DEFRAUD UNITED STATES (18 U.S.C. § 1028(a)(4))

The defendant is charged in [Count _____ of] the indictment with possessing [an identification document] [an authentication feature] [a false identification document] for use in defrauding the United States in violation of Section 1028(a)(4) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly possessed [an identification document] [an authentication feature] [a false identification document]; and

Second, the defendant intended the [identification document] [authentication feature] [false identification document] to be used to defraud the United States.

[In determining whether the defendant possessed an identification document you should not count any that were issued lawfully for the use of the defendant.]

Comment

The first and second elements are drawn from 18 U.S.C. § 1028(a)(4) in light of 18 U.S.C. § 1028(c)(2).

Violation of a federal, state, or local law is not an essential element of an offense under Section 1028(a)(4). *United States v. McCormick*, 72 F.3d 1404, 1407 (9th Cir. 1995) (affirming the trial court's instruction that the government must prove (1) that the defendant knowingly possessed a false identification document, and (2) that he did so with the intent to defraud the United States).

Section 1028(d) provides definitions for the terms: "identification document," "authentication feature," and "false identification document."

Section 1028(b) provides for various enhanced statutory maximum penalties in certain circumstances such as when particular types of identification documents are involved or when their use occurs in connection with certain other criminal conduct. In the event that such enhanced penalties are charged, a special verdict form may need to be submitted to the jury regarding the presence or absence of such facts.

See Instruction 3.16 (Intent to Defraud—Defined).

8.79 FRAUD IN CONNECTION WITH IDENTIFICATION DOCUMENTS—DOCUMENT-MAKING IMPLEMENTS (18 U.S.C. § 1028(a)(5))

The defendant is charged in [Count _____ of] the indictment with [[possessing] [producing] [transferring]] [[a document-making implement] [an authentication feature]] in violation of Section 1028(a)(5) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [[produced] [transferred] [possessed]] [[a document-making implement] [an authentication feature]];

Second, the defendant intended the [document-making implement] [authentication feature] to be used in the production of [another document-making implement] [another authentication feature], which was to be used in producing a false identification document; and

[Third, the authentication feature was or appeared to be issued by or under authority of [the United States] [*specify issuing authority*].]

or

[Third, the document-making implement was designed or suited for making [an identification document] [an authentication feature] [a false identification document].]

or

[Third, the [production] [transfer] [possession] [use] of the [document-making implement] [authentication feature] was in or affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country].]

or

[Third, in the course of defendant's [production] [transfer] [possession] [use] of the document-making implement, it was transported in the mail.]

Comment

The first and second elements are drawn from 18 U.S.C. § 1028(a)(5); the alternative third elements are drawn from18 U.S.C. § 1028(c)(1), (c)(3)(A) and (c)(3)(B).

Section 1028(d) provides definitions for the terms: "identification document," "authentication feature," "false identification document," "document-making implement," "issuing authority," and "transfer."

Section 1028(b) provides for various enhanced statutory maximum penalties in certain circumstances such as when particular types of identification documents are involved or when their use occurs in connection with certain other criminal conduct. In the event that such enhanced penalties are charged, a special verdict form may need to be submitted to the jury regarding the presence or absence of such facts.

8.80 FRAUD IN CONNECTION WITH IDENTIFICATION DOCUMENTS—POSSESSION (18 U.S.C. § 1028(a)(6))

The defendant is charged in [Count _____ of] the indictment with possessing an [identification document] [authentication feature] in violation of Section 1028(a)(6) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly possessed an [identification document] [authentication feature];

Second, the [identification document] [authentication feature] was or appeared to be an [identification document] [authentication feature] of [the United States] [*specify issuing authority*];

Third, the [identification document] [authentication feature] was [stolen] [produced without lawful authority]; and

Fourth, the defendant knew the [identification document] [authentication feature] was [stolen] [produced without lawful authority].

Comment

The elements are drawn from 18 U.S.C. § 1028(a)(6).

Section 1028(d) provides definitions for the terms: "identification document," "authentication feature," "issuing authority," and "produce."

Section 1028(b) provides for various enhanced statutory maximum penalties in certain circumstances such as when particular types of identification documents are involved or when their use occurs in connection with certain other criminal conduct. In the event that such enhanced penalties are charged, a special verdict form may need to be submitted to the jury regarding the presence or absence of such facts.

In *United States v. Fuller*, 531 F.3d 1020, 1027–28 (9th Cir. 2008), the Ninth Circuit, in a case under Section 1028(a)(6), approved the use of an instruction that the identification document "was or appeared to be an identification document of the United States." In so doing, the court rejected the argument that the language of the instruction operated to relieve the

government of the burden of showing that the identification document be issued by or under the authority of the United States. *Id.* at 1028.

8.81 FRAUD IN CONNECTION WITH IDENTIFICATION DOCUMENTS—POSSESSING ANOTHER'S MEANS OF IDENTIFICATION (18 U.S.C. § 1028 (a)(7))

The defendant is charged in [Count _____ of] the indictment with [possessing] [transferring] [using] another person's means of identification without lawful authority in violation of Section 1028(a)(7) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [transferred] [possessed] [used] a means of identification of another person;

Second, the defendant did so without lawful authority;

[Third, the defendant intended to commit [*specify unlawful activity*]; and]

or

[Third, the defendant aided or abetted [*specify unlawful activity*]; and]

or

[Third, the defendant [transferred] [possessed] [used] the means of identification in connection with [*specify unlawful activity*]; and]

[Fourth, [transfer] [possession] [use] of the means of identification of another person was in or affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country];

or

[Fourth, [in the course of [transfer] [possession] [use], the means of identification was transported in the mail.]

Comment

The first, second, and third elements are drawn from 18 U.S.C. § 1028(a)(7); the fourth element is drawn from § 1028(c)(3). The unlawful activity must be a violation of federal law or be a felony under applicable state or local law. 18 U.S.C. § 1028(a)(7).

A § 1028(a)(7) conviction requires no evidence of an underlying crime. *United States v. Sutcliffe*, 505 F.3d 944, 960 (9th Cir. 2007) ("the government must only prove that the defendant committed the unlawful act with the requisite criminal intent, not that the defendant's crime actually caused another crime to be committed").

Section 1028(d) provides definitions for the terms: "means of identification" and "transfer." The Ninth Circuit has held that a signature qualifies as a "means of identification." *United States v. Blixt*, 548 F.3d 882, 887 (9th Cir. 2008).

Section 1028(b) provides for various enhanced statutory maximum penalties in certain circumstances such as when particular types of identification documents are involved or when their use occurs in connection with certain other criminal conduct. In the event that such enhanced penalties are charged, a special verdict form may need to be submitted to the jury regarding the presence or absence of such facts.

8.82 FRAUD IN CONNECTION WITH IDENTIFICATION DOCUMENTS—TRAFFICKING (18 U.S.C. § 1028(a)(8))

The defendant is charged in [Count _____ of] the indictment with trafficking in authentication features in violation of Section 1028(a)(8) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly trafficked in [false] authentication features;

Second, that the [false] authentication features were for use in [false identification documents] [document-making implements] [means of identification]; and

[Third, the authentication feature was or appeared to be issued by or under authority of [the United States] [*specify issuing authority*].]

or

[Third, the transfer of the [false] authentication feature was in or affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country.]

or

[Third, in the course of transferring the authentication feature, it was transported in the mail.]

Comment

The first and second elements are drawn from 18 U.S.C. § 1028(a)(8); the alternative third elements are drawn from 18 U.S.C. § 1028(c)(1), (c)(3)(A) and (c)(3)(B).

Section 1028(d) provides definitions for the terms: "authentication feature," "false authentication feature," "false identification document," "document-making implements," "means of identification," "traffic," "issuing authority," and "transfer." The Ninth Circuit has held that a signature qualifies as a "means of identification." *United States v. Blixt*, 548 F.3d 882, 887 (9th Cir. 2008).

Section 1028(b) provides for various enhanced statutory maximum penalties in certain circumstances such as when particular types of identification documents are involved or when their use occurs in connection with certain other criminal conduct. In the event that such enhanced penalties are charged, a special verdict form may need to be submitted to the jury regarding the presence or absence of such facts.

8.83 FRAUD IN CONNECTION WITH IDENTIFICATION DOCUMENTS—AGGRAVATED IDENTITY THEFT (18 U.S.C. § 1028A)

The defendant is charged in [Count _____ of] the indictment with aggravated identity theft in violation of Section 1028A of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [transferred] [possessed] [used] without legal authority [a means of identification of another person] [a false identification document]; [and]

[Second, the defendant knew that the means of identification belonged to a real person; and]

[Second] [Third], the defendant did so during and in relation to [*specify felony violation*].

[The Government need not establish that the [means of identification of another person] [false identification document] was stolen.]

Comment

See United States v. Doe, 842 F.3d 1117, 1119-20 (9th Cir. 2016) (setting out elements for section 1028A). Both direct and circumstantial evidence can establish that a defendant knew that the means of identification belonged to a real person. *Id*. at 1120-22. If the case involves circumstantial evidence of knowledge, consider the following instruction from *Doe* at 1121:

> Repeated and successful testing of the authenticity of a victim's identifying information by submitting it to a government agency, bank or other lender is circumstantial evidence that you may consider in deciding whether the defendant knew the identifying information belonged to a real person as opposed to a fictitious one. It is up to you to decide whether to consider any such evidence and how much weight to give it.

For offenses charged under Section 1028A(a)(1), use only "a means of identification of another person" under the first element and select the applicable felony from Section 1028A(c)(1)–(11) for insertion in the last element. For offenses charged under Section 1028A(a)(2) [terrorism offense], select the applicable felony from 18 U.S.C. § 2332b(g)(5) for insertion in the last element. Do not use the bracketed second element in cases charging a false identification document under Section 1028A(a)(2).

Section 1028(d) provides definitions for the terms: "false identification document" and "means of identification." The Ninth Circuit has held that a signature qualifies as a "means of identification." *United States v. Blixt*, 548 F.3d 882, 887 (9th Cir. 2008).

In *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), the Supreme Court held that Section 1028A requires that the government prove the defendant knew that the "means of identification" he or she unlawfully transferred, possessed or used belonged to a real person. The word "person" includes both living and deceased persons, and the government is not required to prove that the defendant knew the person was living when the defendant committed the crime of aggravated identity theft. *United States v. Maciel-Alcala*, 598 F.3d 1239, 1242-48 (9th Cir. 2010).

If the government offers evidence at trial of uncharged identity theft against victims not included in the indictment, it may be necessary for the court to modify this instruction to name the specific victims whose identities the indictment accuses the defendant of stealing. *See United States v. Ward*, 747 F.3d 1184, 1192 (9th Cir. 2014) (reversible error to permit jury to convict on counts of aggravated identity theft against two victims named in indictment based on evidence presented at trial of uncharged conduct against identity-theft victims not named in indictment). *See* Instruction 3.10 (Activities Not Charged).

When conduct necessary to satisfy an element of the offense is charged in the indictment and the government's proof at trial includes uncharged conduct that would satisfy the same element, the court should instruct the jury that it must find the conduct charged in the indictment before it may convict. *See United States v. Ward*, 747 F.3d 1184, 1191 (9th Cir. 2014) (reversible error to permit jury to convict on counts of aggravated identity theft against two victims named in indictment based on evidence presented at trial of uncharged conduct against identity-theft victims not named in indictment).

The government need not prove that the identification document was stolen. *United States v. Osuna-Alvarez*, 788 F.3d 1183 (9th Cir. 2015).

Approved 3/2017

8.84 COUNTERFEIT ACCESS DEVICES—PRODUCING, USING, OR TRAFFICKING (18 U.S.C. § 1029(a)(1))

The defendant is charged in [Count _____ of] the indictment with [production of] [use of] [trafficking in] [a] counterfeit access device[s] in violation of Section 1029(a)(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [used] [produced] [trafficked in] a counterfeit access device;

Second, the defendant acted with intent to defraud; and

Third, the defendant's conduct in some way affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country.

A "counterfeit access device" means any access device that is counterfeit, fictitious, altered or forged, or an identifiable component of an access device or a counterfeit access device.

[To "produce" a telecommunications instrument means to design, alter, authenticate, duplicate, or assemble it.]

[To "traffic" in a telecommunications instrument means to transfer or otherwise dispose of it to another, or to obtain control of it with intent to transfer or dispose of it.]

Comment

Use this instruction in conjunction with Instruction 8.90 (Access Device—Defined).

For a definition of "intent to defraud," *see* Instruction 3.16 (Intent to Defraud—Defined).

18 U.S.C. § 1029(e) defines the terms "counterfeit," "produce," and "traffic."

For a definition of "knowingly," *see* Instructions 5.6 (Knowingly—Defined) and 5.7 (Deliberate Ignorance).

Regarding a jury finding that commerce was affected, consult *United States v. Gomez*, 87 F.3d 1093, 1096–97 (9th Cir. 1996) (discussing role of the jury in determining a fact which is both an element of the offense and a jurisdictional fact). *See also United States v. Lopez*, 514

U.S. 549 (1995) (regarding the "affecting" commerce requirement); *United States v. Clayton*, 108 F.3d 1114, 1117 (9th Cir. 1997) (applying the test in *Lopez* to alleged violation of section 1029).

18 U.S.C. § 1029(b)(1) and (b)(2) specify penalties for an attempt or a conspiracy to violate any subsection of § 1029(a). Where the indictment charges such an attempt or conspiracy, adjust this instruction accordingly, using relevant elements from Instructions 5.3 (Attempt) or 8.20 (Conspiracy—Elements).

For specific cases referring to counterfeit access devices, see the following: *United States v. McCormick*, 72 F.3d 1404, 1408 (9th Cir. 1995) (holding that submission of a credit card application containing false or inflated information produces a counterfeit access device); *United States v. Brannan*, 898 F.2d 107, 109 (9th Cir. 1989) (submitting fictitious credit card applications to bank was functional equivalent to the manufacture of counterfeit access devices); *United States v. Luttrell*, 889 F.2d 806, 810 (9th Cir. 1989) (discussing the distinction between unauthorized and counterfeit access devices).

18 U.S.C. § 10 defines interstate and foreign commerce.

8.85 UNAUTHORIZED ACCESS DEVICES—USING OR TRAFFICKING (18 U.S.C. § 1029(a)(2))

The defendant is charged in [Count _____ of] the indictment with [using] [trafficking in] unauthorized access devices during a period of one year in violation of Section 1029(a)(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [used] [trafficked in] the unauthorized access devices at any time during a one-year period [beginning [*date*], and ending [*date*]];

Second, by [using] [trafficking in] the unauthorized access devices during that period, the defendant obtained [anything of value worth $1,000 or more] [things of value, their value together totaling $1,000 or more] during that period;

Third, the defendant acted with the intent to defraud; and

Fourth, the defendant's conduct in some way affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country.

An "unauthorized access device" is any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud.

[To "traffic" in an access device means to transfer or otherwise dispose of it to another, or to obtain control of it with intent to transfer or dispose of it.]

Comment

Use this instruction in conjunction with Instruction 8.90 (Access Device—Defined). *See United States v. Brannan*, 898 F.2d 107, 110 (9th Cir. 1990) (distinguishing "unauthorized access device" from "counterfeit access device").

For a definition of "intent to defraud," see Instruction 3.16 (Intent to Defraud—Defined).

For a definition of "knowingly," *see* Instructions 5.6 (Knowingly—Defined) and 5.7 (Deliberate Ignorance).

When parties dispute the "affecting commerce" requirement, *see* Comment to Instruction 8.84 (Counterfeit Access Devices—Producing, Using, or Trafficking). *See also* that Comment

regarding changes to this instruction when attempt or conspiracy is alleged in violation of 18 U.S.C. § 1029(a).

18 U.S.C. § 10 defines interstate and foreign commerce.

18 U.S.C. § 1029(e) defines “access device,” “traffic,” and “unauthorized access device.”

8.86 ACCESS DEVICES—UNLAWFULLY POSSESSING FIFTEEN OR MORE (18 U.S.C. § 1029(a)(3))

The defendant is charged in [Count _____ of] the indictment with unlawful possession of access devices in violation of Section 1029(a)(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly possessed at least fifteen [counterfeit] [unauthorized] access devices at the same time;

Second, the defendant knew that the devices were [counterfeit] [unauthorized];

Third, the defendant acted with the intent to defraud; and

Fourth, the defendant's conduct in some way affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country.

[An "unauthorized access device" is any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud.]

[A "counterfeit access device" is any device that is counterfeit, fictitious, altered or forged, or an identifiable component of an access device or a counterfeit access device.]

Comment

Use this instruction in conjunction with Instruction 8.90 (Access Device—Defined).

See Comment to Instruction 8.84 (Counterfeit Access Devices—Producing, Using, or Trafficking) and Comment to Instruction 8.85 (Unauthorized Access Devices—Using or Trafficking).

18 U.S.C. § 10 defines interstate and foreign commerce.

18 U.S.C. § 1029(e) defines "access device," "counterfeit access device," and "unauthorized access device."

8.87 DEVICE-MAKING EQUIPMENT— ILLEGAL POSSESSION OR PRODUCTION (18 U.S.C. § 1029(a)(4))

The defendant is charged in [Count _____ of] the indictment with [production] [trafficking in] [having control or custody of] [possessing] device-making equipment in violation of Section 1029(a)(4) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [produced] [trafficked in] [had custody or control of] [possessed] device-making equipment;

Second, the defendant acted with intent to defraud; and

Third, the defendant's conduct in some way affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country.

"Device-making equipment" is any equipment, mechanism, or impression designed or primarily used for making an access device or a counterfeit access device.

[A "counterfeit access device" is any device that is counterfeit, fictitious, altered or forged, or an identifiable component of an access device or a counterfeit access device.]

[To "traffic" in device-making equipment means to transfer or otherwise dispose of it to another, or to obtain control of it with intent to transfer or dispose of it to another.]

[To "produce" device-making equipment means to design, alter, authenticate, duplicate, or assemble it.]

Comment

Use this instruction in conjunction with Instruction 8.90 (Access Device—Defined).

See Comment to Instruction 8.84 (Counterfeit Access Devices—Producing, Using, or Trafficking) and Comment to Instruction 8.85 (Unauthorized Access Devices—Using or Trafficking).

18 U.S.C. § 10 defines interstate and foreign commerce.

18 U.S.C. § 1029(e) defines “access device,” “counterfeit access device,” “trafficking,” “produce,” and “unauthorized access device.”

8.88 ACCESS DEVICES—ILLEGAL TRANSACTIONS (18 U.S.C. § 1029(a)(5))

The defendant is charged in [Count _____ of] the indictment with effecting transactions with an access device issued to another person in violation of Section 1029(a)(5) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, with [an access device] [access devices] issued to [another person] [other persons], the defendant knowingly effected transactions;

Second, the defendant obtained through such transactions [at any time during a one-year period beginning [*date*], and ending [*date*]] a total of at least $1,000 in payment[s] or [any other thing] [other things] of value;

Third, the defendant acted with intent to defraud; and

Fourth, the defendant's conduct in some way affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country.

Comment

Use this instruction in conjunction with Instruction 8.90 (Access Device—Defined).

See Comment to Instruction 8.84 (Counterfeit Access Devices—Producing, Using, or Trafficking) and Comment to Instruction 8.85 (Unauthorized Access Devices—Using or Trafficking).

18 U.S.C. § 10 defines interstate and foreign commerce.

8.89 ACCESS DEVICES—UNAUTHORIZED SOLICITATION (18 U.S.C. § 1029(a)(6))

The defendant is charged in [Count _____ of] the indictment with soliciting persons for the purpose of [offering] [selling information regarding] an access device in violation of Section 1029(a)(6) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant knowingly solicited a person for the purpose of [offering an access device] [selling information regarding an access device] [selling information regarding an application to obtain an access device];

Second, the defendant solicited that person without authorization of the issuer of the access device;

Third, the defendant acted with the intent to defraud; and

Fourth, the defendant's conduct in some way affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country.

Comment

Use this instruction in conjunction with Instruction 8.90 (Access Device—Defined).

See Comment to Instruction 8.84 (Counterfeit Access Devices—Producing, Using, or Trafficking) and Comment to Instruction 8.85 (Unauthorized Access Devices—Using or Trafficking).

18 U.S.C. § 10 defines interstate and foreign commerce.

8.90 ACCESS DEVICE—DEFINED
(18 U.S.C. § 1029)

An "access device" means any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access, that can be used alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).

Comment

18 U.S.C. § 1029(e)(1) contains the definition of what constitutes an "access device." Use this instruction in conjunction with Instructions 8.84 to 8.89.

8.91 TELECOMMUNICATIONS INSTRUMENT—ILLEGAL MODIFICATION (18 U.S.C. § 1029(a)(7))

The defendant is charged in [Count _____ of] the indictment with [use of] [production of] [trafficking in] a telecommunications instrument that had been modified to obtain unauthorized telecommunications services in violation of Section 1029(a)(7) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [used] [produced] [trafficked in] [had custody or control of] [possessed] a telecommunications instrument that had been modified or altered to obtain unauthorized use of telecommunications services;

Second, the defendant acted with the intent to defraud; and

Third, the defendant's conduct in some way affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country.

[To "produce" a telecommunications instrument means to design, alter, authenticate, duplicate, or assemble it.]

[To "traffic" in a telecommunications instrument means to transfer or otherwise dispose of it to another, or to obtain control of it with intent to transfer or dispose of it.]

Comment

Section 1029 does not define the term "telecommunications instrument." Section 1029(e)(9) provides that "telecommunications service" has the meaning given in the Communications Act of 1934, 47 U.S.C. § 153, which defines "telecommunications service" as: "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

18 U.S.C. § 10 defines interstate and foreign commerce.

18 U.S.C. § 1029(e)(4) and (5) defines "produce" and "traffic."

8.92 USE OR CONTROL OF SCANNING RECEIVER (18 U.S.C. § 1029(a)(8))

The defendant is charged in [Count _____ of] the indictment with [using] [producing] [trafficking in] [possessing] a scanning receiver in violation of Section 1029(a)(8) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [used] [produced] [trafficked in] [had custody or control of] [possessed] a scanning receiver;

Second, the defendant acted with intent to defraud; and

Third, the defendant's conduct in some way affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country.

[A "scanning receiver" is a device or apparatus that can be used to intercept illegally a wire or electronic communication or to intercept illegally an electronic serial number, mobile identification number, or other identifier of any telecommunications service, equipment, or instrument.]

[To "produce" a scanning receiver means to design, alter, authenticate, duplicate, or assemble it.]

[To "traffic" in a scanning receiver means to transfer or otherwise dispose of it to another, or to obtain control of it with intent to transfer or dispose of it.]

Comment

For a definition of "intent to defraud," *see* Instruction 3.16 (Intent to Defraud—Defined).

For a definition of "knowingly," *see* Instructions 5.6 (Knowingly—Defined) and 5.7 (Deliberate Ignorance).

18 U.S.C. § 10 defines interstate and foreign commerce.

18 U.S.C. § 1029(e)(8) defines the term "scanning receiver" to be a device or apparatus that can be used to intercept a wire or electronic communication in violation of 18 U.S.C. §§ 2510-2522. 18 U.S.C. § 2510(4) defines "intercept" to mean the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic,

mechanical, or other device. When parties dispute whether the device involved is a "scanning receiver," the court should add the following paragraph to the instruction concerning the meaning of that term:

> The government has the burden of proving beyond a reasonable doubt that [*specify device*] is a scanning receiver. A scanning receiver is a device that can be used to intercept illegally a wire, oral, or electronic telecommunication.

Section 1029 does not define the term "telecommunications instrument." Section 1029(e)(9) provides that "telecommunications service" has the meaning given in the Communications Act of 1934, 47 U.S.C. § 153, that carries the definition: "transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(47).

Section 1029(b)(1) and (b)(2) specify penalties for an attempt or a conspiracy to violate any subsection of Section 1029(a). Where the indictment charges an attempt or conspiracy, modify this instruction accordingly, using relevant elements from Instruction 5.3 (Attempt) or 8.20 (Conspiracy—Elements).

8.93 ILLEGALLY MODIFIED TELECOMMUNICATIONS EQUIPMENT—POSSESSION OR PRODUCTION (18 U.S.C. § 1029(a)(9))

The defendant is charged in [Count _____ of] the indictment with [use of] [production of] [having possession, custody, or control of] [trafficking in] hardware or software configured to [insert] [modify] telecommunication identifying information [contained within] [associated with] a telecommunications instrument, so that such instrument could be used to obtain telecommunications services, in violation of Section 1029(a)(9) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [used] [produced] [trafficked in] [had custody or control of] [possessed] hardware or software configured to [insert] [modify] telecommunication identifying information, so that a telecommunications instrument could be used to obtain telecommunications services without authorization;

Second, the defendant acted with the intent to defraud; and

Third, the defendant's conduct in some way affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country.

"Telecommunication identifying information" means an electronic serial number or any other number or signal that identifies a specific telecommunications instrument or account, or a specific communication transmitted from a telecommunications instrument.

[To "produce" a telecommunications instrument means to design, alter, authenticate, duplicate, or assemble it.]

[To "traffic" in a telecommunications instrument means to transfer or otherwise dispose of it to another, or to obtain control of it with intent to transfer or dispose of it.]

Comment

See Comment to Instruction 8.91 (Telecommunications Instrument—Illegal Modification). *See also* Comment to Instruction 8.84 (Counterfeit Access Devices—Producing, Using, or Trafficking) and Comment to Instruction 8.85 (Unauthorized Access Devices—Using or Trafficking) for discussion of intent to defraud, and affecting interstate commerce.

18 U.S.C. § 10 defines interstate and foreign commerce.

8.94 CREDIT CARD TRANSACTION FRAUD
(18 U.S.C. § 1029(a)(10))

The defendant is charged in [Count _____ of] the indictment with arranging for another person to present a record of a transaction made by an access device to a credit card system for payment in violation of Section 1029(a)(10) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant knowingly [arranged for] [caused] another person to present, for payment to a credit card system [member] [agent], one or more [records] [evidences] of transactions made by an access device;

Second, that the defendant was not authorized by the credit card system [member] [agent] to [arrange] [cause] such a claim to be presented for payment;

Third, the defendant acted with the intent to defraud; and

Fourth, the defendant's conduct in some way affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country.

Comment

Use this instruction in conjunction with Instruction 8.90 (Access Device—Defined).

See Comment to Instruction 8.84 (Counterfeit Access Devices—Producing, Using, or Trafficking) and Comment to Instruction 8.85 (Unauthorized Access Devices—Using or Trafficking).

A "credit card system member" is a "financial institution or other entity that is a member of a credit card system, including an entity, whether affiliated with or identical to the credit card issuer, that is the sole member of a credit card system." 18 U.S.C. § 1029(e)(7).

18 U.S.C. § 10 defines interstate and foreign commerce.

8.94A WITHOUT AUTHORIZATION—DEFINED

A person uses a computer "without authorization" when the person has not received permission from the [owner] [[person who] or [entity which] controls the right of access to the computer] for any purpose, or when the [owner] [[person who] or [entity which] controls the right of access to the computer] has withdrawn or rescinded permission to use the computer and the person uses the computer anyway.

Comment

Use this instruction with instructions 8.95, 8.96, 8.97, 8.98, 8.99, 8.100, 8.101, 8.102, 8.103, and 8.104. Where appropriate, substitute "government," "financial institution," or other specific entity where called for by the accompanying CFAA instructions. *See*, *e.g.*, Instruction No. 8.96 (Obtaining Information by Computer.From Financial Institution or Government Computer).

A person uses a computer "without authorization" under the CFAA when the owner of the computer, or of the right to access to the computer, has rescinded permission to access the computer and the defendant uses the computer anyway. *United States v. Nosal*, 844 F.3d 1024, 1034 (9th Cir. 2016).

Approved 3/2017

8.95 OBTAINING INFORMATION BY COMPUTER—INJURIOUS TO UNITED STATES OR ADVANTAGEOUS TO FOREIGN NATION (18 U.S.C. § 1030(a)(1))

The defendant is charged in [Count _____ of] the indictment with obtaining and transmitting injurious information by computer in violation of Section 1030(a)(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [accessed without authorization] [exceeded authorized access to] a computer;

Second, by [accessing without authorization] [exceeding authorized access to] a computer, the defendant obtained [information that had been determined by the United States government to require protection against disclosure for reasons of national defense or foreign relations] [data regarding the design, manufacture or use of atomic weapons];

Third, the defendant had reason to believe that the information or data obtained could be used to the injury of the United States or to the benefit of a foreign nation; and

[Fourth, the defendant willfully [caused to be] [[communicated] [delivered] [transmitted]] the information or data to any person not entitled to receive it.]

or

[Fourth, the defendant willfully [caused to be] retained and failed to deliver the information or data to an officer or employee of the United States entitled to receive it.]

Comment

18 U.S.C. § 1030(e) provides definitions of the terms "computer," "exceeds authorized access," and "person." As to "knowingly," *see* Instruction 5.6 (Knowingly—Defined), and as to "willfully," *see* Comment in 5.5 (Willfully).

The Ninth Circuit has held that the phrase "exceeds [or exceeded] authorized access" limits the applicability of § 1030(a)(1) to violations of restrictions on *access* to information, and not restrictions on the *use* of information that is permissibly accessed. *United States v. Nosal*,

676 F.3d 854, 864 (9th Cir. 2012); *see also United States v. Christensen*, 828 F.3d 763, 786-87 (9th Cir. 2015), *as amended on denial of reh'g* (July 8, 2016).

Approved 12/2015

8.96 OBTAINING INFORMATION BY COMPUTER—FROM FINANCIAL INSTITUTION OR GOVERNMENT COMPUTER (18 U.S.C. § 1030(a)(2)(A) and (B))

The defendant is charged in [Count _____ of] the indictment with unlawfully obtaining information of a [financial institution] [card issuer] [consumer reporting agency] [government department or agency] in violation of Section 1030(a)(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intentionally [accessed without authorization] [exceeded authorized access to] a computer; and

[Second, by [accessing without authorization] [exceeding authorized access to] a computer, the defendant obtained information contained in a record of [*specify financial institution or card issuer*].]

or

[Second, by [accessing without authorization] [exceeding authorized access to] a computer, the defendant obtained information contained in a file [of *specify consumer reporting agency*] on a consumer.]

or

[Second, by [accessing without authorization] [exceeding authorized access to] a computer, the defendant obtained information from [*specify department or agency of the United States*].]

Comment

18 U.S.C. § 1030(e) provides definitions of the terms "computer," "financial institution," "financial record," "exceeds authorized access," and "department of the United States."

Interpreting the civil counterpart to Section 1030 and expressly finding such interpretation equally applicable in the criminal context, the Ninth Circuit held that "a person uses a computer 'without authorization' under §§ 1030(a)(2) and (4) when the person has not received permission to use the computer for any purpose (such as when a hacker accesses

someone's computer without any permission), or when the employer has rescinded permission to access the computer and the defendant uses the computer anyway." *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1135 (9th Cir. 2009). The court further held that an employee's use of a computer contrary to the employer's interest does not alone satisfy the "without authorization" prong of the statute. *Id.*

The Ninth Circuit has held that the phrase "exceeds [or exceeded] authorized access" limits the applicability of § 1030(a)(1) to violations of restrictions on access to information, and not restrictions on the use of information that is permissibly accessed. *United States v. Nosal*, 676 F.3d 854, 864 (9th Cir. 2012); *see also United States v. Christensen*, 828 F.3d 763, 786-87 (9th Cir. 2015), *as amended on denial of reh'g* (July 8, 2016).

Approved 12/2015

8.97 OBTAINING INFORMATION BY COMPUTER— "PROTECTED" COMPUTER (18 U.S.C. § 1030(a)(2)(C))

The defendant is charged in [Count _____ of] the indictment with unlawfully obtaining information from a protected computer in violation of Section 1030(a)(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intentionally [accessed without authorization] [or] [exceeded authorized access to] a computer; and

Second, by [accessing without authorization] [exceeding authorized access to] a computer, the defendant obtained information from a computer that was [[exclusively for the use of a financial institution or the United States government] [not exclusively for the use of a financial institution or the United States government, but the defendant's access affected the computer's use by or for the financial institution or the United States government] [used in or affected commerce or communication between one state and [an]other state[s], or between a state of the United States and a foreign country] [located outside the United States but that computer was used in a manner that affected interstate or foreign commerce or communication of the United States]].

Comment

18 U.S.C. § 1030(e) provides definitions of the terms "computer," "financial institution," and "exceeds authorized access." While the term "protected computer" is defined in 18 U.S.C. § 1030(e), that term is not used in the elements of this instruction because that definition has been incorporated into the second element. Accordingly, it is not necessary to provide a definition of "protected computer."

The first prong is satisfied when a defendant intentionally accesses a computer without authorization *or* exceeds authorized access. *Musacchio v. United States*, 136 S. Ct. 709, 713 (2016).

Interpreting the civil counterpart to Section 1030 and expressly finding such interpretation equally applicable in the criminal context, the Ninth Circuit held that "a person uses a computer 'without authorization' under §§ 1030(a)(2) and (4) when the person has not received permission to use the computer for any purpose (such as when a hacker accesses someone's computer without any permission), or when the employer has rescinded permission to access the computer and the defendant uses the computer anyway." *LVRC Holdings LLC v.*

Brekka, 581 F.3d 1127, 1135 (9th Cir. 2009). The court further held that an employee's use of a computer contrary to the employer's interest does not alone satisfy the "without authorization" prong of the statute. *Id.*

The Ninth Circuit has held that the phrase "exceeds [or exceeded] authorized access" limits the applicability of § 1030(a)(1) to violations of restrictions on access to information, and not restrictions on the use of information that is permissibly accessed. *United States v. Nosal*, 676 F.3d 854, 864 (9th Cir. 2012); *see also United States v. Christensen*, 828 F.3d 763, 786-87 (9th Cir. 2015), *as amended on denial of reh'g* (July 8, 2016).

Approved 3/2016

8.98 UNLAWFULLY ACCESSING NONPUBLIC COMPUTER USED BY THE GOVERNMENT (18 U.S.C. § 1030(a)(3))

The defendant is charged in [Count _____ of] the indictment with unlawfully accessing a computer in violation of Section 1030(a)(3) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intentionally accessed a nonpublic computer of [*specify department or agency of the United States*];

Second, the defendant accessed that computer without authorization; and

Third, the computer accessed by the defendant [was exclusively for the use of the United States government] [was used nonexclusively by or for the United States government, but the defendant's conduct affected that computer's use by or for the United States government].

Comment

18 U.S.C. § 1030(e) provides definitions of the terms "computer" and "department of the United States."

8.99 COMPUTER FRAUD—USE OF PROTECTED COMPUTER (18 U.S.C. § 1030(a)(4))

The defendant is charged in [Count _____ of] the indictment with computer fraud in violation of Section 1030(a)(4) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [accessed without authorization] [exceeded authorized access to] a computer [that was exclusively for the use of a financial institution or the United States government] [that was not exclusively for the use of a financial institution or the United States government, but the defendant's access affected the computer's use by or for the financial institution or the United States government] [used in or affecting interstate or foreign commerce or communication] [located outside the United States but using it in a manner that affected interstate or foreign commerce or communication of the United States];

Second, the defendant did so with the intent to defraud;

Third, by [accessing the computer without authorization] [exceeding authorized access to the computer], the defendant furthered the intended fraud; [and]

Fourth, the defendant by [accessing the computer without authorization] [exceeding authorized access to the computer] obtained anything of value[.] [; and]

[Fifth, the total value of the defendant's computer use exceeded $5,000 during [*specify applicable period*.]

Comment

See as to intent to defraud, Instruction 3.16 (Intent to Defraud—Defined).

Use the fifth element of this instruction when the prosecution's theory is that the object of the defendant's alleged fraud was only the use of the computer and the value of that computer use was "more than $5,000 in any 1-year period." This fifth element reflects the requirements of 18 U.S.C. § 1030(a)(4) which apply where the defendant's purpose and the thing of value the defendant obtained by the fraud was only the use of the computer.

18 U.S.C. § 1030(e) provides definitions of the terms "computer," "financial institution," and "exceeds authorized access." While the term "protected computer" is defined in 18 U.S.C. §

1030(e), that term is not used in the elements of this instruction because that definition has been incorporated into the first element of the instruction. Accordingly, it is not necessary to provide a definition of "protected computer."

Interpreting the civil counterpart to Section 1030 and expressly finding such interpretation equally applicable in the criminal context, the Ninth Circuit held that "a person uses a computer 'without authorization' under §§ 1030(a)(2) and (4) when the person has not received permission to use the computer for any purpose (such as when a hacker accesses someone's computer without any permission), or when the employer has rescinded permission to access the computer and the defendant uses the computer anyway." *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1135 (9th Cir. 2009). The court further held that an employee's use of a computer contrary to the employer's interest does not alone satisfy the "without authorization" prong of the statute. *Id.*

The Ninth Circuit has held that the phrase "exceeds [or exceeded] authorized access" limits the applicability of § 1030(a)(1) to violations of restrictions on access to information, and not restrictions on the use of information that is permissibly accessed. *United States v. Nosal*, 676 F.3d 854, 864 (9th Cir. 2012); *see also United States v. Christensen*, 828 F.3d 763, 786-87 (9th Cir. 2015), *as amended on denial of reh'g* (July 8, 2016).

Approved 12/2015

8.100 INTENTIONAL DAMAGE TO A PROTECTED COMPUTER (18 U.S.C. § 1030(a)(5)(A))

The defendant is charged in [Count _____ of] the indictment with transmitting [a program] [a code] [a command] [information] to a computer [system], intending to cause damage, in violation of Section 1030(a)(5) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly caused the transmission of [a program] [a code] [a command] [information] to a computer;

Second, as a result of the transmission, the defendant intentionally impaired without authorization the [integrity] [availability] of [data] [a program] [a system] [information]; and

Third, the computer was [exclusively for the use of a financial institution or the United States government] [used in or affected interstate or foreign commerce or communication] [located outside the United States but was used in a manner that affects interstate or foreign commerce or communication of the United States] [not exclusively for the use of a financial institution or the United States government, but the defendant's transmission affected the computer's use by or for a financial institution or the United States government].

Comment

18 U.S.C. § 1030(e) provides definitions of the terms "computer" and "financial institution." While the term "protected computer" is defined in 18 U.S.C. § 1030, that term is not used in the elements of this introduction because that definition has been incorporated into the third element of the instruction. Accordingly, it is not necessary to provide a definition of "protected computer." Similarly, the term "damage" is defined at 18 U.S.C. § 1030(e), but because the common usage of that term could be broader and therefore conducive to confusion, the definition has been incorporated into the second and third elements.

In *United States v. Middleton*, 231 F.3d 1207, 1211-12 (9th Cir. 2000), the Ninth Circuit discussed the definitions of "protected computer" and "damage." However, it is uncertain that the conclusions drawn by the circuit are still applicable after amendments to § 1030 in Pub. L. 107-56, Title V, § 506(a), Title VIII, § 814, Oct. 26, 2001, 115 Stat. 366, 382). *See* 18 U.S.C. § 1030(e) ("protected computer" and "damage").

8.101 RECKLESS DAMAGE TO A PROTECTED COMPUTER (18 U.S.C. § 1030(a)(5)(B))

The defendant is charged in [Count _____ of] the indictment with accessing a computer and recklessly damaging it in violation of Section 1030(a)(5) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intentionally accessed a computer without authorization;

Second, as a result of the defendant's access, the defendant recklessly impaired the [integrity] [availability] of [data] [a program] [a system] [information]; and

Third, the computer was [exclusively for the use of a financial institution or the United States government] [used in or affected interstate or foreign commerce or communication] [located outside the United States but was used in a manner that affects interstate or foreign commerce or communication of the United States] [not exclusively for the use by or for a financial institution or the United States government, but the defendant's transmission affected the computer's use by or for a financial institution or the United States government].

