INTRODUCTION

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

The instructions in this Manual are models. They 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. *McDowell v. Calderon*, 130 F.3d 833, 840 (9th Cir. 1997). While adaptation or tailoring may be necessary to fit a particular case or changing law, the format suggested may be used in most criminal cases.

This edition of the Manual has one new feature. The Committee has renumbered the instructions by eliminating the use of numbers with more than one decimal point. To assist users, the Committee has included a table listing the old instruction numbers in the 1997 edition and the corresponding numbers in the 2000 edition.

The Committee has continued the practice of date-coding the instructions. All instructions were reviewed by the Committee for this edition, and each instruction is marked with a year indicating when the instruction was last revised (*e.g.*, "*Rev. 1997*"). Users of the Manual should check an instruction's date to determine whether an instruction has been incorporated from a prior edition.

The model instructions also are available online by accessing the "Documents" area at the Ninth Circuit's website at http://www.ce9.uscourts.gov. As instructions are revised, the Committee will post them at that site.

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 sections of the book. The Committee extends its particular thanks to Ninth Circuit staff members Robin Donoghue and Julie Cobb Martel, extern Lindsay Robbins, and former staff member Laura Ryan. The Committee also extends its thanks to former staff member Joseph Franaszek, Esq., who has voluntarily assisted the Committee after leaving federal employment. The Committee also strongly encourages users of this book to make suggestions for further revisions and updates. A suggestion form has been included in the back of this book for that purpose.

NINTH CIRCUIT JURY COMMITTEE

Judge John M. Roll, Chair
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Chief Judge Wm. Fremming Nielsen
Judge Stephen V. Wilson
Judge Thomas S. Zilly
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February 2000

JURY INSTRUCTION NUMBERS
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9.7	9.41	Failure to Report [Exporting] [Importing] Monetary Instruments (31 U.S.C. § 5316(a)).
9.8.1	9.9	Lacey Act–Import or Export of Illegally Taken Fish, Wildlife or Plants (16 U.S.C. §§ 3372 and 3373(d)(1)(A)).

9.8.2	9.10	Lacey Act–Commercial Activity in Illegally Taken Fish, Wildlife or Plants (16 U.S.C. §§ 3372 and 3373(d)(1)(B)).
9.8.3	9.11	Lacey Act–With Due Care Defendant Should Have Known That Fish, Wildlife or Plants Were Illegally Taken (16 U.S.C. §§ 3372 and 3373(d)(2)).
9.8.4	9.12	Lacey Act–False Labeling of Fish, Wildlife or Plants (16 U.S.C. §§ 3372(d) and 3373(d)(3)).

New Sections added 2/2003:

5.9 Advice of Counsel
8.166A Falsely Made Immigration Document (18 U.S.C. § 1546(a))
8.166B Fraud–Use, Possession of Immigration Document Procured by Fraud (18 U.S.C. § 1546(a))
8.166C Fraud–False Statement on Immigration Document (18 U.S.C. § 1546(a))

New Sections added 3/2003:

8.100A Hostage Taking
8.100B Seized or Detained Defined
8.101A Scheme to Defraud – Vicarious Liability

CRIMINAL INSTRUCTIONS

1. PRELIMINARY INSTRUCTIONS

Instruction

Introductory Comment.

1.1 Duty of Jury.
1.2 The Charge—Presumption of Innocence.
1.3 What Is Evidence.
1.4 What Is Not Evidence.
1.5 Evidence for Limited Purpose.
1.6 Direct and Circumstantial Evidence.
1.7 Ruling on Objections.
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1.10 No Transcript Available to Jury.
1.11 Taking Notes.
1.12 Outline of Trial.
1.13 Jury to Be Guided by Official English Translation/Interpretation.
1.14 Separate Consideration for Each Defendant.

Introductory Comment

It is within the district court's discretion to provide the jury with preliminary instructions including preliminary instructions regarding elements of the offenses charged. *United States v. Aguon*, 851 F.2d 1158, 1161 (9th Cir. 1988), *overruled on other grounds, Evans v. United States,* 504 U.S. 255 (1992). However, erroneous pretrial instructions can be the basis for appeal. Caution should therefore be used in giving preliminary instructions when there is a dispute as to applicable law. *Guam v. Ignacio*, 852 F.2d 459, 461 (9th Cir. 1988). *See also United States v. Hegwood*, 977 F.2d 492, 495 (9th Cir. 1992) (absent defense objection, correct instruction at trial cured error in preliminary instruction), *cert. denied*, 508 U.S. 913 (1993).

1.1 DUTY OF JURY

Ladies and gentlemen: 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 instructions. These are preliminary instructions. At the end of the trial I will give you more detailed instructions. Those instructions will control your deliberations.

You should 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.

1.2 THE CHARGE—PRESUMPTION OF INNOCENCE

This is a criminal case brought by the United States government. The government charges the defendant with [*crime[s] charged*]. The charge[s] against the defendant [is] [are] contained in the indictment. The indictment is simply the description of the charge[s] made by the government against the defendant; it is not evidence of anything.

[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]*]. These instructions are preliminary and the instructions I will give at the end of the case will control.]

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

Comment

The description of the offense given in this introduction instruction should not track statutory language but should be stated in plain language, avoiding the technical and repetitive language of the statute. Before giving the jury an elements instruction, counsel should be consulted.

See also JURY COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES, § 3.3 (1998).

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;

(2) the exhibits which are to be received into evidence; and

(3) any facts to which all the lawyers stipulate.

Comment

See United States v. Mikaelian, 168 F.3d 380, 389 (9th Cir.) (material facts to which the parties voluntarily stipulate are to be treated as "conclusively established") (citing *United States v. Houston,* 547 F.2d 104, 107 (9th Cir. 1976)), *amended by* 180 F.3d 1091 (9th Cir. 1999).

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. Instruction 1.7 (Ruling on Objections). *See also* Instruction 3.7 (What is Not Evidence) and Comment.

1.5 EVIDENCE FOR LIMITED PURPOSE

Some evidence is admitted for a limited purpose only. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

Comment

As a general rule, limiting instructions need only be given when requested and need not be given sua sponte by the court. *United States v. McLennan,* 563 F.2d 943, 947–48 (9th Cir. 1977), *cert. denied,* 435 U.S. 969 (1978). S*ee also United States v. Beltran,* 165 F.3d 1266, 1271-72 (9th Cir. 1999) (not plain error for court to fail to give limiting instructions regarding other act evidence), *cert. denied,* 120 S. Ct. 194 (1999); *United States v. Palmer,* 691 F.2d 921, 923 (9th Cir. 1982) (failure to give a limiting instruction sua sponte is generally not reversible error).

1.6 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. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Comment

See United States v. Gulino, 588 F.2d 256, 257–58 (9th Cir. 1978) (approving a similar instruction).

The law makes no distinction between the weight to be given to direct evidence and to circumstantial evidence. *United States v. Ramirez–Rodriquez,* 552 F.2d 883, 884 (9th Cir. 1977). S*ee also Payne v. Borg*, 982 F.2d 335, 339 (9th Cir. 1992), *cert. denied*, 450 U.S. 934 (1993) (explaining that "circumstantial evidence can be used to prove any fact, including facts from which another fact is to be inferred, and is not to be distinguished from testimonial evidence insofar as the jury's fact-finding function is concerned." (citation omitted.))

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 explain 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.

See also Instruction 3.8 (Direct and Circumstantial Evidence) for corresponding instruction to be given at the end of the case.

1.7 RULING ON OBJECTIONS

There are rules of evidence which control what can be received into evidence. When a lawyer asks a question or offers an exhibit into 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, and 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 which I told you to disregard.

1.8 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 opportunity and ability of the witness to see or hear or know the things testified to;

2. the witness' memory;

3. the witness' manner while testifying;

4. the witness' interest in the outcome of the case and any bias or prejudice;

5. whether other evidence contradicted the witness' testimony;

6. the reasonableness of the witness' testimony in light of all the evidence; and

7. 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.

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.

1.9 CONDUCT OF THE JURY

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

Until the trial is over:

First, you are not to discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else, nor are you allowed to permit others to discuss the case with you. If anyone approaches you and tries to talk to you about the case, please let me know about it immediately;

Second, do not read any news stories or articles or listen to any radio or television reports about the case or about anyone who has anything to do with it;

Third, 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;

Fourth, if you need to communicate with me simply give a signed note to the [bailiff] [clerk] [law clerk] [matron] to give to me; and

Fifth, do not make up your mind about what the verdict should be until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence. Keep an open mind until then.

Comment

An abbreviated instruction should be repeated before the first recess, and as needed before other recesses. *See* Instruction 2.1 (Cautionary Instruction at 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.) ("There is a reason that most judges continually admonish their juries during trials not to discuss the evidence or begin deliberations until told to do so, after all of the evidence, argument, and instruction on the law has been received."), *cert. denied,* 120 S. Ct. 453 (1999).

1.10 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

The previous version of this instruction has been 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 (2nd Cir.), *cert. denied*, 469 U.S. 918 (1984). *See also* JURY COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES, § 5.1.F (1998).

1.11 TAKING NOTES

If you wish, you may take notes to help you remember what witnesses said. 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 so that you do not hear other answers by witnesses. When you leave, your notes should be left in the [court room] [jury room] [envelope in the jury room].

Whether or not you take 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 the notes.

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, 1402 (9th Cir. 1993), *cert. denied*, 513 U.S. 934 (1994). *See also* JURY COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES, § 3.4 (1998).

1.12 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, the defendant may present evidence and 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.

1.13 JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION

Languages other than English may be 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 non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English [interpretation] [translation]. You must disregard any different meaning of the non-English words.

Comment

The Committee recommends that this instruction be given in every case where applicable. *See 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).

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 3.20 (Jury to be Guided by Official English Language Translation/Interpretation) to be given at the end of the case.