Comment

18 U.S.C. § 1030(e) provides definitions of the terms "computer" and "financial institution." While the term "protected computer" is defined in 18 U.S.C. § 1030(e), that term is not used in the elements of this instruction because that definition has been incorporated into the third element of the instruction. Accordingly, it is not necessary to provide a definition of "protected computer." Similarly, the term "damage" is defined at 18 U.S.C. § 1030(e) but because the common usage of that term could be broader and therefore conducive to confusion, the definition has been incorporated into the second and third elements.

In *United States v. Middleton*, 231 F.3d 1207, 1211-12 (9th Cir. 2000), the Ninth Circuit discussed the definitions of "protected computer" and "damage." However, it is uncertain that the conclusions drawn by the circuit are still applicable after amendments to § 1030 in Pub. L. 107-56, Title V, § 506(a), Title VIII, § 814, Oct. 26, 2001, 115 Stat. 366, 382). *See* 18 U.S.C. § 1030(e) ("protected computer" and "damage").

8.102 DAMAGE TO A PROTECTED COMPUTER CAUSING LOSS (18 U.S.C. § 1030(a)(5)(C))

The defendant is charged in [Count _____ of] the indictment with accessing a computer [system] which resulted in its damage in violation of Section 1030(a)(5) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intentionally accessed a computer without authorization;

Second, as a result of the defendant's access, the defendant caused the impairment of the [integrity] [availability] of [data] [a program] [a system] [information];

Third, as a result of the defendant's access, the defendant caused a loss; and

Fourth, the computer was [exclusively for the use of a financial institution or the United States government] [used in or affected interstate or foreign commerce or communication] [located outside the United States but was used in a manner that affects interstate or foreign commerce or communication of the United States] [not exclusively for the use by or for a financial institution or the United States government, but the defendant's transmission affected the computer's use by or for a financial institution or the United States government].

Comment

18 U.S.C. § 1030(e) provides definitions of the terms "computer," "financial institution" and "loss." While the term "protected computer" is defined in 18 U.S.C. § 1030(e), that term is not used in the elements of this instruction because that definition has been incorporated into the third element of the instruction. Accordingly, it is not necessary to provide a definition of "protected computer." Similarly, the term "damage" is defined at 18 U.S.C. § 1030(e) but as the common usage of that term could be broader and therefore conducive to confusion, the definition has been incorporated into the second and third elements.

In *United States v. Middleton*, 231 F.3d 1207, 1211-12 (9th Cir. 2000), the Ninth Circuit discussed the definitions of "protected computer" and "damage." However, it is uncertain that the conclusions drawn by the circuit are still applicable after amendments to § 1030 in Pub. L. 107-56, Title V, § 506(a), Title VIII, § 814, Oct. 26, 2001, 115 Stat. 366, 382). *See* 18 U.S.C. § 1030(e) ("protected computer" and "damage").

8.103 TRAFFICKING IN PASSWORDS
(18 U.S.C. § 1030(a)(6)(A) and (B))

The defendant is charged in [Count _____ of] the indictment with trafficking in [a] password[s] or similar information through which a computer may be accessed without authorization, in violation of Section 1030(a)(6) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [[transferred to another] [disposed of to another] [obtained control of with intent to transfer or dispose of]] [a] password[s] or similar information through which a computer may be accessed without authorization;

Second, the defendant acted with the intent to defraud; and

Third, [the defendant's conduct affected commerce between [one state and another] [a foreign nation and the United States]] [the computer was used by or for the government of the United States].

Comment

See as to intent to defraud, Instruction 3.16 (Intent to Defraud—Defined).

18 U.S.C. § 1030(e) provides a definition of "computer" and incorporates the definition of "traffic" in 18 U.S.C. § 1029(e).

8.104 THREATENING TO DAMAGE A COMPUTER
(18 U.S.C. § 1030(a)(7))

The defendant is charged in [Count _____ of] the indictment with transmitting a threat to damage a computer, in violation of Section 1030(a)(7) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following beyond a reasonable doubt:

First, the defendant transmitted a communication in interstate or foreign commerce;

Second, the defendant acted with intent to extort money or any other thing of value from any individual, firm, corporation, educational institution, financial institution, government entity, or legal or other entity;

[Third, the communication contained a threat to cause damage to a computer; and]

or

[Third, the communication contained a threat to [obtain] [impair the confidentiality of] information from a computer [without authorization] [in excess of authorization]; and]

or

[Third, the communication contained a [demand or request for money or other thing of value in relation to damage to a computer, and damages were caused to facilitate the extortion]; and]

Fourth, the defendant's threat concerned a computer that was [exclusively for the use of a financial institution or the United States government] [used in or affected interstate or foreign commerce or communication] [located outside the United States but was used in a manner that affects interstate or foreign commerce or communication of the United States] [not exclusively for the use by or for a financial institution or the United States government, but the defendant's transmission affected the computer's use by or for a financial institution or the United States government].

Comment

18 U.S.C. § 1030(e) provides definitions of the terms "computer," "financial institution" and "government entity."

8.105 HARBORING OR CONCEALING PERSON FROM ARREST (18 U.S.C. § 1071)

The defendant is charged in [Count _____ of] the indictment with [harboring] [concealing] a person from arrest in violation of Section 1071 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, a federal warrant had been issued for the arrest of [*name of person*];

Second, the defendant knew that a warrant had been issued for the arrest of [*name of person*];

Third, the defendant knowingly [harbored] [concealed] [*name of person*]; and

Fourth, the defendant intended to prevent the discovery or arrest of [*name of person*].

Comment

A violation of 18 U.S.C. § 1071 requires proof of four elements. *United States v. Hill*, 279 F.3d 731, 737 (9th Cir. 2002) (setting forth the four elements listed in the above instruction). Any "physical act of providing assistance, including food, shelter, and other assistance to aid a fugitive in avoiding detection and apprehension is harboring." *Id.* at 738 (paying money to a fugitive so that he may shelter, feed or hide himself is not harboring; providing shelter, food or aid directly is harboring).

A wife may be convicted of harboring her fugitive husband even if the harboring occurs outside the United States (*i.e.*, Mexico). *Id.* at 733.

8.106 HARBORING OR CONCEALING ESCAPED PRISONER (18 U.S.C. § 1072)

The defendant is charged in [Count _____ of] the indictment with [harboring] [concealing] an escaped prisoner in violation of Section 1072 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [*name of prisoner*] escaped from [the custody of [*e.g.*, a Deputy U.S. Marshal]] [a federal penal or correctional institution]; and

Second, the defendant thereafter knowingly [[harbored] [concealed]] [*name of prisoner*].

Comment

A defendant is in "federal custody" for the purposes of this statute if he or she is confined under the authority of the Attorney General. It does not matter that the prisoner is not physically confined in a federal institution, nor that actual federal officials supervise custody. *United States v. Eaglin*, 571 F.2d 1069, 1072-73 (9th Cir. 1977). As to the issue of whether walking away from a half-way house is an escape, *see United States v. Jones*, 569 F.2d 499, 500 (9th Cir. 1978) ("A federal prisoner participating in a pre-release or half-way house program by designation of the Attorney General commits an escape when he willfully violates the terms of his extended confinement.").

Any "physical act of providing assistance, including food, shelter, and other assistance to aid a fugitive in avoiding detection and apprehension is harboring." *United States v. Hill*, 279 F.3d 731, 738 (9th Cir. 2002) (paying money to a fugitive so that he may shelter, feed or hide himself is not harboring; providing shelter, food or aid directly is harboring).

8.107 MURDER—FIRST DEGREE
(18 U.S.C. § 1111)

The defendant is charged in [Count _____ of] the indictment with murder in the first degree in violation of Section 1111 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant unlawfully killed [*name of victim*];

Second, the defendant killed [*name of victim*] with malice aforethought;

Third, the killing was premeditated; and

Fourth, the killing occurred at [*specify place of federal jurisdiction*].

To kill with malice aforethought means to kill either deliberately and intentionally or recklessly with extreme disregard for human life.

Premeditation means with planning or deliberation. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough, after forming the intent to kill, for the killer to have been fully conscious of the intent and to have considered the killing.

Comment

The elements for first degree murder are discussed in *United States v. Free*, 841 F.2d 321, 325 (9th Cir. 1988) ("The essential elements of first-degree murder are: (1) the act . . . of killing a human being; (2) doing such act . . . with malice aforethought; and (3) doing such act . . . with premeditation."); *United States v. Warren*, 984 F.2d 325, 327 (9th Cir. 1993) (locus of offense is issue for jury).

Whether the crime alleged occurred at a particular location is a question of fact. Whether the location is within the special maritime and territorial jurisdiction of the United States or a federal prison is a question of law. *See United States v. Gipe,* 672 F.2d 777, 779 (9th Cir. 1982).

In *United States v. Houser*, 130 F.3d 867, 872 (9th Cir. 1997), the Ninth Circuit approved the use of a jury instruction which defined malice aforethought as "either deliberately and intentionally or recklessly with extreme disregard for human life."

This instruction is only for situations where no special circumstances are charged in the indictment so as to constitute felony murder.

If there is evidence that the defendant acted in self-defense or with some other justification or excuse, *see* Instruction 6.8 (Self-Defense).

Killing with "extreme disregard" refers not only to acts endangering the public at large, but also to acts directed solely to the person killed. *Houser*, 130 F.3d at 890. In addition, extreme caution should be exercised regarding the "troublesome issue" of providing a permissive inference instruction on malice aforethought. *Id.* at 869-71.

The trial judge may be obligated to give an instruction on involuntary manslaughter in a murder case even when the defense does not offer the instruction. In *United States v. Anderson*, 201 F.3d 1145, 1150 (9th Cir. 2000), the Ninth Circuit concluded it was plain error for the court not to instruct the jury on involuntary manslaughter, even though the defendant had not requested such an instruction, because there was evidence in the record to support the theory that the killing was accidental. A defendant is not automatically entitled to a voluntary manslaughter instruction. There must be some evidence which supports the proposition that the defendant was acting out of passion rather than malice, such as evidence of provocation. *United States v. Begay*, 673 F.3d 1038 (9th Cir. 2011) (en banc). The court, which instructed the jury following 9th Cir. Model Crim. Jury Instr. 8.89 (2003) (now this instruction), properly instructed the jury on the correct definition of premeditation. *Id.* at 1043.

The trial judge is obligated to give an instruction on involuntary manslaughter in a murder case if the law and evidence satisfy a two-part test. *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007). The first step is a legal question: "Is the offense for which the instruction is sought a lesser-included offense of the charged offense?" *Id.* "The second step is a factual inquiry: Does the record contain evidence that would support conviction of the lesser offense?" *Id.* Voluntary and involuntary manslaughter are lesser included offenses of murder. *Id.*

Approved 4/2011

8.108 MURDER—SECOND DEGREE
(18 U.S.C. § 1111)

The defendant is charged in [Count _____ of] the indictment with murder in the second degree in violation of Section 1111 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant unlawfully killed [*name of victim*];

Second, the defendant killed [*name of victim*] with malice aforethought; and

Third, the killing occurred at [*specify place of federal jurisdiction*].

To kill with malice aforethought means to kill either deliberately and intentionally or recklessly with extreme disregard for human life.

Comment

See Comment to Instruction 8.107 (Murder—First Degree). Because the difference between first and second degree murder is the element of premeditation, *United States v. Quintero,* 21 F.3d 885, 890 (9th Cir. 1994), most of that Comment is applicable to second degree murder.

This instruction is derived from several sources. It is primarily based upon *Ornelas v. United States*, 236 F.2d 392, 394 (9th Cir. 1956) (defendant could be convicted of second degree at most, when premeditation not part of murder charge). *See also Quintero,* 21 F.3d at 890. In addition, the standard of malice was approved in *United States v. Houser*, 130 F.3d 867, 871 (9th Cir. 1997) (in second degree murder prosecution, malice aforethought means "to kill either deliberately and intentionally or recklessly with extreme disregard for human life"). That a jurisdiction element is necessary is suggested by *United States v. Warren,* 984 F.2d 325, 327 (9th Cir. 1993). The necessity for an additional element if a defense is raised is considered in *United States v. Lesina,* 833 F.2d 156, 160 (9th Cir. 1987) (when defendant raised defense of accident to second degree murder charge, government bore burden of proving lack of heat of passion).

If there is evidence that the defendant acted in self-defense, *see* Instruction 6.8 (Self-Defense).

Evidence that the defendant acted upon a sudden quarrel or heat of passion "acts in the nature of a defense to the murder charge . . . . Once such evidence is raised, the burden is on the

government to prove . . . the absence of sudden quarrel or heat of passion before a conviction for murder can be sustained." *United States v. Quintero*, 21 F.3d 885, 890 (9th Cir. 1994). The following language might be added to address such circumstances:

> The defendant claims to have acted in sudden quarrel or in the heat of passion caused by adequate provocation, and therefore without malice aforethought. Heat of passion may be provoked by fear, rage, anger or terror. Provocation, in order to be adequate, must be such as might arouse a reasonable and ordinary person to kill someone.
>
> In order to show that the defendant acted with malice aforethought, the government must prove the absence of heat of passion beyond a reasonable doubt.

The heat of passion standard set forth above is suggested by *United States v. Roston*, 986 F.2d 1287, 1291 (9th Cir. 1993).

The circuit has noted that heat of passion is not the only condition which might serve as a defense to a murder charge and reduce the offense to manslaughter. In *Kleeman v. United States Parole Commission*, 125 F.3d 725, 732 (9th Cir. 1997), the circuit suggested that an "extremely irrational and paranoid state of mind that severely impairs a defendant's capacity for self control" may also negate the malice attached to an intentional killing. If such a defense is raised, it may be appropriate to instruct the jury regarding the effect of such a theory.

Whether the crime alleged occurred at a particular location is a question of fact. Whether the location is within the special maritime and territorial jurisdiction of the United States or a federal prison is a question of law. *See United States v. Gipe,* 672 F.2d 777, 779 (9th Cir. 1982).

The trial judge may be obligated to give an instruction on involuntary manslaughter in a murder case even when the defense does not offer the instruction. In *United States v. Anderson*, 201 F.3d 1145, 1150 (9th Cir. 2000), the court of appeals concluded it was plain error for the court not to instruct the jury on involuntary manslaughter, even though the defendant had not requested such an instruction, because there was evidence in the record to support the theory that the killing was accidental.

The trial judge is obligated to give an instruction on involuntary manslaughter in a murder case if the law and evidence satisfy a two part test. *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007). The first step is a legal question: "Is the offense for which the instruction is sought a lesser-included offense of the charged offense?" *Id.* "The second step is a factual inquiry: Does the record contain evidence that would support conviction of the lesser offense?" *Id.* Voluntary and involuntary manslaughter are lesser included offenses of murder. *Id*.

8.109 MANSLAUGHTER—VOLUNTARY
(18 U.S.C. § 1112)

The defendant is charged in [Count _____ of] the indictment with voluntary manslaughter in violation of Section 1112 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant unlawfully killed [*name of victim*];

Second, while in a sudden quarrel or heat of passion, caused by adequate provocation:

a) the defendant intentionally killed [*name of victim*]; or

b) the defendant killed [*name of victim*] recklessly with extreme disregard for human life; and

Third, the killing occurred at [*specify place of federal jurisdiction*].

Heat of passion may be provoked by fear, rage, anger or terror. Provocation, in order to be adequate, must be such as might arouse a reasonable and ordinary person to kill someone.

Comment

The United States Code defines manslaughter as an "unlawful killing of a human being without malice." 18 U.S.C. § 1112. Such killing is voluntary manslaughter when it occurs "[u]pon a sudden quarrel or heat of passion." *Id*. However, noting tension between the common law and the boundaries of these statutory definitions, the circuit suggested that courts have leeway to reconcile the "apparent language" of the statute with the common law of homicide. *See United States v. Quintero,* 21 F.3d 885, 890-91 (9th Cir. 1994) (intent without malice, not heat of passion was essential element of voluntary manslaughter, despite "apparent" statutory language). *But see United States v. Paul*, 37 F.3d 496, 499 n.1 (9th Cir. 1994) (suggesting language from *Quintero* that intent to kill is necessary element of voluntary manslaughter is dicta; while most voluntary manslaughter cases involve intent to kill, it is possible that a defendant who killed unintentionally but recklessly with extreme disregard for human life may have acted in a heat of passion with adequate provocation, so as to commit voluntary manslaughter).

Regardless of whether the mental state of a defendant was to kill intentionally or to kill with extreme recklessness, the circuit has explained that acting under a heat of passion serves to negate the malice that otherwise would attach to an intentional or extremely reckless killing. *United States v. Roston*, 986 F.2d 1287, 1291 (9th Cir. 1993) (defendant's showing of heat of passion is said to negate the presence of malice); *Paul*, 37 F.3d at 499 n.1 (finding of heat of passion and adequate provocation negates the malice that would otherwise attach if a defendant killed with the mental state required for murder—intent to kill or extreme recklessness—so that

it would not be murder but manslaughter); *Quintero*, 21 F.3d at 890-91 (sudden quarrel or heat of passion are not essential elements of voluntary manslaughter, but may demonstrate that the defendant acted without malice).

Heat of passion is not the only condition that might serve as a defense to a murder charge and reduce the offense to manslaughter. In *Kleeman v. United States Parole Commission*, 125 F.3d 725, 732 (9th Cir. 1997), the circuit suggested that an "extremely irrational and paranoid state of mind that severely impairs a defendant's capacity for self control" may also negate the malice attached to an intentional killing.

If there is evidence that the defendant acted in self-defense, *see* Instruction 6.8 (Self-Defense).

If there is evidence of justification or excuse, the following language should be added: "A killing is unlawful within the meaning of this instruction if it was [not justifiable] [not excusable] [neither justifiable nor excusable]."

The heat of passion standard found in the last paragraph of this instruction was suggested by *Roston*, 986 F.2d at 1291.

Second degree murder is reduced to voluntary manslaughter if the unlawful killing is done upon a sudden quarrel or in the heat of passion caused by adequate provocation. *Roston*, 986 F.2d 1290-91.

Whether the crime alleged occurred at a particular location is a question of fact. Whether the location is within the special maritime and territorial jurisdiction of the United States or a federal prison is a question of law. *See United States v. Gipe,* 672 F.2d 777, 779 (9th Cir. 1982).

The trial judge may be obligated to give an instruction on involuntary manslaughter in a murder case even when the defense does not offer the instruction. In *United States v. Anderson*, 201 F.3d 1145, 1150 (9th Cir. 2000), the Ninth Circuit concluded it was plain error for the court not to instruct the jury on involuntary manslaughter, even though the defendant had not requested such an instruction, because there was evidence in the record to support the theory that the killing was accidental.

Voluntary and involuntary manslaughter are lesser included offenses of murder. *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007).

8.110 MANSLAUGHTER—INVOLUNTARY
(18 U.S.C. § 1112)

The defendant is charged in [Count _____ of] the indictment with involuntary manslaughter in violation of Section 1112 of Title 18 of the United States Code. [Involuntary manslaughter is the unlawful killing of a human being without malice aforethought and without an intent to kill.] In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant committed an act that might produce death;

Second, the defendant acted with gross negligence, defined as wanton or reckless disregard for human life;

Third, the defendant's act was the proximate cause of the death of the victim. A proximate cause is one that played a substantial part in bringing about the death, so that the death was the direct result or a reasonably probable consequence of the defendant's act;

Fourth, the killing was unlawful;

Fifth, the defendant either knew that such conduct was a threat to the lives of others or knew of circumstances that would reasonably cause the defendant to foresee that such conduct might be a threat to the lives of others; and

Sixth, the killing occurred at [*specify place of federal jurisdiction*].

Comment

With respect to the first and second elements, *see United States v. Garcia*, 729 F.3d 1171 (9th Cir. 2013).

If there is evidence of justification or excuse, the following language should be added: "A killing is unlawful within the meaning of this instruction if it was [not justifiable] [not excusable] [neither justifiable nor excusable]."

While the fifth element is not in the statute, it is required by *United States v. Keith*, 605 F.2d 462, 463 (9th Cir. 1979).

Whether the crime alleged occurred at a particular location is a question of fact. Whether the location is within the special maritime and territorial jurisdiction of the United States or a federal prison is a question of law. *See United States v. Gipe*, 672 F.2d 777, 779 (9th Cir. 1982).

The trial judge may be obligated to give an instruction on involuntary manslaughter in a murder case even when the defense does not offer the instruction. In *United States v. Anderson*, 201 F.3d 1145, 1150 (9th Cir. 2000), the Ninth Circuit concluded it was plain error for the court not to instruct the jury on involuntary manslaughter, even though the defendant had not

requested such an instruction, because there was evidence in the record to support the theory that the killing was accidental.

The trial judge is obligated to give an instruction on involuntary manslaughter in a murder case if the law and evidence satisfy a two part test. *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007). The first step is a legal question: "Is the offense for which the instruction is sought a lesser-included offense of the charged offense?" *Id.* "The second step is a factual inquiry: Does the record contain evidence that would support conviction of the lesser offense?" *Id.* Voluntary and involuntary manslaughter are lesser included offenses of murder. *Id.*

Approved 10/2013

8.111 ATTEMPTED MURDER
(18 U.S.C. § 1113)

The defendant is charged in [Count _____ of] the indictment with attempted murder in violation of Section 1113 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant did something that was a substantial step toward killing [*name of intended victim*];

Second, when the defendant took that substantial step, the defendant intended to kill [*name of intended victim*]; and

Third, the attempted killing occurred at [*specify place of federal jurisdiction*].

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Comment

See Braxton v. United States, 500 U.S. 344, n.351 (1991) ("Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill.") (citations omitted). Although one acting "recklessly with extreme disregard for human life" can be convicted of murder if a killing results (*see* Instruction 8.107 (Murder—First Degree) and 8.108 (Murder—Second Degree)), that same recklessness cannot support a conviction of attempted murder if, fortuitously, no one is killed. *See United States v. Kwong*, 14 F.3d 189, 194-95 (2d Cir. 1994) (under 18 U.S.C. § 1113, attempted murder conviction requires proof of specific intent to kill; recklessness and wanton conduct, grossly deviating from a reasonable standard of care such that defendant was aware of the serious risk of death, would not suffice as proof of an intent to kill).

See United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1990) (attempt liability requires that the "substantial step towards commission of the crime . . . strongly corroborate[ ] that intent" to commit the crime).

"[A] person may be convicted of an attempt to commit a crime even though that person may have actually completed the crime." *United States v. Rivera-Relle*, 333 F.3d 914, 921 (9th Cir. 2003) (conviction under 8 U.S.C. § 1326 of deported alien attempting reentry to U.S. without consent).

"To constitute a substantial step, a defendant's actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007). Jurors do not need to agree unanimously as to which particular act or actions

constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.112 KILLING OR ATTEMPTING TO KILL FEDERAL OFFICER OR EMPLOYEE (18 U.S.C. § 1114)

Comment

If a defendant is charged with murder, manslaughter, attempted murder, or attempted manslaughter of an officer or employee of the United States in violation of 18 U.S.C. § 1114, the appropriate murder instruction (8.107, Murder—First Degree or 8.108, Murder—Second Degree), manslaughter instruction (8.109, Manslaughter—Voluntary or 8.110, Manslaughter—Involuntary) or attempted murder instruction (8.111, Attempted Murder) should be used but modified to require the jury to find that the victim was a federal officer or employee. An element alleging that the killing or attempted killing occurred at a place of federal jurisdiction, that is, within the special maritime and territorial jurisdiction of the United States is not necessary here.

8.113 DETERMINATION OF INDIAN STATUS FOR OFFENSES COMMITTED WITHIN INDIAN COUNTRY (18 U.S.C. § 1153)

In order for the defendant to be found to be an Indian, the government must prove the following, beyond a reasonable doubt:

First, the defendant has some quantum of Indian blood, whether or not that blood is traceable to a member of a federally recognized tribe; and

Second, the defendant was a member of, or affiliated with, a federally recognized tribe at the time of the offense.

[[*Specify tribe*] [[is][is not]] a federally recognized tribe.]

Whether the defendant was a member of, or affiliated with, a federally recognized tribe is determined by considering four factors, in declining order of importance, as follows:

1. Enrollment in a federally recognized tribe;
2. Government recognition formally and informally through receipt of assistance reserved only to individuals who are members, or are eligible to become members, of federally recognized tribes;
3. Enjoyment of the benefits of affiliation with a federally recognized tribe; and
4. Social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe.

Comment

Indian status is a jurisdictional element under 18 U.S.C. § 1153. *See United States v. Bruce*, 394 F.3d 1215, 1223-24 (9th Cir. 2005). "[T]he government must prove that the defendant was an Indian at the time of the offense with which the defendant is charged." *United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015). This rule applies with the same force when the Indian status of the victim is in question under 18 U.S.C. § 1152. *United States v. Reza-Ramos*, 816 F.3d 110, 1120-21 (9th Cir. 2016). As to the first element, the defendant must have a blood connection to an Indian tribe, but the tribe need not be federally recognized. *Zepeda*, 792 F.3d 1103, 1113. With regard to the second element, the defendant must have a current affiliation with a federally recognized tribe. *Id*. It is plain error for the court to fail to instruct on each of the two prongs of the Indian status test. *Reza-Ramos*, 816 F.3d at 1123.

The court also must instruct the jury of the "declining order of importance" of the four factors used to determine whether the defendant has been recognized by a tribe or the federal government as an Indian. *United States v. Cruz*, 554 F.3d 840, 851 n.17 (9th Cir. 2009). "The federally recognized tribe with which a defendant is currently affiliated need not be, and sometimes is not, the same as the tribe or tribes from which his bloodline derives." *Zepeda*, 792 F.3d at 1110. Whether a tribe is federally recognized is a question of law to be determined by

the court. *Id*. at 1115. "[T]he list of federally recognized tribes [at the time of the offense] prepared by the Bureau of Indian Affairs (BIA) is the best evidence of a tribe's federal recognition. *Reza-Ramos*, 816 F.3d at 1122 (9th Cir. 2016). "Although some prefer the term 'Native American' or 'American Indian,' we use the term 'Indian' . . . as that is the term employed in the statutes at issue . . . ." *Cruz*, 554 F.3d at 842 n.1.

"If the court has found that the tribe of which the government claims the defendant is a member, or with which the defendant is affiliated, is federally recognized, it should inform the jury that the tribe is federally recognized as a matter of law." *Zepeda*, 792 F.3d at 1114-15.

Offenses committed within Indian country are identified in 18 U.S.C. § 1153(a) as follows: murder, manslaughter, kidnapping, maiming, a felony under chapter 109A (sexual abuse felonies), incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in 18 U.S.C. § 1365), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 (embezzlement and theft) committed by any Indian against the person or property of another Indian or other person within Indian country.

Section 1153(b) provides: "Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense."

Whether the offense occurred at a particular location is a question of fact to be decided by the jury, with the court determining the jurisdictional question of whether the location is within Indian country as a question of law. *See United States v. Gipe*, 672 F.2d 777, 779 (9th Cir. 1982).

For the enumerated offenses prosecuted under 18 U.S.C. § 1153, the court should give this instruction, and the jury instruction used for the offense should include two additional elements, as follows:

> _____ [*Number of element*], the ____ [*specify offense*] occurred at a place within the _____ [*name of the alleged Indian Country where the offense occurred*], which I instruct you is in Indian Country.
>
> _____ [*Number of element*], the defendant is an Indian.

Approved 6/2016

8.114 KIDNAPPING—INTERSTATE TRANSPORTATION (18 U.S.C. § 1201(a)(1))

The defendant is charged in [Count _____ of] the indictment with kidnapping in violation of Section 1201(a)(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [[kidnapped] [seized] [confined]] [*name of kidnapped person*];

Second, the defendant held [*name of kidnapped person*] for ransom, reward or other benefit; and

Third, the defendant intentionally transported [*name of kidnapped person*] across state lines.

8.115 KIDNAPPING—WITHIN SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF UNITED STATES (18 U.S.C. § 1201(a)(2))

The defendant is charged in [Count _____ of] the indictment with kidnapping [*name of kidnapped person*] within the special maritime and territorial jurisdiction of the United States in violation of Section 1201(a)(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [[kidnapped] [seized] [confined]] [*name of kidnapped person*] within [*specify place of federal jurisdiction*]; and

Second, the defendant held [*name of kidnapped person*] for ransom, reward or other benefit.

Comment

"Special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7. While federal jurisdiction over the place may be determined as a matter of law, the locus of the offense within that place is an issue for the jury. *United States v. Gipe,* 672 F.2d 777, 779 (9th Cir. 1982).

8.116 KIDNAPPING—FOREIGN OFFICIAL OR OFFICIAL GUEST (18 U.S.C. § 1201(a)(4))

The defendant is charged in [Count _____ of] the indictment with kidnapping [a foreign official] [an internationally protected person] [an official guest] in violation of Section 1201(a)(4) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [[seized] [confined] [kidnapped]] [*name of kidnapped person*];

Second, [*name of kidnapped person*] was [*specify status*]; and

Third, the defendant held [*name of kidnapped person*] for ransom, reward or other benefit.

Comment

"Foreign official," "internationally protected person," and "official guest" are defined in 18 U.S.C. § 1116(b).

8.117 KIDNAPPING—FEDERAL OFFICER OR EMPLOYEE (18 U.S.C. § 1201(a)(5))

The defendant is charged in [Count _____ of] the indictment with kidnapping a federal officer or employee in violation of Section 1201(a)(5) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [[seized] [confined] [kidnapped]] [*name of kidnapped person*];

Second, at the time [*name of kidnapped person*] was [*specify federal office or employment position*];

Third, the defendant acted while [*name of kidnapped person*] was engaged in, or on account of, the performance of official duties; and

Fourth, the defendant held [*name of kidnapped person*] for ransom, reward or other benefit.

Comment

Federal officers or employees who may be the victim of a kidnapping are listed in 18 U.S.C. § 1114.

8.118 ATTEMPTED KIDNAPPING— FOREIGN OFFICIAL OR OFFICIAL GUEST (18 U.S.C. § 1201(d))

The defendant is charged in [Count _____ of] the indictment with attempting to kidnap [a foreign official] [an official guest] [an internationally protected person] in violation of Section 1201(d) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to [seize] [confine] [kidnap] and hold [a foreign official] [an official guest] [an internationally protected person] for ransom, reward or other benefit; and

Second, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Comment

"Foreign official," "official guest," and "internationally protected person" are defined in 18 U.S.C. § 1116(b).

"[A] person may be convicted of an attempt to commit a crime even though that person may have actually completed the crime." *United States v. Rivera-Relle*, 333 F.3d 914, 921 (9th Cir. 2003).

"To constitute a substantial step, a defendant's actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007). Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.119 ATTEMPTED KIDNAPPING— FEDERAL OFFICER OR EMPLOYEE (18 U.S.C. § 1201(d))

The defendant is charged in [Count _____ of] the indictment with attempting to kidnap a [federal officer] [federal employee] in violation of Section 1201(d) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to [seize] [confine] [kidnap] and to hold a [federal officer] [federal employee], on account of or during the performance of official duties, for ransom, reward or other benefit; and

Second, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Comment

Federal officers or employees who may be victims of kidnapping are listed in 18 U.S.C. § 1114.

"[A] person may be convicted of an attempt to commit a crime even though that person may have actually completed the crime." *United States v. Rivera-Relle*, 333 F.3d 914, 921 (9th Cir. 2003).

"To constitute a substantial step, a defendant's actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007). Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.120 HOSTAGE TAKING
(18 U.S.C. § 1203(a))

The defendant is charged in [Count _____ of] the indictment with taking a person hostage in violation of Section 1203(a) of Title 18 of the United States Code. In order for a defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intentionally seized or detained a person;

Second, the defendant threatened to kill, injure, or continue to detain that person; and

Third, the defendant did so with the purpose and intention of compelling a third person [or government organization] to act, or refrain from acting, in some way, as an explicit or implicit condition for the release of the seized or detained person.

A person is "seized" or "detained" when the person is held or confined against his or her will by physical restraint, fear, or deception for an appreciable period of time.

[The fact that the person may initially agree to accompany the hostage taker does not prevent a later "seizure" or "detention."]

Comment

The crime of hostage taking is not limited to taking aliens as hostages. *United States v. Sierra-Velasquez*, 310 F.3d 1217, 1220 (9th Cir. 2002), *cert. denied*, 538 U.S. 952 (2003). In the context of alien smuggling, it is not necessary that the smuggler demand an increase in fee in order for the smuggler to be found guilty of hostage taking. *Id. See* 18 U.S. C. § 1203(b)(1) and (2) limiting the application of this offense.

As to the penultimate paragraph of the instruction, *see United States v. Carrion-Caliz*, 944 F.2d 220,225 (5th Cir. 1991) (a hostage is "seized" or "detained" within the meaning of the Hostage Taking Act "when she is held or confined against her will for an appreciable period of time").

As to the last paragraph of the instruction, *see United States v. Lopez-Flores,*63 F.3d 1468, 1477 (9th Cir. 1995) ("that the hostage may initially agree to accompany the hostage taker does not prevent a later 'seizure' or 'detention' within the meaning of the Hostage Taking Act") (quoting *Carrion-Caliz,* 944 F.2d at 226).

8.121 MAIL FRAUD—SCHEME TO DEFRAUD OR TO OBTAIN MONEY OR PROPERTY BY FALSE PROMISES (18 U.S.C. § 1341)

The defendant is charged in [Count _____ of] the indictment with mail fraud in violation of Section 1341 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [participated in] [devised] [intended to devise] a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises;

Second, the statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property;

Third, the defendant acted with the intent to defraud; that is, the intent to deceive or cheat; and

Fourth, the defendant used, or caused to be used, the mails to carry out or attempt to carry out an essential part of the scheme.

In determining whether a scheme to defraud exists, you may consider not only the defendant's words and statements, but also the circumstances in which they are used as a whole.

A mailing is caused when one knows that the mails will be used in the ordinary course of business or when one can reasonably foresee such use. It does not matter whether the material mailed was itself false or deceptive so long as the mail was used as a part of the scheme, nor does it matter whether the scheme or plan was successful or that any money or property was obtained.

Comment

Use this instruction with respect to a crime charged under the second clause of 18 U.S.C. § 1341.

Much of the language in this instruction is taken from the instructions approved in *United States v. Woods*, 335 F.3d 993 (9th Cir. 2003). Materiality is an essential element of the crime of mail fraud. *Neder v. United States*, 527 U.S. 1 (1999). Materiality of statements or promises must be established, *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981), but the jury need not unanimously agree that a specific material false statement was made. *United States v. Lyons*, 472 F.3d 1055, 1068 (9th Cir. 2007). Materiality is a question of fact for the jury. *United States v. Carpenter*, 95 F.3d 773, 776 (9th Cir. 1996). The common-law test for materiality in the false-statement statutes, as reflected in the second element of this instruction, is the preferred formulation. *United States v. Peterson*, 538 F.3d 1064, 1072 (9th Cir. 2008).

Success of the scheme is immaterial. *United States v. Rude*, 88 F.3d 1538, 1547 (9th Cir. 1996); *United States v. Utz*, 886 F.2d 1148, 1150-51 (9th Cir. 1989).

"[M]ailings designed to avoid detection or responsibility for a fraudulent scheme"—even if sent after the proceeds of the fraud have been obtained—may satisfy the fourth element of the instruction if "they are sent prior to the scheme's completion." *United States v. Tanke*, 743 F.3d 1296, 1305 (9th Cir. 2014). To determine when the scheme ends, the jury must look to the scope of the scheme as devised by the perpetrator. *Id.* But allowance must be made for the reality that fraudulent schemes "may evolve over time, contemplate no fixed end date or adapt to changed circumstances." *Id. See also Schmuck v. United States*, 489 U.S. 705, 712 (1989) (mailing that is "incident to an essential part of the scheme" or "a step in the plot" satisfies mailing element of offense); *United States v. Hubbard*, 96 F.3d 1223, 1228–29 (9th Cir. 1996) (same).

See United States v. LeVeque, 283 F.3d 1098, 1102 (9th Cir. 2002) (government-issued license does not constitute property for purposes of § 1341).

A charge of mail fraud can be premised on a mailing that, although not sent by the defendant, was "incident to an essential part of the scheme." *See United States v. Eglash*, 813 F.3d 882, 886 (9th Cir. 2016) (quoting *Schmuck v. United States*, 489 U.S. 705, 721 (1989) (affirming conviction for mail fraud premised on Social Security Administration's mailing of notice of disability award); *see also United States v. Brown*, 771 F.3d 1149, 1158 (9th Cir. 2014) (affirming conviction for mail fraud based on mailings by bankruptcy court of Notice of Chapter 7 Bankruptcy Case and Notice of Discharge).

Approved 3/2016

8.122 SCHEME TO DEFRAUD—VICARIOUS LIABILITY (18 U.S.C. §§ 1341, 1343, 1344, 1346)

If you decide that the defendant was a member of a scheme to defraud and that the defendant had the intent to defraud, the defendant may be responsible for other co-schemers' actions during the course of and in furtherance of the scheme, even if the defendant did not know what they said or did.

For the defendant to be guilty of an offense committed by a co-schemer in furtherance of the scheme, the offense must be one that the defendant could reasonably foresee as a necessary and natural consequence of the scheme to defraud.

Comment

This instruction is based on the co-schemer liability instruction approved by *United States v. Stapleton*, 293 F.3d 1111, 1115-18 (9th Cir. 2002) (no error of law in court's instruction on elements of co-schemer vicarious liability, when court also correctly instructed on scheme to defraud), and the Ninth Circuit's guidance on vicarious liability in *United States v. Green*, 592 F.3d 1057, 1070-71 (9th Cir. 2010).

Where this instruction is appropriate, it should be given in addition to Instructions 8.121 (Mail Fraud—Scheme to Defraud or to Obtain Money or Property by False Promises), 8.123 (Mail Fraud—Scheme to Defraud—Deprivation of Intangible Right of Honest Services, 8.124 (Wire Fraud) or 8.127 (Bank Fraud—Scheme to Defraud by False Promises). *See Stapleton*, 293 F.3d at 1118-20.

On co-schemer liability generally, *see United States v. Blitz*, 151 F.3d 1002, 1006 (9th Cir. 1998) (knowing participant in scheme to defraud is liable for fraudulent acts of co-schemers); *United States v. Lothian*, 976 F.2d 1257, 1262-63 (9th Cir. 1992) (similarity of co-conspirator and co-schemer liability); and *United States v. Dadanian*, 818 F.2d 1443, 1446 (9th Cir. 1987), *modified*, 856 F.2d 1391 (1988) (like co-conspirators, "knowing participants in the scheme are legally liable for their co-schemer's use of mails or wires.").

8.123 MAIL FRAUD—SCHEME TO DEFRAUD—DEPRIVATION OF INTANGIBLE RIGHT OF HONEST SERVICES (18 U.S.C. §§ 1341 and 1346)

The defendant is charged in [Count _____ of] the indictment with mail fraud in violation of Section 1341 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant devised or knowingly participated in a scheme or plan to deprive [*name of victim*] of [his] [her] right of honest services;

Second, the scheme or plan consists of a [bribe] [kickback] in exchange for the defendant's services. The "exchange" may be express or may be implied from all the surrounding circumstances;

Third, the defendant owed a fiduciary duty to [*name of victim*];

Fourth, the defendant acted with the intent to defraud by depriving [*name of victim*] of [his] [her] right of honest services;

Fifth, the defendant's act was material; that is, it had a natural tendency to influence, or was capable of influencing, [a person's] [an entity's] acts; and

Sixth, the defendant used, or caused someone to use, the mails to carry out or to attempt to carry out the scheme or plan.

A "fiduciary" duty exists whenever one [person] [entity] places special trust and confidence in another person–the fiduciary–in reliance that the fiduciary will exercise [his] [her] discretion and expertise with the utmost honesty and forthrightness in the interests of the [person] [entity], such that the [person] [entity] relaxes the care and vigilance that [he] [she] [it] would ordinarily exercise, and the fiduciary knowingly accepts that special trust and confidence and thereafter undertakes to act on behalf of the other [person] [entity] based on such reliance.