1.14 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 3.13 (Separate Consideration of Single Count– Multiple Defendants) and 3.14 (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

We are about to take our first break during the trial and I want to remind you of the instruction I gave you earlier. Until the trial is over, you are not to discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else, nor are you allowed to permit others to discuss the case with you. If anyone approaches you and tries to talk to you about the case, please let me know about it immediately. Do not read or listen to any news reports of the trial. Finally, you are reminded to keep an open mind until all the evidence has been received and you have heard the arguments of counsel, the instructions of the court, 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] [matron] to give to me.

I will not repeat these admonitions each time we recess or adjourn, but you will be reminded of them on such occasions.

2.2 BENCH CONFERENCES AND RECESSES

From time to time during the trial, it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury is present in the courtroom, or by calling a recess. Most often these conferences will involve determination as to whether evidence is admissible under the rules of evidence. It is appropriate to take these matters up outside the presence of the jury. Should I conclude that a more prolonged discussion is necessary I may excuse you from the courtroom.

We will, of course, 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. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

Comment

Conducting bench conferences is within the discretion of the court. Regarding the defendant's right to be present at bench conferences, *see* JURY COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES, § 1.6.A (1998) .

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

When parties enter into stipulations as to material facts, those facts will be deemed to have been conclusively proved, and the jury may be so instructed. *United States v. Houston,* 547 F.2d 104, 107 (9th Cir. 1976). *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 COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES, § 1.1.D (1998).

Because a stipulation may amount to an admission of guilt, the judge should ascertain that the stipulation is voluntarily and knowingly made. *United States v. Stapleton,* 600 F.2d 780, 782 (9th Cir. 1979); *United States v. Miller,* 588 F.2d 1256, 1264 (9th Cir. 1978), *cert. denied,* 440 U.S. 947 (1979); *United States v. Terrack,* 515 F.2d 558, 561 (9th Cir. 1975). The judge's inquiry need not, however, be as probing as, for example, the inquiry required by Fed.R.Crim.P. 11 for guilty pleas. *Miller,* 588 F.2d at 1263. The judge may take the word of the defendant's counsel that the defendant is aware of the content of the stipulation and agrees to it. *United States v. Ferreboeuf,* 632 F.2d 832, 836 (9th Cir. 1980), *cert. denied,* 450 U.S. 934 (1981).

2.5 JUDICIAL NOTICE

The court has decided to accept as proved the fact that [*e.g.*, the city of San Francisco is north of the city of Los Angeles], even though no evidence has been introduced on the subject. 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. Fed. R. Evid. 201(g) permits the judge to determine that a fact is sufficiently undisputed to be judicially noticed, but also requires that the jury be instructed that it is not required to accept that fact. *See United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir. 1994) (in a criminal case "the trial court must instruct the 'jury that it may, but is not required to, accept as conclusive any fact judicially noticed.'" (citing Fed. R. Evid. 201(g).)). *But see* NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTION 2.5 (1997) (in civil cases, jury required to accept facts judicially noticed).

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. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify.

[Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.]

Comment

This instruction should be used only when testimony by deposition is offered as substantive evidence. The Committee recommends that it be given immediately before a deposition is read. It need not be repeated if more than one deposition is read. If the judge prefers to include the instruction as a part of the instructions before evidence, it should be modified appropriately.

See Fed. R. Crim. P. 15.

2.7 TRANSCRIPT OF RECORDING IN ENGLISH

You are about to listen to a tape recording that has been received in evidence. Please listen to it very carefully. Each of you has been given a transcript of the recording to help you identify speakers and as a guide to help you listen to the tape. However, bear in mind that the tape recording is the evidence, not the transcript. If you hear something different from what appears in the transcript, what you heard is controlling. After the tape has been played, the transcript will be taken from you.

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 tape 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 tape recording is played. However, the judge should remind the jury that the tape 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.

See Instruction 2.8 (Transcript of Recording in Foreign Language).

2.8 TRANSCRIPT OF RECORDING IN FOREIGN LANGUAGE

You are about to listen to a tape recording in a language other than English. Each of you has been given a transcript of the recording which has been admitted into evidence. The transcript is a translation of the foreign language tape recording.

Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must accept the English translation contained in the transcript and disregard any different meaning of the non-English words.

Comment

This instruction is appropriate immediately prior to the jury hearing a tape-recorded conversation in a foreign language if the accuracy of the translation is not in issue. *See, e.g., United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998); *United States v. Fuetes-Montijo*, 68 F.3d 352, 355-56 (9th Cir. 1995).

See Instructions 2.9 (Foreign Language Testimony) for instruction to be used during trial, and 3.20 (Jury to be Guided by Official English Translation/Interpretation) for instruction at the end of the case.

2.9 FOREIGN LANGUAGE TESTIMONY

You are about to hear testimony of a witness who will be testifying in a language other than English. This witness will testify through the official court interpreter. Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must accept the English translation of the witness' testimony. You must disregard any different meaning of the non-English words.

Comment

C.f. United States v. Franco, 136 F.3d 622, 626 (9th Cir. 1998) (jury properly instructed that it must accept translation of foreign language tape-recording where the accuracy of the translation is not in issue); *United States v. Fuentes-Montijo*, 68 F.3d 352, 355-56 (9th Cir. 1995).