The mere fact that a business relationship arises between two persons does not mean that either owes a fiduciary duty to the other. If one person engages or employs another and thereafter directs, supervises, or approves the other's actions, the person so employed is not necessarily a fiduciary. Rather, as previously stated, it is only when one party places, and the other accepts, a special trust and confidence—usually involving the exercise of professional expertise and discretion—that a fiduciary relationship exists.

A mailing is caused when one knows that the mails will be used in the ordinary course of business or when one can reasonably foresee such use. It does not matter whether the material mailed was itself false or deceptive so long as the mail was used as a part of the scheme, nor does it matter whether the scheme or plan was successful or that any money or property was obtained.

Comment

Honest services fraud criminalizes only schemes to defraud that involve bribery or kickbacks. *Skilling v. United States*, 561 U.S. 358, 408-09 (2010); *Black v. United States*, 561 U.S. 465, 471 (2010). Undisclosed conflicts of interest, or undisclosed self-dealing, is not sufficient. *Skilling*, 561 U.S. at 409-10. This instruction is limited to honest services schemes to defraud that involve a bribe or kickback because there is, as yet, no controlling case law subsequent to *Skilling* that extends honest services fraud to any other circumstance. *See id.* at 412 ("no other misconduct falls within § 1346's province").

The "prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing – and defining – similar crimes." *Id.* (citing 18 U.S.C. §§ 201(b) (bribery), 666(a)(2); 41 U.S.C. § 52(2) (kickbacks)); *see also McNally v. United States*, 483 U.S. 350 (1987). However, conduct constituting a bribe or kickback under either state law or federal law establishes the second element of a charge of services fraud. *See United States v. Christensen*, 828 F.3d 763, 785 (9th Cir. 2015), *as amended on denial of reh'g* (July 8, 2016) (affirming RICO conviction when honest services fraud predicate act under § 1346 was premised on violation of California state bribery law). Although it did not define bribery or kickbacks, the Supreme Court in *Skilling* cited three appellate decisions that reviewed jury instructions on the bribery element of honest services fraud. *Skilling*, 561 U.S. at 413 (citing *United States v. Ganim*, 510 F.3d 134, 147-49 (2d Cir. 2007), *cert denied*, 552 U.S. 1313 (2008); *United States v. Whitfield*, 590 F.3d 325, 352-53 (5th Cir. 2009); and *United States v. Kemp*, 500 F.3d 257, 281-86 (3d Cir. 2007)). In the Ninth Circuit, bribery requires at least an implicit *quid pro quo*. *United States v. Kincaid-Chauncey*, 556 F.3d 923, 941 (9th Cir. 2009). "Only individuals who can be shown to have had the specific intent to trade official actions for items of value are subject to criminal punishment on this theory of honest services fraud." *Id.* at 943 n.15. The *quid pro quo* need not be explicit, and an implicit *quid pro quo* need not concern a specific official act. *Id.* at 945-46 (citing *Kemp*, 500 F.3d at 282 ("[T]he government need not prove that each gift was provided with the intent to prompt a specific official act.")). A *quid pro quo* requirement is satisfied if the evidence shows a course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official acts favorable to the donor. *Id.* at 943. Bribery is to be distinguished from legal lobbying activities. *Id.* at 942, 946 (citing *Kemp*, 500 F.3d at 281-82). These principles are consistent with the appellate decisions cited by the Supreme Court.

The Supreme Court in *Skilling* cited a statutory definition of kickbacks. *Skilling*, 561 U.S. at 412 ("'The term 'kickback' means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances].'") (quoting 41 U.S.C. 52(2)).

Relying on *Skilling*, the Ninth Circuit determined that breach of a fiduciary duty is an element of honest services fraud. *United States v. Milovanovic*, 678 F.3d 713 (9th Cir. 2012) (en banc). The fiduciary duty required is not limited to the classic definition of the term but also extends to defendants who assume a comparable duty of loyalty, trust, or confidence with the victim. *Id*. at 723-24. "The existence of a fiduciary duty in a criminal prosecution is a fact-based

determination that must ultimately be determined by a jury properly instructed on this issue." *Id* at 723.

Honest services fraud requires a "specific intent to defraud." *Kincaid-Chauncey*, 556 F.3d at 941.

The Ninth Circuit has expressly adopted the "materiality test" to bring § 1346 in line with the mail, wire, and bank fraud statutes. *Milovanovic*, 678 F.3d at 726-27. The common law test for materiality in the false statement statutes, as reflected in the fifth element of this instruction, is the preferred formulation. *United States v. Peterson,* 538 F.3d 1064, 1072 (9th Cir. 2008). In a public sector case, the government need not prove that the fraud involved any foreseeable economic harm. *Milovanovic*, 678 F.3d at 727 ("We do not need to decide whether in a private sector case there might be a requirement that economic damages be shown").

In the case of mail or wire fraud, the government need not prove a specific false statement was made. *United States v. Woods*, 335 F.3d 993, 999 (9th Cir. 2003). "Under the mail fraud statute the government is not required to prove any particular false statement was made. Rather, there are alternative routes to a mail fraud conviction, one being proof of a scheme or artifice to defraud, which may or may not involve any specific false statements." *Id.* (quoting *United States v. Munoz*, 233 F.3d 1117, 1131 (9th Cir. 2000) (internal citations omitted)).

Approved 12/2015

8.124 WIRE FRAUD
(18 U.S.C. § 1343)

The defendant is charged in [Count _____ of] the indictment with wire fraud in violation of Section 1343 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [participated in] [devised] [intended to devise] a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises;

Second, the statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property;

Third, the defendant acted with the intent to defraud, that is, the intent to deceive or cheat; and

Fourth, the defendant used, or caused to be used, a wire communication to carry out or attempt to carry out an essential part of the scheme.

In determining whether a scheme to defraud exists, you may consider not only the defendant's words and statements, but also the circumstances in which they are used as a whole.

A wiring is caused when one knows that a wire will be used in the ordinary course of business or when one can reasonably foresee such use.

It need not have been reasonably foreseeable to the defendant that the wire communication would be interstate in nature. Rather, it must have been reasonably foreseeable to the defendant that some wire communication would occur in furtherance of the scheme, and an interstate wire communication must have actually occurred in furtherance of the scheme.

Comment

See also Comment to Instruction 8.121 (Mail Fraud—Scheme to Defraud or to Obtain Money or Property by False Promises). For cases involving wire fraud by deprivation of honest services, see Instruction 8.123 (Mail Fraud—Scheme to Defraud—Deprivation of Intangible Right of Honest Services).

The only difference between mail fraud and wire fraud is that the former involves the use of the mails and the latter involves the use of wire, radio, or television communication in interstate or foreign commerce. Much of the language of this instruction is taken from the instructions approved in *United States v. Jinian*, 712 F.3d 1255, 1265-67 (9th Cir. 2013).

As with mail fraud, materiality is an essential element of the crime of wire fraud. *Neder*

v. United States, 527 U.S. 1 (1999); *United States v. Milovanovic*, 678 F.3d 713, 726-27 (9th Cir. 2012) (en banc).

In a case involving wire fraud that "affects a financial institution" within the meaning of 18 U.S.C. § 1343, *see United States v. Stargell*, 738 F.3d 1018, 1022-23 (9th Cir. 2013) (defining term "affects").

Approved 2/2014

8.125 BANK FRAUD—SCHEME TO DEFRAUD BANK (18 U.S.C. § 1344(1))

The defendant is charged in [Count _____ of] the indictment with bank fraud in violation of Section 1344(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following beyond a reasonable doubt:

First, the defendant knowingly executed a scheme to defraud a financial institution as to a material matter;

Second, the defendant did so with the intent to defraud the financial institution; and

Third, the financial institution was insured by the Federal Deposit Insurance Corporation.

The phrase "scheme to defraud" means any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, or deprive a financial institution of something of value. It is not necessary for the government to prove that a financial institution was the only or sole victim of the scheme to defraud. It is also not necessary for the government to prove that the defendant was actually successful in defrauding any financial institution. Finally, it is not necessary for the government to prove that any financial institution lost any money or property as a result of the scheme to defraud.

An intent to defraud is an intent to deceive or cheat.

Comment

Much of the language in this instruction is taken from the instructions approved in *United States v. Shaw*, 781 F.3d 1130 (9th Cir. 2015). When the scheme or artifice to defraud is a scheme or artifice to deprive another of the intangible right to honest services under 18 U.S.C. § 1346, use Instruction 8.126 (Bank Fraud—Scheme to Deprive Bank of Intangible Right of Honest Services).

In a prosecution under 18 U.S.C. § 1344(1), the government is not required to prove that the defendant intended the bank to suffer a financial loss. *See Shaw*, 781 F.3d at 1135 (rejecting defendant's argument that because intended victims were PayPal and individual's bank account, defendant lacked requisite intent to defraud bank).

Approved 6/2015

8.126 BANK FRAUD—SCHEME TO DEPRIVE BANK OF INTANGIBLE RIGHT OF HONEST SERVICES (18 U.S.C. §§ 1344(1) and 1346)

The defendant is charged in [Count _____ of] the indictment with bank fraud in violation of Section 1344(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant devised or knowingly participated in a scheme or plan to deprive the [*specify financial institution*] of the right of honest services;

Second, the scheme or plan consists of a [bribe] [kickback] in exchange for the defendant's services. The "exchange" may be express or may be implied from all the surrounding circumstances;

Third, the defendant owed a fiduciary duty to [*specify financial institution*];

Fourth, the defendant acted with the intent to defraud by depriving the [*specify financial institution*] of the right of honest services;

Fifth, the defendant's act was material; that is, the act had a natural tendency to influence, or was capable of influencing, the decisionmaker or decisionmaking body to which it was directed; and

Sixth, the [*specify financial institution*] was federally [chartered] [insured].

A "fiduciary" duty exists whenever one [person] [entity] places special trust and confidence in another person–the fiduciary–in reliance that the fiduciary will exercise [his] [her] discretion and expertise with the utmost honesty and forthrightness in the interests of the [person] [entity], such that the [person] [entity] relaxes the care and vigilance that [he] [she] [it] would ordinarily exercise, and the fiduciary knowingly accepts that special trust and confidence and thereafter undertakes to act on behalf of the other [person] [entity] based on such reliance.

The mere fact that a business relationship arises between two persons does not mean that either owes a fiduciary duty to the other. If one person engages or employs another and thereafter directs, supervises, or approves the other's actions, the person so employed is not necessarily a fiduciary. Rather, as previously stated, it is only when one party places, and the other accepts, a special trust and confidence—usually involving the exercise of professional expertise and discretion—that a fiduciary relationship exists.

Comment

See Comment to Instruction 8.123 (Mail Fraud—Scheme to Defraud—Deprivation of Intangible Right of Honest Services).

For a definition of “financial institution,” see 18 U.S.C. § 20.

Approved 6/2015

8.126A ATTEMPTED BANK FRAUD—SCHEME TO DEPRIVE OF INTANGIBLE RIGHT OF HONEST SERVICES (18 U.S.C. §§ 1344(1) and 1346)

The defendant is charged in [Count _____ of] the indictment with attempted bank fraud in violation of Section 1344(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant devised or knowingly participated in a scheme or plan to deprive the [*specify financial institution*] of the right of honest services;

Second, the scheme or plan consists of a [bribe] [kickback] in exchange for the defendant's services. The "exchange" may be express or may be implied from all the surrounding circumstances;

Third, the defendant owed a fiduciary duty to [*specify financial institution*];

Fourth, the defendant acted with the intent to defraud by depriving the [*specify financial institution*] of the right of honest services;

Fifth, the plan or scheme was material; that is, it had a natural tendency to, or was capable of depriving the [*specify financial institution*] of the right of honest services;

Sixth, the defendant did something that was a substantial step toward carrying out the plan or scheme to deprive the [*specify financial institution*] of the right of honest services; and

Seventh, the [*specify financial institution*] was federally [chartered] [insured].

A "fiduciary" duty exists whenever one [person] [entity] places special trust and confidence in another person–the fiduciary–in reliance that the fiduciary will exercise [his] [her] discretion and expertise with the utmost honesty and forthrightness in the interests of the [person] [entity], such that the [person] [entity] relaxes the care and vigilance that [he] [she] [it] would ordinarily exercise, and the fiduciary knowingly accepts that special trust and confidence and thereafter undertakes to act on behalf of the other [person] [entity] based on such reliance.

The mere fact that a business relationship arises between two persons does not mean that either owes a fiduciary duty to the other. If one person engages or employs another and thereafter directs, supervises, or approves the other's actions, the person so employed is not necessarily a fiduciary. Rather, as previously stated, it is only when one party places, and the other accepts, a special trust and confidence—usually involving the exercise of professional expertise and discretion—that a fiduciary relationship exists.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Comment

See Comment to Instruction 8.123 (Mail Fraud—Scheme to Defraud—Deprivation of Intangible Right of Honest Services).

For a definition of "financial institution," see 18 U.S.C. § 20.

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

Approved 6/2015

8.127 BANK FRAUD—SCHEME TO DEFRAUD BY FALSE PROMISES (18 U.S.C. § 1344(2))

The defendant is charged in [Count _____ of] the indictment with bank fraud in violation of Section 1344(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly carried out a scheme or plan to obtain money or property from the [*specify financial institution*] by making false statements or promises;

Second, the defendant knew that the statements or promises were false;

Third, the statements or promises were material; that is, they had a natural tendency to influence, or were capable of influencing, a financial institution to part with money or property;

Fourth, the defendant acted with the intent to defraud; and

Fifth, [*specify financial institution*] was federally [chartered] [insured].

Comment

In *United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993), the Ninth Circuit approved the following instruction in a case involving the crime of bank fraud:

> You may determine whether a defendant had an honest, good faith belief in the truth of the specific misrepresentations alleged in the indictment in determining whether or not the defendant acted with intent to defraud. However, a defendant's belief that the victims of the fraud will be paid in the future or will sustain no economic loss is no defense to the crime.

Materiality is an essential element of the crime of bank fraud. *Neder v. United States*, 527 U.S. 1 (1999). The common law test for materiality in the false statement statutes, as reflected in the third element of this instruction, is the preferred formulation. *United States v. Peterson,* 538 F.3d 1064, 1072 (9th Cir. 2008).

In *Loughrin v. United States*, 134 S. Ct. 2384 (2014), the defendant used a forged, stolen check to buy merchandise from a store, which he immediately returned for cash. On appeal he contended there was no evidence he intended to defraud a bank, only evidence that he intended to defraud the store. The Supreme Court held that the government need not prove the defendant intended to defraud a bank, and that Section 1344(2)'s "by means of" language is satisfied when "the defendant's false statement was the mechanism naturally inducing a bank to part with money in its control." *Id.* at 2393.

The government need not prove the defendant knowingly made false representations directly to a bank. *United States v. Cloud*, 872 F.2d 846, 851 n.5 (9th Cir. 1989).

For a definition of “financial institution,” see 18 U.S.C. § 20.

Approved 3/2015

8.128 ATTEMPTED BANK FRAUD— SCHEME TO DEFRAUD BY FALSE PROMISES (18 U.S.C. § 1344)

The defendant is charged in [Count _____ of] the indictment with attempted bank fraud in violation of Section 1344 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly devised a plan or scheme to obtain money or property from the [*specify financial institution*] by false promises or statements;

Second, the promises or statements were material; that is, they had a natural tendency to influence, or were capable of influencing, a financial institution to part with money or property;

Third, the defendant acted with the intent to defraud;

Fourth, the defendant did something that was a substantial step toward carrying out the plan or scheme; and

Fifth, [*specify financial institution*] was federally [chartered] [insured].

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Comment

In *United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993), the Ninth Circuit approved the following instruction in a case involving the crime of bank fraud:

> You may determine whether a defendant had an honest, good faith belief in the truth of the specific misrepresentations alleged in the indictment in determining whether or not the defendant acted with intent to defraud. However, a defendant's belief that the victims of the fraud will be paid in the future or will sustain no economic loss is no defense to the crime.

The government need not prove the defendant knowingly made false representations directly to a bank. *United States v. Cloud*, 872 F.2d 846, 851 n.5 (9th Cir. 1989).

Materiality is an essential element of the crime of bank fraud. *Neder v. United States*, 527 U.S. 1 (1999). The common law test for materiality in the false statement statutes, as reflected in the second element of this instruction, is the preferred formulation. *United States v. Peterson,* 538 F.3d 1064, 1072 (9th Cir. 2008).

For a definition of "financial institution," see 18 U.S.C. § 20.

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.129 OBSTRUCTION OF JUSTICE—INFLUENCING JUROR (18 U.S.C. § 1503)

The defendant is charged in [Count _____ of] the indictment with obstruction of justice in violation of Section 1503 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [*name of juror*] was a [prospective] [grand] juror;

Second, the defendant tried to influence, intimidate, or impede [*name of juror*] in the discharge of [his] [her] duties as a [grand] juror; and

Third, the defendant acted corruptly, or by threats or force, or by any threatening communication, with the intent to obstruct justice.

[The government need not prove that the defendant's sole or even primary intention was to obstruct justice so long as the government proves beyond a reasonable doubt that one of the defendant's intentions was to obstruct justice. The defendant's intention to obstruct justice must be substantial.]

Comment

See Comment at Instruction 3.15 (Corruptly—Defined).

If the corrupt act at issue involved the making of a false statement, materiality of the false statement is a required element of the crime. *See United States v. Thomas*, 612 F.3d 1107, 1123-24 (9th Cir. 2010).

As used in Section 1503, "corruptly" means that the act must be done with the purpose of obstructing justice. *United States v. Rasheed,* 663 F.2d 843, 851 (9th Cir. 1981).

Include the last paragraph if the evidence shows the defendant may have had more than one intention when engaging in the challenged conduct. *See United States v. Smith*, 831 F.3d 1207, 1218 (9th Cir.2016).

18 U.S.C. § 1503 also applies to venire members who have not been sworn or selected as jurors and are prospective jurors. *United States v. Russell*, 255 U.S. 138 (1921).

Approved 3/2017

8.130 OBSTRUCTION OF JUSTICE—INJURING JUROR (18 U.S.C. § 1503)

The defendant is charged in [Count _____ of] the indictment with obstruction of justice in violation of Section 1503 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [*name of juror*] was a [grand] juror [who assented to a [verdict] [indictment]]; and

Second, the defendant injured [*name of juror*] [or [his] [her] property] on account of [his] [her] having [been] [assented to the [verdict] [indictment] as] a [grand] juror.

Comment

See Comment to Instruction 8.129 (Obstruction of Justice—Influencing Juror).

8.131 OBSTRUCTION OF JUSTICE— OMNIBUS CLAUSE OF 18 U.S.C. § 1503

The defendant is charged in [Count _____ of] the indictment with obstruction of justice in violation of Section 1503 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant influenced, obstructed, or impeded, or tried to influence, obstruct, or impede the due administration of justice; and

Second, the defendant acted corruptly, or by threats or force, or by any threatening communication, with the intent to obstruct justice.

[The government need not prove that the defendant's sole or even primary intention was to obstruct justice so long as the government proves beyond a reasonable doubt that one of the defendant's intentions was to obstruct justice. The defendant's intention to obstruct justice must be substantial.]

Comment

See Comment at Instruction 3.15 (Corruptly–Defined).

If the corrupt act at issue involved the making of a false statement, materiality of the false statement is a required element of the crime. *See United States v. Thomas*, 612 F.3d 1107, 1123-24 (9th Cir. 2010).

As used in § 1503, "corruptly" means that the act must be done with the purpose of obstructing justice. *United States v. Rasheed,* 663 F.2d 843, 851 (9th Cir. 1981).

Include the last paragraph if the evidence shows the defendant may have had more than one intention when engaging in the challenged conduct. *See United States v. Smith*, 831 F.3d 1207, 1218 (9th Cir.2016).

"The 'omnibus clause' of § 1503, . . . provides: 'Whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be [punished] . . .'" *United States v. Aguilar*, 515 U.S. 593, 609-10 (1995).

Approved 3/2017

8.131A OBSTRUCTION OF JUSTICE—DESTRUCTION, ALTERATION OR FALSIFICATION OF RECORDS IN FEDERAL INVESTIGATIONS AND BANKRUPTCY (18 U.S.C. § 1519)

The defendant is charged in [Count _____ of] the indictment with obstruction of justice in violation of Section 1519 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly altered, destroyed, concealed or falsified a record, document or tangible object; and

Second, the defendant acted with the intent to impede, obstruct or influence an actual or contemplated investigation of a matter within the jurisdiction of any department or agency of the United States.

[The government need not prove that the defendant's sole or even primary intention was to obstruct justice so long as the government proves beyond a reasonable doubt that one of the defendant's intentions was to obstruct justice. The defendant's intention to obstruct justice must be substantial.]

Comment

For a definition of "knowingly," see Instructions 5.6 (Knowingly—Defined) and 5.7 (Deliberate Ignorance).

Include the last paragraph if the evidence shows the defendant may have had more than one intention when engaging in the challenged conduct. *See United States v. Smith*, 831 F.3d 1207, 1218 (9th Cir.2016).

To qualify as a "tangible object" under the meaning of § 1519, an item must be "one used to record or preserve information." *Yates v. United States*, 135 S. Ct. 1074, 1088–89 (2015) (holding that fisherman's undersized fish were not "tangible objects" under § 1519).

Even when a defendant intends to obstruct justice, the government still must prove that the defendant *actually* altered, destroyed, concealed or falsified a record, document, or other tangible object used to record or preserve information, to secure a conviction under § 1519. *United States v. Katakis*, 800 F.3d 1017, 1030 (9th Cir. 2015) (affirming judgment of acquittal when government failed to prove that defendant who meant to delete emails successfully did so, and holding that moving emails into "deleted items" folder does not qualify as concealment under § 1519).

Approved 3/2017

8.132 FRAUD—FORGED, COUNTERFEITED, ALTERED OR FALSELY MADE IMMIGRATION DOCUMENT (18 U.S.C. § 1546(a))

The defendant is charged in [Count _____ of] the indictment with fraud in the [use] [misuse] of an immigration document in violation of Section 1546(a) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [[forged] [counterfeited] [altered] [falsely made]] [[an immigrant] [a non-immigrant]] [[visa] [permit] [border crossing card] [alien registration receipt card] [other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States]]; and

Second, the defendant acted knowingly.

Comment

See Comment to Instruction 8.133 (Fraud—Use or Possession of Immigration Document Procured by Fraud).

Use this instruction with respect to a crime charged under 18 U.S.C. § 1546(a), first paragraph, first clause. Use Instruction 8.133 (Fraud—Use or Possession of Immigration Document Procured by Fraud), for an instruction as to a crime charged under 18 U.S.C. § 1546(a), first paragraph, second clause. Use Instruction 8.134 (Fraud—False Statement on Immigration Document), for an instruction as to a crime charged under 18 U.S.C. § 1546(a), fourth paragraph.

8.133 FRAUD—USE OR POSSESSION OF IMMIGRATION DOCUMENT PROCURED BY FRAUD (18 U.S.C. § 1546(a))

The defendant is charged in [Count _____ of] the indictment with fraud in the [use] [misuse] of an immigration document in violation of Section 1546(a) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [[uttered] [used] [attempted to use] [possessed] [obtained] [accepted] [received]] [[an immigrant] [a non-immigrant]] [[visa] [permit] [border crossing card] [alien registration receipt card] [other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States]]; and

Second, the defendant knew the document [[to be [forged] [counterfeited] [altered] [falsely made]] [[to have been [procured by means of any false claim or statement] [otherwise procured by fraud] [unlawfully obtained]].

Comment

Use this instruction with respect to a crime charged under 18 U.S.C. § 1546(a), first paragraph, second clause. Use Instruction 8.132 (Fraud—Forged, Counterfeited, Altered, or Falsely Made Immigration Document) for an instruction as to a crime charged under 18 U.S.C. § 1546(a), first paragraph, first clause. Use Instruction 8.134 (Fraud—False Statement on Immigration Document), for an instruction as to a crime charged under 18 U.S.C. § 1546(a), fourth paragraph.

In *United States v. Krstic*, 558 F.3d 1010 (9th Cir. 2009), the Ninth Circuit held the first paragraph, second clause of the statute criminalizes both the possession of authentic immigration documents procured unlawfully and the possession of forged or other falsely made immigration documents.

The statute reaches documents that may be insufficient, in and of themselves, to authorize entry into the United States, when they are plainly prescribed by law as a prerequisite thereof. *United States v. Ryan-Webster*, 353 F.3d 353, 361-62 (4th Cir. 2003).

Mistake or ignorance of the law is no defense to a charge of "knowingly . . . accept[ing], or receiv[ing]" forged documents in violation of 18 U.S.C. § 1546(a). *United States v. De Cruz*, 82 F.3d 856, 867 (9th Cir. 1996).

8.134 FRAUD—FALSE STATEMENT ON IMMIGRATION DOCUMENT (18 U.S.C. § 1546(a))

The defendant is charged in [Count _____ of] the indictment with a false statement on an immigration document in violation of Section 1546(a) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [made] [subscribed as true] a false statement;

Second, the defendant acted with knowledge that the statement was untrue;

Third, the statement was material to the activities or decisions of the [*specify immigration agency*]; that is, it had a natural tendency to influence, or was capable of influencing, the agency's decisions or activities;

Fourth, the statement was made under [oath] [penalty of perjury]; and

Fifth, the statement was made on an [application] [affidavit] [other document] required by immigration laws or regulations.

Comment

Use this instruction in connection with crimes charged under 18 U.S.C. § 1546(a), fourth paragraph.

The term "oath" as used in Section 1546 should be construed the same as "oath" as used in the perjury statute, 18 U.S.C. § 1621, *United States v. Chu*, 5 F.3d 1244, 1247 (9th Cir. 1993).

Materiality is a requirement of visa fraud under subsection (a) and presents a mixed question of fact and law to be decided by the jury. *United States v. Matsumaru,* 244 F.3d 1092, 1101 (9th Cir. 2001). The common law test for materiality in the false statement statutes, as reflected in the third element of this instruction, is the preferred formulation. *United States v. Peterson,* 538 F.3d 1064, 1072 (9th Cir. 2008). A statement need not have actually influenced the agency decision in order to meet the materiality requirement. *Matsumaru,* 244 F.3d at 1101 (citing *United States v. Serv. Deli, Inc.,* 151 F.3d 938, 941 (9th Cir. 1998)).

8.135 PERJURY—TESTIMONY
(18 U.S.C. § 1621)

The defendant is charged in [Count _____ of] the indictment with perjury in violation of Section 1621 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant testified under oath orally or in writing that [*specify false testimony*];

Second, the testimony was false[, with all of you agreeing as to which statement was false];

Third, the false testimony was material to the matters before [*specify proceeding*]; that is, the testimony had a natural tendency to influence, or was capable of influencing, the actions of [*specify, for example,* the grand jury]; and

Fourth, the defendant acted willfully, that is deliberately and with knowledge that the testimony was false.

The testimony of one witness is not enough to support a finding that the testimony of [*name of defendant*] was false. There must be additional evidence—either the testimony of another person or other evidence—which tends to support the testimony of falsity. The other evidence, standing alone, need not convince you beyond a reasonable doubt that the testimony was false. But after considering all the evidence on the subject, you must be convinced beyond a reasonable doubt that the testimony was false.

Comment

The bracketed language in the second element of this instruction should be given when the indictment charges that the defendant made more than one false statement. *See Vitello v. United States*, 425 F.2d 416, 423 (9th Cir. 1970). *See also* Instruction 7.9 (Specific Issue Unanimity).

The Committee believes that what is "a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered" for purposes of Section 1621 is a question of law and need not be submitted to the jury.

The Supreme Court has held that materiality is a question of fact for the jury. *Johnson v. United States*, 520 U.S. 461, 465-66 (1997) (in context of perjury prosecution). Accordingly, it is necessary to include materiality as an element of the offense in this instruction. *See, e.g.,* Instruction 8.73 (False Statement to Government Agency). The common law test for materiality in the false statement statutes, as reflected in the third element of this instruction, is the preferred formulation. *United States v. Peterson,* 538 F.3d 1064, 1072 (9th Cir. 2008).

Because the jury must determine whether a statement is material under *Johnson*, the definition of materiality has been included in this instruction. *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir.) (discussing the materiality of false statements in the context of perjury), *cert. denied*, 540 U.S. 941 (2003).

Whether a statement that may be literally true can support a conviction requires careful consideration. *See United States v. Thomas*, 612 F.3d 1107, 1121-23 (9th Cir. 2010). If the defendant's theory of defense is that his or her statement was literally true, some modification of the instruction may be appropriate. *Id.*

When the defendant is accused of multiple falsehoods, the jury must be unanimous on at least one of the charges in the indictment. *Vitello*, 425 F.2d at 423.

The last paragraph of the instruction concerning corroboration is worded to cover the case where the perjury is in the giving of testimony. Where the perjury consists of one or more false statements in a writing, such as an affidavit, it should be substituted for "testimony." This paragraph applies to a charge of perjury in violation of 18 U.S.C. § 1621 and to a charge of subornation of perjury in violation of 18 U.S.C. § 1622. *See* Instruction 8.136 (Subornation of Perjury). In the case of a Section 1622 charge, the name of the person alleged to have been suborned should be inserted.

A paragraph in the instruction concerning corroboration is not required when a defendant is accused of violating 18 U.S.C. § 1623. *See* Instruction 8.137 (False Declaration Before Grand Jury or Court).

When the alleged false testimony is proved by circumstantial evidence, corroboration is not required. *Gebhard v. United States,* 422 F.2d 281, 288 (9th Cir. 1970).

Corroborative evidence may be circumstantial and need not be independently sufficient to establish the falsity of the testimony. *United States v. Howard*, 445 F.2d 821, 822 (9th Cir. 1971); *Arena v. United States*, 226 F.2d 227, 233 (9th Cir. 1955).

8.136 SUBORNATION OF PERJURY
(18 U.S.C. § 1622)

The defendant is charged in [Count _____ of] the indictment with subornation of perjury in violation of Section 1622 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant voluntarily and intentionally persuaded [*name of witness*] to testify commit perjury;

Second, the defendant acted with the intent that [*name of witness*] would deceive the [court] [jury]; and

Third, [*name of witness*] committed perjury in that:

(a) [he] [she] testified under oath or affirmation at [*describe proceeding*] that [*specify alleged false testimony*];

(b) the testimony given was false[, with all of you agreeing at to which statement was false];

(c) at the time [*name of witness*] testified, [he] [she] knew the testimony was false; and

(d) the false testimony was material to the matter before the [court] [grand jury]; that is, the testimony had a natural tendency to influence, or was capable of influencing, the actions of [*specify, for example:* the grand jury].

Comment

See Comment to Instruction 8.135 (Perjury—Testimony).

The bracketed language in subpart (b) of the third element of this instruction should be given when the indictment charges that the defendant made more than one false statement. *See Vitello v. United States*, 425 F.2d 416, 423 (9th Cir. 1970). *See also* Instruction 7.9 (Specific Issue Unanimity).

Language in the instruction concerning corroboration is not required where a defendant is accused of a violation of 18 U.S.C. § 1623, but is required under 18 U.S.C. § 1621. *See* Instruction 8.135 (Perjury—Testimony).

The Supreme Court has held that materiality is a question of fact for the jury. *Johnson v. United States*, 520 U.S. 461, 465-66 (1997) (in context of perjury prosecution). Accordingly, it is necessary to include materiality as an element of the offense in this instruction. The common law test for materiality in the false statement statutes, as reflected in the third element of this

instruction, is the preferred formulation. *United States v. Peterson,* 538 F.3d 1064, 1072 (9th Cir. 2008).

Because the jury must determine whether a statement is material under *Johnson*, the definition of materiality has been included in this instruction. *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir.) (discussing the materiality of false statements in the context of perjury), *cert. denied*, 540 U.S. 941 (2003).

A perjury is an essential element of this offense. *See Catrino v. United States,* 176 F.2d 884, 886–87 (9th Cir. 1949). The use of "any perjury" in Section 1622 evidences a Congressional intent that subornation of perjury is committed not only by one who procures another to commit perjury in violation of 18 U.S.C. § 1621, but also by one who procures another to make a false statement in violation of 18 U.S.C. § 1623. *United States v. Gross,* 511 F.2d 910, 915-16 (3d Cir. 1975).

If the suborned testimony is in violation of 18 U.S.C. § 1621, the "two-witness" or "corroboration" rule applies. *See* Instruction 8.135 (Perjury—Testimony). However, corroboration is not required if the suborned testimony is in violation of 18 U.S.C. § 1623. 18 U.S.C. § 1623(e); *Gross*, 511 F.2d at 915-16.

8.137 FALSE DECLARATION BEFORE GRAND JURY OR COURT (18 U.S.C. § 1623)

The defendant is charged in [Count _____ of] the indictment with having made a false declaration in violation of Section 1623 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant testified under oath before a [court] [grand jury];

Second, the testimony was false[, with all of you agreeing as to which statement was false];

Third, the defendant knew that the testimony was false; and

Fourth, the false testimony was material to the matters before the [court] [grand jury]; that is, it had a natural tendency to influence, or was capable of influencing, the [court] [grand jury's investigations].

Comment

See Comment to Instructions 8.135 (Perjury—Testimony) and 8.136 (Subornation of Perjury).

The bracketed language in the second element of this instruction should be given when the indictment charges that the defendant made more than one false statement. *See Vitello v. United States*, 425 F.2d 416, 423 (9th Cir. 1970). *See* Instruction 7.9 (Specific Issue Unanimity).

Materiality of the false declaration is an element of the offense and therefore an issue for the jury. *Johnson v. United States*, 520 U.S. 461, 465-66 (1997). The common law test for materiality in the false statement statutes, as reflected in the fourth element of this instruction, is the preferred formulation. *United States v. Peterson*, 538 F.3d 1064, 1072 (9th Cir. 2008). The government must present evidence from an earlier trial to prove that the statements were material; "simply offering the defendant's statement itself is not enough." *See United States v. Leon-Reyes*, 177 F.3d 816, 819 (9th Cir. 1999).

Because the jury must determine whether a statement is material under *Johnson*, the definition of materiality has been included in this instruction. *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir.) (discussing the materiality of false statements in the context of perjury), *cert. denied*, 540 U.S. 941 (2003).

Whether a statement that may be literally true can support a conviction requires careful consideration. *See United States v. Thomas*, 612 F.3d 1107, 1121-23 (9th Cir. 2010). If the defendant's theory of defense is that his or her statement was literally true, some modification of the instruction may be appropriate. *Id.*

Note that Section 1623 applies only to "any proceeding before or ancillary to any court or grand jury of the United States." An "ancillary proceeding" is "an action conducted by a judicial representative or an action conducted pursuant to explicit statutory or judicial procedures." *United States v. Tibbs,* 600 F.2d 19, 21 (6th Cir. 1979). *See also United States v. Krogh*, 366 F. Supp. 1255, 1256 (D.D.C.1973) (sworn deposition was an ancillary proceeding).

Section 1623(c) authorizes a person to be accused of having "made two or more declarations, which are inconsistent to the degree that one of them is necessarily false," and the government is not required to specify which declaration is false.

8.138 MAIL THEFT
(18 U.S.C. § 1708)

The defendant is charged in [Count _____ of] the indictment with mail theft in violation of Section 1708 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, there was [[a letter] [a postal card] [a package] [a bag] [mail]] [[in the mail] [in a private mail box] [at a post office] [in a letter box] [in a mail receptacle] [in a mail route] [in an authorized depository for mail matter] [in possession of a letter or mail carrier]];

Second, the defendant took the [letter] [postal card] [package] [bag] [mail] from the [mail] [post office] [letter box] [a private mail box] [mail receptacle] [mail route] [authorized depository for mail matter] [mail carrier]; and

Third, at the time the defendant took the [letter] [postal card] [package] [bag] [mail], the defendant intended to deprive the owner, temporarily or permanently, of its use and benefit.

Comment

A jury may infer that the defendant stole an item of mail if a properly addressed and recently mailed item was never received by the addressee and was found in the defendant's possession. *See United States v. Ellison*, 469 F.2d 413, 415 (9th Cir. 1972).

Approved 8/2012

8.139 ATTEMPTED MAIL THEFT
(18 U.S.C. § 1708)

The defendant is charged in [Count _____ of] the indictment with attempted mail theft in violation of Section 1708 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to steal mail from a [post office] [letter box] [a private mail box] [mail receptacle] [mail route] [authorized depository for mail matter] [mail carrier]; and

Second, the defendant did something that was a substantial step toward stealing the mail.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Comment

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.140 POSSESSION OF STOLEN MAIL
(18 U.S.C. § 1708)

The defendant is charged in [Count _____ of] the indictment with possession of stolen mail in violation of Section 1708 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [a letter] [a postal card] [a package] [a bag] [mail] was stolen from the [mail] [post office] [letter box] [a private mail box] [mail receptacle] [mail route] [authorized depository for mail matter] [mail carrier].

Second, the defendant possessed the [letter] [postal card] [package] [bag] [mail] [*or specify an article or thing contained therein*]; and

Third, the defendant knew that the [letter] [postal card] [package] [bag] [mail] was stolen.

Comment

See Instruction 8.138 (Mail Theft).

It is not necessary that the defendant knew the matter was stolen from the mail so long as the defendant knew that it was stolen. *Barnes v. United States,* 412 U.S. 837, 847 (1973).

8.141 EMBEZZLEMENT OF MAIL BY POSTAL EMPLOYEE (18 U.S.C. § 1709)

The defendant is charged in [Count _____ of] the indictment with embezzling mail in violation of Section 1709 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, while working as a Postal Service employee, the defendant [was entrusted with] [came into possession of] the [letter] [postal card] [package] [bag] [mail];

Second, the [letter] [postal card] [package] [bag] [mail] was intended to be conveyed by mail; and

Third, the defendant stole the [letter] [postal card] [package] [bag] [mail] [*or specify an article or thing contained therein*].

Comment

The government need not prove in a prosecution under 18 U.S.C. § 1709 that a defendant had the specific intent permanently to deprive the owner of the property. *United States v. Monday,* 614 F.3d 983, 985-86 (9th Cir. 2010).

Approved 12/2010

8.142 HOBBS ACT—EXTORTION OR ATTEMPTED EXTORTION BY FORCE (18 U.S.C. § 1951)

The defendant is charged in [Count _____ of] the indictment with [attempted] extortion by force, violence or fear in violation of Section 1951 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [[induced] [intended to induce]] [*name of victim*] to part with property by the wrongful use of actual or threatened force, violence, or fear;

Second, the defendant acted with the intent to obtain property;

Third, commerce from one state to another [was] [would have been] affected in some way[.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

Comment

For an instruction on extortion or attempted extortion by nonviolent threat, *see* Instruction 8.142A (Hobbs Act—Extortion or Attempted Extortion by Nonviolent Threat).

Only a de minimis effect on interstate commerce is required to establish jurisdiction under the Hobbs Act, and the effect need only be probable or potential, not actual. *United States v. Lynch*, 437 F.3d 902, 908-09 (9th Cir. 2006) (en banc). The interstate nexus may arise from either direct or indirect effects on interstate commerce. *Id*. at 909-10. When the effects are only indirect it may be appropriate to measure the adequacy of proof of interstate nexus by applying the test articulated in *United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994).

"Property" under the Hobbs Act is not limited to tangible things; it includes the right to make business decisions and to solicit business free from coercion. *United States v. Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985) (citing *United States v. Zemek,* 634 F.2d 1159, 1174 (9th Cir. 1980)). The Hobbs Act is not limited to lawful property and includes contraband. *United States v. Cortes*, 732 F.3d 1078, 1093 (9th Cir. 2013).