See Instructions 2.8 (Foreign Language Transcripts) for instruction to be used during trial, and 3.20 (Jury to be Guided by Official English Translation/Interpretation) for instruction at the end of the case.

2.10 OTHER CRIMES, WRONGS OR ACTS OF DEFENDANT

You are about to hear testimony that the defendant previously committed other [crimes] [wrongs] [acts] not charged here. I instruct you that the testimony is being admitted only for the limited purpose of being considered by you on the question of defendant's [intent] [motive] [opportunity] [preparation] [plan] [knowledge] [identity] [absence of mistake] [absence of accident] and for no other purpose.

Comment

This instruction comports with Fed. R. Evid. 404(b). Such a limiting instruction must be given if requested, Fed.R.Evid. 105; *United States v. McClain,* 440 F.2d 241, 245 (D.C. Cir. 1971). It may be given sua sponte when appropriate, but a failure to give it sua sponte is not reversible error. *United States v. Sangrey,* 586 F.2d 1312, 1315 (9th Cir. 1978)*; United States v. O'Brien,* 601 F.2d 1067, 1070 (9th Cir. 1979). *See also United States v. Walls,* 577 F.2d 690, 697 (9th Cir.) (while sua sponte limiting instruction was desirable, it was not reversible error to fail to give it), *cert. denied,* 439 U.S. 893 (1978).

If evidence under Fed. R. Evid. 413 or 414 is offered and admitted, the trial judge should give an appropriate cautionary instruction.

See Instruction 4.3 (Other Crimes, Wrongs or Acts of Defendant) for an instruction to be given at the end of the case.

2.11 DEFENDANT'S PHOTOGRAPHS, "MUG SHOTS"

One of the witnesses, [*name of witness*], has testified that [*e.g.*, a photograph of the defendant was shown to the witness by the police]. The police collect pictures of many people from many different sources and for many different purposes. The fact that the police had the defendant's picture does not mean that the defendant committed this or any other crime.

Comment

See United States v. Burdeau, 168 F.3d 352, 357-58 (9th Cir.), *cert. denied,* 120 S. Ct. 388 (1999).

This instruction should not be given unless specifically requested by the defendant.

2.12 DISMISSAL OF SOME CHARGES AGAINST DEFENDANT

At the beginning of the trial, the court described the charges against the defendant. Since that time, the charge[s] of [*dismissed count[s]*] [has] [have] been disposed of and [is] [are] therefore no longer before you.

The defendant is on trial only for the charge[s] of [*remaining count[s*]]. Evidence presented can only be considered as it relates to [those] [that] remaining count[s].

Comment

The Ninth Circuit has affirmed a similarly worded instruction. *See United States v. DeCruz,* 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 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 defendant's intent). *See also United States v. Bagley,* 641 F.2d 1235, 1240 & n.8 (9th Cir.), *cert. denied,* 454 U.S. 942 (1981).

2.13 DISPOSITION OF CHARGE AGAINST CODEFENDANT

The case against codefendant [*name*] has been disposed of and is no longer before you. Do not guess or speculate as to the reason for the disposition. The disposition 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

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), *cert. denied,* 474 U.S. 1062 (1986) ("When a co-defendant becomes absent from a trial, whether through a plea, an acquittal, a government motion to dismiss, temporary flight, or for any other reason, a trial court should acknowledge the co-defendant'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 co-defendant's absence."). *See also United States v. Carraway*, 108 F.3d 745, 755 (7th Cir.), *cert. denied,* 118 S. Ct. 228 (1997); *United States v. Rapp*, 871 F.2d 957, 967 (11th Cir.), *cert. denied,* 493 U.S. 890 (1989).

2.14 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. This instruction should not be given unless specifically requested by the defendant.

3. INSTRUCTIONS AT END OF CASE

Instruction

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.

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 which 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 find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the court 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 COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES, § 4.3.B and § 4.3.C (1998).

See also Fed. R. Crim. P. 30.

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. The defendant is presumed to be innocent and does not have to testify or present any evidence to prove innocence. The government has the burden of proving every element of the charge 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), *cert. denied*, 497 U.S. 1005 (1990).

It is preferable to give a presumption of innocence instruction at the end of the case. *United States v. Garcia-Guizar*, 160 F.3d 511, 523 (9th Cir. 1998).

See also JURY COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES, § 4.4 (1998).

3.3 DEFENDANT'S DECISION NOT TO TESTIFY

A defendant in a criminal case has a constitutional right not to testify. No presumption of guilt may be raised, and no inference of any kind may be drawn, from the fact that the defendant did not testify.

Comment

It is preferable to tell the jury that no inference may be drawn from the fact that defendant failed to testify. *United States v. Castaneda*, 94 F.3d 592, 596 (9th Cir. 1996). The Committee recommends that this instruction be given in every criminal case in which the defendant does not testify unless objected to by the defendant. If the instruction is requested by the defendant, it must be given. *Carter v. Kentucky*, 450 U.S. 288 (1981)*; Shults v. Whitley,* 982 F.2d 361 (9th Cir. 1992).