Actual or threatened force standing alone does not violate the statute. "We conclude that Congress did not intend to create a freestanding physical violence offense in the Hobbs Act. It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to

engage in what the statute refers to as robbery or extortion (and related attempts or conspiracies)." *Scheidler v. Nat'l Org. for Women, Inc.* 547 U.S. 9, 23 (2006).

A defendant's claim of right to the property is not a defense. "'Congress meant to punish as extortion any effort to obtain property by inherently wrongful means, such as force or threats of force . . . regardless of the defendant's claim of right to the property . . . .'" *United States v. Daane*, 475 F.3d 1114, 1120 (9th Cir. 2007) (quoting with approval from *United States v. Zappola*, 677 F.2d 264, 268-69 (2d Cir. 1982)). There is an exception to this proposition, but it is confined to cases involving certain types of labor union activity. *Id*. at 1119-20.

The bracketed language stating a fourth element applies to attempt to engage in extortion by force. Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

Approved 6/2014

8.142A HOBBS ACT—EXTORTION OR ATTEMPTED EXTORTION BY NONVIOLENT THREAT (18 U.S.C. § 1951)

The defendant is charged in [Count _____ of] the indictment with [attempted] extortion by threat of [economic harm] [*specify other nonviolent harm*] in violation of Section 1951 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [[induced] [intended to induce]] [*name of victim*] to part with property by wrongful threat of [economic harm] [*specify other nonviolent harm*];

Second, the defendant acted with the intent to obtain property;

Third, commerce from one state to another [was] [would have been] affected in some way[.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

A threat is wrongful [if it is unlawful] [or] [if the defendant knew [he] [she] was not entitled to obtain the property].

Comment

See generally Comment to Instruction 8.142 (Hobbs Act—Extortion or Attempted Extortion by Force).

A nonviolent threat is prohibited by the Hobbs Act if it is "wrongful." 18 U.S.C. § 1951(b)(2) (defining extortion as "the obtaining of property from another, with his consent, induced by *wrongful* use of actual or threatened . . . fear" (emphasis added)); *United States v. Villalobos*,748 F.3d 953 (9th Cir. 2014) (error for jury instruction to essentially read out § 1951's "wrongful" element).

If a nonviolent threat is to be carried out by *unlawful* means, then the Hobbs Act's "wrongful" requirement is satisfied, regardless of whether the defendant had a lawful claim of right to the property demanded. *Id.* at 957-58. For example, threats to cooperate with, or alternatively, impede an ongoing investigation, contingent on payment, are unlawful and therefore clearly wrongful. *Id.*

A nonviolent threat is prohibited by the Hobbs Act if it is "wrongful." 18 U.S.C. § 1951(b)(2) (defining extortion as "the obtaining of property from another, with his consent, induced by *wrongful* use of actual or threatened . . . fear" (emphasis added)); *United States v. Villalobos*,748 F.3d 953 (9th Cir. 2014) (error for jury instruction to essentially read out § 1951's "wrongful" element).

If a nonviolent threat is to be carried out by *unlawful* means, then the Hobbs Act's "wrongful" requirement is satisfied, regardless of whether the defendant had a lawful claim of right to the property demanded. *Id.* at 957-58. For example, a defendant's threat to cooperate with, or alternatively, impede an ongoing investigation, contingent upon payment are unlawful and therefore clearly wrongful. *Id.*

If, on the other hand, a nonviolent threat is to be carried out by *lawful* means (for example, a threat of economic harm), a claim of right instruction is necessary. *See United States v. Dischner*, 974 F.2d 1502, 1515 (9th Cir. 1992) (holding that wrongfully obtaining property by threat of economic harm is sufficient to convict of extortion under Hobbs Act and noting that "[o]btaining property is generally 'wrongful' if the alleged extortionist has no lawful claim to that property" (citing *United States v. Enmons*, 410 U.S. 396, 400 (1973))), *overruled on other grounds by United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997).

It is unclear whether the claim of right instruction to be given in lawful-threat cases must require that the defendant *knew* he or she was not entitled to obtain the property. At least one other circuit so requires, *see United States v. Sturm*, 870 F.2d 769, 773-74 (1st Cir. 1989), but the Ninth Circuit has yet to impose such a requirement. *See United States v. Greer*, 640 F.3d 1011, 1019 n.4 (9th Cir. 2011) ("Because the district court's instructions satisfied the First Circuit's requirement in *Sturm*, we need not decide whether to adopt *Sturm* as the law of this circuit."); *Dischner*, 974 F.2d at 1515 (declining to "decide whether the government must prove that the defendant knew he had no entitlement" to property because district court's jury instructions necessarily required such finding). Until the Ninth Circuit decides the question, the Committee recommends the above instruction, which requires the government to prove that the defendant knew he or she was not entitled to obtain the property.

A general instruction that the defendant need not have known that his or her conduct was unlawful does not negate the instruction in lawful-threat cases that a threat is wrongful if the defendant knew he or she was not entitled to obtain the property. Knowledge that one has no entitlement to property is distinguishable from knowledge that an act violates the Hobbs Act. *Greer*, 640 F.3d at 1019-20.

The bracketed language stating a fourth element applies to attempt to engage in extortion by nonviolent threat. Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

Approved 6/2014

8.143 HOBBS ACT—EXTORTION OR ATTEMPTED EXTORTION UNDER COLOR OF OFFICIAL RIGHT (18 U.S.C. § 1951)

The defendant is charged in [Count _____ of] the indictment with [attempted] extortion under color of official right in violation of Section 1951 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was a public official;

Second, the defendant [[obtained] [intended to obtain]] [*specify property*] that the defendant knew [he] [she] was not entitled to receive;

[Third, the defendant knew that the [*specify property*] [[was] [would be]] given in return for [taking] [withholding] some official action; [and]]

or

[Third, the defendant knew that the [*specify property*] [[was] [would be]] given in return for an express promise to perform a particular official action; and]

Fourth, commerce or the movement of an article or commodity in commerce from one state to another [was] [would have been] affected in some way[.] [; and]

[Fifth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

[The acceptance by a public official of a campaign contribution does not, in itself, constitute a violation of law even though the donor has business pending before the official. However, if a public official demands or accepts [money] [property] [some valuable right] in exchange for a specific requested exercise of official power, such a demand or acceptance does constitute a violation regardless of whether the payment is made in the form of a campaign contribution.]

Comment

If the defendant is not a public official, then this instruction should be modified to include a requirement that the government prove that the defendant either conspired with a public official or aided and abetted a public official. *United States v. McFall*, 558 F.3d 951, 960 (9th Cir. 2009). A Hobbs Act conspiracy may exist even if some members of the conspiracy are

not public officials and thus cannot complete the offense. *Ocasio v. United States*, 136 S.Ct. 1423, 1429-32 (2016). The object of the conspiracy need not be to get property from a person outside the conspiracy; it is sufficient that the property comes from another member of the conspiracy. *Id*. at 1434-35.

If there is any question in the case about the "official" character of the action sought by the defendant, give Instruction 8.11A (Official Action—Defined). When using that instruction in connection with Instruction 8.143, the court should change the term "official act" to "official action."

When the property is not a campaign contribution, the government need only show that the public official obtained payment to which he or she was not entitled knowing that the payment was made in exchange for some official act. *See United States v. Kincaid-Chauncey,* 556 F.3d 923, 937-38 (9th Cir. 2009). In such a case the first version of the third element should be used and the final paragraph should not be included.

The second version of the third element, and the final paragraph should be included in cases involving an alleged campaign contribution. *See McCormick v. United States*, 500 U.S. 257 (1991); *Kincaid-Chauncey,* 556 F.3d at 936. The express promise need not actually be carried out. It is sufficient if the promise to act is given in exchange for the property. *See Evans v. United States,* 504 U.S. 255, 267 (1992).

The bracketed language stating a fifth element applies to attempt to engage in extortion under color of official right. Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

Approved 12/2016

8.143A HOBBS ACT—ROBBERY OR ATTEMPTED ROBBERY (18 U.S.C. § 1951)

The defendant is charged in [Count _____ of] the indictment with [attempted] robbery in violation of Section 1951 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [attempted to induce][induced] [name of victim] to part with property by the wrongful use of actual or threatened force, violence, or fear;

Second, the defendant acted with the intent to obtain property; and

Third, commerce from one state to another [was] [would have been] affected in some way.

Comment

Only a de minimis effect on interstate commerce is required to establish jurisdiction under the Hobbs Act, and the effect need only be probable or potential, not actual. *United States v. Lynch*, 437 F.3d 902, 908-09 (9th Cir. 2006) (en banc). The interstate nexus may arise from either direct or indirect effects on interstate commerce. *Id*. at 909-10. When the effects are only indirect it may be appropriate to measure the adequacy of proof of interstate nexus by applying the test articulated in *United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994).

For a definition of "affecting interstate commerce," *see* Instruction 8.143B (Hobbs Act—Robbery or Attempted Robbery).

When the defendant has been charged with robbing or attempting to rob a drug dealer, the government satisfies the "affecting commerce" element of this crime if it shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds. *Taylor v. United States*, 136 S. Ct. 2074 (2016). "[T]he Government need not show that the drugs that a defendant stole or attempted to steal either traveled or were destined for transport across state lines." *Id*. at 2081.

Approved 12/2016

8.143B HOBBS ACT—AFFECTING INTERSTATE COMMERCE

To convict the defendant of [*specify crime*], the government must prove that the defendant's conduct affected or could have affected interstate commerce. Conduct affects interstate commerce if it in any way involves, interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in commerce between or among the states or between the United States and a foreign country. The effect can be minimal.

It is not necessary for the government to prove that the defendant knew or intended that [his][her] conduct would affect commerce; it must prove only that the natural consequences of [his][her] conduct affected commerce in some way. Also, you do not have to find that there was an actual effect on commerce. The government must show only that the natural result of the offense would be to cause an effect on interstate commerce to any degree, however minimal or slight.

Approved 12/2016

8.144 TRAVEL ACT—INTERSTATE OR FOREIGN TRAVEL IN AID OF RACKETEERING ENTERPRISE (18 U.S.C. § 1952(a)(3))

The defendant is charged in [Count _____ of] the indictment with violating Section 1952(a)(3) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [traveled in interstate or foreign commerce] [used the mail] [[used [*specify facility*] in interstate or foreign commerce]] with the intent to [promote, manage, establish, or carry on] [facilitate the promotion, management, establishment, or carrying on of] [*specify unlawful activity*]; and

Second, after doing so the defendant [[performed [*specify act*]] [[attempted to perform [*specify act*]][.] [; and]

[Third, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

Comment

The bracketed language stating a third element applies only when the charge is an attempt. Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

In *United States v. Nader*, 542 F.3d 713, 722 (9th Cir. 2008), the Ninth Circuit held that telephone calls that were entirely intrastate in nature and were made on a facility in interstate commerce, were adequate to support the conviction.

8.145 ILLEGAL GAMBLING BUSINESS
(18 U.S.C. § 1955)

The defendant is charged in [Count _____ of] the indictment with [conducting] [financing] [managing] [supervising] [directing] [owning] an illegal gambling business in violation of Section 1955 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [conducted] [financed] [managed] [supervised] [directed] [owned] a business consisting of [*specify illegal gambling business*];

Second, [*specify illegal gambling business*] is illegal gambling in [*specify state or political subdivision*];

Third, the business involved five or more persons who [conducted] [financed] [managed] [supervised] [directed] [owned] all or part of the business; and

Fourth, the business [had been in substantially continuous operation by five or more persons for more than thirty days] [had a gross revenue of $2,000 in any single day].

Comment

Where jurors could find from the evidence two separate thirty-day periods, the jury must be instructed that they must unanimously agree on the same period. *United States v. Gilley,* 836 F.2d 1206, 1211-12 (9th Cir. 1988).

8.146 FINANCIAL TRANSACTION TO PROMOTE UNLAWFUL ACTIVITY (18 U.S.C. § 1956(a)(1)(A))

The defendant is charged in [Count _____ of] the indictment with [conducting] [attempting to conduct] a financial transaction to promote [*unlawful activity*] in violation of Section 1956(a)(1)(A) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [conducted] [intended to conduct] a financial transaction involving property that represented the proceeds of [*specify prior, separate criminal activity*];

Second, the defendant knew that the property represented the proceeds of [*specify prior, separate criminal activity*]; [and]

Third, the defendant acted with the intent to promote the carrying on of [*specify unlawful activity being promoted*][.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

A financial transaction is a transaction involving [the movement of funds by wire or other means that] [one or more monetary instruments that] [the use of a financial institution that is engaged in, or the activities of which] affect[s] interstate or foreign commerce in any way.

Comment

See United States v. Sayakhom, 186 F.3d 928, 940 (9th Cir. 1999), approving a similar version of this instruction.

For cases involving conduct on or after May 20, 2009, "proceeds" means "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9) (subsection (c)(9) was added by Pub. L. 111-21, 123 Stat. 1618). For cases involving conduct prior to May 20, 2009, consider *United States v. Santos*, 553 U.S. 507, 513-14 (2008) (plurality opinion) (Where the prior, separate criminal activity is gambling, the term "proceeds" must be defined as "profits."), and *United States v. Van Alstyne*, 584 F.3d 803, 814 (9th Cir. 2009) ("We therefore view the holding that commanded five votes in *Santos* as being that 'proceeds' means 'profits' where viewing 'proceeds' as 'receipts' would present a 'merger' problem of the kind that troubled the plurality and concurrence in *Santos*.").

With respect to the second element, the government must prove that the defendant knew that the property represented the proceeds of the specific prior, separate criminal activity but need not prove that the defendant knew that the act of laundering the proceeds was unlawful. *See United States v. Deeb*, 175 F.3d 1163, 1167 (9th Cir. 1999).

Because it is a specific intent crime, it is reversible error to give Instruction 5.6 (Knowingly—Defined) in a money laundering case. *United States v. Stein*, 37 F.3d 1407, 1410 (9th Cir. 1994). *See also United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997) (applying *Stein* retroactively).

The bracketed language stating a fourth element applies to attempt to engage in a financial transaction to promote unlawful activity. For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.147 LAUNDERING MONETARY INSTRUMENTS (18 U.S.C. § 1956(a)(1)(B))

The defendant is charged in [Count _____ of] the indictment with [laundering] [attempting to launder] money in violation of Section 1956(a)(1)(B) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [conducted] [intended to conduct] a financial transaction involving property that represented the proceeds of [*specify prior, separate criminal activity*];

Second, the defendant knew that the property represented the proceeds of some form of unlawful activity; and

Third, the defendant knew that the transaction was designed in whole or in part [to conceal or disguise the [nature] [location] [source] [ownership] [control] of the proceeds] [to avoid a transaction reporting requirement under state or federal law][.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

A financial transaction is a transaction involving [the movement of funds by wire or other means that] [one or more monetary instruments that] [the use of a financial institution that is engaged in, or the activities of which] affect[s] interstate or foreign commerce in any way.

The phrase "knew that the property represented the proceeds of some form of unlawful activity" means that the defendant knew that the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony. I instruct you that [*specify relevant unlawful activity*] is a felony.

[The laws of the [United States] [State of _____] require the reporting of [*specify reporting requirement*].]

Comment

For cases involving conduct on or after May 20, 2009, "proceeds" means "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9) (subsection (c)(9) was added by Pub. L. 111-21, 123 Stat. 1618).

For cases involving conduct prior to May 20, 2009, consider *United States v. Santos*, 553 U.S. 507, 513-14 (2008) (plurality opinion) (Where the prior, separate criminal activity is

gambling, the term "proceeds" must be defined as "profits."), and *United States v. Van Alstyne*, 584 F.3d 803, 814 (9th Cir. 2009) ("We therefore view the holding that commanded five votes in *Santos* as being that 'proceeds' means 'profits' where viewing 'proceeds' as 'receipts' would present a 'merger' problem of the kind that troubled the plurality and concurrence in *Santos*."). *See also United States v. Webster*, 623 F.3d 901, 906 (9th Cir. 2010) (reading *Santos* as holding that where a money laundering count is based on transfers among co-conspirators of money from the sale of drugs, "proceeds" includes all "receipts" from such sales).

If the defendant is charged with laundering a monetary instrument other than cash, *see* 18 U.S.C. § 1956(c)(5), the instruction should be modified accordingly.

Because it is a specific intent crime, it is reversible error to give Instruction 5.6 (Knowingly–Defined) in a money laundering case. *United States v. Stein*, 37 F.3d 1407, 1410 (9th Cir. 1994). *See also United States v. Turman*, 122 F.3d 1167, 1169 (9th Cir. 1997) (applying *Stein* retroactively).

The government is required to prove "that the defendant knew that the underlying acts which provided the sources of the laundered proceeds were illegal," but not that "the defendant knew that his money-laundering acts were illegal." *United States v. Golb*, 69 F.3d 1417, 1428 (9th Cir. 1999).

With respect to the third element of the instruction, *see Cuellar v. United States*, 553 U.S. 550, 561-68 (2008) (evidence of how money was moved insufficient to prove knowledge); see also *United States v. Wilkes*, 662 F.3d 524, 547 (9th Cir. 2011) (evidence that defendant's transactions were "convoluted" rather than "simple transactions that can be followed with relative ease, or transactions that involve nothing but the initial crime," was sufficient to prove a transaction designed to conceal) (citation omitted).

The bracketed language stating a fourth element applies to attempt to launder monetary investments. Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

The bracketed language regarding reporting requirements in the last paragraph of the instruction only applies if the defendant is charged with laundering funds in order to avoid a transaction reporting requirement under state or federal law.

Approved 3/2016

8.148 TRANSPORTING FUNDS TO PROMOTE UNLAWFUL ACTIVITY (18 U.S.C. § 1956(a)(2)(A))

The defendant is charged in [Count _____ of] the indictment with [transporting] [attempting to transport] funds to promote unlawful activity in violation of Section 1956(a)(2)(A) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [transported] [intended to transport] money [from a place in the United States to or through a place outside the United States] [to a place in the United States from or through a place outside the United States]; [and]

Second, the defendant acted with the intent to promote the carrying on of [*specify criminal activity charged in the indictment*][.] [; and]

[Third, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

Comment

The bracketed language stating a third element applies to attempt to transport funds to promote unlawful activity.

For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

Approved 4/2011

8.149 TRANSPORTING MONETARY INSTRUMENTS FOR THE PURPOSE OF LAUNDERING (18 U.S.C. § 1956(a)(2)(B))

The defendant is charged in [Count _____ of] the indictment with [transporting] [attempting to transport] money for the purpose of laundering in violation of Section 1956(a)(2)(B) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [transported] [intended to transport] money [from a place in the United States to or through a place outside the United States] [to a place in the United States from or through a place outside the United States];

Second, the defendant knew that the money represented the proceeds of [*specify prior, separate criminal activity*]; [and]

Third, the defendant knew the transportation was designed in whole or in part [to conceal or disguise the [nature] [location] [source] [ownership] [control] of the proceeds of [*specify criminal activity charged in the indictment*]] [to avoid a transaction reporting requirement under state or federal law][.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime of transporting money for the purpose of laundering. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

[The laws of the [United States] [State of _____] require the reporting of [*reporting requirement*].]

Comment

For cases involving conduct on or after May 20, 2009, "proceeds" means "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9) (subsection (c)(9) was added by Pub. L. 111-21, 123 Stat. 1618).

For cases involving conduct prior to May 20, 2009, consider *United States v. Santos*, 553 U.S. 507, 513-14 (2008) (plurality opinion) (Where the prior, separate criminal activity is gambling, the term "proceeds" must be defined as "profits."), and *United States v. Van Alstyne*, 584 F.3d 803, 814 (9th Cir. 2009) ("We therefore view the holding that commanded five votes in *Santos* as being that 'proceeds' means 'profits' where viewing 'proceeds' as 'receipts' would present a 'merger' problem of the kind that troubled the plurality and concurrence in *Santos*.").

See also United States v. Phillips, 704 F.3d 754 (9th Cir. 2012) (when money laundering activity did not further predicate criminal scheme or occur during normal course of running scheme, "proceeds" were correctly defined as "gross receipts" under 18 U.S.C. § 1957); *United States v. Webster*, 623 F.3d 901, 906 (9th Cir. 2010) (reading *Santos* as holding that when money laundering count is based on transfers among co-conspirators of money from sale of drugs, "proceeds" includes all "receipts" from such sales).

Because it is a specific intent crime, it is reversible error to give Instruction 5.6 (Knowingly–Defined) in a money laundering case. *United States v. Stein*, 37 F.3d 1407, 1410 (9th Cir. 1994). *See also United States v. Turman*, 122 F.3d 1167, 1169 (9th Cir. 1997) (applying *Stein* retroactively).

The elements of this instruction follow the language of the statute, although in most cases the crime described in each element would be the same. *See United States v. Jenkins*, 633 F.3d 788, 806-07 (9th Cir. 2011).

With respect to the second element of the instruction, the government must prove that the defendant knew that the property represented the proceeds of the specific prior, separate criminal activity but need not prove that the defendant knew that the act of laundering the proceeds was unlawful. *See United States v. Deeb*, 175 F.3d 1163, 1167 (9th Cir. 1999).

With respect to the third element of the instruction, *see Cuellar v. United States*, 553 U.S. 550, 561-68 (2008) (evidence of how money was moved insufficient to prove knowledge).

The bracketed language stating a fourth element applies to attempt to transport monetary instruments for the purpose of laundering.

For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

Approved 4/2013

8.150 MONEY LAUNDERING
(18 U.S.C. § 1957)

The defendant is charged in [Count _____ of] the indictment with money laundering in violation of Section 1957 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly engaged or attempted to engage in a monetary transaction;

Second, the defendant knew the transaction involved criminally derived property;

Third, the property had a value greater than $10,000;

Fourth, the property was, in fact, derived from [*describe the specified unlawful activity alleged in the indictment*]; and

Fifth, the transaction occurred [[in the [United States] [special maritime and territorial jurisdiction of the United States]] [*specify defendant's status which qualifies under 18 U.S.C. § 1957(d)(2)*].

The term "monetary transaction" means the [deposit] [withdrawal] [transfer] or [exchange], in or affecting interstate commerce, of funds or a monetary instrument by, through, or to a financial institution. [The term "monetary transaction" does not include any transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution.]

The term "financial institution" means [*identify type of institution listed in 31 U.S.C. § 5312 as alleged in the indictment*].

The term "criminally derived property" means any property constituting, or derived from, the proceeds of a criminal offense. The government must prove that the defendant knew that the property involved in the monetary transaction constituted, or was derived from, proceeds obtained by some criminal offense. The government does not have to prove that the defendant knew the precise nature of that criminal offense, or knew the property involved in the transaction represented the proceeds of [*specified unlawful activity as alleged in the indictment*].

Although the government must prove that, of the property at issue more than $10,000 was criminally derived, the government does not have to prove that all of the property at issue was criminally derived.

Comment

The above definition of "criminally derived property" refers to the "proceeds" of a criminal offense. For cases involving conduct on or after May 20, 2009, "proceeds" means "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1957(f)(3); 18 U.S.C. § 1956(c)(9) (§ 1957 subsection (f)(3) was modified by Pub. L. 111-21, 123 Stat. 1618, which also added § 1956 subsection (c)(9)). For cases involving conduct prior to May 20, 2009, "proceeds" means "gross receipts" unless the money laundering transactions were a "central component" of the criminal scheme. *United States v. Phillips*, 704 F.3d 754 (9th Cir. 2012); *see also United States v. Van Alstyne*, 584 F.3d 803, 814 (when defining "proceeds" as "gross receipts" would present a merger problem, "proceeds" means "profits"). *See* Instruction 8.149.

Approved 4/2013

8.151 VIOLENT CRIME IN AID OF RACKETEERING ENTERPRISE (18 U.S.C. § 1959)

The defendant is charged in Count _____ of the indictment with [committing] [threatening to commit] [attempting to commit] [conspiring to commit] a crime of violence, specifically, [*specify crime of violence*] in aid of a racketeering enterprise in violation of Section 1959 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, on or about the time period described in Count _____, an enterprise affecting interstate commerce existed;

Second, the enterprise engaged in racketeering activity;

Third, the defendant [committed] [threatened to commit] [attempted to commit] [conspired to commit] the following crime of violence: [*specify crime of violence*] as defined in [*specify jury instruction stating all elements of predicate crime of violence*]; [and]

Fourth, that the defendant's purpose in [[committing] [threatening to commit] [attempting to commit] [conspiring to commit]] [*specify crime of violence*] was to gain entrance to, or to maintain, or to increase [his] [her] position in the enterprise[.] [and]

[Fifth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

Comment

Use this instruction in conjunction with Instructions 8.152 (Racketeering Enterprise—Enterprise Affecting Interstate Commerce—Defined), 8.153 (Racketeering Activity—Defined), 8.154 (Racketeering Enterprise—Proof of Purpose); and an instruction setting forth the elements of the predicate crime of violence. When the charge alleges an attempt or conspiracy to commit a crime of violence, include an appropriate instruction as to attempt or conspiracy. *See* Instruction 5.3 (Attempt) and Instruction 8.20 (Conspiracy—Elements).

In *United States v. Banks*, 514 F.3d 959, 964 (9th Cir. 2008), the Ninth Circuit summarized existing case law that identified the four elements necessary for a conviction of committing violent crimes in aid of racketeering activity (VICAR):

> The VICAR statute provides that '[w]hoever, *. . .for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity,* murders [or] . . . assaults with a dangerous weapon . . . in violation of the laws of any

> State or the United States, or attempts or conspires so to do, shall be punished.' 18 U.S.C. § 1959(a) (emphasis added). In our prior decisions we have identified four elements required for a conviction under this statute: '(1) that the criminal organization exists; (2) that the organization is a racketeering enterprise; (3) that the defendant[ ] committed a violent crime; and (4) that [the defendant] acted for the purpose of promoting [his] position in a racketeering enterprise.' *United States v. Bracy*, 67 F.3d 1421, 1429 (9th Cir. 1995); *see also United States v. Fernandez,* 388 F.3d 1199, 1220 (9th Cir. 2004).

In *United States v. Houston*, 648 F.3d 806, 819-20 (9th Cir. 2011), the Ninth Circuit held it was not error to refuse to instruct on second degree murder as a lesser predicate to VICAR first degree murder.

A charge under Section 1959 also applies to violent crimes committed "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity." If that is the basis of the charged crime, the fourth element of the instruction should be modified accordingly. *See United States v. Concepcion*, 983 F.2d 369, 384 (2d Cir. 1992) (Section 1959 is sufficiently inclusive to encompass actions of an "independent contractor," as it reaches not only those who seek to maintain or increase their positions within a RICO enterprise, but also those who perform violent crimes as consideration for the receipt of anything of pecuniary value from such an enterprise).

Approved 4/2013

8.152 RACKETEERING ENTERPRISE—ENTERPRISE AFFECTING INTERSTATE COMMERCE—DEFINED (18 U.S.C. § 1959)

With respect to the first element in Instruction _____ [*insert cross reference to pertinent instruction, e.g., Instruction 8.151*], the government must prove that an "enterprise" existed that was engaged in or had an effect on interstate commerce. An enterprise is a group of people who have associated together for a common purpose of engaging in a course of conduct over a period of time. This group of people, in addition to having a common purpose, must have an ongoing organization, either formal or informal. The personnel of the enterprise, however, may change and need not be associated with the enterprise for the entire period alleged in the indictment. This group of people does not have to be a legally recognized entity, such as a partnership or corporation. This group may be organized for a legitimate and lawful purpose, or it may be organized for an unlawful purpose. [The name of the organization itself is not an element of the offense and does not have to be proved.]

Therefore, the government must prove beyond a reasonable doubt that this was a group of people (1) associated for a common purpose of engaging in a course of conduct; (2) that the association of these people was an ongoing formal or informal organization, and (3) the group was engaged in or had an effect upon interstate or foreign commerce. The government need not prove that the enterprise had any particular organizational structure.

Interstate commerce includes the movement of goods, services, money and individuals between states. These goods can be legal or illegal. Only a minimal effect on commerce is required and the effect need only be probable or potential, not actual. It is not necessary to prove that the defendant's own acts affected interstate commerce as long as the enterprise's acts had such effect.

Comment

Use this instruction in conjunction with Instructions 8.151 (Violent Crime in Aid of Racketeering Enterprise), 8.153 (Racketeering Activity—Defined), and 8.154 (Racketeering Enterprise—Proof of Purpose).

Definitions of "enterprise" are found in 18 U.S.C. §§ 1959(b)(2) and 1961(4). *See also United States v. Turkette*, 452 U.S. 576, 583 (1981); *Odom v. Microsoft Corp.*, 486 F.3d 541, 550-52 (9th Cir. 2000); *United Energy Owners Committee, Inc. v. United States Energy Management System, Inc.*, 837 F.2d 356, 362 (9th Cir. 1988).

8.153 RACKETEERING ACTIVITY—DEFINED
(18 U.S.C. § 1959)

With respect to the second element in Instruction _____ [*insert cross reference to pertinent instruction, e.g. Instruction 8.151*], the government must prove that the enterprise was engaged in racketeering activity. "Racketeering activity" means the commission of certain crimes. These include [*insert applicable statutory definitions of state or federal crimes at issue as listed in 18 U.S.C. § 1961.*]

The government must prove beyond a reasonable doubt that the enterprise was engaged in [at least one of] the crime[s] named above.

Comment

Use this instruction in conjunction with Instructions 8.151 (Violent Crime in Aid of Racketeering Enterprise), 8.152 (Racketeering Enterprise—Enterprise Affecting Interstate Commerce—Defined), and 8.154 (Racketeering Enterprise—Proof of Purpose).

For a definition of "racketeering activity," see 18 U.S.C. § 1959(b)(1), which states that term has the meaning set forth in 18 U.S.C. § 1961(1). *See also United States v. Banks*, 514 F.3d 959, 968 (9th Cir. 2008).

8.154 RACKETEERING ENTERPRISE—PROOF OF PURPOSE (18 U.S.C. § 1959)

With respect to the fourth element in Instruction _____ [*insert cross reference to pertinent instruction, e.g. Instruction 8.151*], the government must prove beyond a reasonable doubt that the defendant's purpose was to gain entrance to, or to maintain, or to increase [his] [her] position in the enterprise.

It is not necessary for the government to prove that this motive was the sole purpose, or even the primary purpose of the defendant in committing the charged crime. You need only find that enhancing [his] [her] status in [*name of enterprise*] was a substantial purpose of the defendant or that [he] [she] committed the charged crime as an integral aspect of membership in [*name of enterprise*].

In determining the defendant's purpose in committing the alleged crime, you must determine what [he] [she] had in mind. Since you cannot look into a person's mind, you have to determine purpose by considering all the facts and circumstances before you.

Comment

Use this instruction in conjunction with Instructions 8.151 (Violent Crime in Aid of Racketeering Enterprise), 8.152 (Racketeering Enterprise—Enterprise Affecting Interstate Commerce—Defined), and 8.153 (Racketeering Activity—Defined). *See* Comment to Instruction 8.151. If the fourth element of Instruction 8.151 is modified, this instruction should also be modified.

"[T]he purpose element is met if 'the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership.'" *United States v. Banks*, 514 F.3d 959, 965 (9th Cir. 2008) (quoting *United States v. Pimentel*, 346 F.3d 285, 295-96 (2d Cir. 2003)).

"VICAR's purpose element is satisfied even if the maintenance or enhancement of his position in the criminal enterprise was not the defendant's sole or principal purpose." *Banks*, 514 F.3d at 965. The law, however, requires a defendant's purpose be "more than merely incidental." *Id.* at 969. Although the gang or racketeering enterprise purpose does not have to be "the only purpose or the main purpose" of a murder or assault, it does have to be a substantial purpose. *Id.* at 970. "Murder *while* a gang member is not necessarily a murder *for the purpose* of maintaining or increasing position in a gang, even if it would have the effect of maintaining or increasing position in a gang." *Id.*

The Ninth Circuit held that it was not error to instruct on an alternate *Pinkerton* theory (co-conspirator's liability), even though under *Pinkerton* it is not necessary that the defendant personally act for the purpose of maintaining his position in the enterprise provided that he had that intent when he joined the conspiracy. *United States v. Houston*, 648 F.3d 806, 818-19 (9th Cir. 2011).

8.155 RICO—RACKETEERING ACT— CHARGED AS SEPARATE COUNT IN INDICTMENT (18 U.S.C. § 1961(1))

The crimes of [*specify crimes charged*] charged in Counts _____ of the indictment are racketeering acts. If you find the defendant guilty of [at least two of] the crimes charged in Counts _____ you must then decide whether those counts formed a pattern of racketeering activity.

All of you must agree on the same two crimes which form a pattern of racketeering activity.

Comment

Unanimity as to the crimes forming a pattern of racketeering activity is appropriate under the reasoning of *Richardson v. United States*, 526 U.S. 813 (1999) (in continuing criminal enterprise prosecution, there must be unanimity as to the specific violations which make up the "continuing series of violations"). *See also* Instruction 7.9 (Specific Issue Unanimity).

8.156 RICO—RACKETEERING ACT— NOT CHARGED AS SEPARATE COUNT IN INDICTMENT (18 U.S.C. § 1961(1))

The crime of [specify crime charged] is a racketeering act. In order for you to find that the defendant [committed] [aided and abetted others in committing] the crime of [*specify crime charged*], the government must prove each of the following elements beyond a reasonable doubt:

[*Specify elements of the crime*.]

[All of you must agree on the same two racketeering acts that the defendant [committed] [aided and abetted in committing].]

Comment

There is no requirement that the defendant must have been convicted of the crime constituting an act of racketeering activity before the act can be used as part of the pattern of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479 (1985). Even though a defendant has previously been acquitted of a crime in a state court, he or she can still be charged with the same crime in a RICO charge. *United States v. Licavoli,* 725 F.2d 1040, 1047 (6th Cir. 1984).

A pattern of racketeering activity requires at least two acts of racketeering activity. 18 U.S.C. § 1961(5). More than one crime may be charged as a racketeering act.

8.157 RICO—PATTERN OF RACKETEERING ACTIVITY (18 U.S.C. § 1961(5))

To establish a pattern of racketeering activity, the government must prove each of the following beyond a reasonable doubt:

First, at least two acts of racketeering were committed;

Second, the acts of racketeering had a relationship to each other which posed a threat of continued criminal activity; and

Third, the acts of racketeering embraced the same or similar purposes, results, participants, victims, or methods of commission, or were otherwise interrelated by distinguishing characteristics.

Sporadic, widely separated, or isolated criminal acts do not form a pattern of racketeering activity.

Two racketeering acts are not necessarily enough to establish a pattern of racketeering activity.

Comment

If there is an issue whether there were two racketeering activities within ten years, the instruction should be modified by inserting "within a period of ten years" after "acts of racketeering were committed" at the end of the first element.

In determining whether two racketeering activities occurred within ten years, any period of imprisonment after the commission of a prior act must be excluded.

See United States v. Camez, 839 F.3d 871, 876 (9th Cir. 2016) (pattern of racketeering activity requires at least two predicate acts, one of which may have occurred while defendant was minor if criminal conduct in issue continued past age of majority); *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496 n.14 (1985) (although at least two acts are necessary under the definition of "pattern of racketeering activity," two acts may not be sufficient to constitute a pattern). *See also H.J. Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229, 239 (1989) (pattern of racketeering activity requires a "showing that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity"); *Sever v. Alaska Pulp Corp.,* 978 F.2d 1529, 1535-36 (9th Cir. 1992) (applying *Northwestern Bell*); *Ikuno v. Yip*, 912 F.2d 306, 309 (9th Cir. 1990) (same).

Approved 12/2016

8.158 RICO—USING OR INVESTING INCOME FROM RACKETEERING ACTIVITY (18 U.S.C. § 1962(a))

The defendant is charged in [Count _____ of] the indictment with using or investing income from racketeering activity in violation of Section 1962(a) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant received income, directly or indirectly, from a pattern of racketeering activity, or through collection of an unlawful debt;

Second, the defendant used or invested, directly or indirectly, any part of that income or the proceeds of such income to [buy an interest or invest in] [establish] [operate] [*specify enterprise*]; and

Third, [*specify enterprise*] was engaged in or its activities in some way affected commerce between one state and [an]other state[s], or between the United States and a foreign country.

Comment

When the predicate racketeering acts are charged as separate counts in the indictment, use this instruction in combination with Instructions 8.155 (RICO—Racketeering Act—Charged as Separate Count in Indictment) and 8.157 (RICO—Pattern of Racketeering Activity). When the predicate racketeering acts are not charged as separate counts in the indictment, use this instruction in combination with Instructions 8.156 (RICO—Racketeering Act—Not Charged as Separate Count in Indictment) and 8.157 (RICO—Pattern of Racketeering Activity).

Unlike a case in which a corporation is charged under 18 U.S.C. § 1962(c), "where a corporation engages in racketeering activities and is the direct or indirect beneficiary of the pattern of racketeering activity, it can be both the 'person' and the 'enterprise' under section 1962(a)." *Schreiber Distrib. Co. v. Serv–Well Furniture Co.*, 806 F.2d 1393, 1396 (9th Cir. 1986).

Approved 12/2016

8.159 RICO—ACQUIRING INTEREST IN ENTERPRISE (18 U.S.C. § 1962(b))

The defendant is charged in [Count _____ of] the indictment with acquiring or maintaining an interest in or control of an enterprise in violation of Section 1962(b) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant, directly or indirectly, acquired or maintained an interest in or control of [*specify enterprise*];

Second, the defendant did so through a pattern of racketeering activity or through collection of an unlawful debt; and

Third, [*specify enterprise*] engaged in or its activities in some way affected commerce between one state and [an]other state[s] or the United States and a foreign country.

Comment

When the predicate racketeering acts are charged as separate counts in the indictment, use this instruction in combination with Instructions 8.155 (RICO—Racketeering Act—Charged as Separate Count in Indictment) and 8.157 (RICO—Pattern of Racketeering Activity). When the predicate racketeering acts are not charged as separate counts in the indictment, use this instruction in combination with Instructions 8.156 (RICO—Racketeering Act—Not Charged as Separate Count in Indictment) and 8.157 (RICO—Pattern of Racketeering Activity).

The enterprise in which a defendant invests must be an entity distinct from the defendant.

RICO predicate acts only require a de minimus impact on interstate commerce. *United States v. Fernandez*, 388 F.3d 1199, 1218 (9th Cir. 2004); *United States v. Juvenile Male,* 118 F.3d 1344, 1347 (9th Cir. 1997).

Control under § 1962(b) does not require "formal control." *Ikuno v. Yip,* 912 F.2d 306, 310 (9th Cir. 1990).

8.160 RICO—CONDUCTING AFFAIRS OF COMMERCIAL ENTERPRISE OR UNION (18 U.S.C. § 1962(c))

The defendant is charged in [Count _____ of] the indictment with having [conducted] [participated in the conduct of] the affairs of [*specify enterprise or union*] through a pattern of racketeering activity in violation of Section 1962(c) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was employed by or associated with [*specify enterprise or union*];

Second, the defendant [conducted] [participated, directly or indirectly, in the conduct of] the affairs of [*specify enterprise or union*] through a pattern of racketeering activity or collection of unlawful debt. To conduct or participate means that the defendant had to be involved in the operation or management of the [*specify enterprise or union*]; and

Third, [*specify enterprise or union*] engaged in or its activities in some way affected commerce between one state and [an]other state[s], or the United States and a foreign country.

Comment

When racketeering acts are charged as separate counts in the indictment, use this instruction in combination with Instructions 8.155 (RICO—Racketeering Act—Charged as Separate Count in Indictment) and 8.157 (RICO—Pattern of Racketeering Activity). When the racketeering acts are not charged as separate counts in the indictment, use this instruction in combination with Instructions 8.156 (RICO—Racketeering Act—Not Charged as Separate Count in the Indictment) and 8.157 (RICO—Pattern of Racketeering Activity).

As defined in 18 U.S.C. § 1961(4), an enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union"; therefore, the name of the legal entity should be used.