See Instruction 3.4 (Defendant's Decision to Testify) concerning the defendant's decision to testify.

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) concerning the defendant's decision not to testify.

3.5 REASONABLE DOUBT—DEFINED

Proof beyond a reasonable doubt is proof that leaves you firmly convinced that 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 Committee strongly recommends that the jury be provided with a definition of reasonable doubt.

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 Lisenbee v. Henry*, 166 F.3d 997, 999 (9th Cir. 1999), *cert.denied*, 120 S. Ct. 82 (1999).

Earlier model instructions instructed the jury to find the defendant guilty only if "you find the evidence so convincing that an ordinary person would be willing to make the most important decisions in his or her own life on the basis of such evidence." NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS 3.04 (1984); NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS 3.04 (1985). The Committee rejected this analogy because the most important decisions in life—choosing a spouse, buying a house, borrowing money, and the like—may involve a heavy element of uncertainty and risk-taking and are wholly unlike the decisions jurors ought to make in criminal cases. *See United States v. Ramirez*, 136 F.3d 1209, 1213-14 (9th Cir.), *cert. denied,* 119 S. Ct. 415 (1998).

3.6 WHAT IS EVIDENCE

The evidence from which you are to decide what the facts are consists of:

(1) the sworn testimony of any witness;

(2) the exhibits which have been received into evidence; and

(3) any facts to which all the lawyers have stipulated.

Comment

See United States v. Mikaelian, 168 F.3d 380, 389 (9th Cir.) (material facts to which the parties voluntarily stipulate are to be treated as "conclusively established") (citing *United States v. Houston,* 547 F.2d 104, 107 (9th Cir. 1976)), *amended by* 180 F.3d 1091 (1999).

3.7 WHAT IS NOT EVIDENCE

In reaching your verdict you may consider only the testimony and exhibits received into evidence. Certain things are not evidence and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they 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. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the question, the objection, or the court's ruling on it.

3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition some testimony and exhibits have been received only for a limited purpose; where I have given a limiting instruction, you must follow it.

4. 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 1.5 (Evidence of a Limited Purpose) regarding case law on limiting instructions.

Turner v. Louisiana, 379 U.S. 466, 471-73 (1965), discusses the right to a jury influenced only by courtroom evidence. *See also United States v. Harber*, 53 F.3d 236, 239-41 (9th Cir. 1995) (finding introduction of government official's report into jury room during deliberations inherently prejudicial).

3.8 DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Comment

The Committee believes that a simple instruction on circumstantial evidence eliminates the need to explain what an inference is. The reasoning process described as drawing an inference may be treated in terms of circumstantial evidence. Such a general instruction obviates the need for instructions on particular inferences. Matters which might be the subject for such instructions (flight, resistance to arrest, *etc.*) are then better left to argument of counsel, subject to prior clearance with the court. *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,* 120 S. Ct. 838 (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). *See also* Introductory Comment to Part 4 (Consideration of Particular Evidence).

If an instruction defining the word "inference" is desired, the following language is suggested:

> The word "infer"—or the expression "to draw an inference"—means to find that a fact exists based on proof of another fact. In deciding whether to draw an inference, you must consider all the facts in the light of reason, common sense and experience. After you have done that, it is for you to decide whether to draw a particular inference.
>
> 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 explain 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 opportunity and ability of the witness to see or hear or know the things testified to;

2. the witness' memory;

3. the witness' manner while testifying;

4. the witness' interest in the outcome of the case and any bias or prejudice;

5. whether other evidence contradicted the witness' testimony;

6. the reasonableness of the witness' testimony in light of all the evidence; and

7. 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.

3.10 EVIDENCE OF OTHER ACTS OF DEFENDANT OR ACTS AND STATEMENTS OF OTHERS

You are here only to determine whether the defendant is guilty or not guilty of the charge[s] in the indictment. Your determination must be made only from the evidence in the case. The defendant is not on trial for any conduct or offense not charged in the indictment. You should consider evidence about the acts, statements, and intentions of others, or evidence about other acts of the defendant, only as they relate to this charge against this defendant.

Comment

This instruction should only be used when Fed. R. Evid. 404(b) evidence has been introduced during trial. It is also necessary to give Instruction 4.3 (Other Crimes, Wrongs, Acts of Defendant) in connection with this instruction. Otherwise, see Instruction 3.9 (Credibility of Witnesses).

Fed. R. Evid. 404 states the circumstances under which evidence of other crimes may be admissible.

3.11 ACTIVITIES NOT CHARGED

The defendant is on trial only for the crime[s] charged in the indictment, not for any other activities.

Comment

This instruction should be given only when Fed. R. Evid. 404(b) evidence has not been admitted at trial.

3.12 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

This instruction should be given when there is one defendant charged with multiple counts. If the case involves multiple defendants and multiple counts, Instruction 3.14 (Separate Consideration of Multiple Counts—Multiple Defendants) should be given instead. If more than one defendant is charged with the same crime, Instruction 3.13 (Separate Consideration of Single Count—Multiple Defendants) should be given.