The enterprise cannot also be the RICO defendant when the charge is that the defendant violated 18 U.S.C. § 1962(c).

See United States v. Shryock, 342 F.3d 948, 985-86 (9th Cir. 2003) (defining "conducts or participates" in the affairs of the enterprise).

8.161 CONDUCTING AFFAIRS OF ASSOCIATION–IN–FACT (18 U.S.C. § 1962(c))

The defendant is charged in [Count _____ of] the indictment with having [conducted] [participated in the conduct of] the affairs of an enterprise through a pattern of racketeering activity in violation of Section 1962(c) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, there was an on-going enterprise with some sort of formal or informal framework for carrying out its objectives consisting of a group of persons associated together for a common purpose of engaging in a course of conduct;

Second, the defendant was employed by or associated with the enterprise;

Third, the defendant [conducted] [participated, directly or indirectly, in the conduct of] the affairs of the enterprise through a pattern of racketeering activity or collection of unlawful debt. To conduct or participate means that the defendant had to be involved in the operation or management of the enterprise; and

Fourth, the enterprise engaged in or its activities in some way affected commerce between one state and [an]other state[s], or between the United States and a foreign country.

An enterprise need not be a formal entity such as a corporation and need not have a name, regular meetings, or established rules.

Comment

When racketeering acts are charged as separate counts in the indictment, use this instruction in combination with Instructions 8.155 (RICO–Racketeering Act–Charged as Separate Count in Indictment) and 8.157 (RICO–Pattern of Racketeering Activity). When the racketeering acts are not charged as separate counts in the indictment, use this instruction in combination with Instructions 8.156 (RICO–Racketeering Act–Not Charged as Separate Count in the Indictment) and 8.157 (RICO–Pattern of Racketeering Activity).

RICO requires that an association-in-fact enterprise must have a structure, but the word "structure" need not be used in the jury instruction. *Boyle v. United States*, 556 U.S. 938, 946 (2009). The definition of "enterprise" in the first element of the instruction is based on *Boyle*, 556 U.S. at 944, and *United States v. Turkette,* 452 U.S. 576, 583 (1981).

For RICO purposes, an association in fact "need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies." *Boyle*, 556 U.S. at 948.

Defendants in RICO actions must have had "some knowledge of the nature of the enterprise . . . to avoid an unjust association of the defendant[s] with the crimes of others," but the requirement of a common purpose may be met so long as the defendants were "each aware of the essential nature and scope of [the] enterprise and intended to participate in it." *United States v. Christensen*, 828 F.3d 763, 780 (9th Cir. 2015), *as amended on denial of reh'g* (July 8, 2016). A RICO enterprise is not defeated even when some of the enterprise's participants lack detailed knowledge of all of the other participants or their activities. Instead, "it is sufficient that the defendant know the general nature of the enterprise and know that the enterprise extends beyond his individual role." *Id.*

See United States v. Shryock, 342 F.3d 948, 985-86 (9th Cir. 2003) (defining "conducts or participates" in the affairs of the enterprise).

Approved 12/2015

8.162 BANK ROBBERY
(18 U.S.C. § 2113(a), (d))

The defendant is charged in [Count _____ of] the indictment with [armed] bank robbery in violation of Section 2113 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

[First, the defendant, through force and violence or intimidation, [took] [obtained by extortion] [[property] [money] [something of value]] belonging to or in the care, custody, control, management or possession of [*specify financial institution*];]

or

[First, the defendant entered [*specify financial institution*] intending to commit [*insert applicable crime*] affecting [*specify financial institution*];]

Second, the deposits of [*specify financial institution*] were then insured by the [Federal Deposit Insurance Corporation] [National Credit Union Administration Board][.] [; and]

[Third, the defendant intentionally [[struck or wounded [*name of victim*]] [made a display of force that reasonably caused [*name of victim*] to fear bodily harm] by using a [*specify dangerous weapon or device*]. [A weapon or device is dangerous if it is something that creates a greater apprehension in the victim and increases the likelihood that police or bystanders would react using deadly force.]

Comment

Choose the applicable first element of the instruction depending on which portion of 18 U.S.C. § 2113(a) the defendant is charged under. When the second option of the first element is used, a companion instruction may be necessary to define the applicable crime.

The third element should be used when a violation of 18 U.S.C. § 2113(d) for use of a dangerous weapon is charged. When the § 2113(d) offense is predicated on an underlying § 2113(b) offense, substitute for the first element in this instruction the first element in Instruction 8.162A.

Frequently, the weapon used is a firearm, in which case there is not likely to be an issue about whether a dangerous weapon was used. In such cases, the last bracketed sentence in the fourth element might be omitted. A "dangerous weapon" is required for both the "assault" and "display of force" options of § 2113(d). *See Simpson v. United States*, 435 U.S. 6, 13 n.6 (1978), *superseded by statute on other grounds as stated in United States v. Beierle*, 77 F.3d 1199, 1201 n.1 (9th Cir. 1996).

There may be cases in which a jury must decide whether the weapon or device is dangerous. In such cases the bracketed last sentence in the third element should be used. The definition of dangerous weapon is derived from a discussion in *United States v. Pike*, 473 F.3d 1053, 1060 (9th Cir. 2007), which did not involve a dangerous weapon issue. The Ninth Circuit explained that its previous decisions in *United States v. Taylor*, 960 F.2d 115, 116-17 (9th Cir. 1992), and *United States v. Boyd*, 924 F.2d 945, 947 (9th Cir. 1991), had held devices to be dangerous because the device increased victim apprehension and increased the likelihood of police or bystanders responding with deadly force. *Pike*, 473 F.3d at 1060.

To convict a defendant for armed bank robbery under an aiding and abetting theory, the Ninth Circuit requires the government to show beyond a reasonable doubt both that the defendant knew that the principal had and intended to use a dangerous weapon during the robbery, and that the defendant intended to aid in that endeavor. *United States v. Dinkane*, 17 F.3d 1192, 1195 (9th Cir. 1994). Failure to properly instruct the jury on this issue constitutes reversible error. *Id*.

Bank robbery is a general intent crime. *See*, *e.g.*, *United States v. Burdeau*, 168 F.3d 352, 356 (9th Cir. 1999) (citing *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993)).

Approved 6/2015

8.162A BANK ROBBERY
(18 U.S.C. § 2113(b), (c))

The defendant is charged in [Count _____ of] the indictment with bank robbery in violation of Section 2113 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [took and carried away with intent to steal or purloin] [received, possessed, concealed, stored, bartered, sold, or disposed of] [[property] [money] [something of value]] belonging to or in the care, custody, control, management or possession of [*specify financial institution*];

Second, what the defendant [took and carried away] [received, possessed, concealed, bartered, sold, or disposed of] had a value [greater than $1000] [of $1000 or less]; [and]

[Third, the defendant knew that what the defendant received, possessed, concealed, stored, bartered, sold or disposed of had been stolen; and]

or

[Third] [Fourth], the deposits of [*specify financial institution*] were then insured by the [Federal Deposit Insurance Corporation] [National Credit Union Administration Board].

Comment

Use the third element concerning the defendant's knowledge when the defendant is charged under 18 U.S.C. § 2113(c) and adjust the number of the last element accordingly.

See also Instructions 8.162 and 8.162B.

Approved 6/2015

8.162B BANK ROBBERY
(18 U.S.C. § 2113(e))

The defendant is charged in [Count _____ of] the indictment with bank robbery in violation of Section 2113 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

[First, the defendant [took] [obtained by extortion] [[property] [money] [something of value]] belonging to or in the care, custody, control, management or possession of [*specify financial institution*], using force and violence or intimidation in doing so.]

or

[First, the defendant entered [*specify financial institution*], intending to commit [*insert applicable crime*] affecting [*specify financial institution*];]

or

[First, the defendant took and carried away, with intent to steal or purloin, [[property] [money] [something of value]] belonging to or in the care, custody, control, management or possession of [*specify financial institution*];]

or

[First, the defendant received, possessed, concealed, stored, bartered, sold, or disposed of [[property] [money] [something of value]] belonging to, or in the care, custody, control, management or possession of [*specify financial institution*], knowing that the [[property] [money] [item]] was stolen;]

or

[First, the defendant [took] [obtained by extortion] [[property] [money] [something of value]] belonging to, or in the care, custody, control, management or possession of [*specify financial institution*], using force and violence or intimidation in doing so [and intentionally struck or wounded a person] [and intentionally made a display of force that reasonably caused another person to fear bodily harm by] using [*specify dangerous weapon or device*];]

or

[First, the defendant entered [*specify financial institution*] intending to commit [*insert applicable crime*] affecting [*specify financial institution*], using force and violence or intimidation in doing so and intentionally [struck or wounded a person] [made a display of force that reasonably caused another person to fear bodily harm by] using [*specify dangerous weapon or device*];]

Second, while doing so, the defendant [killed [*name of victim*]] [forced [*name of victim*] to accompany the defendant without the consent of such person. A defendant "forces a person to accompany" the defendant when the defendant forces that person to go somewhere with the defendant, even if the movement occurs entirely within a single building or over a short distance]; and

Third, the deposits of [*specify financial institution*] were then insured by the [Federal Deposit Insurance Corporation] [National Credit Union Administration Board].

Comment

Depending on which crime(s) from 18 U.S.C. § 2113 are charged in the indictment, select the appropriate "First" option(s).

The "forced" language in the second element should be used when a violation of 18 U.S.C. § 2113(e) for kidnapping a person in connection with a robbery is charged. *See Whitfield v. United States*, 135 S. Ct. 785 (2015) (§ 2113(e) does not require defendant to force someone to accompany defendant over "substantial distance"; movement may occur "entirely within a single building or over a short distance"); *United States v. Strobehn*, 421 F.3d 1017, 1019 (9th Cir. 2005) ("On its face, the enhancing elements are that a defendant (1) in the course of committing a bank robbery (2) forces a person (3) to accompany him (4) without that person's consent. While 'kidnaping' works as a shorthand description because § 2113(e) contemplates moving someone by force to someplace he doesn't want to go, the statute plainly, and only, requires accompaniment that is forced and without consent").

Approved 6/2015

8.163 ATTEMPTED BANK ROBBERY
(18 U.S.C. § 2113)

The defendant is charged in [Count _____ of] the indictment with attempted bank robbery in violation of Section 2113 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to use force or intimidation to take money that belonged to [*specify financial institution*];

Second, the deposits of [*specify financial institution*] were then insured by the [Federal Deposit Insurance Corporation] [National Credit Union Administration Board]; and

Third, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward the committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Comment

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.164 AGGRAVATED SEXUAL ABUSE
(18 U.S.C. § 2241(a))

The defendant is charged in [Count _____ of] the indictment with aggravated sexual abuse in violation of Section 2241(a) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [used force] [threatened or placed [*name of victim*] in fear that some person would be subject to death, serious bodily injury or kidnapping] to cause [*name of victim*] to engage in a sexual act; and

Second, the offense was committed at [*specify place of federal jurisdiction*].

In this case, "sexual act" means [*specify statutory definition*].

Comment

See 18 U.S.C. § 2246(2) for the definition of sexual act referred to in the last paragraph of the instruction.

For a definition of "knowingly," see Instruction 5.6 (Knowingly–Defined).

Whether the crime alleged occurred at a particular location is a question of fact. Whether the location is within the special maritime and territorial jurisdiction of the United States, a federal prison or a facility where federal detainees are held pursuant to a contract is a question of law. *See United States v. Mujahid*, 799 F.3d 1228 (9th Cir. 2015); *see also United States v. Gipe,* 672 F.2d 777, 779 (9th Cir. 1982).

Approved 9/2015

8.165 ATTEMPTED AGGRAVATED SEXUAL ABUSE (18 U.S.C. § 2241(a))

The defendant is charged in [Count _____ of] the indictment with attempted aggravated sexual abuse in violation of Section 2241(a) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to [use force] [threaten or place [*name of victim*] in fear that some person would be subjected to death, serious bodily injury, or kidnapping] to cause [*name of victim*] to engage in a sexual act;

Second, the defendant did something that was a substantial step toward committing the crime; and

Third, the offense was committed at [*specify place of federal jurisdiction*].

In this case, "sexual act" means [*specify statutory definition*].

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

See 18 U.S.C. § 2246(2) for the definition of sexual act referred to in the penultimate paragraph of the instruction.

"[A] person may be convicted of an attempt to commit a crime even though that person may have actually completed the crime." *United States v. Rivera-Relle*, 333 F.3d 914, 921 (9th Cir.), *cert. denied*, 540 U.S. 977 (2003).

"To constitute a substantial step toward the commission of a crime, the defendant's conduct must (1) advance the criminal purpose charged, and (2) provide some verification of the existence of that purpose." *United States v. Goetzke*, 494 F.3d 1231, 1235 (9th Cir. 2007). Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.166 AGGRAVATED SEXUAL ABUSE— ADMINISTRATION OF DRUG, INTOXICANT OR OTHER SUBSTANCE (18 U.S.C. § 2241(b)(2))

The defendant is charged in [Count _____ of] the indictment with aggravated sexual abuse in violation of Section 2241(b)(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly administered a drug, intoxicant or other similar substance to [*name of victim*] [by force or threat of force] [without the knowledge or permission of [*name of victim*]];

Second, as a result, [*name of victim*]'s ability to judge or control conduct was substantially impaired;

Third, the defendant then engaged in a sexual act with [*name of victim*]; and

Fourth, the offense was committed at [*specify place of federal jurisdiction*].

In this case, "sexual act" means [*specify statutory definition*].

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

8.167 ATTEMPTED AGGRAVATED SEXUAL ABUSE—ADMINISTRATION OF DRUG, INTOXICANT OR OTHER SUBSTANCE (18 U.S.C. § 2241(b)(2))

The defendant is charged in [Count _____ of] the indictment with attempted aggravated sexual abuse in violation of Section 2241(b)(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to engage in a sexual act with [*name of victim*] after substantially impairing [*name of victim*]'s ability to judge or control conduct by administering a drug, intoxicant or other similar substance either by force or threat of force or without the knowledge or permission of [*name of victim*];

Second, the defendant did something that was a substantial step toward committing the crime of aggravated sexual abuse; and

Third, the offense was committed at [*specify place of federal jurisdiction*].

In this case, "sexual act" means [*specify statutory definition*].

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

"[A] person may be convicted of an attempt to commit a crime even though that person may have actually completed the crime." *United States v. Rivera-Relle*, 333 F.3d 914, 921 (9th Cir.), *cert. denied*, 540 U.S. 977 (2003).

"To constitute a substantial step toward the commission of a crime, the defendant's conduct must (1) advance the criminal purpose charged, and (2) provide some verification of the existence of that purpose." *United States v. Goetzke*, 494 F.3d 1231, 1235 (9th Cir. 2007). Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.168 AGGRAVATED SEXUAL ABUSE OF CHILD (18 U.S.C. § 2241(c))

The defendant is charged in [Count _____ of] the indictment with aggravated sexual abuse of a child in violation of Section 2241(c) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly engaged in a sexual act with [*name of victim*];

Second, at the time, [*name of victim*] was under the age of twelve years; and

Third, [the defendant crossed a state line with the intent to engage in a sexual act with a person who was under the age of twelve years] [the offense was committed at [*specify place of federal jurisdiction*]].

The government need not prove that the defendant knew that the other person engaging in the sexual act was under the age of twelve years.

In this case, "sexual act" means [*specify statutory definition*].

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

Although the Committee has not found any Ninth Circuit case explicitly holding that proof of a sexual act is an element of the offense under the first clause of 18 U.S.C. § 2241(c), the court, when analyzing the mandatory life sentencing enhancement under the last sentence of the statute, stated a conviction under § 2241(c) "depend[s] on the commission of a 'sexual act.'" (defining sexual act as "skin-to-skin touching"). *United States v. Etimani,* 328 F.3d 493, 503 (9th Cir. 2003).

See 18 U.S.C. § 2241(d), as to the penultimate paragraph of the instruction. *See* 18 U.S.C. § 2246(2) for the definition of sexual act referred to in the last paragraph of the instruction.

An alleged mistake as to the victim's age is not a defense to a charge of aggravated sexual abuse under a statute prohibiting anyone from knowingly engaging in sexual contact with another person who has not attained the age of 12 years. *United States v. Juvenile Male*, 211 F.3d 1169, 1171 (9th Cir. 2000).

8.169 ATTEMPTED AGGRAVATED SEXUAL ABUSE OF CHILD (18 U.S.C. § 2241(c))

The defendant is charged in [Count _____ of] the indictment with attempted aggravated sexual abuse of a child in violation of Section 2241(c) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to engage in a sexual act with [*name of victim*];

Second, [*name of victim*] was under the age of twelve years;

Third, the defendant did something that was a substantial step toward committing the crime; and

Fourth, [the defendant crossed a state line with the intent to engage in a sexual act with a person who was under the age of twelve years] [the offense was committed at [*specify place of federal jurisdiction*]].

The government need not prove that the defendant knew that the other person with whom the defendant intended to engage in a sexual act was under the age of twelve years.

In this case, "sexual act" means [*specify statutory definition*].

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

Although the Committee has not found any Ninth Circuit case explicitly holding that proof of a sexual act is an element of the offense under the first clause of 18 U.S.C. § 2241(c), the court, when analyzing the mandatory life sentencing enhancement under the last sentence of the statute, stated a conviction under § 2241(c) "depend[s] on the commission of a 'sexual act.'" (defining sexual act as "skin-to-skin touching"). *United States v. Etimani,* 328 F.3d 493, 503 (9th Cir. 2003).

See 18 U.S.C. § 2241(d), as to the sixth paragraph of the instruction. *See* 18 U.S.C. § 2246(2) for the definition of sexual act referred to in the seventh paragraph of the instruction.

"[A] person may be convicted of an attempt to commit a crime even though that person may have actually completed the crime." *United States v. Rivera-Relle*, 333 F.3d 914, 921 (9th Cir.), *cert. denied*, 540 U.S. 977 (2003).

"To constitute a substantial step toward the commission of a crime, the defendant's conduct must (1) advance the criminal purpose charged, and (2) provide some verification of the existence of that purpose." *United States v. Goetzke*, 494 F.3d 1231, 1235 (9th Cir. 2007). Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.170 SEXUAL ABUSE—BY THREAT
(18 U.S.C. § 2242(1))

The defendant is charged in [Count _____ of] the indictment with sexual abuse in violation of Section 2242(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly caused [*name of victim*] to engage in a sexual act by threatening or placing [*name of victim*] in fear; and

Second, the offense was committed at [*specify place of federal jurisdiction*].

In this case, "sexual act" means [*specify statutory definition*].

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

This instruction is appropriate when the defendant has placed the victim in fear of something other than death, serious bodily injury or kidnapping.

8.171 ATTEMPTED SEXUAL ABUSE— BY THREAT (18 U.S.C. § 2242(1))

The defendant is charged in [Count _____ of] the indictment with attempted sexual abuse in violation of Section 2242(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to cause [*name of victim*] to engage in a sexual act by threatening or placing [*name of victim*] in fear;

Second, the defendant did something that was a substantial step toward committing the crime of sexual abuse; and

Third, the offense was committed at [*specify place of federal jurisdiction*].

In this case, "sexual act" means [*specify statutory definition*].

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

"[A] person may be convicted of an attempt to commit a crime even though that person may have actually completed the crime." *United States v. Rivera-Relle*, 333 F.3d 914, 921 (9th Cir.), *cert. denied*, 540 U.S. 977 (2003).

"To constitute a substantial step toward the commission of a crime, the defendant's conduct must (1) advance the criminal purpose charged, and (2) provide some verification of the existence of that purpose." *United States v. Goetzke*, 494 F.3d 1231, 1235 (9th Cir. 2007). Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.172 SEXUAL ABUSE—INCAPACITY OF VICTIM (18 U.S.C. § 2242(2))

The defendant is charged in [Count _____ of] the indictment with sexual abuse in violation of Section 2242(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly engaged in a sexual act with [*name of victim*];

Second, [*name of victim*] was [incapable of appraising the nature of the conduct] [physically incapable of declining participation in, or communicating unwillingness to engage in that sexual act]; and

Third, the offense was committed at [*specify place of federal jurisdiction*].

In this case, "sexual act" means [*specify statutory definition*].

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

8.173 ATTEMPTED SEXUAL ABUSE— INCAPACITY OF VICTIM (18 U.S.C. § 2242(2))

The defendant is charged in [Count _____ of] the indictment with attempted sexual abuse in violation of Section 2242(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to engage in a sexual act with a person who was [incapable of appraising the nature of the conduct] [physically incapable of declining participation in or communicating unwillingness to engage in that sexual act];

Second, the defendant did something that was a substantial step toward committing the crime of sexual abuse; and

Third, the offense was committed at [*specify place of federal jurisdiction*].

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

In this case, "sexual act" means [*specify statutory definition*].

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

"[A] person may be convicted of an attempt to commit a crime even though that person may have actually completed the crime." *United States v. Rivera-Relle*, 333 F.3d 914, 921 (9th Cir.), *cert. denied*, 540 U.S. 977 (2003).

"To constitute a substantial step toward the commission of a crime, the defendant's conduct must (1) advance the criminal purpose charged, and (2) provide some verification of the existence of that purpose." *United States v. Goetzke*, 494 F.3d 1231, 1235 (9th Cir. 2007). Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.174 SEXUAL ABUSE OF MINOR
(18 U.S.C. § 2243(a))

The defendant is charged in [Count _____ of] the indictment with sexual abuse of a minor in violation of Section 2243(a) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly engaged in a sexual act with [*name of victim*];

Second, [*name of victim*] had reached the age of twelve years but had not yet reached the age of sixteen years;

Third, [*name of victim*] was at least four years younger than the defendant; and

Fourth, the offense was committed at [*specify place of federal jurisdiction*].

The government need not prove that the defendant knew the age of [*name of victim*] or that the defendant knew that [*name of victim*] was at least four years younger than the defendant.

In this case, "sexual act" means [*specify statutory definition*].

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

See 18 U.S.C. § 2243(d), as to the penultimate paragraph of the instruction. *See* 18 U.S.C. § 2246(2) for the definition of sexual act referred to in the last paragraph of the instruction.

Sexual abuse of a minor is not a lesser included offense of aggravated sexual assault. *United States v. Rivera*, 43 F.3d 1291, 1297 (9th Cir. 1995).

8.175 ATTEMPTED SEXUAL ABUSE OF MINOR (18 U.S.C. § 2243(a))

The defendant is charged in [Count _____ of] the indictment with attempted sexual abuse of a minor in violation of Section 2243(a) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to engage in a sexual act with [*name of victim*], who had reached the age of twelve years but had not reached the age of sixteen years;

Second, [*name of victim*] was at least four years younger than the defendant;

Third, the defendant did something that was a substantial step toward committing the crime; and

Fourth, the offense was committed at [*specify place of federal jurisdiction*].

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

The government need not prove that the defendant knew the age of [*name of victim*] or that the defendant knew that [*name of victim*] was at least four years younger than the defendant.

In this case, "sexual act" means [*specify statutory definition*].

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

See 18 U.S.C. § 2243(d), as to the penultimate paragraph of the instruction. *See* 18 U.S.C. § 2246(2) for the definition of sexual act referred to in the last paragraph of the instruction.

"[A] person may be convicted of an attempt to commit a crime even though that person may have actually completed the crime." *United States v. Rivera-Relle*, 333 F.3d 914, 921 (9th Cir.), *cert. denied*, 540 U.S. 977 (2003).

"To constitute a substantial step toward the commission of a crime, the defendant's conduct must (1) advance the criminal purpose charged, and (2) provide some verification of the existence of that purpose." *United States v. Goetzke*, 494 F.3d 1231, 1235 (9th Cir. 2007). Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.176 SEXUAL ABUSE OF PERSON IN OFFICIAL DETENTION (18 U.S.C. § 2243(b))

The defendant is charged in [Count _____ of] the indictment with sexual abuse of a person in official detention in violation of Section 2243(b) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly engaged in a sexual act with [*name of victim*];

Second, at the time, [*name of victim*] was in official detention at [*specify place of federal jurisdiction*]; and

Third, at the time [*name of victim*] was under the custodial, supervisory or disciplinary authority of the defendant.

In this case, "sexual act" means [*specify statutory definition*].

In this case, "official detention" means [*official detention definition*].

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

"Official detention" is defined in 18 U.S.C. § 2246(5).

8.177 ATTEMPTED SEXUAL ABUSE OF PERSON IN OFFICIAL DETENTION (18 U.S.C. § 2243(b))

The defendant is charged in [Count _____ of] the indictment with attempted sexual abuse of a person in official detention in violation of Section 2243(b) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to engage in a sexual act with [*name of victim*], who at the time was in official detention at [*specify place of federal jurisdiction*] and was under the custodial, supervisory, or disciplinary authority of the defendant; and

Second, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

In this case, "sexual act" means [*specify statutory definition*].

In this case, "official detention" means [*specify official detention definition*].

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

"Official detention" is defined in 18 U.S.C. § 2246(5).

"[A] person may be convicted of an attempt to commit a crime even though that person may have actually completed the crime." *United States v. Rivera-Relle*, 333 F.3d 914, 921 (9th Cir.), *cert. denied*, 540 U.S. 977 (2003).

"To constitute a substantial step toward the commission of a crime, the defendant's conduct must (1) advance the criminal purpose charged, and (2) provide some verification of the existence of that purpose." *United States v. Goetzke*, 494 F.3d 1231, 1235 (9th Cir. 2007). Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.178 SEXUAL ABUSE—DEFENSE OF REASONABLE BELIEF OF MINOR'S AGE (18 U.S.C. § 2243(c)(1))

It is a defense to the charge of [attempted] sexual abuse of a minor that the defendant reasonably believed that the minor had reached the age of sixteen. The defendant has the burden of proving that it is more probably true than not true that the defendant reasonably believed that the minor had reached the age of sixteen.

If you find that the defendant reasonably believed that the minor had reached the age of sixteen, you must find the defendant not guilty.

Comment

This defense applies only to offenses under 18 U.S.C. § 2243(a); *see* Instructions 8.174 (Sexual Abuse of Minor) and 8.175 (Attempted Sexual Abuse of Minor).

8.179 ABUSIVE SEXUAL CONTACT—GENERAL
(18 U.S.C. § 2244(a))

Comment

The offenses defined in 18 U.S.C. §§ 2241, 2242 and 2243 as sexual abuse become abusive sexual contact under 18 U.S.C. § 2244 if there was not a "sexual act" but there was a "sexual contact." Those terms are defined in Sections 2246(2) and (3). Accordingly, when it is necessary to instruct a jury on abusive sexual contact, the appropriate sexual abuse instruction should be used with "a sexual contact" substituted for "a sexual act."

Section 2244 does not make it a crime to attempt a sexual contact.

8.180 ABUSIVE SEXUAL CONTACT—WITHOUT PERMISSION (18 U.S.C. § 2244(b))

The defendant is charged in [Count _____ of] the indictment with abusive sexual contact in violation of Section 2244(b) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly had sexual contact with [*name of victim*];

Second, the sexual contact was without [*name of victim*]'s permission; and

Third, the offense was committed at [*specify place of federal jurisdiction*].

In this case, "sexual contact" means [*specify statutory definition*].

Comment

Acts that fall within the meaning of "sexual contact"are listed in 18 U.S.C. § 2246(3).

Whether the crime alleged occurred at a particular location is a question of fact. Whether the location is within the special maritime and territorial jurisdiction of the United States or a federal prison is a question of law. *See United States v. Gipe,* 672 F.2d 777, 779 (9th Cir. 1982).

"Special maritime and territorial jurisdiction of the United States" includes, to the extent permitted by international law, a crime occurring on a foreign vessel during a voyage having a scheduled departure from or arrival in the United States where the offense was committed by or against a United States national. *United States v. Neil*, 312 F.3d 419, 422 (9th Cir. 2002) (crime of sexual contact with a minor in violation of 18 U.S.C. § 2244(a) by noncitizen defendant on a cruise ship in Mexican territorial waters was within special maritime and territorial jurisdiction where ship departed from and arrived in the United States and victim was a United States citizen).

8.181 SEXUAL EXPLOITATION OF CHILD
(18 U.S.C. § 2251(a))

The defendant is charged in [Count _____ of] the indictment with sexual exploitation of a child in violation of Section 2251(a) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, at the time, [*name of victim*] was under the age of eighteen years;

Second, the defendant

> [[employed] [used] [persuaded] [coerced] [[*name of victim*]] to take part in sexually explicit conduct]
>
> *or*
>
> [had [*name of victim*] assist any other person to engage in sexually explicit conduct]
>
> *or*
>
> [transported [*name of victim*] [[across state lines] [in foreign commerce] [in any Territory or Possession of the United States]] with the intent that [*name of victim*] engage in sexually explicit conduct]

for the purpose of producing a visual depiction of such conduct; and

Third,

> [the defendant knew or had reason to know that the visual depiction would be mailed or transported across state lines or in foreign commerce.]
>
> *or*
>
> [the visual depiction was produced using materials that had been mailed, shipped, or transported across state lines or in foreign commerce.]
>
> *or*
>
> [the visual depiction was mailed or actually transported across state lines or in foreign commerce.]

In this case, "sexually explicit conduct" means [*specify statutory definition*].

In this case, "producing" means [*specify statutory definition*].

Comment

"Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

"Producing" is defined in 18 U.S.C. § 2256(3).

Knowledge of the age of the minor victim is not an element of the offense. *United States v. United States District Court,* 858 F.2d 534 (9th Cir. 1988). *See also United States v. X–Citement Video, Inc.*, 513 U.S. 64, 76 n. 5 (1994) ("[P]roducers may be convicted under § 2251(a) without proof they had knowledge of age . . .") (dicta). *But see* Instruction 8.186 (Sexual Exploitation of a Child—Defense of Reasonable Belief of Age).

Transportation in interstate or foreign commerce can be accomplished by any means, including by a computer. 18 U.S.C. § 2251(b).

See United States v McCalla, 545 F.3d 750, 753-56 (9th Cir. 2008) (applying § 2251(a) to noncommercial intrastate production did not violate the Commerce Clause; Congress had a broad interest in preventing sexual exploitation of children and it was rational that Congress would regulate intrastate production).

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. § 2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. *See United States v. Kemmish*, 120 F.3d 937, 942 (9th Cir. 1997).

The term "used" in the second element of the instruction means "to put into action or service," "to avail oneself of," or "[to] employ." *United States v. Laursen*, 847 F.3d 1026, 1032 (9th Cir. 2017).

The third element of the instruction reflects § 2251(a)'s three alternative grounds for federal jurisdiction. Only the first of the three grounds requires a particular mental state of the defendant. The "knows or has reason to know" language from the statute's first jurisdictional clause does not impute a knowledge requirement to the other two clauses. *United States v. Sheldon*, 755 F.3d 1047 (9th Cir. 2014) (testimony at trial that video recorder used in Montana was manufactured in China sufficient to satisfy jurisdictional element of § 2251(a)).

Approved 3/2017

8.182 SEXUAL EXPLOITATION OF CHILD— PERMITTING OR ASSISTING BY PARENT OR GUARDIAN (18 U.S.C. § 2251(b))

The defendant is charged in [Count _____ of] the indictment with sexual exploitation of a child in violation of Section 2251(b) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, at the time, [*name of victim*] was under the age of eighteen years;

Second, the defendant was a [parent] [legal guardian] [person having custody or control] of [*name of victim*];

Third, the defendant knowingly permitted [*name of victim*] to [engage in sexually explicit conduct] [assist any other person to engage in sexually explicit conduct] for the purpose of producing a visual depiction of such conduct; and

Fourth,

> [the defendant knew or had reason to know that the visual depiction would be mailed or transported across state lines or in foreign commerce.]
>
> *or*
>
> [the visual depiction was produced using materials that had been mailed, shipped, or transported across state lines or in foreign commerce.]
>
> *or*
>
> [the visual depiction was actually mailed or transported across state lines or in foreign commerce.]

In this case, "sexually explicit conduct" means [*specify statutory definition*].

In this case, "producing" means [*specify statutory definition*].

Comment

"Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

"Producing" is defined in 18 U.S.C. § 2256(3).

Transportation in interstate or foreign commerce can be accomplished by any means, including by a computer. 18 U.S.C. § 2251(b).

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. § 2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. *See United States v. Kemmish*, 120 F.3d 937, 942 (9th Cir. 1997).

8.183 SEXUAL EXPLOITATION OF CHILD—NOTICE OR ADVERTISEMENT SEEKING OR OFFERING (18 U.S.C. § 2251(d))

The defendant is charged in [Count _____ of] the indictment with sexual exploitation of a child in violation of Section 2251(d) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, at the time, [*name of victim*] was under the age of eighteen years;

Second, the defendant knowingly [made] [printed] [published] [caused to be made] [caused to be printed] [caused to be published] a [notice] [advertisement];

Third, the [notice] [advertisement] [[sought] [offered]]

> [to [receive] [exchange] [buy] [produce] [display] [distribute] [reproduce] any visual depiction, if the production of the visual depiction utilized [*name of victim*] engaging in sexually explicit conduct and such visual depiction is of such conduct; and]
>
> *or*
>
> [participation in any act of sexually explicit conduct [by] [with] [[*name of victim*]] for the purpose of producing a visual depiction of such conduct; and]

Fourth, the defendant knew or had reasons to know the [notice] [advertisement] would be transported across state lines or mailed, or such [notice] [advertisement] was actually transported across state lines or mailed.

In this case, "sexually explicit conduct" means [*sexually explicit conduct definition*].

In this case, "producing" means [*producing definition*].

Comment

"Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

"Producing" is defined in 18 U.S.C. § 2256(3).

"Visual depiction" is defined in 18 U.S.C. § 2256(5).

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. § 2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. *See United States v. Kemmish*, 120 F.3d 937, 942 (9th Cir. 1997).

Under 18 U.S.C. § 2251(d)(1)(A) "[t]here is no requirement that a defendant personally produce child pornography in order for criminal liability to attach." *United States v. Williams*, 660 F.3d 1223, 1225 (9th Cir. 2011).

Approved 1/2012

8.184 SEXUAL EXPLOITATION OF CHILD— TRANSPORTATION OF CHILD PORNOGRAPHY (18 U.S.C. § 2252(a)(1))

The defendant is charged in [Count _____ of] the indictment with [shipping] [transporting] child pornography in violation of Section 2252(a)(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant knowingly [transported] [shipped] a visual depiction in interstate commerce by any means, including a computer;

Second, that the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;

Third, that such visual depiction was of a minor engaged in sexually explicit conduct;

Fourth, that the defendant knew that such visual depiction was of sexually explicit conduct; and

Fifth, the defendant knew that at least one of the persons engaged in sexually explicit conduct in such visual depiction was a minor.

Comment

"Interstate commerce" is defined by 18 U.S.C. § 10.

"Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

"Producing" is defined in 18 U.S.C. § 2256(3).

"Visual depiction" is defined in 18 U.S.C. § 2256(5).

"Computer" is defined in 18 U.S.C. §§ 1030(e) and 2256(6).

Although the term "knowingly" in the text of 18 U.S.C. § 2252(a)(1) and (2) appears only to modify the act of transportation or shipment, the United States Supreme Court has held that the knowledge requirement also applies to the sexually explicit nature of the material as well as the minority status of the persons depicted. *See United States v. X–Citement Video, Inc.,* 513 U.S. 64, 78 (1994).

Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999), sets forth a legislative history of the various federal acts dealing with child pornography.

8.185 SEXUAL EXPLOITATION OF CHILD— POSSESSION OF CHILD PORNOGRAPHY (18 U.S.C. § 2252(a)(4)(B))

The defendant is charged in [Count _____ of] the indictment with possession of child pornography in violation of Section 2252(a)(4)(B) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant knowingly possessed [books] [magazines] [periodicals] [films] [video tapes] [matters] that the defendant knew contained [a] visual depiction[s] of [a] minor[s] engaged in sexually explicit conduct;

Second, the defendant knew [each] [the] visual depiction contained in the [[books] [magazines] [periodicals] [films] [video tapes] [matters]] [[was of] [showed]] [a] minor[s] engaged in sexually explicit conduct;

Third, the defendant knew that production of such [a] visual depiction[s] involved use of a minor in sexually explicit conduct; and

Fourth, that [each] [the] visual depiction had been either

a) [mailed] [shipped] [transported] in interstate or foreign commerce, or

b) produced using material that had been [mailed] [shipped] [transported] in interstate or foreign commerce [by computer [or other means]].

"Visual depiction" includes undeveloped film and video tape, and data stored on a computer disk or data stored by electronic means and capable of conversion into a visual image.

A "minor" is any person under the age of 18 years.

"Sexually explicit conduct" means actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person.

"Producing" means producing, directing, manufacturing, issuing, publishing, or advertising.

Comment

Prior to 1998, 18 U.S.C. § 2252(a)(4) required the possession of at least three visual depictions before an offense had occurred. As part of the Protection of Children From Sexual Predators Act of 1998, Congress amended section 2252(a) to prohibit possession of one visual depiction. At the same time, Congress added 18 U.S.C. § 2252(c), which provides an affirmative defense when, under certain circumstances, the defendant possessed "less than three

matters containing any visual depiction." If such a defense has been raised, care should be taken in revising the instruction so that the jury is not confused.

The definitions of "minor," "sexually explicit conduct," "producing," and "visual depiction" are derived from 18 U.S.C. § 2256(1), (2), (3) and (5), respectively. Interstate or foreign commerce is defined by 18 U.S.C. § 10. "Matter" is a physical medium capable of containing images such as a computer hard drive or disk. *United States v. Lacey*, 119 F.3d 742, 748 (9th Cir. 1997).

See Lacey, 119 F.3d at 748 (jury instruction for possession of child pornography must include as element whether defendant knew "matter" in question contained unlawful visual depictions; such depiction may be "produced" when defendant downloads visual depictions from Internet); *see also United States v. Romm,* 455 F.3d 990, 1002-05 (9th Cir. 2006).

Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999), sets forth a legislative history of the various federal acts dealing with child pornography.

The statute was unconstitutionally applied to a mother who possessed a family photo showing herself and her young daughter exposed because the photo was meant entirely for personal use, no economic or commercial use was intended, and such possession had no connection with, or effect on, the national or international commercial child pornography market. *United States v. McCoy*, 323 F.3d 1114, 1132 (9th Cir. 2003); *but see United States v. McCalla*, 545 F.3d 750, 756 (9th Cir. 2008) (holding that any reasoning in *McCoy* relying on local nature of activity was overruled by *Gonzalez v. Raich*, 545 U.S. 1 (2005).

Expert testimony is not required for the government to establish that the images depicted an actual minor (*i.e.*, that the images were not computer generated). *United States v. Salcido*, 506 F.3d 729, 733-34 (9th Cir. 2007).

Possession of materials involving the sexual exploitation of minors under § 2254(a)(4)(B) may be a lesser-included offense of receipt of such materials under § 2252(a)(2). *United States v. Schales*, 546 F.3d 966, 977 (9th Cir. 2008). However, possession of materials involving the sexual exploitation of minors under § 2254(a)(4)(B) is not a lesser-included offense of distribution of such materials under § 2252(a)(2). *See United States v. McElmurry*, 776 F.3d 1061, 1063-65 (9th Cir. 2015). When possession is charged along with either receipt or distribution and a "lesser-included offense" instruction is not given, the court should ensure that the "separate conduct" requirement under the Double Jeopardy Clause has been satisfied. This could be done either with an appropriate instruction directing that separate conduct be found or by providing the jury with a special verdict form that requires the jury to identify the conduct

supporting each conviction. *See United States v. Teague,* 722 F.3d 1187, 1193 (9th Cir. 2013)

Approved 3/2015

8.186 SEXUAL EXPLOITATION OF A CHILD— DEFENSE OF REASONABLE BELIEF OF AGE

It is a defense to a charge of sexual exploitation of a child that the defendant did not know, and could not reasonably have learned, that the child was under 18 years of age.

The defendant has the burden of proving by clear and convincing evidence—that is, that it is highly probable—that the defendant did not know and could not reasonably have learned that [*name of victim*] was under 18 years of age. Proof by clear and convincing evidence is a lower standard of proof than proof beyond a reasonable doubt.

If you find by clear and convincing evidence that the defendant did not know and could not reasonably have learned that the child was under 18 years of age, you must find the defendant not guilty of the charge of sexual exploitation of a child.

Comment

Although the statute is silent on whether reasonable mistake of age may serve as an affirmative defense, the Ninth Circuit has held that the defense is required by the First Amendment. *United States v. United States District Court,* 858 F.2d 534, 540-42 (9th Cir. 1988). The defendant must establish this defense by clear and convincing evidence. *Id.* at 543.

8.187 INTERSTATE TRANSPORTATION OF STOLEN VEHICLE, VESSEL OR AIRCRAFT (18 U.S.C. § 2312)

The defendant is charged in [Count _____ of] the indictment with transportation of a stolen [motor vehicle] [vessel] [aircraft] in [interstate] [foreign] commerce in violation of Section 2312 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the [motor vehicle] [vessel] [aircraft] was stolen;

Second, the defendant transported the [motor vehicle] [vessel] [aircraft] between [one state and another] [a foreign nation and the United States];

Third, the defendant knew the [motor vehicle] [vessel] [aircraft] had been stolen at the time defendant transported it; and

Fourth, the defendant intended to permanently or temporarily deprive the owner of ownership of the [motor vehicle] [vessel] [aircraft].

[It is not necessary that the taking of the [motor vehicle] [vessel] [aircraft] be unlawful at the time of the taking. Even if possession is lawfully acquired, the [motor vehicle] [vessel] [aircraft] will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and keeps the [motor vehicle] [vessel] [aircraft] for the defendant's own use.]

Comment

The elements stated in this instruction were expressly identified by the Ninth Circuit in *United States v. Albuquerque*; 538 F.2d 277, 278 (9th Cir. 1976).

Where a person lawfully obtains possession of a motor vehicle and later forms an intention to convert it to that person's own use, and in furtherance of that intention transports it across state boundaries, a violation of the statute has occurred. *United States v. Miles,* 472 F.2d 1145, 1146 (8th Cir. 1973).

8.188 SALE OR RECEIPT OF STOLEN VEHICLE, VESSEL OR AIRCRAFT (18 U.S.C. § 2313)

The defendant is charged in [Count _____ of] the indictment with [receiving] [possessing] [concealing] [storing] [bartering] [selling] [disposing of] a stolen [motor vehicle] [vessel] [aircraft] in violation of Section 2313 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the [motor vehicle] [vessel] [aircraft] was stolen;

Second, after being stolen, the [motor vehicle] [vessel] [aircraft] was transported in [interstate] [foreign] commerce, meaning between [one state and another] [a foreign nation and the United States];

Third, the defendant [received] [possessed] [concealed] [stored] [bartered] [sold] [disposed of] the [motor vehicle] [vessel] [aircraft] while it was in [interstate] [foreign] commerce; and

Fourth, the defendant knew that the [motor vehicle] [vessel] [aircraft] was stolen at the time [he] [she] acted.

The government need not prove the defendant knew the property was in [interstate] [foreign] commerce; it need only prove the defendant knew it was stolen.

Something enters [interstate] [foreign] commerce when its transportation begins in one [state] [country] and is intended to continue into another. Property does not continue to be in [interstate] [foreign] commerce indefinitely. It ordinarily ceases to be in [interstate] [foreign] commerce when delivered to its final destination, unless it is being held there for some improper purpose such as disguising its nature as stolen property or preparing it for re-sale as legitimate property.

Comment

An instruction which used the elements in this instruction, but compressed the first and second elements into a single element was approved in *United States v. Henderson*, 721 F.2d 662, 666 n.3 (9th Cir. 1983). Defendant's knowledge that the stolen property was in interstate commerce is not an element of the offense. *Id.* The four element format is derived from *United States v. Albuquerque*, 538 F.2d 277 (9th Cir. 1976) (stating elements of transporting a stolen motor vehicle in interstate commerce).

Whether property is in interstate commerce is a fact for the jury to determine under all of the circumstances. *Henderson*, 721 F.2d at 666. The time a stolen object remains in the destination state may indicate it has left interstate commerce, but other factors may negate this inference. For example, if a stolen item is concealed so that it may "cool off," the concealment is

an integral part of the movement in interstate commerce rather than a break in it. *United States v. Tobin,* 576 F.2d 687, 693 (5th Cir. 1978).

8.189 INTERSTATE TRANSPORTATION OF STOLEN PROPERTY (18 U.S.C. § 2314)

The defendant is charged in [Count _____ of] the indictment with the transportation of stolen property in [interstate] [foreign] commerce in violation of Section 2314 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [transported] [transmitted] [transferred] stolen [*specify property*] between [one state and another] [a foreign nation and the United States];

Second, at the time of the [*specify property*] crossed the [state] [country] border, the defendant knew it was stolen;

Third, the defendant intended to deprive the owner of the ownership of the [*specify property*] temporarily or permanently; and

Fourth, the money or property was of the value of $5,000 or more.

The government need not prove who stole the [*specify property*].

Comment

The government need not show by direct evidence that the property was stolen. *United States v. Drebin*, 557 F.2d 1316, 1328 (9th Cir. 1977).

In *United States v. Albuquerque*, 538 F.2d 277, 278 (9th Cir. 1976), it was held that one of the elements of the offense of interstate transportation of a stolen vehicle was that the defendant intended to permanently or temporarily deprive the owner of ownership.

Section 2314 creates several distinct crimes. This instruction only applies to interstate or foreign movement of stolen property.

8.190 SALE OR RECEIPT OF STOLEN GOODS, SECURITIES AND OTHER PROPERTY (18 U.S.C. § 2315)

The defendant is charged in [Count _____ of] the indictment with [receiving] [possessing] [concealing] [storing] [bartering] [selling] [disposing of] stolen [*specify stolen property*] in violation of Section 2315 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [received] [possessed] [concealed] [stored] [bartered] [sold] [disposed of] [*specify stolen property*] that had crossed a [state] [United States] boundary after having been stolen;

Second, at the time defendant did so [he] [she] knew that the [*specify stolen property*] had been stolen; and

Third, the [*specify stolen property*] was of a value of $5,000 or more.

The government need not prove defendant knew the property was in interstate commerce; it need only prove defendant knew it was stolen.

Something enters [interstate] [foreign] commerce when its transportation begins in one [state] [country] and is intended to continue into another. Property does not continue to be in [interstate] [foreign] commerce indefinitely. It ordinarily ceases to be in [interstate] [foreign] commerce when delivered to its final destination[, unless it is being held there for some improper purpose such as disguising its nature as stolen property or preparing it for re-sale as legitimate property].

Comment

See Comment to Instruction 8.188 (Sale or Receipt of Stolen Vehicle, Vessel or Aircraft (18 U.S.C. § 2313).

Section 2315 of Title 18 creates a variety of crimes in addition to those addressed in this instruction. Among them is the crime of pledging or accepting stolen property as security for a loan. When that is the crime charged, the value of the stolen property need be only $500. If one of the other crimes is charged, this Instruction should be modified.

8.191 TRANSPORTATION FOR PROSTITUTION
(18 U.S.C. § 2421)

The defendant is charged in [Count _____ of] the indictment with [transporting] [attempting to transport] a person with intent that the person engage in prostitution in violation of Section 2421 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [transported] [attempted to transport] a person in [interstate] [foreign] commerce; [and]

Second, the defendant [transported] [attempted to transport] a person with the intent that such person engage in [prostitution] [any sexual activity for which a person can be charged with a criminal offense][.] [; and]

[Third, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

Comment

For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.192 PERSUADING OR COERCING TO TRAVEL TO ENGAGE IN PROSTITUTION (18 U.S.C. § 2422(a))

The defendant is charged in [Count _____ of] the indictment with [persuading] [inducing] [enticing] [coercing] travel to engage in prostitution in violation of Section 2422 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove beyond a reasonable doubt:

[That, the defendant knowingly [persuaded] [induced] [enticed] [coerced] an individual to travel in [interstate] [foreign] commerce to engage in [prostitution] [in any sexual activity for which any person can be charged with a criminal offense].]

or

[First, the defendant knowingly attempted to [persuade] [induce] [entice] [coerce] an individual to travel in [interstate] [foreign] commerce to engage in [prostitution] [any sexual activity for which any person can be charged with a criminal offense]; and

Second, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

Comment

Both 18 U.S.C. § 2422(a) and (b) use the common terms "persuade," "induce," and "entice." Those terms "have plain and ordinary meanings within the statute, and [a] court [has] no obligation to provide further definitions." *See United States v. Dhingra*, 371 F.3d 557, 567 (9th Cir. 2004) (*Dhingra* involved a prosecution under 18 U.S.C. § 2422(b)).

The fact that women desired to leave Russia and travel to the United States did not preclude the finding that defendant persuaded, induced, enticed or coerced them to do so. *United States v. Rashkovski*, 301 F.3d 1133, 1136–37 (9th Cir. 2002). The statutory language does not require defendant to "have created out of whole cloth the women's desire to go to the United States; it merely requires that he have convinced or influenced [them] to actually undergo the journey, or made the possibility more appealing." *Id.* "[I]t is the defendant's intent that forms the basis for his criminal liability, not the victims'." *Id.* at 1137.

For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

8.193 TRANSPORTATION OF MINOR FOR PROSTITUTION (18 U.S.C. § 2423)

The defendant is charged in [Count _____ of] the indictment with transporting a minor with intent that [he] [she] engage in prostitution in violation of Section 2423 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant transported [*name of victim*] from _____ to _____;

Second, the defendant did so with the intent that [*name of victim*] engage in prostitution; and

Third, [*name of victim*] was under the age of eighteen years at the time.

Comment

It is not a defense to the crime of transporting a minor for purposes of prostitution that the defendant was ignorant of the child's age. *See United States v. Taylor*, 239 F.3d 994, 997 (9th Cir. 2001). If someone knowingly transports a person for the purposes of prostitution or another sex offense, the transporter assumes the risk that the victim is a minor, regardless of what the victim says or how the victim appears. *Id.*

8.194 FAILURE TO APPEAR
(18 U.S.C. § 3146(a)(1))

The defendant is charged in [Count _____ of] the indictment with failure to appear in violation of Section 3146(a)(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was released from custody with the requirement to appear in court or before a judicial officer on [*date*];

Second, the defendant knew of this required appearance; and

Third, the defendant intentionally failed to appear as required.

Comment

If the defendant becomes a fugitive prior to the hearing, the defendant's release is no longer pursuant to the statute. *United States v. Castaldo*, 636 F.2d 1169 (9th Cir. 1980). *But see United States v. Daniel*, 667 F.2d 783 (9th Cir. 1982).

"When a defendant engages in a course of conduct designed to avoid notice of his trial date, the government is not required to prove the defendant's actual knowledge of that date." *Weaver v. United States*, 37 F.3d 1411, 1413 (9th Cir. 1994).

"A deliberate decision to disobey the law cannot be found beyond a reasonable doubt merely from nonappearance and notice of obligation to appear." *United States v. Wilson,* 631 F.2d 118, 119 (9th Cir. 1980).

8.195 FAILURE TO SURRENDER
(18 U.S.C. § 3146(a)(2))

The defendant is charged in [Count _____ of] the indictment with failure to surrender in violation of Section 3146(a)(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was sentenced to a term of imprisonment;

Second, the defendant was ordered to surrender for service of the sentence on [*date*];

Third, the defendant knew of the order to surrender; and

Fourth, the defendant intentionally failed to surrender as ordered.

Comment

See Comment to Instruction 8.194 (Failure to Appear).

8.196 FAILURE TO APPEAR OR SURRENDER— AFFIRMATIVE DEFENSE (18 U.S.C. § 3146(c))

It is a defense to a charge of failure to [appear] [surrender] if uncontrollable circumstances prevented the person from [appearing] [surrendering]. In order to establish this defense, the defendant must prove that the following elements are more probably true than not true:

First, uncontrollable circumstances prevented the defendant from [appearing] [surrendering];

Second, the defendant did not contribute to the creation of the circumstances in reckless disregard of the requirement to [appear] [surrender]; and

Third, the defendant [appeared] [surrendered] as soon as the uncontrollable circumstances ceased to exist.

If you find that each of these elements is more probably true than not true, you must find the defendant not guilty.

Comment

See United States v. Springer, 51 F.3d 861, 866-68 (9th Cir. 1995) (discussing the "uncontrollable circumstances" prong).

9. OFFENSES UNDER OTHER TITLES

Instruction

9.1 Alien—Bringing to United States (Other than Designated Place) (8 U.S.C. § 1324(a)(1)(A)(i))
9.2 Alien—Illegal Transportation (8 U.S.C. § 1324(a)(1)(A)(ii))
9.3 Alien—Harboring (8 U.S.C. § 1324(a)(1)(A)(iii))
9.4 Alien—Encouraging Illegal Entry (8 U.S.C. § 1324(a)(1)(A)(iv))
9.5 Alien—Bringing to United States Without Authorization (8 U.S.C. § 1324(a)(2)(B))
9.6 Alien—Deported Alien Reentering United States Without Consent (8 U.S.C. § 1326(a))
9.7 Alien—Deported Alien Reentering United States Without Consent—Attempt (8 U.S.C. § 1326(a))
9.8 Alien—Deported Alien Found in United States (8 U.S.C. § 1326(a))
9.9 Securities Fraud (15 U.S.C. §§ 78j(b), 78ff; 17 C.F.R. § 240.10b-5)
9.9A Sale of Unregistered Securities
9.10 Excavating or Trafficking in Archaeological Resources (16 U.S.C. § 470ee(a), (b)(2) and (d))
9.11 Lacey Act—Import or Export of Illegally Taken Fish, Wildlife or Plants (16 U.S.C. §§ 3372 and 3373(d)(1)(A))
9.12 Lacey Act—Commercial Activity in Illegally Taken Fish, Wildlife or Plants (16 U.S.C. §§ 3372 and 3373(d)(1)(B))
9.13 Lacey Act—Defendant Should Have Known That Fish, Wildlife or Plants Were Illegally Taken (16 U.S.C. §§ 3372 and 3373(d)(2))
9.14 Lacey Act—False Labeling of Fish, Wildlife or Plants (16 U.S.C. §§ 3372(d) and 3373(d)(3))
9.15 Controlled Substance—Possession With Intent to Distribute (21 U.S.C. § 841(a)(1))
9.16 Determining Amount of Controlled Substance
9.17 Controlled Substance—Attempted Possession With Intent to Distribute (21 U.S.C. §§ 841(a)(1) and 846)
9.18 Controlled Substance—Distribution or Manufacture (21 U.S.C. § 841(a)(1))
9.19 Controlled Substance—Conspiracy to Distribute or Manufacture (21 U.S.C. §§ 841(a) and 846)
9.19A Buyer-Seller Relationship
9.20 Controlled Substance—Attempted Distribution or Manufacture (21 U.S.C. §§ 841(a)(1) and 846)
9.21 Controlled Substance—Distribution to Person Under 21 Years (21 U.S.C. §§ 841(a)(1) and 859)
9.22 Controlled Substance—Attempted Distribution to Person Under 21 Years (21 U.S.C. §§ 841(a)(1), 846 and 859)
9.23 Controlled Substance—Distribution in or Near School (21 U.S.C. §§ 841(a)(1) and 860)
9.24 Controlled Substance—Attempted Distribution in or Near School (21 U.S.C. §§ 841(a)(1), 846 and 860)
9.25 Controlled Substance—Employment of Minor to Violate Drug Law (21 U.S.C. §§ 841(a)(1) and 861(a)(1))

9.26 Controlled Substance—Attempted Employment of Minor to Violate Drug Laws (21 U.S.C. §§ 841(a)(1), 846 and 861(a)(1))
9.27 Controlled Substance—Possession of Listed Chemical With Intent to Manufacture (21 U.S.C. § 841(c)(1))
9.28 Controlled Substance—Possession or Distribution of Listed Chemical (21 U.S.C. § 841(c)(2))
9.29 Illegal Use of Communication Facility (21 U.S.C. § 843(b))
9.30 Controlled Substance—Continuing Criminal Enterprise (21 U.S.C. § 848)
9.31 Controlled Substance—Maintaining Drug-Involved Premises (21 U.S.C. § 856(a)(1))
9.32 Controlled Substance—Unlawful Importation (21 U.S.C. §§ 952 and 960)
9.33 Controlled Substance—Manufacture for Purpose of Importation (21 U.S.C. §§ 959 and 960(a)(3))
9.34 Firearms—Possession of Unregistered Firearm (26 U.S.C. § 5861(d))
9.35 Firearms—Destructive Devices—Component Parts (26 U.S.C. § 5861(d))
9.36 Firearms—Possession Without Serial Number (26 U.S.C. § 5861(i))
9.37 Attempt to Evade or Defeat Income Tax (26 U.S.C. § 7201)
9.38 Willful Failure to Pay Tax or File Tax Return (26 U.S.C. § 7203)
9.39 Filing False Tax Return (26 U.S.C. § 7206(1))
9.40 Aiding or Advising False Income Tax Return (26 U.S.C. § 7206(2))
9.41 Filing False Tax Return (Misdemeanor) (26 U.S.C. § 7207)
9.42 Willfully—Defined (26 U.S.C. §§ 7201, 7203, 7206, 7207)
9.43 Forcible or Attempted Rescue of Seized Property (26 U.S.C. § 7212(b))
9.44 Failure to Report Exporting or Importing Monetary Instruments (31 U.S.C. § 5316(a)(1))
9.45 Bulk Cash Smuggling (31 U.S.C. § 5332(a))

9.1 ALIEN—BRINGING TO THE UNITED STATES (OTHER THAN DESIGNATED PLACE) (8 U.S.C. § 1324(a)(1)(A)(i))

The defendant is charged in [Count _____ of] the indictment with [bringing] [attempting to bring] an alien to the United States in violation of Section 1324(a)(1)(A)(i) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [brought] [attempted to bring] a person who was an alien to the United States at a place other than a designated port of entry or at a place other than as designated by a United States immigration official;

Second, the defendant knew that the person was an alien; [and]

Third, the defendant acted with the intent to violate the United States immigration laws by assisting that person to enter the United States at a time or place other than as designated by a United States immigration official[.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing a crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

An alien is a person who is not a natural-born or naturalized citizen of the United States.

Comment

Bringing an alien to the United States does not require that the alien be free from official restraint as is required for offenses under 8 U.S.C. § 1326 for aliens illegally reentering or being found in the United States. *United States v. Lopez*, 484 F.3d 1186, 1193 (9th Cir. 2007); *United States v. Hernandez-Garcia*, 284 F.3d 1135, 1137-38 (9th Cir.), *cert. denied*, 537 U.S. 932 (2002); *see also* Comment to Instruction 9.6 (Alien—Deported Alien Reentering United States Without Consent).

The offense of bringing an alien to the United States is a continuing offense; "although all of the elements of the 'bringing to' offense are satisfied once the aliens cross the border, the crime does not terminate until the initial transporter who brings the aliens to the United States ceases to transport them—in other words, the offense continues until the initial transporter drops off the aliens on the U.S. side of the border." *Lopez*, 484 F.3d at 1187-88. Thereafter, the offense is illegal "transport within" the United States, 8 U.S.C. § 1324(a)(1)(A)(ii). *Id.* at 1194-98. *Lopez* overrules *United States v. Ramirez-Martinez*, 273 F.3d 903 (9th Cir. 2001) (applying immediate destination analysis of whether the alien had reached the ultimate or intended

destination within the United States); *United States v. Angwin*, 271 F.3d 786, 271 F.3d 786 (9th Cir. 2001) (same)). *Lopez* at 1191.

Aiding and abetting, involving a state-side transporter, requires proof of the specific intent to facilitate the commission of the "bringing to" offense and evidence that the state-side transporter involved himself in the bringing to offense prior to its completion. *See United States v. Singh*, 532 F.3d 1053, 1057-59 (9th Cir. 2008).

Statutory maximum sentences under § 1324 are increased for offenses causing serious bodily injury, placing the life of any person in jeopardy, or resulting in the death of a person. In such cases, a special jury finding is required.

An alien is also defined as being a person who is not a national. In the rare event that there is an issue as to the alien being a national, the definition of alien in the last paragraph of the instruction should be modified accordingly. *See* 8 U.S.C. § 1101(a)(22); *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 967-68 (9th Cir. 2003); *United States v. Sotelo*, 109 F.3d 1446, 1447-1448 (9th Cir. 1997).

For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

9.2 ALIEN—ILLEGAL TRANSPORTATION
(8 U.S.C. § 1324(a)(1)(A)(ii))

The defendant is charged in [Count _____ of] the indictment with [attempted] illegal transportation of an alien in violation of Section 1324(a)(1)(A)(ii) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [*name of alien*] was an alien;

Second, [*name of alien*] was not lawfully in the United States;

Third, the defendant [knew] [acted in reckless disregard of the fact] that [*name of alien*] was not lawfully in the United States; [and]

Fourth, the defendant knowingly [transported or moved] [attempted to transport or move] [*name of alien*] in order to help [him] [her] remain in the United States illegally[.] [; and]

[Fifth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

An alien is a person who is not a natural-born or naturalized citizen of the United States. An alien is not lawfully in this country if the person was not duly admitted by an Immigration Officer.

Comment

See Comment to Instruction 9.1 (Alien—Bringing to the United States (Other than Designated Place)).

"Reckless disregard" is not defined in Title 8, United States Code, and Ninth Circuit case law has not defined the phrase as used in this context. "Reckless disregard" has been defined by other circuits as being aware of facts which, if considered and weighed in a reasonable manner, indicate a substantial and unjustifiable risk that the alleged aliens were in fact aliens and were in the United States unlawfully. *See United States v. Zlatogur*, 271 F.3d 1025, 1029 (11th Cir. 2001), *cert. denied*, 535 U.S. 946 (2002); *United States v. Uresti-Hernandez*, 968 F.2d 1042, 1046 (10th Cir. 1992).

Statutory maximum sentences under § 1324 are increased for offenses done for commercial advantage or private financial gain, or which caused serious bodily injury, placed the life of any person in jeopardy, or resulted in the death of a person. In such cases, a special jury finding is required.

For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

If the defendant is charged with transportation of illegal aliens resulting in deaths under 8 U.S.C. § 1324(a)(1)(A)(ii) and (a)(1)(B)(iv), the government must proves beyond a reasonable doubt that the defendant's conduct was the proximate cause of the charged deaths. *United States v. Pineda-Doval*,614 F.3d 1019, 1026-28 (9th Cir. 2010). In such cases, the instruction should be modified to instruct on the proximate cause element of "resulting in death."

9.3 ALIEN—HARBORING
(8 U.S.C. § 1324(a)(1)(A)(iii))

The defendant is charged in [Count _____ of] the indictment with [attempted] harboring of an alien in violation of Section 1324(a)(1)(A)(iii) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [*name of alien*] was an alien;

Second, [*name of alien*] was not lawfully in the United States;

Third, the defendant [knew] [acted in reckless disregard of the fact] that [name of *alien*] was not lawfully in the United States; [and]

Fourth, the defendant [harbored, concealed, or shielded from detection] [attempted to harbor, conceal, or shield from detection] [*name of alien*] for the purpose of avoiding [his] [her] detection by immigration authorities[.] [; and]

[Fifth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

An alien is a person who is not a natural-born or naturalized citizen of the United States. An alien is not lawfully in this country if the person was not duly admitted by an Immigration Officer.

Comment

See Comment to Instructions 9.1 (Alien—Bringing to United States (Other than Designated Place)) and 9.2 (Alien—Illegal Transportation).

Statutory maximum sentences under § 1324 are increased for offenses done for commercial advantage or private financial gain, or which caused serious bodily injury, placed the life of any person in jeopardy, or resulted in the death of a person. In such cases, a special jury finding is required.

For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

9.4 ALIEN—ENCOURAGING ILLEGAL ENTRY
(8 U.S.C. § 1324(a)(1)(A)(iv))

The defendant is charged in [Count _____ of] the indictment with encouraging illegal entry by an alien in violation of Section 1324(a)(1)(A)(iv) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [*name of alien*] was an alien;

Second, the defendant encouraged or induced [*name of alien*] to [come to] [enter] [reside in] the United States in violation of law; and

Third, the defendant [knew] [acted in reckless disregard of the fact] that [*name of alien*]'s [coming to] [entry into] [residence in] the United States would be in violation of the law.

An alien is a person who is not a natural-born or naturalized citizen of the United States. An alien enters the United States in violation of law if not duly admitted by an Immigration Officer.

Comment

See Comment to Instructions 9.1 (Alien—Bringing to United States (Other than Designated Place)) and 9.2 (Alien—Illegal Transportation).

Statutory maximum sentences under § 1324 are increased for offenses done for commercial advantage or private financial gain, or which caused serious bodily injury, placed the life of any person in jeopardy, or resulted in the death of a person. In such cases, a special jury finding is required.

9.5 ALIEN—BRINGING TO THE UNITED STATES (WITHOUT AUTHORIZATION) (8 U.S.C. § 1324(a)(2)(B)(i)-(iii)

The defendant is charged in [Count _____ of] the indictment with [bringing] [attempting to bring] an alien to the United States [knowing] [in reckless disregard of the fact] that the alien has not received prior official authorization to [come to] [enter] [reside in] the United States. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [brought] [attempted to bring] a person who was an alien to the United States [[for the purpose of the defendant's [commercial advantage] [private gain]] [and upon arrival did not immediately bring and present the alien to an appropriate immigration official at a designated port of entry] [with the intent or with reason to believe that the alien will commit an offense against the United States or any state punishable by imprisonment for more than one year];

Second, the defendant [knew] [was in reckless disregard of the fact] that the person was an alien who had not received prior official authorization to [come to] [enter] [reside in] the United States; [and]

Third, the defendant acted with the intent to violate the United States immigration laws[.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

An alien is a person who is not a natural-born or naturalized citizen of the United States.

Comment

See Comment to Instructions 9.1 (Alien—Bringing to the United States (Other than Designated Place)) for aiding and abetting and bringing to the United States and 9.2 (Alien—Illegal Transportation) for "reckless disregard."

This is a separate crime from 8 U.S.C. § 1324(a)(1)(A)(i) (as to that statutory provision, *see* Instruction 9.1). Nevertheless, the two crimes share the same elements. Both require that the alien lack prior authorization to enter the United States, but Section 1324(a)(1)(A)(i) requires that the entry be at a place not designated as a port of entry. *United States v. Barajas-Montiel*, 185 F.3d 947, 951 (9th Cir. 1999).

The instruction should be modified to reflect which subsection in Section 1324(a)(2)(B) is charged: (i) an offense committed with the intent or with reason to believe that the alien will commit an offense against the United States or any state punishable by imprisonment for more than one year; (ii) an offense done for the purpose of commercial advantage or private financial gain or (iii) an offense in which the alien is not upon arrival immediately brought to an appropriate immigration official at a designated port of entry.

Commercial advantage or financial gain may be established under either the theory that, as a principal, the defendant acted for his own commercial advantage or financial gain or under the theory that he aided another individual in committing the crime for a pecuniary motive. *United States v. Lopez-Martinez*, 543 F.3d 509, 515-16 (9th Cir. 2008); *United States v. Munoz*, 412 F.3d 1043, 1046-47 (9th Cir. 2005); *United States v. Tsai*, 282 F.3d 690, 697 (9th Cir. 2002). If the theory of liability is aiding and abetting, the jury need not find that the defendant committed the offense for his own financial advantage. It is enough that the offense was committed for the purpose of commercial advantage and financial gain of another. *Lopez-Martinez*, 543 F.3d at 515-16. If the defendant is charged with aiding and abetting instead of as a principal, modify the first element by deleting the words "the defendant's" to reflect the offense was done "for the purpose of [commercial advantage] [private financial gain]."

Statutory maximum sentences are increased for offenses involving groups of aliens in excess of 10. 8 U.S.C. § 1324(c). In such cases, a special jury finding is required.

See Barajas–Montiel, 185 F.3d at 951-53 (holding that criminal intent is required for felony convictions under 8 U.S.C. § 1324(a) (1) and (2)(B), as distinguished from a misdemeanor offense under § 1324(a)(2)(A), where Congress eliminated *mens rea* requirement if illegal alien is brought to the United States and taken directly to INS official at a designated port of entry). This instruction may be used for a misdemeanor charge by excluding the felonies described in § 1324(a)(2)(B)(i), (ii) and (iii) in the first element and omitting the third element.

For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

9.6 ALIEN—DEPORTED ALIEN REENTERING UNITED STATES WITHOUT CONSENT (8 U.S.C. § 1326(a))

The defendant is charged in [Count _____ of] the indictment with being an alien who, after [removal] [deportation], reentered the United States in violation of Section 1326(a) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [[the defendant was [removed] [deported] from the United States]] [[the defendant departed the United States while an order of [removal] [deportation] was outstanding]];

Second, thereafter the defendant knowingly and voluntarily reentered the United States without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security, to reapply for admission into the United States; and

Third, the defendant was an alien at the time of reentry.

An alien is a person who is not a natural-born or naturalized citizen of the United States.

Comment

Section 1326 provides three separate offenses for a deported alien: to enter; to attempt to enter, and to be found in the United States without permission. *United States v. Parga-Rosas*, 238 F.3d 1209, 1213 (9th Cir. 2001). Use this instruction for "entered," Instruction 9.7 for "attempted reentry," and Instruction 9.8 for "found in."

As to the second element of this instruction, it should be noted that although 8 U.S.C. § 1326(a) provides that the statute is violated by an alien who "enters, attempts to enter, or is at any time found in, the United States, unless . . . prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented" to the alien's reapplying for admission, it is common for the charging indictment in such prosecutions to refer to the lack of consent by the Secretary of the Department of Homeland Security.

An alien has not reentered the United States for purposes of the crime of reentry of deported alien "until he or she is physically present in the country and free from official restraint." *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1191 n.3 (9th Cir. 2000) (citing *United States v. Pacheco-Medina*, 212 F.3d 1162, 1166 (9th Cir. 2000)). The government must prove that the alien had a specific intent to remain in the country free from official restraint. If there is conflicting evidence as to whether the defendant possessed any specific intention to remain free of restraint, the jury should decide the issue. *United States v. Argueta-Rosales*, 819 F.3d 1149, 1156 (9th Cir. 2016) (holding that government must prove alien had specific intention to enter country free of official restraint, when alien presented evidence that attempt to enter was based on intent to be placed into protective custody). An alien is under official restraint if, after crossing the border, he is "'deprived of his liberty and prevented from going at large within the United States.'" *United States v. Cruz-Escoto*, 476 F.3d 1081, 1185 (9th Cir.

2007) (citations omitted). An alien need not be in physical custody to be officially restrained. *Id.* (citing *United States v. Ruiz-Lopez*, 234 F.3d 445, 448 (9th Cir. 2000)). "'[R]estraint may take the form of surveillance, unbeknownst to the alien.'" *Id.* (quoting *Pacheco-Medina*, 212 F.3d at 1164). The government has the burden of proving the defendant was free from official restraint, but need not respond to a defendant's free floating speculation that he might have been observed the whole time. *United States v. Castellanos-Garcia*, 270 F.3d 773, 777 (9th Cir. 2001). When there is some evidentiary support for it, the court might consider instructing the jury on the defense of constant official restraint as follows:

THEORY OF DEFENSE

> In this case when deciding whether the defendant is guilty or not guilty of the crime of being a deported alien found in the United States, the government must prove beyond a reasonable doubt that the defendant was not under constant official restraint when [he] [she] entered the United States. If the defendant was under constant official restraint, [he] [she] cannot be found guilty of being found in the United States.
>
> "Under constant official restraint" means the defendant was under constant, continuous observation by a United States officer, either directly or by camera surveillance, from the moment [he] [she] first crossed the border and entered the territory of the United States up until the time of [his] [her] apprehension. If the individual was first observed after [he] [she] had physically crossed the border of the United States, then [he] [she] is not under constant official restraint.

In *Almendarez-Torres*, 523 U.S. 224, 244 (1998), the Supreme Court held that in a prosecution for illegal re-entry after deportation in violation of 8 U.S.C. § 1326(a), the existence of a prior aggravated felony conviction need not be alleged in the indictment and presented to the jury because the conviction constitutes a sentencing enhancement pursuant to 8 U.S.C. § 1326(b)(2) and "[a] prior felony conviction is not an element of the offense described in 8 U.S.C. § 1326(a)." *United States v. Alviso*, 152 F.3d 1195, 1199 (9th Cir. 1998). The [Supreme] Court's opinion in *Apprendi v. New Jersey*, 530 U.S. 446 (2002) expressed doubt concerning the correctness of *Almendarez-Torres*; however, the Ninth Circuit has stated that "until the Supreme Court expressly overrules it, *Almendarez-Torres* controls." *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414-415 (9th Cir. 2000).

Under § 1326(b)(1), a sentence based on a removal that was subsequent to a conviction for a felony or aggravated felony, the aggravating fact of the removal being subsequent to the conviction must be submitted to the jury. *United States v. Salazar-Lopez,* 506 F.3d 748, 751-52 (9th Cir. 2007); *see also United States v. Covian-Sandoval*, 462 F.3d 1090, 1097-98 (9th Cir. 2006) (explaining it was error for a court to find the existence of a subsequent removal that was neither proven beyond a reasonable doubt at trial nor admitted by defendant).

The instruction directs the jury that it must find the alien re-entered after having been removed from the United States. A special jury finding is required as to the date the defendant was removed from the country or that removal was subsequent to a prior conviction, unless the

temporal sequence of events is necessarily established by the evidence and jury verdict. *See United States v. Calderon-Segura*, 512 F.3d 1104, 1110-11 (9th Cir. 2008) (evidence presented of removal in 1999 and jury found defendant guilty of being deported, thereby establishing the date of removal was subsequent to a prior conviction in 1997); *see also Butler v. Curry*, 528 F.3d 624, 645 (9th Cir. 2008).

The third element, alienage, is an element of the offense that the government must prove. A defendant who contends that his or her citizenship derives from the citizenship of a parent is not raising an affirmative defense. The burden remains on the government to prove the defendant is an alien. *See United States v. Sandoval-Gonzalez*, 642 F.3d 717 (9th Cir. 2011). Alienage cannot be proven either by a prior deportation order alone or a defendant's admission of noncitizenship alone without corroborating evidence. *United States v. Gonzalez-Corn*, 807 F.3d 989 (9th Cir. 2015). These two facts taken together, however, may establish alienage. *Id*. at 996. *See id*. at 992, 996 (providing example of instruction addressing alienage).

A person who meets any of the qualifications set out in 8 U.S.C § 1401 is a national or a citizen at birth.

In the typical case the third element will turn on whether the defendant is a citizen, but in rare cases the issue could be whether the defendant is a national of the United States. *See* 8 U.S.C. § 1101(a)(22) for a definition of national of the United States. *See also Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 967-68 (9th Cir. 2003).

Approved 6/2016

9.7 DEPORTED ALIEN REENTERING UNITED STATES WITHOUT CONSENT—ATTEMPT (8 U.S.C. § 1326(a))

The defendant is charged in [Count _____ of] the indictment with being an alien who, after deportation, attempted reentry into the United States in violation of Section 1326(a) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [[the defendant was [removed] [deported] from the United States]] [[the defendant departed the United States while an order of [removal] [deportation] was outstanding]];

Second, the defendant had the conscious desire to reenter the United States without consent;

Third, the defendant was an alien at the time of the defendant's attempted reentry into the United States;

Fourth, the defendant had not obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission into the United States; and

Fifth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

An alien is a person who is not a natural-born or naturalized citizen of the United States.

Comment

See Comment to Instruction 9.6 (Alien—Deported Alien Reentering United States Without Consent).

The crime of attempted illegal reentry is a specific intent offense. *See United States v. Gracidas-Ulibarry,* 231 F.3d 1188, 1190 (9th Cir. 2000) (en banc) (discussing elements of the offense where defendant claimed he was asleep when he entered the United States). The attempt coupled with the specification of the time and place of the attempted illegal reentry may provide the requisite overt act that constitutes a substantial step toward completing the offense. *United States v. Resendiz-Ponce*, 549 U.S. 102, 107-08 (2007).

For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

9.8 ALIEN—DEPORTED ALIEN FOUND IN UNITED STATES (8 U.S.C. § 1326(a))

The defendant is charged in [Count _____ of] the indictment with being an alien who, after [removal] [deportation], was found in the United States in violation of Section 1326(a) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [[the defendant was [removed] [deported] from the United States]] [[the defendant departed the United States while an order of [removal] [deportation] was outstanding]];

Second, thereafter, the defendant voluntarily entered the United States;

Third, [[at the time of entry the defendant knew [he] [she] was entering the United States]] [[after entering the United States the defendant knew that [he] [she] was in the United States and knowingly remained]];

Fourth, the defendant was found in the United States without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission into the United States; and

Fifth, the defendant was an alien at the time of the defendant's entry into the United States.

An alien is a person who is not a natural-born or naturalized citizen of the United States.

Comment

See Comment to Instruction 9.6 (Alien—Deported Alien Reentering United States Without Consent).

In *United States v. Lopez*, 747 F.3d 1141 (9th Cir. 2014), the court cited this instruction with approval and held that if the defendant enters the United States after being denied admission, excluded, deported or removed, then it is not necessary for the government to prove the existence of an order of deportation, removal or exclusion. "[T]he order of deportation, removal, or exclusion becomes a necessary element that the government must prove beyond a reasonable doubt [only] if the alien returns after he 'has departed' on his own." *Id.* at 1145-46 (quoting 8 U.S.C. § 1326(a)(1)).

In *United States v. Salazar-Gonzalez*, 458 F.3d 851, 856 (9th Cir. 2006), *overruled on other grounds, United States v. Orozco-Acosta*, 607 F.3d 1156 (9th Cir. 2010), the court clarified "an area of confusion in our § 1326 jurisprudence" by holding "that for a defendant to be convicted of a § 1326 'found in' offense, the government must prove beyond a reasonable doubt that he entered voluntarily *and* had knowledge that he was committing the underlying act that made his conduct illegal—entering or remaining in the United States."

The legal definition of reentry is being physically present in the United States and being free from official restraint. *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1191 n.3 (9th Cir. 2000). Mere physical presence is inadequate to support a conviction for being found in the United States. *See United States v. Ruiz-Lopez*, 234 F.3d 445, 448 (9th Cir. 2000) (proof that border patrol encountered the defendant at the port of entry does not constitute adequate proof that the defendant was found in the United States free from official restraint).

Whether an alien crosses the border at a designated point of entry or elsewhere weighs on the question of official restraint. *United States v. Cruz-Escoto*, 476 F.3d 1081, 1085 (9th Cir. 2007). When an alien crosses the border at a designated point of entry and proceeds directly in the manner designated by the government where he is stopped when he presents himself to the authorities, he has not yet entered and cannot be found in the United States. *Id.* (citing *United States v. Zavala-Mendez*, 411 F.3d 1116, 1121 (9th Cir. 2005)). Aliens who sneak across the border are under official restraint only if they are under constant governmental observation from the moment they set foot in this country until the moment of their arrest. *Id.* (citing *United States v. Castellanos-Garcia*, 270 F.3d 773, 775 (9th Cir. 2001)).

Approved 6/2014

9.9 SECURITIES FRAUD
(15 U.S.C. §§ 78j(b), 78ff; 17 C.F.R. § 240.10b-5)

The defendant is charged in [Count _____ of] the indictment with securities fraud in violation of federal securities law. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant willfully [used a device or scheme to defraud someone] [made an untrue statement of a material fact] [failed to disclose a material fact that resulted in making the defendant's statements misleading] [engaged in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person];

Second, the defendant's [acts were undertaken] [statement was made] [failure to disclose was done] in connection with the [purchase] [sale] of [*specify security*];

Third, the defendant directly or indirectly used the [*specify instrument or facility*] in connection with [these acts] [making this statement] [this failure to disclose]; and

Fourth, the defendant acted knowingly.