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), *cert. denied,* 404 U.S. 836 (1971). An instruction to consider particular evidence only in connection with a certain count may be requested, but need not be given sua sponte. *See United States v. Brashier,* 548 F.2d 1315, 1323–24 (9th Cir. 1976), *cert. denied,* 429 U.S. 1111 (1977).

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

Comment

This instruction should be given when there is more than one defendant charged with the same crime. If the case involves multiple defendants and multiple counts, Instruction 3.14 (Separate Consideration of Multiple Counts—Multiple Defendants) should be given instead. If one defendant has been charged with multiple counts, Instruction 3.12 (Separate Consideration of Multiple Counts—Single Defendant) should be given.

3.14 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 of 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

This instruction should be given when there is more than one defendant charged with multiple counts. If the case involves multiple defendants charged with the same count, Instruction 3.13 (Separate Consideration of Single Count—Multiple Defendants) should be given instead. If one defendant has been charged with multiple counts, Instruction 3.12 (Separate Consideration of Multiple Counts—Single Defendant) should be given.

3.15 LESSER INCLUDED OFFENSE

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

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

[*List elements of lesser included crime.*]

Comment

This instruction is appropriate where a lesser offense is identified within the charged offense and a rational jury could find the defendant guilty of the lesser offense but not guilty of the greater one. *United States v. Skinner,* 667 F.2d 1306, 1309 (9th Cir. 1982), *cert. denied,* 463 U.S. 1229 (1983). The lesser offense must not include all of the elements of the greater offense. *Sansone v. United States,* 380 U.S. 343, 349–50 (1965). It cannot include an additional element to those in the greater offense. It is "identified" within the greater offense only if it is "necessarily presented as part of the showing of the greater offense, and both crimes relate to the protection of the same interests." *E.g., United States v. Raborn,* 575 F.2d 688, 691 (9th Cir. 1978).

The lesser included offense instruction must be given if it is requested and is appropriate to the case. *E.g., Keeble v. United States,* 412 U.S. 205, 208 (1973). Either side may request the instruction, but the prosecution is limited to those offenses of which the defendant had notice in the allegations of the indictment. *United States v. Johnson,* 637 F.2d 1224, 1239 (9th Cir. 1980). The instruction need not be given sua sponte by the court, *United States v. Lone Bear,* 579 F.2d 522, 524 (9th Cir. 1978); *United States v. Carey,* 475 F.2d 1019, 1022 (9th Cir. 1973), except possibly where the lesser offense is inevitably included in the greater and omission of the instruction could be highly prejudicial. *See Walker v. United States,* 418 F.2d 1116, 1119 (D.C.Cir. 1969). The court should exercise caution in acting sua sponte, as the failure to request a lesser included offense instruction may represent a tactical decision by counsel.

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).

If the jury convicts on the greater offense, a conviction on the lesser included offense cannot stand. *United States v. Crawford,* 576 F.2d 794, 800 (9th Cir.), *cert. denied,* 439 U.S. 851 (1978). This instruction makes this clear.

3.16 CORRUPTLY—DEFINED

Comment

Consult each statute that uses the term "corruptly" for the meaning of the term. "Corruptly" is capable of different meanings in different contexts. *See United States v. Dorri*, 15 F.3d 888, 894-95 (9th Cir.) (dissent) (discussing the difficulty in defining "corruptly" and recommending that it be defined on a case by case basis), *cert. denied,* 513 U.S. 1004 (1994).

3.17 INTENT TO DEFRAUD—DEFINED

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

Comment

One facet of intent to defraud is whether the defendant acted in good faith. In *United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993), *cert. denied,* 513 U.S. 1059 (1994) 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.

3.18 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

This instruction is all-inclusive. 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); *United States v. Perez*, 67 F.3d 1371, 1379-80 (9th Cir. 1995), *opinion withdrawn in part by* 116 F.3d 840 (1997)*; United States v. Terry*, 911 F.2d 272, 280 (9th Cir. 1990).

In the event the case involves use of a firearm under 18 U.S.C. § 924(c)(1), *see* Instruction 8.65 (Firearms—Using or Carrying in the Commission of Drug Trafficking Crime or Crime of Violence).

3.19 CORPORATE DEFENDANT

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

3.20 JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION

Languages other than English have 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 non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English [interpretation] [translation]. You must disregard any different meaning of the non-English words.

Comment

Where there is no dispute as to the accuracy of the translation of a tape-recording of a foreign language conversation, 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. Rrapi,* 175 F.3d 742, 748 (9th Cir. 1999); *United States v. Fuentes-Montijo*, 68 F.3d 352, 355-56 (9th Cir. 1995).

4. CONSIDERATION OF PARTICULAR EVIDENCE

Instruction

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 United States v. McSweaney,* 507 F.2d 298, 301 (9th Cir. 1974); *United States v. Ketola,* 478 F.2d 64, 66 (9th Cir.), *cert. denied,* 414 U.S. 847 (1973).