"Willfully" means intentionally [undertaking an act] [making an untrue statement] [failing to disclose] for the wrongful purpose of defrauding or deceiving someone. Acting willfully does not require that the defendant know that the conduct was unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted willfully.

"Knowingly" means [[to make a statement or representation that is untrue and known to the defendant to be untrue] [to fail to state something that the defendant knows is necessary to make other statements true] [to make a statement with reckless disregard as to its truth or falsity] [to fail to make a statement with reckless disregard that the statement is necessary to make other statements true] in respect to a material fact] [intentional conduct that is undertaken to control or affect the price of securities]. [An act is done] [A statement is made] [A failure to disclose is done] knowingly if the defendant is aware of [the act] [making the statement] [the failure to disclose] and did not [act or fail to act] [make the statement] [fail to disclose] through ignorance, mistake or accident. The government is not required to prove that the defendant knew that [[his] [her] [acts were unlawful] [it was unlawful to make the statement] [[his] [her] failure to disclose was unlawful]. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

["Reckless" means highly unreasonable conduct that is an extreme departure from ordinary care, presenting a danger of misleading investors, which is either known to the defendant or so obvious that the defendant must have been aware of it.]

[A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making the decision to [purchase] [sell] securities.]

It is not necessary that an untrue statement passed [through] [over] the [*specify instrument or facility*] so long as the [*specify instrument or facility*] was used as a part of the [purchase] [sale] transaction.

It is not necessary that the defendant made a profit or that anyone actually suffered a loss.

Comment

"Willfully" as used in 15 U.S.C. Section 78ff(a) does not require the actor to know that the conduct was unlawful. *United States v. Tarallo*, 380 F.3d 1174, 1188 (9th Cir. 2004); *see also United States v. Reyes*, 577 F.3d 1069, 1079 (9th Cir. 2009) (jury need only find defendant acted knowing the falsification to be wrongful).

The Ninth Circuit has held reckless disregard for truth or falsity to be sufficient to sustain a conviction for securities fraud. *See United States v. Farris,* 614 F.2d 634, 638 (9th Cir. 1980); *Tarallo*, 380 F.3d at 1188 (stating that government need only prove that defendant made a false representation with reckless indifference to its falsity).

For Rule 10b-5(a) and (c) violations for schemes or practices designed to defraud investors by controlling or artificially manipulating the market, such as in "pump and dump" cases, use the bracketed language in the instruction defining "knowingly" as: "intentional conduct that is undertaken to control or affect the price of securities" and omit the paragraph as to the meaning of "to be material." Such cases may also proceed under Rule 10b-5(b) for omitting to state a material fact, *United States v. Charnay,* 537 F.2d 341, 351 (9th Cir. 1976) (failure to disclose that market prices are being artificially depressed operates as a deceit on the marketplace *and* is an omission of a material fact, which is actionable under Rule 10b-5(b)), but there must be a duty to disclose such as that arising from a fiduciary or quasi-fiduciary relationship between the defendant and his or her victim, *Chiarella v. United States*, 445 U.S. 222, 230 (1980) (error to fail to instruct the jury as to fiduciary duty).

Materiality, in the context of securities fraud, is measured by a reasonable investor standard. *United States v. Berger*, 473 F.3d 1080, 1100 (9th Cir. 2007); *Tarallo*, 380 F.3d at 1182.

Apprendi does not apply to the Section 78ff penalty provision that "no person shall be subject to imprisonment under this section for a violation of a rule or regulation if he proves that he had no knowledge of such rule or regulation" because it is an affirmative defense that may mitigate the defendant's sentence. *Tarallo*, 380 F.3d at 1192.

Depending on the facts in evidence, it may be appropriate to amend this instruction with language requiring specific jury unanimity. *See* Instruction 7.9 (Specific Issue Unanimity). *See, e.g., United States v. Weiner*, 578 F.2d 757, 788 (9th Cir. 1978) (explaining the distinction between the scheme to defraud, which is the theory of liability under Rule 10b-5, and the means adopted to effectuate the scheme; unanimity is required for the former, but not the latter); *United States v. Lyons*, 472 F.3d 1055, 1068 (9th Cir. 2007) (finding no need for unanimity instruction where there is simply more than one alleged false promise).

Approved 4/2011

9.9A SALE OF UNREGISTERED SECURITIES

The defendant is charged in [Count _____ of] the indictment with the sale or delivery after sale of unregistered securities in violation of federal securities law. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that the securities that the defendant sold were not registered with the Securities and Exchange Commission;

Second, that the securities sold were required to be registered with the Securities and Exchange Commission—that is, that the transactions were not exempt from registration;

Third, that, knowing the shares were not registered and not exempt, the defendant willfully sold or caused the shares to be sold to the public; and

Fourth, that the defendant knowingly, directly or indirectly, used or caused to be used the mails or the means and instrumentalities of interstate commerce to sell the stock.

Comment

This instruction is for use in any case involving a violation of 15 U.S.C. §§ 77e and 77x, involving the offer or sale of an unregistered security in interstate commerce.

"To establish a prima facie case for violation of Section 5, the [government] must show that (1) no registration statement was in effect as to the securities; (2) the defendant directly or indirectly sold or offered to sell securities; and (3) the sale or offer was made through interstate commerce." *SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1255 (9th Cir. 2013) (citing *SEC v. Phan*, 500 F.3d 895, 902 (9th Cir. 2007)).

"'Once the [government] introduces evidence that a defendant has violated the registration provisions, the defendant then has the burden of proof in showing entitlement to an exemption.'" *CMKM Diamonds, Inc.*, 729 F.3d at 1255 (quoting *SEC v. Murphy*, 626 F.2d 633, 641 (9th Cir. 1980)). Exemptions to 15 U.S.C. § 77e are listed in 15 U.S.C. § 77d. "Exemptions from registration provisions are construed narrowly 'in order to further the purpose of the Act: To provide full and fair disclosure of the character of the securities, and to prevent frauds in the sale thereof.'" *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1086 (9th Cir. 2010) (quoting *SEC v. Murphy*, 626 F.2d 633, 641 (9th Cir. 1980)).

Scienter is not an element of liability for civil enforcement of 15 U.S.C. § 77e. *See Aaron v. Sec. & Exch. Comm'n*, 446 U.S. 680, 714 n.5 (1980) ("The prohibition in § 5 of the 1933 Act, 15 U.S.C. § 77e, against selling securities without an effective registration statement has been interpreted to require no showing of scienter."). However, a criminal prosecution under 15 U.S.C. § 77x for the violation of § 77e requires a showing that the sale or offer of unregistered securities was done "willfully." "Willfully" in this context does not require that

the actor know specifically that the conduct was unlawful. *See United States v. Lloyd*, 807 F.3d 1128, 1166 (9th Cir. 2015).

Approved 3/2016

9.10 EXCAVATING OR TRAFFICKING IN ARCHAEOLOGICAL RESOURCES (16 U.S.C. § 470ee(a), (b)(2) and (d))

The defendant is charged in [Count _____ of] the indictment with [excavating] [trafficking in] archaeological resources in violation of Section 470ee(b)(2) and (d) of Title 16 the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

[First, the defendant knowingly [[excavated] [removed] [damaged] [altered] [defaced]] [*specify archaeological resource*] knowing that it was of archaeological interest and at least 100 years of age;]

or

[First, the defendant knowingly [[sold] [purchased] [exchanged] [transported] [received] [offered to sell] [offered to purchase] [offered to exchange]] [*specify archaeological resource*] knowing that it was of archaeological interest and at least 100 years of age;]

Second, the [*specify archaeological resource*] was [[located on] [removed from]] [*specify public or Indian lands*]; and

Third, the defendant acted without a permit to do so from [*specify federal land manager*].

The government is not required to prove that the defendant knew that the [*specify archaeological resource*] was [[located on] [removed from]] [public] [Indian] land.

Comment

A felony prosecution under the Archaeological Resources Protection Act requires proof that the defendant knew, or at least had reason to know, that the object taken is an "archaeological resource"; otherwise, the offense is a misdemeanor and knowledge that the object is of archaeological interest is not an element. *United States v. Lynch*, 233 F.3d 1139, 1145-46 (9th Cir. 2000) (discussing prosecution under 16 U.S.C. § 470ee(a)).

Knowledge that the archaeological resource was on government land is not an element of the offense, only a jurisdictional prerequisite for prosecution. *Cf. United States v. Howey,* 427 F.2d 1017 (9th Cir. 1970) (holding that a defendant's knowledge of government ownership of property is not an element of the offense of theft of government property under 18 U.S.C. § 641).

Statutory maximum sentences are increased for offenses if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of $500. If the value of the resource is disputed, the jury should be instructed to make a finding of whether the value was more than $500. Archaeological value is what it would have cost the United States to engage in a full-blown

archaeological dig to recover the archaeological information protected by the Act. *United States v. Ligon*, 440 F.3d 1182, 1185 (9th Cir. 2006).

For a definition of "archaeological resource," see 16 U.S.C. § 470bb(1). As to obtaining a permit from a federal land manager, see 16 U.S.C. § 470cc.

9.11 LACEY ACT—IMPORT OR EXPORT OF ILLEGALLY TAKEN FISH, WILDLIFE OR PLANTS (16 U.S.C. §§ 3372 and 3373(d)(1)(A))

The defendant is charged in [Count _____ of] the indictment with violating Sections 3372 and 3373 of Title 16 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [[imported] [exported]] [[fish] [wildlife] [plants]]; and

Second, the defendant knew that the [[imported] [exported]] [[fish] [wildlife] [plants]] had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under [United States law] [United States regulations] [United States treaties] [tribal law].

A defendant acts knowingly if [he] [she] is aware of the conduct and does not act through ignorance, mistake or accident. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Comment

This instruction is for use in any case involving a violation of 16 U.S.C. § 3373(d)(1)(A) for the illegal importing or exporting of fish, wildlife or plants. Under that section of the Lacey Act, criminal liability is premised on a finding of a violation of one of the subsections of 16 U.S.C. § 3372. For violations of § 3373(d)(1)(B), *see* Instruction 9.12. For violations of § 3373(d)(2), *see* Instruction 9.13. For violations of § 3373(d)(3), *see* Instruction 9.14.

When a violation of 16 U.S.C. § 3372(a)(1) (U.S. Laws, Treaties) is alleged, use this instruction without change. For offenses under subsections (a)(2) and (a)(3) of Section 3372, the instruction should be modified as shown below.

For an alleged violation of 16 U.S.C. § 3372(a)(2)(A) (fish or wildlife taken in violation of state or foreign law), substitute the following element:

> Second, the defendant knew that the [fish] [wildlife] had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation].

For an alleged violation of 16 U.S.C. § 3372(a)(2)(B) (plants taken in violation of state or foreign law), substitute the following element:

> Second, the defendant knew that the plants had been [taken] [possessed] [transported] [sold] in violation of any [state law] [state regulation] [foreign law] [foreign regulation] that [protects plants] [[regulates [the theft of plants] [the taking of plants from a park, forest reserve, or other officially protected area] [the taking of plants without, or contrary

to, required authorization]] [without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any state or any foreign law or regulation] [in violation of any limitation under any law or regulation of any state, or under any foreign law or regulation, governing the export or transshipment of plants].

For an alleged violation of 16 U.S.C. § 3372(a)(3)(A) (fish or wildlife in special U.S. jurisdiction), substitute the following element:

Second, the defendant possessed [fish] [wildlife] within the Special Maritime and Territorial Jurisdiction of the United States;

and add a new third element:

Third, the defendant knew the [fish] [wildlife] had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation] [tribal law].

For an alleged violation of 16 U.S.C. § 3372(a)(3)(B) (plants in special U.S. jurisdiction), substitute the following element:

Second, the defendant possessed plants within the Special Maritime and Territorial Jurisdiction of the United States;

and add a third element:

Third, the defendant knew the plants had been [taken] [possessed] [transported] [sold] in violation of any [state law] [state regulation] [foreign law] [foreign regulation] that [protects plants] [[regulates [the theft of plants] [the taking of plants from a park, forest reserve, or other officially protected area] [the taking of plants without, or contrary to, required authorization]] [without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any state or any foreign law or regulation] [in violation of any limitation under any law or regulation of any state, or under any foreign law or regulation, governing the export or transshipment of plants].

When a violation of 16 U.S.C. § 3372(a)(2) is involved, consult 18 U.S.C. § 10 for a definition of interstate commerce or foreign commerce.

When a violation of 16 U.S.C. § 3372(a)(3) is involved, consult 18 U.S.C. § 7 for a definition of special maritime and territorial jurisdiction of the United States.

The requirement that the defendant knew that the wildlife was possessed in violation of "a particular law" is not an element of the offense. *See, for example, United States v. Santillan*, 243 F.3d 1125, 1129 (9th Cir. 2001) (concluding that the Lacey Act does not require knowledge of the particular law violated by the possession or other predicate act, so long as the defendant knows of the unlawful possession).

"[A]ny foreign law" in the Lacey Act includes foreign regulations, even those based upon foreign laws invalidated by the foreign government after the time of the offense. *United States v. Lee*, 937 F.2d 1388, 1391-93 (9th Cir. 1991).

9.12 LACEY ACT—COMMERCIAL ACTIVITY IN ILLEGALLY TAKEN FISH, WILDLIFE OR PLANTS (16 U.S.C. §§ 3372 and 3373(d)(1)(B))

The defendant is charged in [Count _____ of] the indictment with violating Sections 3372 and 3373 of Title 16 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knew that the [fish] [wildlife] [plants] had been [taken] [possessed] [transported] [sold] in violation of, or in a manner unlawful under [United States law] [United States regulations] [United States treaties] [tribal law];

Second, the market value of the [fish] [wildlife] [plants] actually [taken] [possessed] [transported] [sold] exceeded $350; and

Third, the defendant [[imported] [exported] [transported] [sold] [received] [acquired] [purchased]] [[fish] [wildlife] [plants]] by knowingly engaging in conduct that involved [its sale] [its purchase] [the offer to sell it] [the offer to purchase it] [the intent to sell it] [the intent to purchase it].

A defendant acts knowingly if [he] [she] is aware of the conduct and does not act through ignorance, mistake or accident. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Comment

This instruction is for use in any case involving a violation of 16 U.S.C. § 3373(d)(1)(B) involving the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a market value in excess of $350. Under that section of the Lacey Act, criminal liability is premised on a finding of a violation of one of the subsections of 16 U.S.C. § 3372. For violations of § 3373(d)(1)(A), *see* Instruction 9.11. For violations of § 3372(d)(2), *see* Instruction 9.13. For violations of § 3373(d)(3), *see* Instruction 9.14.

When a violation of 16 U.S.C. § 3372(a)(1) (U.S. Laws, Treaties) is alleged, use this instruction without change. For offenses under subsections (a)(2) and (a)(3) of Section 3372, the elements of the instruction should be modified as shown below.

For an alleged violation of 16 U.S.C. § 3372(a)(2)(A) (fish or wildlife taken in violation of state or foreign law), substitute the following elements:

First, the defendant knew that the [fish] [wildlife] had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation];

Third, the defendant [imported] [exported] [transported] [sold] [received] [acquired] [purchased] in interstate or foreign commerce the [fish] [wildlife] by knowingly engaging in conduct that involved [[their sale] [their purchase] [the offer to sell them] [the offer to purchase them] [the intent to sell them] [the intent to purchase them]].

For an alleged violation of 16 U.S.C. § 3372(a)(2)(B) (plants taken in violation of state or foreign law), substitute the following elements:

First, the defendant knew that the plants had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation] that [protects plants] [[regulates [the theft of plants] [the taking of plants from a park, forest reserve, or other officially protected area] [the taking of plants without, or contrary to, required authorization]] [without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any state or any foreign law or regulation] [in violation of any limitation under any law or regulation of any state, or under any foreign law or regulation, governing the export or transshipment of plants];

Third, the defendant [imported] [exported] [transported] [sold] [received] [acquired] [purchased] the plants in interstate or foreign commerce by knowingly engaging in conduct that involved the [sale] [purchase] [offer of sale] [offer to purchase] [intent to sell] [intent to purchase] the plants.

For an alleged violation of 16 U.S.C. § 3372(a)(3)(A) (fish or wildlife in special U.S. jurisdiction), substitute the following elements:

First, the defendant knew that the [fish] [wildlife] had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation] [tribal law];

Second, the market value of the [fish] [wildlife] actually [taken] [possessed] [transported] [sold] exceeded $350;

Third, the defendant, while within the special maritime and territorial jurisdiction of the United States, possessed [fish] [wildlife], knowing that it had been [taken] [possessed] [transported] [sold] in violation of any [state law] [state regulation] [foreign law] [foreign regulation] [tribal law]; and

Fourth, in possessing the [fish] [wildlife] within the special maritime and territorial jurisdiction of the United States, the defendant knowingly engaged in conduct that involved [its sale or purchase] [the offer to sell or purchase it] [the intent to sell or purchase it].

For an alleged violation of 16 U.S.C. § 3372(a)(3)(B) (plants in special maritime jurisdiction), substitute the following elements:

First, the defendant knew that the plants had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation] that [protects plants] [[regulates [the theft of plants] [the taking of plants from a park, forest reserve, or other officially protected area] [the taking of plants without, or contrary to, required authorization]] [without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any state or any foreign law or regulation] [in violation of any limitation under any law or regulation of any state, or under any foreign law or regulation, governing the export or transshipment of plants];

Second, the market value of the plants actually [taken] [possessed] [transported] [sold] exceeded $350;

Third, the defendant, while within the special maritime and territorial jurisdiction of the United States, possessed plants, knowing that they had been [taken] [possessed] [transported] [sold] in violation of any [state law] [state regulation] [foreign law] [foreign regulation] that [protects plants] [[regulates [the theft of plants] [the taking of plants from a park, forest reserve, or other officially protected area] [the taking of plants without, or contrary to, required authorization]] [without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any state or any foreign law or regulation] [in violation of any limitation under any law or regulation of any state, or under any foreign law or regulation, governing the export or transshipment of plants]; and

Fourth, in possessing the plants within the special maritime and territorial jurisdiction of the United States, the defendant knowingly engaged in conduct that involved [their sale or purchase] [the offer to sell or purchase them] [the intent to sell or purchase them].

Normally, a specific definition of market value will not be necessary. However, if special circumstances arise where such a definition would be appropriate under the facts of the case, the judge might consult *United States v. Stenberg*, 803 F.2d 422, 432–33 (9th Cir. 1986). Where the case involves purchases made by government agents it is advisable to instruct the jury that the price paid by the government agent is not conclusive evidence of the market value; market value is the price a piece of property would bring if sold on the open market between a willing buyer and seller. *Id.*; *see also United States v. Atkinson*, 966 F.2d 1270, 1273 (9th Cir. 1992) (proper method for valuing game under 16 U.S.C. § 3372(c) on guided hunt is value of offer to provide services).

See United States v. Senchenko, 133 F.3d 1153, 1156 (9th Cir. 1998) (permissible to infer commercial intent on facts presented).

"'[S]ale' for purposes of 16 U.S.C. § 3373(d)(1)(B) includes both the agreement to receive consideration for guiding or outfitting services and the actual provision of such guiding or outfitting services." *United States v. Fejes*, 232 F.3d 696, 701 (9th Cir. 2000), *cert denied*, 534 U.S. 813 (2001).

9.13 LACEY ACT—DEFENDANT SHOULD HAVE KNOWN FISH, WILDLIFE OR PLANTS WERE ILLEGALLY TAKEN (16 U.S.C. §§ 3372 and 3373(d)(2))

The defendant is charged in [Count _____ of] the indictment with violating Sections 3372 and 3373 of Title 16 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [[imported] [exported] [transported] [sold] [received] [acquired] [purchased]] [[fish] [wildlife] [plants]]; and

Second, the defendant in the exercise of due care should have known that the [fish] [wildlife] [plants] had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under [United States Law] [United States regulations] [United States treaties] [tribal law].

A defendant acts knowingly if [he] [she] is aware of the act and does not act through ignorance, mistake or accident. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Due care means that degree of care which a reasonably prudent person would exercise under the same or similar circumstances.

Comment

This instruction is for use in any case involving a violation of 16 U.S.C. § 3373(d)(2), a misdemeanor. *See United States v. Hansen–Sturm*, 44 F.3d 793, 794 (9th Cir. 1995) (describing it as a lesser included offense of the felony provisions of the Lacey Act). Liability is premised on a finding of a violation of one of the subsections of 16 U.S.C. § 3372. For violations of § 3373(d)(1)(A), *see* Instruction 9.11. For violations of §3373(d)(1)(B), *see* Instruction 9.12. For violations of § 3373(d)(3), *see* Instruction 9.14.

When a violation of 16 U.S.C. § 3372(a)(1) (U.S. Laws, Treaties) is alleged, use this instruction without change. For offenses under subsections (a)(2) and (a)(3) of Section 3372, the elements of the instruction should be modified as shown below.

For an alleged violation of 16 U.S.C. § 3372(a)(2)(A) (fish or wildlife taken in violation of state or foreign law), substitute the following elements:

First, the defendant knowingly [[imported] [exported] [transported] [sold] [received] [acquired] [purchased]] [[fish] [wildlife]] in interstate or foreign commerce; and

Second, the defendant in the exercise of due care should have known that the [fish] [wildlife] had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation].

For an alleged violation of 16 U.S.C. § 3372(a)(2)(B) (plants taken in violation of state or foreign law), substitute the following elements:

First, the defendant knowingly [imported] [exported] [transported] [sold] [received] [acquired] [purchased] plants in interstate or foreign commerce; and

Second, the defendant in the exercise of due care should have known that the plants had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation] that [protects plants] [[regulates [the theft of plants] [the taking of plants from a park, forest reserve, or other officially protected area] [the taking of plants without, or contrary to, required authorization]] [without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any state or any foreign law or regulation] [in violation of any limitation under any law or regulation of any state, or under any foreign law or regulation, governing the export or transshipment of plants].

For an alleged violation of 16 U.S.C. § 3372(a)(3)(A) (fish or wildlife in special U.S. jurisdiction), substitute the following elements:

First, while within the special maritime and territorial jurisdiction of the United States, the defendant knowingly possessed [fish] [wildlife] which had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation] [tribal law]; and

Second, in the exercise of due care the defendant should have known that the [fish] [wildlife] had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation] [tribal law].

For an alleged violation of 16 U.S.C. § 3372(a)(3)(B) (plants in special U.S. jurisdiction), substitute the following elements:

First, while within the special maritime and territorial jurisdiction of the United States, the defendant knowingly possessed plants which had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation] that [protects plants] [[regulates [the theft of plants] [the taking of plants from a park, forest reserve, or other officially protected area] [the taking of plants without, or contrary to, required authorization]] [without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any state or any foreign law or regulation] [in violation of any limitation under any law or regulation of any state, or under any foreign law or regulation, governing the export or transshipment of plants; and

Second, in the exercise of due care the defendant should have known that the plants had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under any [state law] [state regulation] [foreign law] [foreign regulation] that [protects plants] [[regulates [the theft of plants] [the taking of plants from a park, forest reserve, or other officially protected area] [the taking of plants without, or contrary to, required authorization]] [without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any state or any foreign law or regulation] [in violation of any limitation under any law or regulation of any state, or under any foreign law or regulation, governing the export or transshipment of plants].

For a discussion of due care, *see United States v. Thomas*, 887 F.2d 1341, 1346 (9th Cir. 1989).

9.14 LACEY ACT—FALSE LABELING OF FISH, WILDLIFE OR PLANTS (16 U.S.C. §§ 3372(d) and 3373(d)(3))

The defendant is charged in [Count _____ of] the indictment with violating Sections 3372 and 3373 of Title 16 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [made] [submitted] a false [[record concerning] [account concerning] [label for] [identification of]] [[fish] [wildlife] [plants]]; [and]

Second, the [[fish] [wildlife] [plants]] [[had been] [were intended to be]] [[imported] [exported] [transported] [sold] [purchased] [received] from a foreign country] [transported in interstate or foreign commerce] [; and]

[Third, the defendant's [making of] [submission of] a false [[record concerning] [account concerning] [label for] [identification of]] [[fish] [wildlife] [plants]] involved the [sale or purchase of] [offer of sale or purchase of] [commission of an act with intent to sell or purchase] the [fish] [wildlife] [plants] with a market value greater than $350].

A defendant acts knowingly if [he] [she] is aware of the act and does not act through ignorance, mistake or accident. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Comment

This instruction is for use in any case involving a violation of 16 U.S.C. § 3373(d)(3). Under that section of the Lacey Act, criminal liability is premised on a finding of a violation of 16 U.S.C. § 3372(d) (false labeling).

The third element should be added only if the defendant is accused of violating 16 U.S.C. § 3373(d)(3)(A)(ii). If the jury finds the government proved only the first and second elements, the defendant may be found guilty of 16 U.S.C. § 3373(d)(3)(A)(I) (felony importation of fish, wildlife or plants) or of 16 U.S.C. § 3373(d)(3)(B) (misdemeanor false labeling).

The scienter required for conviction under 16 U.S.C. § 3373(d)(3) requires the defendant "knowingly" violate 16 U.S.C. § 3372(d) prohibiting making or submitting a false label.

See Comment to Instruction 9.12 (Lacey Act—Commercial Activity In Illegally Taken Fish, Wildlife or Plants) concerning the need for an instruction concerning a definition of "market value."

For a definition of interstate commerce or foreign commerce, *see* 18 U.S.C. § 10.

9.15 CONTROLLED SUBSTANCE— POSSESSION WITH INTENT TO DISTRIBUTE (21 U.S.C. § 841(a)(1))

The defendant is charged in [Count _____ of] the indictment with possession of [*specify controlled substance*] with intent to distribute in violation of Section 841(a)(1) of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly possessed [*specify controlled substance*]; and

Second, the defendant possessed it with the intent to distribute it to another person.

[The government is not required to prove the amount or quantity of [*specify controlled substance*]. It need only prove beyond a reasonable doubt that there was a measurable or detectable amount of [*specify controlled substance*].]

It does not matter whether the defendant knew that the substance was [*specify controlled substance*]. It is sufficient that the defendant knew that it was some kind of a prohibited drug.

To "possess with intent to distribute" means to possess with intent to deliver or transfer possession of [*specify controlled substance*] to another person, with or without any financial interest in the transaction.

Comment

See Comment to Instruction 9.18 (Controlled Substance—Distribution or Manufacture), if death or serious bodily injury occurred.

Use the bracketed paragraph only when quantity is not at issue.

The defendant does not need to know what the controlled substance is so long as the defendant knows that he or she has possession of such a substance. *United States v. Jewell*, 532 F.2d 697, 698 (9th Cir. 1976) (en banc). *See also United States v. Soto-Zuniga*, 837 F.3d 992, 1004-05 (9th Cir.2016) (knowledge of type and quantity of drugs not element of offense).

In the aftermath of *Apprendi v. New Jersey,* 530 U.S. 466 (2000), the Ninth Circuit has held that where the amount of drugs "increases the prescribed statutory maximum penalty to which a criminal defendant is exposed," the amount of drugs must be decided by a jury beyond a reasonable doubt. *United States v. Nordby,* 225 F.3d 1053 (9th Cir. 2000), *overruled on other grounds*, *United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002) (en banc). *See also United States v. Garcia-Guizar*, 227 F.3d 1125 (9th Cir. 2000). However, the government need not prove that the defendant knew the type or quantity of controlled substance he possessed in order to obtain either a conviction under § 841(a) or a particular sentence under § 841(b). It is sufficient that the jury finds beyond a reasonable doubt that the defendant actually possessed a certain type and quantity of drugs. *United States v. Jefferson*, 791 F.3d 1013, 1015 (9th Cir.

2015) (holding in the context of a parallel statute, 21 U.S.C. § 960, that the government is not required to prove a defendant's knowledge of the type or quantity of drugs either for a conviction or for the heightened statutory penalties to apply). As a result, if applicable, the court should obtain a jury determination of the amount of drugs involved. *See also United States v. Booker*, 543 U.S. 220 (2005); *United States v. Ameline,* 409 F.3d 1073 (9th Cir. 2005) (en banc). When it is necessary to determine an amount of controlled substance, use this instruction with Instruction 9.16 (Determining Amount of Controlled Substance), together with a verdict form similar to the example provided in the Comment to Instruction 9.16. *But see United States v. Hunt*, 656 F.3d 906 (9th Cir. 2011) (discussing effect on sentencing of knowledge of type of drug in attempted possession with intent to distribute case).

The defendant may be entitled to a jury instruction on a lesser included offense of simple possession, 21 U.S.C. § 844(a). *See* Instruction 3.15. *See also United States v. Hernandez*, 476 F.3d 791, 798-800 (9th Cir. 2007).

Possession of a controlled substance with intent to distribute requires the jury to find that the defendant (1) knowingly possessed drugs and (2) possessed them with the intent to deliver them to another person. *See, for example, United States v. Orduno-Aguilera*, 183 F.3d 1138, 1140 (9th Cir. 1999); *United States v. Seley*, 957 F.2d 717, 721 (9th Cir. 1992). *See also United States v. Magallon-Jimenez,* 219 F.3d 1109, 1112 (9th Cir. 2000).

Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in *McFadden v. United States*, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug schedules—regardless of whether he knew the particular identity of the substance—or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." *Id*. at 2305.

Approved 12/2016

9.16 DETERMINING AMOUNT OF CONTROLLED SUBSTANCE

If you find the defendant guilty of the charge in [Count _____ of] the indictment, you are then to determine whether the government proved beyond a reasonable doubt that the amount of [*specify controlled substance*] equaled or exceeded [certain weights] [*insert specific threshold weight*]. Your determination of weight must not include the weight of any packaging material. Your decision as to weight must be unanimous.

The government does not have to prove that the defendant knew the quantity of [*specify controlled substance*].

Comment

When a drug conspiracy is charged, the jury may infer the agreed upon drug amount based on the conduct of the conspirators, but may not speculate as to the amount. *See United States v. Narvarrette-Aguilar*, 813 F.3d 785, 794 (9th Cir. 2015) ("Express agreement is not required; rather, agreement may be inferred from conduct.")

While quantity and drug type are not elements of controlled substance offenses, a jury must determine those facts before a sentencing enhancement based upon drug type or quantity can be applied. The Ninth Circuit has held, however, that the Government need not prove that a defendant knew either the controlled substance type or quantity in order for the enhancement to apply. *United States v. Jefferson*, 791 F.3d 1013, 1019 (9th Cir. 2015); *see also United States v. Soto-Zuniga*, 837 F.3d 992, 1004-05 (9th Cir. 2016) (knowledge of type and quantity of drugs not element of offense); *but see United States v. Hunt*, 656 F.3d 906 (9th Cir. 2011) (discussing effect on sentencing of knowledge of type of drug in attempted possession with intent to distribute case). If the charged controlled substances are not in evidence, the court should only allow the jury to use comparison drugs that are from the defendant's activity or a conspiracy in which the defendant was involved. *United States v. Lemus*, 815 F.3d 583, 591 (9th Cir. 2016) (stating that purity of controlled substances not connected to defendant could not be used to estimate purity of defendant's drugs).

When it is necessary to determine an amount of controlled substance, use this instruction with Instruction 9.15 (Controlled Substance–Possession with Intent to Distribute). The following verdict form might be considered in such a circumstance, using the item for the substance in question:

SUGGESTED VERDICT FORM

1. We, the Jury, find the defendant [*name*] NOT GUILTY or GUILTY (circle one) as charged in [Count ___ of] the indictment.

If you find the defendant not guilty, do not consider paragraph 2 below, and your presiding juror should sign and date the form. If you find the defendant guilty as charged, proceed to paragraph 2 below.

2. We, the Jury, having found the defendant guilty of the offense charged in [Count _____ of] the indictment, further unanimously find that [he] [she] [[distributed] [possessed with intent to distribute] [conspired to possess with intent to distribute]] [*specify controlled substance*] in the amount shown (place an X in the appropriate box):

[Marijuana–

(i)	Weighing 1000 kilograms or more	[ ]
(ii)	Weighing at least 100 kilograms but less than 1000 kilograms	[ ]
(iii)	Weighing less than 100 kilograms	[ ]]

[Cocaine–

(i)	Weighing 5 kilograms or more	[ ]
(ii)	Weighing at least 500 grams but less than 5 kilograms	[ ]
(iii)	Weighing less than 500 grams	[ ]]

[Cocaine base ("crack" cocaine)--

(i)	Weighing 50 grams or more	[ ]
(ii)	Weighing at least 5 grams but less than 50 grams	[ ]
(iii)	Weighing less than 5 grams	[ ]]

[A mixture and/or substance with a detectible amount of Methamphetamine–

(i)	Weighing 500 grams or more	[ ]
(ii)	Weighing at least 50 grams but less than 500 grams	[ ]
(iii)	Weighing less than 50 grams	[ ]]

[Pure Methamphetamine–

(i)	Weighing 50 grams or more	[ ]
(ii)	Weighing at least 5 grams but less than 50 grams	[ ]
(iii)	Weighing less than 5 grams	[ ]]

DATED:_____ _____

PRESIDING JUROR

Approved 12/2016

9.17 CONTROLLED SUBSTANCE— ATTEMPTED POSSESSION WITH INTENT TO DISTRIBUTE (21 U.S.C. §§ 841(a)(1) and 846)

The defendant is charged in [Count _____ of] the indictment with attempted possession of [*specify controlled substance*] with intent to distribute in violation of Sections 841(a)(1) and 846 of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to possess [*specify controlled substance*] with the intent to distribute it to another person; and

Second, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

To "possess with the intent to distribute" means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

Comment

See Comment to Instructions 9.15 (Controlled Substance–Possession with Intent to Distribute) and 9.16 (Determining Amount of Controlled Substance). *See United States v. Morales-Perez*, 467 F.3d 1219, 1222 (9th Cir. 2006) (citing *United States v. Davis*, 960 F.2d 820, 826-27 (9th Cir. 1992)); *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1228 (9th Cir. 2007) (*citing to United States v. Estrada-Macias*, 218 F.3d 1064, 1066 (9th Cir. 2000) (jury instruction requiring the government to prove that defendants knowingly associated themselves with the crime and were not mere spectators)).

The Ninth Circuit has stated, in a case in which the defendant pleaded guilty to attempted possession of a controlled substance with the intent to distribute, in violation of § 841(a), and the government sought a sentence under the heightened penalty provisions of § 841(b) based on type and quantity, that the government was required to prove the defendant's intent to possess a *particular* controlled substance. *United States v. Hunt*, 656 F.3d 906, 912-13 (9th Cir. 2011). By contrast, in a case in which the defendant pleaded guilty to actual importation of a controlled substance with the intent to distribute, in violation of § 960(a) (an analogous statute to § 841(a)), the court held that "the government need not prove that the defendant knew the precise type or quantity of drug he imported" for the heightened penalties based on drug type and quantity to apply. *United States v. Jefferson*, 791 F.3d 1013, 1019 (9th Cir. 2015); *see also United States v. Carranza*, 289 F.3d 634, 644 (9th Cir. 2002) ("A defendant charged with importing or possessing a drug is not required to know the type and amount of drug."). The Committee believes that there

may be tension between *Hunt* and *Jefferson* on the issue of a defendant's knowledge or intent regarding drug type and quantity. At least one district judge has limited the holding in *Hunt* to attempt crimes. *See United States v. Rivera*, No. 10-cr-3310-BTM, 2014 WL 3896041, at *2 (S.D. Cal., Aug. 7, 2014).

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in *McFadden v. United States*, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug schedules—regardless of whether he knew the particular identity of the substance—or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." *Id*. at 2305.

Approved 12/2015

9.18 CONTROLLED SUBSTANCE— DISTRIBUTION OR MANUFACTURE (21 U.S.C. § 841(a)(1))

The defendant is charged in [Count _____ of] the indictment with [distribution] [manufacture] of [*specify controlled substance*] in violation of Section 841(a)(1) of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [[distributed] [manufactured]] [*specify controlled substance*]; and

Second, the defendant knew that it was [*specify controlled substance*] or some other prohibited drug.

["Distributing" means delivering or transferring possession of [*specify controlled substance*] to another person, with or without any financial interest in that transaction.]

[The government is not required to prove the amount or quantity of [*specify controlled substance*]. It need only prove beyond a reasonable doubt that there was a measurable or detectable amount of [*specify controlled substance*].]

Comment

See Comment to Instructions 9.15 (Controlled Substance–Possession with Intent to Distribute) and 9.16 (Determining Amount of Controlled Substance).

A similar instruction was explicitly approved in *United States v. Houston*, 406 F.3d 1121, 1122 n.2 (9th Cir.), *cert. denied*, 546 U.S. 914 (2005).

It is also unlawful under 21 U.S.C. § 841(a)(1) to dispense or possess with intent to dispense a controlled substance. If that crime is charged, the instruction should be modified accordingly.

Several of the penalty sections for a violation of 21 U.S.C. §§ 841(a)(1), 846, 859, 860 and/or 861(a)(1) increase the sentence "if death or serious bodily injury results from the use of such [controlled] substance[s]." 21 U.S.C. §§ 841(b)(1)(A)-(C). Although the government must prove that death or serious bodily injury resulted from the use of the controlled substance for this enhancement to apply, the government need not prove that the death was a foreseeable result of the distribution of the controlled substance. *Houston*, 406 F.3d at 1124-25 ("Cause-in-fact is required by the 'results' language, but proximate cause, at least insofar as it requires that the death have been foreseeable, is not a required element.").

"[W]hen Congress made it a crime to 'knowingly. . .possess with intent to manufacture, distribute, or dispense, a controlled substance. . . , it meant to punish not only those who know they possess a controlled substance, but also those who don't know because they don't want to know." *United States v. Heredia*, 483 F.3d 913, 918 (9th Cir.) (en banc), *cert. denied*, 552 U.S. 1077 (2007). *See also* Instruction 5.7 (Deliberate Ignorance).

Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in *McFadden v. United States*, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug schedules—regardless of whether he knew the particular identity of the substance—or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." *Id*. at 2305.

Approved 9/2015

9.19 CONTROLLED SUBSTANCE— CONSPIRACY TO DISTRIBUTE OR MANUFACTURE (21 U.S.C. §§ 841(a) and 846)

The defendant is charged in [Count _____ of] the indictment with conspiracy to [[distribute] [manufacture]] [*specify controlled substance*] in violation of Section 841(a) and Section 846 of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, beginning on or about [*date*] and ending on or about [*date*], there was an agreement between two or more persons to [[distribute] [manufacture]] [*specify controlled substance*]; and

Second , the defendant joined in the agreement knowing of its purpose and intending to help accomplish that purpose.

["To distribute" means to deliver or transfer possession of [*specify controlled substance*] to another person, with or without any financial interest in that transaction.]

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object or purpose of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

Comment

This instruction is for use with Instructions 9.15, 9.16, 9.18, 9.21, 9.23, and 9.25.

Concerning the elements of the crime, *see, e.g., United States v. Reed*, 575 F. 3d 900, 923 (9th Cir. 2009).

To prove an agreement to commit a crime, it is not sufficient for the government to prove that the defendant committed the crime in question. It must prove that the defendant agreed with at least one other person to commit that crime. *United States v. Loveland*, 825 F.3d 555 (9th Cir. 2016).

See United States v. Shabani, 513 U.S. 10, 15-16 (1994), holding that in order to establish a violation of 21 U.S.C. § 846, the government is not required to prove commission of overt acts in furtherance of the conspiracy. The Court contrasted § 846, which is silent as to whether there must be an overt act, with the general conspiracy statute, 18 U.S.C. § 371, which contains the explicit requirement that a conspirator "do any act to effect the object of the conspiracy." *Id*. at 14.

Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in *McFadden v. United States*, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug schedules—regardless of whether he knew the particular identity of the substance—or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." *Id*. at 2305.