An inference, *i.e.,* a finding based on circumstantial evidence, may properly be drawn by the jury when it can be said with substantial assurance that the inferred fact is more likely than not to flow from the proved fact on which it is made to depend. *Leary v. United States,* 395 U.S. 6, 36 (1969). If the rational connection between facts presented and facts inferred is derived from common sense and experience, the matter can normally be left to counsel's argument to the jury's judgment upon general instructions. *Barnes v. United States,* 412 U.S. 837, 845–46 (1973). Specific instructions on particular inferences are therefore not necessary in order for counsel to be able to argue the point and the jury to consider it. *United States v. McDonald,* 576 F.2d 1350, 1357 (9th Cir.), *cert. denied,* 439 U.S. 830; *Bresbis v. United States,* 439 U.S. 927 (1978); *United States v. Lee,* 506 F.2d 111, 123 (D.C.Cir. 1974), *cert. denied,* 421 U.S. 1002 (1975).

For these reasons, the Committee recommends against giving instructions such as those dealing with flight, resistance to arrest, 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.

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 of the evidence about the statement, including the circumstances under which the defendant may have made it.

Comment

Language from this instruction was expressly approved in *United States v. Hoac*, 990 F.2d 1099, 1108 n.4 (9th Cir. 1993).

The instruction uses the word "statement" in preference to the more pejorative term, "confession."

The failure specifically to instruct the jury to weigh the statement in the light of its circumstances may be ground for reversal, although not plain error in this circuit. *See United States v. Miller,* 603 F.2d 109 (9th Cir. 1979). *But see United States v. Barry,* 518 F.2d 342, 347–48 (2d Cir. 1975) (concluding that omission was plain error). Although the judge must determine the voluntariness of a confession outside of the presence of the jury in ruling on its admissibility, the jury must still be instructed to weigh the statement with regard to the circumstances in which it was made. *See Jackson v. Denno,* 378 U.S. 368 (1964); 18 U.S.C. § 3501 (Admissibility of Confessions).

4.2 SILENCE IN THE FACE OF ACCUSATION

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.

Comment

This instruction should be used with caution. Where a defendant is under arrest, silence in the face of an accusatory statement does not constitute an admission of the truth of the statements. Such evidence should not be received, and no instruction will be necessary. *Doyle v. Ohio,* 426 U.S. 610 (1976). 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 necessary.

Evidence that after a crime was committed, a suspect, prior to arrest, failed "'to report the incident to the police and to offer his exculpatory story'" is permissible. *Fletcher v. Weir*, 455 U.S. 603, 604 n.1 (1982) (quoting *Jenkins v. Andersen*, 447 U.S. 231 (1980)).

Evidence that a suspect, after arrest but before *Miranda* warnings were given, failed to offer an exculpatory explanation is not a constitutional violation. *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993) (citing *Fletcher v. Weir*, 455 U.S. 603, 604 (1982)). *See also United States v. Ross*, 123 F.3d 1181, 1188 (9th Cir. 1997) ("In general, the prosecution is free to impeach a defendant based on his silence when that silence does not follow *Miranda* warnings.") (citing *Fletcher v. Weir*, 455 U.S. at 607), *cert. denied*, 118 S.Ct. 733 (1998).

Evidence that a defendant offered no exculpatory explanation following the arrest and the giving of *Miranda* warnings is inadmissible. *United States v. Hale*, 422 U.S. 171 (1975).

Before silence can be considered as an admission, Fed. R. Evid. 801(d)(2)(B), the court must consider whether the defendant was present and heard and understood the statement, whether the subject matter was within his knowledge, whether there were any impediments to responding, and whether the circumstances called for a reply. *See United States v. Hove*, 52 F.3d 233, 236 (9th Cir. 1995); *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), *cert. denied*, 455 U.S. 1027 (1982); *United States v. Giese,* 597 F.2d 1170, 1195–96 (9th Cir.), *cert. denied,* 444 U.S. 979 (1979).

4.3 OTHER CRIMES, WRONGS OR ACTS OF DEFENDANT

You have heard evidence of other [crimes] [acts] [wrongs] engaged in by the defendant. You may consider that evidence only as it bears on the defendant's [*e.g.*, motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident] and for no other purpose.

Comment

See Fed. R. Evid. 404(b).

See United States v. Montgomery, 150 F.3d 983, 1000 (9th Cir.), *cert. denied,* 119 S.Ct. 267 (1998), in which the Ninth Circuit stated:

> We have adopted a four-part test to determine the admissibility of evidence under Rule 404(b).[citation omitted]. First, the evidence of other crimes must tend to prove a material issue in the case. Second, the other crime must be similar to the offense charged. Third, proof of the other crime must be based on sufficient evidence. Fourth, commission of the other crime must not be too remote in time. [citation omitted]. In addition to satisfying the four-part test, evidence of other crimes must also satisfy the Rule 403 balancing test--its probative value must not be substantially outweighed by the danger of unfair prejudice. *See* Fed. R. Evid. 403.