Approved 9/2015

9.19A BUYER-SELLER RELATIONSHIP

A buyer-seller relationship between a defendant and another person, standing alone, cannot support a conviction for conspiracy. The fact that a defendant may have bought [specify controlled substance] from another person or sold [specify controlled substance] to another person is not sufficient without more to establish that the defendant was a member of the charged conspiracy. Instead, a conviction for conspiracy requires proof of an agreement to commit a crime beyond that of the mere sale.

In considering whether the evidence supports the existence of a conspiracy or the existence of a buyer-seller relationship, you should consider all the evidence, including the following factors:

[(1) whether the sales were made on credit or consignment;]
[(2) the frequency of the sales;]
[(3) the quantity of the sales;]
[(4) the level of trust demonstrated between the buyer and the seller, including the use of codes;]
[(5) the length of time during which the sales were ongoing;]
[(6) whether the transactions were standardized;]
[(7) whether the parties advised each other on the conduct of the other's business;]
[(8) whether the buyer assisted the seller by looking for other customers;]
[(9) and whether the parties agreed to warn each other of potential threats from competitors or law enforcement.]

These are merely a list of relevant factors to aid you in analyzing the evidence; the presence or absence of any single factor is not determinative.

Comment

Use this instruction with Instruction 9.19 (Controlled Substance—Conspiracy to Distribute or Manufacture) if applicable.

See United States v. Moe, 781 F.3d 1120 (9th Cir. 2015) (buyer-seller instruction not required when jury instructions as a whole accurately inform jury that conspiracy cannot be found based solely on sale of drugs from one party to another. However, buyer-seller instruction might assist jury in working through fact-intensive determinations and, in certain circumstances, buyer-seller instruction might be required).

"To show a conspiracy, the government must show not only that [the seller] gave drugs to other people knowing that they would further distribute them, but also that he had an agreement with these individuals to so further distribute the drugs." *United States v. Lennick*, 18 F.3d 814, 819 (9th Cir. 1994).

The list of factors provided in this instruction is neither necessarily required nor meant to be exhaustive. *See Id.* at 1125–26. The list of factors presented to the jury should be tailored to fit the facts of the case.

Approved 6/2015

9.20 CONTROLLED SUBSTANCE— ATTEMPTED DISTRIBUTION OR MANUFACTURE (21 U.S.C. §§ 841(a)(1) and 846)

The defendant is charged in [Count _____ of] the indictment with attempted [distribution] [manufacture] of [*specify controlled substance*] in violation of Sections 841(a)(1) and 846 of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to [[distribute [*specify controlled substance*] to another person]] [[manufacture [*specify controlled substance*]];

Second, the defendant knew that it was [*specify controlled substance*] or some other prohibited drug; and

Third, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward the commission of the crime of [distribution] [manufacture] of [*specify controlled substance*]. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

["To distribute" means to deliver or transfer possession of [*specify controlled substance*] to another person, with or without any financial interest in that transaction.]

Comment

See Comment to Instructions 9.15 (Controlled Substance–Possession with Intent to Distribute), 9.16 (Determining Amount of Controlled Substance) and 9.18 (Controlled Substance–Distribution or Manufacture).

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in *McFadden v. United States*, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug schedules—regardless of whether he knew the particular identity of the substance—or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." *Id*. at 2305.

Approved 9/2015

9.21 CONTROLLED SUBSTANCE— DISTRIBUTION TO PERSON UNDER 21 YEARS (21 U.S.C. §§ 841(a)(1) and 859)

The defendant is charged in [Count _____ of] the indictment with distribution of [*specify controlled substance*] to a person under the age of 21 years in violation of Section 841(a)(1) and 859 of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly distributed [*specify controlled substance*] to [*name of underage person*];

Second, the defendant knew that it was [*specify controlled substance*] or some other prohibited drug;

Third, the defendant was at least eighteen years of age; and

Fourth, [*name of underage person*] was under twenty-one years of age.

"Distribution" means delivery or transfer of possession of [*specify controlled substance*] to another person, with or without any financial interest in that transaction.

Comment

See Comment to Instruction 9.15 (Controlled Substance–Possession with Intent to Distribute). *See also* Instruction 9.16 (Determining Amount of Controlled Substance).

Knowledge by the defendant that the person to whom the controlled substance is distributed is under twenty-one years of age is not an essential element. *United States v. Valencia–Roldan,* 893 F.2d 1080, 1083 (9th Cir. 1990).

The government is required to establish beyond a reasonable doubt that the defendant: (1) "knowingly and intentionally" (2) distributed (3) a controlled substance (4) while the defendant was over the age of 18 and (5) the victim was under the age of twenty-one. *United States v. Durham*, 464 F.3d 976, 980-81 (9th Cir. 2006).

Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in *McFadden v. United States*, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug schedules—regardless of whether he knew the particular identity of the substance—or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." *Id*. at 2305.

Approved 9/2015

9.22 CONTROLLED SUBSTANCE— ATTEMPTED DISTRIBUTION TO PERSON UNDER 21 YEARS (21 U.S.C. §§ 841(a)(1), 846 and 859)

The defendant is charged in [Count _____ of] the indictment with attempted distribution of [*specify controlled substance*] to a person under the age of twenty-one years in violation of Sections 841(a)(1), 846 and 859 of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to distribute [*specify controlled substance*] to [*name of underage person*];

Second, the defendant knew that it was [*specify controlled substance*] or some other prohibited drug;

Third, the defendant was at least eighteen years of age;

Fourth, [*name of underage person*] was under the age of twenty-one years; and

Fifth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward the commission of the crime of distribution of [*specify controlled substance*] to a person under the age of twenty-one years. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

"Distribution" means delivery or transfer of possession of [*specify controlled substance*] to another person, with or without any financial interest in that transaction.

Comment

See Comment to Instructions 9.15 (Controlled Substance–Possession with Intent to Distribute), 9.16 (Determining Amount of Controlled Substance) and 9.21 (Controlled Substance–Distribution to Person Under 21 Years).

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in *McFadden v. United States*, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug

schedules—regardless of whether he knew the particular identity of the substance—or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." *Id*. at 2305.

Approved 9/2015

9.23 CONTROLLED SUBSTANCE— DISTRIBUTION IN OR NEAR SCHOOL (21 U.S.C. §§ 841(a)(1) and 860)

The defendant is charged in [Count _____ of] the indictment with distribution of [*specify controlled substance*] in, on or within 1,000 feet of the [schoolyard] [campus] of a [school] [college] [university] in violation of Sections 841(a)(1) and 860 of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly distributed [*specify controlled substance*] to another person;

Second, the defendant knew that it was [*specify controlled substance*] or some other prohibited drug; and

Third, the distribution took place in, on or within 1,000 feet of the [schoolyard] [campus] of [*school*].

"Distribution" means delivery or transfer of possession of [*specify controlled substance*] to another person, with or without any financial interest in that transaction.

Comment

See Comment to Instructions 9.15 (Controlled Substance–Possession with Intent to Distribute) and 9.16 (Determining Amount of Controlled Substance).

The defendant's specific knowledge of the proximity of a school is not an element of the offense. *United States v. Pitts*, 908 F.2d 458, 461 (9th Cir. 1990). Distance is measured by a straight line. *United States v. Ofarril,* 779 F.2d 791, 792 (2d Cir. 1985).

Section 860 applies not only to schools, but also to playgrounds and public housing facilities. In addition, it applies to youth centers, public swimming pools and video arcades; as to these locations, the distribution must have occurred within a 100 foot radius (as opposed to a 1,000 foot radius). The instruction should be revised as necessary to match the facts of the case.

Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in *McFadden v. United States*, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug schedules—regardless of whether he knew the particular identity of the substance—or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." *Id*. at 2305.

Approved 9/2015

9.24 CONTROLLED SUBSTANCE— ATTEMPTED DISTRIBUTION IN OR NEAR SCHOOL (21 U.S.C. §§ 841(a)(1), 846 and 860)

The defendant is charged in [Count _____ of] the indictment with attempted distribution of [*specify controlled substance*] within 1,000 feet of the [schoolyard] [campus] of a [school] [college] [university] in violation of Sections 841(a)(1), 846 and 860 of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to distribute [*specify controlled substance*] to another person in, on, or within 1,000 feet of the [schoolyard] [campus] of [*name of school*];

Second, the defendant knew that it was [*specify controlled substance*] or some other prohibited drug; and

Third, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward the commission of the crime of distribution of [*specify controlled substance*] in or near a school. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances

"Distribution" means delivery or transfer of possession of [*specify controlled substance*] to another person, with or without any financial interest in that transaction.

Comment

See Comment to Instructions 9.15 (Controlled Substance–Possession with Intent to Distribute), 9.16 (Determining Amount of Controlled Substance) and 9.23 (Controlled Substance–Distribution In or Near a School).

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in *McFadden v. United States*, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug schedules—regardless of whether he knew the particular identity of the substance—or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." *Id*. at 2305.

Approved 9/2015

9.25 CONTROLLED SUBSTANCE— EMPLOYMENT OF MINOR TO VIOLATE DRUG LAWS (21 U.S.C. §§ 841(a)(1) and 861(a)(1))

The defendant is charged in [Count _____ of] the indictment with [hiring] [using] [employing] [persuading] [inducing] [enticing] [coercing] a minor to [*specify drug law violation*] in violation of Sections 841(a)(1) and 861(a)(1) of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [[hired] [used] [persuaded] [coerced] [induced] [enticed] [employed]] [*name of minor*] to [*specify drug law violation and controlled substance*];

Second, the defendant was at least eighteen years of age; and

Third, [*name of minor*] was under the age of eighteen years.

The government is not required to prove that the defendant knew the age of [*name of minor*].

Comment

The defendant's knowledge of the age of the minor is not an essential element of the offense. *United States v. Valencia–Roldan,* 893 F.2d 1080, 1083 (9th Cir. 1990). This statute creates a separate offense and is not a mere sentence enhancement. *Id.*

This instruction may be modified for use in cases arising under Sections 861(a)(2) and (3).

Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in *McFadden v. United States*, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug schedules—regardless of whether he knew the particular identity of the substance—or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." *Id*. at 2305.

Approved 9/2015

9.26 CONTROLLED SUBSTANCE— ATTEMPTED EMPLOYMENT OF MINOR TO VIOLATE DRUG LAWS (21 U.S.C. §§ 841(a)(1), 846 and 861(a)(1))

The defendant is charged in [Count _____ of] the indictment with attempted employment of a minor to [*specify drug law violation*] in violation of Sections 841(a)(1), 846 and 861(a)(1) of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intended to [[hire] [use] [persuade] [coerce] [induce] [entice] [employ]] [*name of minor*] to [*specify drug law violation and controlled substance*];

Second, the defendant was at least eighteen years of age;

Third, [*name of minor*] was under the age of eighteen years; and

Fourth, the defendant did something that was a substantial step toward committing the crime.

Mere preparation is not a substantial step toward the commission of the crime of [hiring] [using] a minor to violate the drug laws. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Comment

See Comment to Instruction 9.25 (Controlled Substance–Employment of Minor to Violate Drug Law).

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in *McFadden v. United States*, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug schedules—regardless of whether he knew the particular identity of the substance—or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." *Id*. at 2305.

Approved 9/2015

9.27 CONTROLLED SUBSTANCE— POSSESSION OF LISTED CHEMICAL WITH INTENT TO MANUFACTURE (21 U.S.C. § 841(c)(1))

The defendant is charged in [Count _____ of] the indictment with possession of a listed chemical with intent to manufacture [*specify controlled substance*] in violation of Section 841(c)(1) of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly possessed [*specify listed chemical*]; and

Second, the defendant possessed it with the intent to manufacture [*specify controlled substance*].

It does not matter whether the defendant knew that [*specify listed chemical*] was a listed chemical. It is sufficient that the defendant knew that it was to be used to manufacture [*specify controlled substance*] or some other prohibited drug.

Comment

The term "knowingly" in the first element refers only to "possessed" and not to "listed chemical." *See United States v. Estrada*, 453 F.3d 1208, 1212 (9th Cir. 2006), *cert. denied*, 549 U.S. 1137 (2007); *see also United States v. Ching Tang Lo*, 447 F.3d 1212, 1231 (9th Cir. 2006).

9.28 CONTROLLED SUBSTANCE— POSSESSION OR DISTRIBUTION OF LISTED CHEMICAL (21 U.S.C. § 841(c)(2))

The defendant is charged in [Count _____ of] the indictment with [possession] [distribution] of a listed chemical, knowing or having reasonable cause to believe it would be used to manufacture [*specify controlled substance*] in violation of Section 841(c)(2) of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [[possessed] [distributed]] [*specify listed chemical*]; and

Second, the defendant [possessed] [distributed] it knowing, or having reasonable cause to believe, that it would be used to manufacture [*specify controlled substance*].

It does not matter whether defendant knew that [*specify listed chemical*] was a listed chemical. It is sufficient that the defendant knew or had reasonable cause to believe that it would be used to manufacture [*specify controlled substance*] or some other prohibited drug.

"Reasonable cause to believe" means knowledge of facts that, although not amounting to direct knowledge, would cause a reasonable person in the defendant's position knowing the same facts, to reasonably conclude that the [*specify listed chemical*] would be used to manufacture a controlled substance. You must consider the knowledge and sophistication of the defendant when determining whether the defendant had reasonable cause to believe that the [*specify listed chemical*] would be used to manufacture [*specify controlled substance*] or some other prohibited drug.

Comment

In *United States v. Kaur*, 382 F.3d 1155, 1156 (9th Cir. 2004), the court recognized that 21 U.S.C. § 841(c)(2) ". . . clearly presents knowledge and reasonable cause to believe as two distinct alternatives" and held that the trial court fairly and accurately defined "reasonable cause to believe" as follows: "'Reasonable cause to believe' means to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person knowing the same facts, to reasonably conclude that the pseudoephedrine would be used to manufacture a controlled substance." *See United States v. Johal*, 428 F.3d 823, 825-28 (9th Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006). The "reasonable cause to believe" standard incorporates both objective and subjective elements. *Kaur*, 382 F.3d at 1157. The standard "requires a jury to evaluate scienter through the lens of the particular defendant on trial" considering "the knowledge and sophistication of the particular defendant on trial, not that of a hypothetical person before the court." *United States v. Munguia*, 704 F.3d 596, 603 (9th Cir. 2012).

See United States v. Ching Tang Lo, 447 F.3d 1212, 1231-33 (9th Cir. 2006) (mens reastandard for conspiring to aid and abet the manufacture of controlled substances).

Approved 4/2013

9.29 ILLEGAL USE OF COMMUNICATION FACILITY (21 U.S.C. § 843(b))

The defendant is charged in [Count _____ of] the indictment with illegal use of a communication facility in violation of Section 843(b) of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove beyond a reasonable doubt that the defendant knowingly or intentionally used a [a telephone] [the mail] [a radio] [a telegraph] to help bring about [*e.g.*, the conspiracy to distribute cocaine charged in Count I of the indictment].

Comment

For a definition of "knowingly," *see* Instruction 5.6 (Knowingly—Defined).

9.30 CONTROLLED SUBSTANCE—CONTINUING CRIMINAL ENTERPRISE (21 U.S.C. § 848)

The defendant is charged in [Count _____ of] the indictment with engaging in a continuing criminal enterprise in violation of Section 848 of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant committed the violation[s] of [*specify drug law violation*] [as charged in [Count[s] _____ of] the indictment];

Second, the violation[s] [was] [were] part of a series of three or more violations committed by the defendant over a definite period of time, with the jury unanimously finding that the defendant committed each of at least three such violations;

Third, the defendant committed the violations together with five or more other persons. The government does not have to prove that all five or more of the other persons operated together at the same time, or that the defendant knew all of them;

Fourth, the defendant acted as an organizer, supervisor or manager of the five or more other persons; and

Fifth, the defendant obtained substantial income or resources from the violations.

"Income or resources" means receipts of money or property.

Comment

"[A] jury in a federal criminal case brought under § 848 must unanimously agree not only that the defendant committed some 'continuing series of violations' but also that the defendant committed each of the individual 'violations' necessary to make up that 'continuing series.'" *Richardson v. United States*, 526 U.S. 813, 815 (1999); *see also United States v. Garcia*, 988 F.2d 965, 969 (9th Cir. 1993) (a general unanimity instruction is sufficient unless a "genuine possibility" of juror confusion exists), citing *United States v. Gilley*, 836 F.2d 1206, 1211-12 (9th Cir. 1988)); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1570-73 (9th Cir. 1989).

The Supreme Court has held that a § 846 drug conspiracy is a lesser included offense of a continuing criminal enterprise. *Rutledge v. United States*, 517 U.S. 292, 306-07 (1996).

To be held liable for occupying "position of organizer" and "supervisory position" within a continuing criminal enterprise, the defendant must be in position of management. *United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995); *but see United States v. Jerome*, 942 F.2d 1328, 1331 (9th Cir. 1991) (the court reversed a conviction when the jury was not properly instructed as to which of several persons could be included in the "five or more" category; ". . .we hold that on these facts where the jury had a confusing array of persons presented, some of whom could be

counted and some of whom could not be counted, it was plain error to fail to instruct the jury as to who could not count toward [defendant's] conviction of a continuing criminal enterprise.").

9.31 CONTROLLED SUBSTANCE—MAINTAINING DRUG-INVOLVED PREMISES (21 U.S.C. § 856(a)(1))

The defendant is charged in [Count _____ of] the indictment with knowingly and intentionally [opening] [leasing] [renting] [using] [maintaining] any place, whether permanently or temporarily, for the purpose of manufacturing, distributing or using a controlled substance in violation of Section 856(a)(1) of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove beyond a reasonable doubt that the defendant knowingly [opened] [maintained] a place for the purpose of [manufacturing] [distributing] [using] a controlled substance.

["For the purpose of manufacturing, distributing or using a controlled substance" means that manufacturing, distributing or using a controlled substance is one of the primary or principal uses to which the residence is put.]

"Maintaining" a place includes facts showing that over a period of time, the defendant directed the activities of and the people in the place.

Comment

In *United States v. Shetler*, 665 F.3d 1150, 1162 (9th Cir. 2011), the Ninth Circuit held that "in the residential context, the manufacture (or distribution or use) of drugs must at least be one of the primary or principal uses to which the house is put" (quoting *United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995)). *See also United States v. Mancuso*, 718 F.3d 780, 794 (9th Cir. 2013) (following *Shetler* and holding that "primary or principal use" instruction should have been used for count alleging unlawful use of dental office, as well as use of house).

See United States v. Basinger, 60 F.3d 1400, 1405-06 (9th Cir. 1995) (dominion and control over mobile home); *United States v. Ford*, 371 F.3d 550, 554-55 (9th Cir. 2004). *See also United States v. Hollis*, 490 F.3d 1149 (9th Cir. 2007).

Approved 7/2013

9.32 CONTROLLED SUBSTANCE— UNLAWFUL IMPORTATION (21 U.S.C. §§ 952 and 960)

The defendant is charged in [Count _____] of the indictment with unlawful importation of a controlled substance in violation of Sections 952 and 960 of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly brought [*specify controlled substance*] into the United States from a place outside the United States; and

Second, the defendant knew the substance he was bringing into the United States was [*specify controlled substance*] or some other prohibited drug.

[The government is not required to prove the amount or quantity of [*specify controlled substance*]. It need only prove beyond a reasonable doubt that there was a measurable or detectable amount of [*specify controlled substance*].]

It does not matter whether the defendant knew that the substance was [*specify controlled substance*]. It is sufficient that the defendant knew that it was some kind of a prohibited drug.

Comment

See Comment to Instructions 9.15 (Controlled Substance—Possession with Intent to Distribute) and 9.16 (Determining Amount of Controlled Substance).

Separate counts for different controlled substances is not multiplicitous. *United States v. Vargas-Castillo*, 329 F.3d 715, 720-22 (9th Cir.) (proper to instruct the jury that knowledge of specific types of smuggled narcotics is not required), *cert. denied*, 540 U.S. 998 (2003).

"By their very nature, 'importation' offenses and 'distribution' offenses require entirely different factual bases to justify a conviction." *United States v. Transfiguracion*, 442 F.3d 1222, 1235-36 (9th Cir. 2006).

See also United States v. Vallejo, 237 F.3d 1008, 1025 n.8 (9th Cir. 2001).

9.33 CONTROLLED SUBSTANCE— MANUFACTURE FOR PURPOSE OF IMPORTATION (21 U.S.C. §§ 959 and 960(a)(3))

The defendant is charged in [Count _____ of] the indictment with the manufacture of [*specify controlled substance*] for purposes of unlawful importation in violation of Sections 959 and 960(a)(3) of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant manufactured [*specify controlled substance*] outside of the United States; and

Second, the defendant either intended that the [*specify controlled substance*] be unlawfully brought into the United States [or into waters within a distance of 12 miles off the coast of the United States] or knew that the [*specify controlled substance*] would be unlawfully brought into the United States.

9.34 FIREARMS—POSSESSION OF UNREGISTERED FIREARM (26 U.S.C. § 5861(d))

The defendant is charged in [Count _____ of] the indictment with [possession] [receipt] of an unregistered firearm in violation of Section 5861(d) of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [[possessed] [received]] [*specify firearm*]; and

Second, the defendant was aware that the [*specify firearm*] was [*specify statutory features or characteristics of the firearm that bring it within the statute*]; and

Third, the defendant had not registered the [*specify firearm*] with the National Firearms Registration and Transfer Record.

The government need not prove that the defendant knew that possessing the firearm was illegal.

Comment

For a definition of "firearm," *see* 26 U.S.C. § 5845(a).

The government must prove that the defendant knew of those features which brought the firearm within the scope of the statute. *See Staples v. United States*, 511 U.S. 600, 619 (1994) ("[T]o obtain a conviction, the Government should have been required to prove that petitioner knew of the features of his AR-15 that brought it within the scope of the Act"); *United States v. Montoya-Gaxiola*, 796 F.3d 1118, 1122 (9th Cir. 2015) ("The law then is clear that, in order to convict under § 5861(d) . . . the Government must prove that the defendant knew the specific characteristics that made it a firearm within the Act"). The government need not prove that the defendant knew that possessing the firearm was illegal. *United States v. Summers*, 268 F.3d 683, 688 (9th Cir. 2001).

Approved 9/2015

9.35 FIREARMS—DESTRUCTIVE DEVICES—COMPONENT PARTS (26 U.S.C. § 5861(d))

The defendant is charged in [Count _____ of] the indictment with possession of an unregistered firearm—specifically, components from which a destructive device such as a bomb, grenade or mine can be readily assembled—in violation of Section 5861(d) of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly possessed components that could be readily assembled into a destructive device such as a bomb, grenade or mine;

Second, the defendant intended to use the components as a weapon; and

Third, the components were not registered to the defendant in the National Firearms Registration and Transfer Record.

Comment

The statutory definition of "destructive device" includes "any combination of parts either designed or intended for use in converting any device into a destructive device . . . and from which a destructive device may be readily assembled." 26 U.S.C. § 5845(f). For unassembled components to qualify as a "firearm" there must be proof beyond a reasonable doubt that the components were intended for use as a weapon. *United States v. Fredman,* 833 F.2d 837, 839 (9th Cir. 1987).

9.36 FIREARMS—POSSESSION WITHOUT SERIAL NUMBER (26 U.S.C. § 5861(i))

The defendant is charged in [Count _____ of] the indictment with [possession] [receipt] of a firearm without a serial number in violation of Section 5861(i) of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [possessed] [received] a [*specify firearm*]; and

Second, there was no serial number on the [*specify firearm*].

Comment

For a definition of "knowingly," *see* Instruction 5.6 (Knowingly—Defined).

For a definition of "firearm," see 26 U.S.C. § 5845(a).

9.37 ATTEMPT TO EVADE OR DEFEAT INCOME TAX (26 U.S.C. § 7201)

The defendant is charged in [Count _____ of] the indictment with [*specify charge*] in violation of Section 7201 of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant owed more federal income tax for the calendar year [*specify year*] than was declared due on the defendant's income tax return for that calendar year;

Second, the defendant knew that more federal income tax was owed than was declared due on the defendant's income tax return;

Third, the defendant made an affirmative attempt to evade or defeat such additional tax; and

Fourth, in attempting to evade or defeat such additional tax, the defendant acted willfully.

Comment

See Instruction 9.42 (Willfully—Defined) as to " willfully" in the context of prosecutions for violations of Title 26.

The elements of attempted tax evasion under 26 U.S.C. § 7201 are stated in *United States v. Kayser*, 488 F.3d 1070, 1073 (9th Cir. 2007), as follows: (1) willfulness; (2) the existence of a tax deficiency; and (3) an affirmative act constituting an evasion or attempted evasion of the tax. (citing *Sansone v. United States*, 380 U.S. 343, 351 (1965) and *United States v. Marashi*, 913 F.2d 724, 735 (9th Cir. 1990)). "A tax deficiency occurs when a defendant owes more federal income tax for the applicable tax year than was declared due on the defendant's income tax return." *Kayser*, 488 F.3d at 1073.

The first element requires the government to prove there was a tax deficiency, but the deficiency need not be "substantial." *Marashi*, 913 F.2d at 735.

"A defendant may negate the element of tax deficiency in a tax evasion case with evidence of unreported deductions." *Kayser*, 488 F.3d at 1073 (rejecting an argument that the defendant was precluded from offering evidence that is inconsistent with information that he reported on his tax returns).

When a corporation makes a distribution to a stockholder initially characterized as a dividend, that "dividend" may subsequently be legitimately characterized as a non-taxable "capital distribution" if the corporation has no earnings. *See Boulware v. United States*, 552 U.S. 421, 431 (2008).

A defendant accused of tax evasion is not entitled to a lesser included offense instruction based on § 7203 if the act constituting evasion was the filing of a false return. *Sansone*, 380 U.S. at 351. In addition, because failure to file a return is an element of a § 7203 failure to file charge, but is not an element of a § 7201 tax evasion charge, the offense of failure to file is not a lesser included offense of tax evasion. *United States v. Nichols*, 9 F.3d 1420, 1422 (9th Cir. 1993). *See* Instruction 3.14 (Lesser Included Offense), and Instruction 9.38 (Willful Failure to Pay Tax or File Tax Return).

9.38 WILLFUL FAILURE TO PAY TAX OR FILE TAX RETURN (26 U.S.C. § 7203)

The defendant is charged in [Count _____ of] the indictment with willful failure [to pay tax] [to file an income tax return] in violation of Section 7203 of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [owed taxes] [was required to file a return] [was required to keep records] [was required to supply information] for the calendar year ending December 31, [*specify year*];

Second, the defendant failed to [[pay the tax] [file an income tax return]] [[by April 15, [*specify year*]] as required by Title 26 of the United States Code; and

Third, in failing to do so, the defendant acted willfully.

Comment

See Instruction 9.42 (Willfully—Defined) as to " willfully" in the context of prosecutions for violations of Title 26.

9.39 FILING FALSE TAX RETURN
(26 U.S.C. § 7206(1))

The defendant is charged in [Count _____ of] the indictment with filing a false tax return in violation of Section 7206(1) of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant signed and filed a tax return for the year [*specify year*] that [he] [she] knew contained [false] [incorrect] information as to a material matter;

Second, the return contained a written declaration that it was being signed subject to the penalties of perjury; and

Third, in filing the false tax return, the defendant acted willfully.

A matter is material if it had a natural tendency to influence, or was capable of influencing, the decisions or activities of the Internal Revenue Service.

Comment

See Instruction 9.42 (Willfully—Defined) as to " willfully" in the context of prosecutions for violations of Title 26.

Section 7206 creates several distinct crimes. This instruction applies to § 7206(1) and should be modified if the charge arises under § 7206(3), (4), or (5). If the charge arises under § 7206(2), see Instruction 9.40 (Aiding or Advising False Income Tax Return).

False information is material if it had a natural tendency to influence or was capable of influencing or affecting the ability of the IRS to audit or verify the accuracy of the tax return or a related return. *See United States v. Gaudin*, 515 U.S. 506, 509 (1995) (material statement has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision making body to which it was addressed") (quoting *Kungys v. United States,* 485 U.S. 759, 770 (1988)); *see also United States v. Peterson*, 538 F.3d 1064, 1067 (9th Cir. 2008) (district courts should instruct on materiality "tracking the language" of *Gaudin*). A false statement "need not have actually influenced the agency, and the agency need not rely on the information in fact for it to be material." *United States v. Serv. Deli Inc.*, 151 F.3d 938, 941 (9th Cir. 1998); *see also United States v. Matsumaru*, 244 F.3d 1092, 1101 (9th Cir. 2001).

When a corporation makes a distribution to a stockholder initially characterized as a dividend, that "dividend" may subsequently be legitimately characterized as a non-taxable "capital distribution" if the corporation has no earnings. *See Boulware v. United States*, 552 U.S. 421, 431 (2008).

The tax return must have been filed. *United States v. Boitano*, 796 F.3d 1160 (9th Cir. 2015).

Approved 9/2015

9.40 AIDING OR ADVISING FALSE INCOME TAX RETURN (26 U.S.C. § 7206(2))

The defendant is charged in [Count _____ of] the indictment with [aiding] [assisting] [advising] [procuring] [counseling] the preparation of a false income tax return in violation of Section 7206(2) of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [[aided] [assisted] [advised] [procured] [counseled]] [*specify person(s)*] in the [preparation] [presentation] of an income tax return that was [false] [fraudulent];

Second, the income tax return was [false] [fraudulent] as to any material matter necessary to a determination of whether income tax was owed; and

Third, the defendant acted willfully.

The government is not required to prove that the taxpayer knew that the return was false.

A matter is material if it had a natural tendency to influence, or was capable of influencing, the decisions or activities of the Internal Revenue Service.

Comment

See Instruction 9.42 (Willfully—Defined) as to " willfully" in the context of prosecutions for violations of Title 26.

"Under § 7206(2), the government must prove that '(1) the defendant aided, assisted, or otherwise caused the preparation and presentation of a return; (2) that the return was fraudulent or false as to a material matter; and (3) the act of the defendant was willful."' *United States v. Smith*, 424 F.3d 992, 1009 (9th Cir. 2005) (quoting *United States v. Salerno,* 902 F.2d 1429, 1432 (9th Cir. 1990)).

False information is material if it had a natural tendency to influence or was capable of influencing or affecting the ability of the IRS to audit or verify the accuracy of the tax return or a related return. *See United States v. Gaudin*, 515 U.S. 506, 509 (1995) (material statement has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision making body to which it was addressed") (quoting *Kungys v. United States,* 485 U.S. 759, 770 (1988)); *see also United States v. Peterson*, 538 F.3d 1064, 1067 (9th Cir. 2008) (district courts should instruct on materiality "tracking the language" of *Gaudin*). A false statement "need not have actually influenced the agency, and the agency need not rely on the information in fact for it to be material." *United States v. Serv. Deli Inc.*, 151 F.3d 938, 941 (9th Cir. 1998); *see also United States v. Matsumaru*, 244 F.3d 1092, 1101 (9th Cir. 2001).

9.41 FILING FALSE TAX RETURN (MISDEMEANOR)
(26 U.S.C. § 7207)

The defendant is charged in [Count _____ of] the indictment with filing a false tax return in violation of Section 7207 of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [delivered] [disclosed] a tax return knowing that it contained [false] [fraudulent] information as to any material matter; and

Second, the defendant acted willfully.

A matter is material if it had a natural tendency to influence, or was capable of influencing, the decisions or activities of the Internal Revenue Service.

Comment

See Comment to Instruction 9.37 (Attempt to Evade or Defeat Income Tax).

See Instruction 9.42 (Willfully—Defined) as to " willfully" in the context of prosecutions for violations of Title 26.

False information is material if it had a natural tendency to influence or was capable of influencing or affecting the ability of the IRS to audit or verify the accuracy of the tax return or a related return. *See United States v. Gaudin*, 515 U.S. 506, 509 (1995) (material statement has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision making body to which it was addressed") (quoting *Kungys v. United States,* 485 U.S. 759, 770 (1988)); *see also United States v. Peterson*, 538 F.3d 1064, 1067 (9th Cir. 2008) (district courts should instruct on materiality "tracking the language" of *Gaudin*). A false statement "need not have actually influenced the agency, and the agency need not rely on the information in fact for it to be material." *United States v. Serv. Deli Inc.*, 151 F.3d 938, 941 (9th Cir. 1998); *see also United States v. Matsumaru*, 244 F.3d 1092, 1101 (9th Cir. 2001).

9.42 WILLFULLY—DEFINED
(26 U.S.C. §§ 7201, 7203, 7206, 7207)

In order to prove that the defendant acted "willfully," the government must prove beyond a reasonable doubt that the defendant knew federal tax law imposed a duty on [him] [her], and the defendant intentionally and voluntarily violated that duty.

[A defendant who acts on a good faith misunderstanding as to the requirements of the law does not act willfully even if [his] [her] understanding of the law is wrong or unreasonable. Nevertheless, merely disagreeing with the law does not constitute a good faith misunderstanding of the law because all persons have a duty to obey the law whether or not they agree with it. Thus, in order to prove that the defendant acted willfully, the government must prove beyond a reasonable doubt that the defendant did not have a good faith belief that [he] [she] was complying with the law.]

Comment

Sections 7201–7207 of the Internal Revenue Code use the term "willfully." In *Cheek v. United States*, 498 U.S. 192, 201 (1991), the Supreme Court set forth the following definition: "Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." This same definition applies equally to all tax offenses, misdemeanors and felonies alike. *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (citing *United States v. Bishop*, 412 U.S. 346, 359–60 (1973)). "In other words, if you know that you owe taxes and you do not pay them, you have acted willfully." *United States v. Easterday*, 564 F.3d 1004, 1006 (9th Cir. 2009). Despite earlier case law suggesting the contrary, the element of willfulness does not require that the defendant have the financial ability to pay the taxes. *Id*. at 1005 (holding that *United States v. Poll*, 521 F.2d 329 (9th Cir. 1975) is no longer controlling authority in light of intervening Supreme Court decisions). In a failure to file tax return prosecution, the government is not required to prove an intent to evade or defeat a tax, but may instead prove an intent to disobey or disregard the law, which may be the intent not to file a return, rather than the intent to evade or defeat a tax. *United States v. Meredith*, 685 F.3d 814, 826 (9th Cir. 2012).

The bracketed second paragraph of this instruction may be used when there is evidence a defendant acted on a good faith, but erroneous belief as to the requirements of the tax laws. In *United States v. Trevino*, 419 F.3d 896, 901 (9th Cir. 2005), the Ninth Circuit explained:

> The government's burden of proving willfulness requires negating [1] a defendant's claim of ignorance of the law ***or*** [2] a claim that because of a *misunderstanding of the law,* he had a *good-faith belief* that he was not violating any of the provisions of the tax laws. This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist. *Cheek v. United States,* 498 U.S. 192, 202, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) (emphasis added). . . . In order to rely on a good faith defense, the defendant must in fact have some "belief;" either that her own understanding was correct, or that she in good faith relied on

the tax advice of a qualified tax professional. *See United States v. Bishop,* 291 F.3d 1100, 1106-07 (9th Cir. 2002).

Nonetheless, Ninth Circuit precedent forecloses the argument a defendant is entitled to a separate "good faith" instruction "when the jury has been adequately instructed with regard to the intent required to be found guilty of the crime charged. . . ." *United States v. Hickey*, 580 F.3d 922, 931 (9th Cir. 2009) (no good faith instruction needed when jury properly instructed on intent to defraud).

A defendant's views regarding the validity of a tax statute is irrelevant to the issue of willfulness and, if heard, the jury should be instructed to disregard such views. *Cheek*, 498 U.S. at 202. *See also United States v. Powell*, 955 F.2d 1206, 1212 (9th Cir. 1992) (no plain error to instruct that "mere disagreement with the law, in and of itself, does not constitute good faith misunderstanding under the requirements of law[] [b]ecause it is the duty of all persons to obey the law whether or not they [agree with it].")

Willfulness is a state of mind that may be established by evidence of fraudulent acts. *United States v. Voorhies*, 658 F.2d 710, 715 (9th Cir. 1981); *United States v. Conforte,* 624 F.2d 869, 875 (9th Cir. 1980).

Approved 12/2012

9.43 FORCIBLE OR ATTEMPTED RESCUE OF SEIZED PROPERTY (26 U.S.C. § 7212(b))

The defendant is charged in [Count _____ of] the indictment with [forcibly rescuing] [attempting to rescue forcibly] seized property in violation of Section 7212(b) of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [*specify property*] was seized as authorized by the Internal Revenue Code;

Second, the defendant knew that the property had been seized as authorized by the Internal Revenue Code; and

Third, the defendant [forcibly retook] [caused to be retaken forcibly] [attempted to retake forcibly] the property without the consent of the United States.

"Forcibly" is not limited to force against persons, but includes any force that enables the defendant to retake the seized property.

[A defendant "attempts to retake" seized property where that defendant does something that is a substantial step toward retaking it. Mere preparation is not a substantial step toward the commission of attempting to rescue seized property. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.]

Comment

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

9.44 FAILURE TO REPORT EXPORTING OR IMPORTING MONETARY INSTRUMENTS (31 U.S.C. §§ 5316(a)(1), 5324(c))

The defendant is charged in [Count _____ of] the indictment with failure to report [exporting] [importing] monetary instruments in violation of Sections 5316(a)(1) and 5324(c) of Title 31 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [transported] [was about to transport] more than $10,000 in [*specify monetary instrument*] [from a place in the United States to or through a place outside the United States] [to a place in the United States from or through a place outside the United States];

Second, the defendant knew that a report of the amount [transported] [about to be transported] was required to be filed with the Secretary of Treasury; and

Third, the defendant intentionally evaded the reporting requirement.

Comment

This instruction covers a violation of 31 U.S.C. § 5316(a)(1), regarding the reporting requirement for exporting or importing monetary instruments. The reporting requirement for receipt of such instruments after their importation into the United States is codified in 31 U.S.C. § 5316(a)(2).

See Del Toro-Barboza, 673 F.3d 1136, 1144 (9th Cir. 2012) (setting forth the elements of the offense).

Knowing concealment is not an element of failure to report under 31 U.S.C. § 5316(a), but is an element of bulk cash smuggling under 31 U.S.C. § 5332(a). Therefore, where a defendant's conduct constitutes a violation of both statutory provisions, the offenses do not merge, and cumulative punishment may be imposed. *Tatoyan*, 474 F.3d at 1181–82. As to violations of § 5332(a), *see* Instruction 9.45 (Bulk Cash Smuggling).

Approved 8/2012

9.45 BULK CASH SMUGGLING
(31 U.S.C. § 5332(a))

The defendant is charged in [Count _____ of] the indictment with bulk cash smuggling in violation of Section 5332(a) of Title 31 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly concealed more than $10,000 in [*specify monetary instrument*] [[on his or her person] [in any conveyance, article of luggage, merchandise or other container]];

Second, the defendant [transported] [attempted to transport] the [*specify monetary instrument*] [[from a place within the United States to a place outside the United States] [from a place outside the United States to a place within the United States]];

Third, the defendant knew that a report of the amount concealed was required to be filed with the Secretary of Treasury; and

Fourth, the defendant intended to evade filing such a report.

The intent to evade the reporting requirement can arise at any time prior to (and including) the moment of [attempted] transportation. It is not necessary that the defendant have such intent at the time the concealment occurred.

Comment

The authority for the last paragraph in the instruction is found in *United States v. Tatoyan*, 474 F.3d 1174, 1180 (9th Cir. 2007).

The penalties set forth in 31 U.S.C. § 5322—in particular a fine of up to $250,000–do not apply unless the jury makes an additional explicit finding that the defendant acted "willfully." *Tatoyan*, 474 F.3d at 1180. Absent such a finding, the applicable penalties are found in 31 U.S.C. § 5332(b) and include a forfeiture provision, but not a fine. *Tatoyan*, 474 F.3d at 1180.