But see United States v. Vizcarra-Martinez, 66 F.3d 1006, 1014 n.5 (9th Cir. 1995) ("We recognize that in cases involving the use of prior crimes to show opportunity, knowledge, preparation, or motive, similarity may or may not be necessary depending upon the circumstances.") (internal citations omitted).

The other act evidence need not constitute a crime, *United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993) ("Prior acts need not be unlawful to be admissible under Rule 404(b) . . . ."), *cert. denied,* 513 U.S. 1059 (1994) and may have occurred after the crime charged, *United States v. Ayers*, 924 F.2d 1468, 1473 (9th Cir. 1991).

4.4 CHARACTER OF DEFENDANT

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.

Comment

See Fed. R. Evid. 404(a)(1).

The 1985 version of the NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS, Instruction 4.5 stated that "character evidence alone may create a reasonable doubt of the defendant's guilt." Several circuits have forbidden "standing alone" instructions on the grounds that they mislead the jury. *See United States v. Burke,* 781 F.2d 1234, 1241 & n.3 (7th Cir. 1985). *See also Carbo v. United States,* 314 F.2d 718, 746 (9th Cir. 1963) (trial court properly refused to instruct that character evidence alone may create reasonable doubt), *cert. denied,* 377 U.S. 953 (1964).

4.5 CHARACTER OF VICTIM

You have heard evidence of specific instances of the victim's character for [violence, peacefulness, *etc.*]. You may consider such evidence in determining whether the victim was acting 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

The Ninth Circuit has recently decided two cases dealing with character of the victim in self defense cases. *United States v. Saenz,* 179 F.3d 686, 687-89 (9th Cir. 1999) (holding that a defendant claiming self defense could testify that he knew of the victim's prior violent behavior because extrinsic evidence corroborating evidence of victim's acts of violence is admissible to show defendant's state of mind); *United States v. James,* 169 F.3d 1210, 1214 (9th Cir. 1999) (finding that the district judge erred in refusing to admit police records as corroborating victim's character and holding that character evidence is not limited to "state of mind" of defendant). *See also United States v. Keiser*, 57 F.3d 847, 853 (9th Cir.) ("The fact that [Fed. R. Evid. 402(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."), *cert. denied,* 516 U.S. 1029 (1995).

These cases address what type of proof can be used to show the victim's character in self defense cases. These cases may require the instruction to clarify language that limits the jury's consideration of victim character evidence. Fed. R. Evid. 404 has similar provisions for character of defendant and character of victim.

4.6 IMPEACHMENT, PRIOR CONVICTION OF DEFENDANT

You have heard evidence that 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).

If past crimes of the defendant are to be used for another purpose—*e.g.*, to prove an element of an habitual offender charge, or to establish 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

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' testimony and how much weight to give to it.

Comment

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).

See also Instruction 4.17 (Opinion Evidence, Expert Witness).

4.8 IMPEACHMENT EVIDENCE—WITNESS

You have heard evidence that [*witness*], a witness, [*e.g*. has been convicted of a felony, lied under oath on a prior occasion, *etc.*]. You may consider this evidence, along with other pertinent evidence, in deciding whether or not to believe this witness and how much weight to give to the testimony of that 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 WITNESS UNDER GRANT OF IMMUNITY

You have heard testimony from [*witness*], a witness who has received immunity. That testimony was given in exchange for a promise by the government that [the witness will not be prosecuted, the [*witness*] testimony will not be used in any case against the witness, *etc.*].

In evaluating [*witness*] testimony, you should consider whether that testimony may have been influenced by the government's promise of immunity given in exchange for it, and you should consider that testimony with greater caution than that of other witnesses.

Comment

The defendant is entitled to this instruction, but not necessarily in addition to Instructions 4.10 (Testimony of Witness Receiving Benefits) and 4.11 (Testimony of Accomplice), which have a similar cautionary effect. *See United States v. Morgan,* 555 F.2d 238, 242–43 (9th Cir. 1977). Where more than one of these reasons exists for questioning the credibility of a witness, the better practice is to combine them in a single instruction regarding the credibility of the witness' testimony. *United States v. Bernard,* 625 F.2d 854, 858–59 (9th Cir. 1980).

4.10 TESTIMONY OF WITNESS RECEIVING BENEFITS

You have heard testimony that [*witness*], a witness, has received [benefits, compensation, favored treatment, *etc.*] from the government in connection with this case. You should examine [*witness*] testimony with greater caution than that of other witnesses. In evaluating that testimony, you should consider the extent to which it may have been influenced by the receipt of [*e.g.*, benefits] from the government.

Comment

This instruction was previously entitled "Testimony of Informer."

The defendant is entitled to this instruction when the witness has gathered information "in an undercover capacity for the government" or has been paid, given promises or advantageous treatment, or has received other benefits for the information. *See Guam v. Dela Rosa,* 644 F.2d 1257, 1259–60 (9th Cir. 1980). *See also United States v. Holmes*, 229 F.3d 782, 786 (9th Cir. 2000); *United States v. Bernard,* 625 F.2d 854, 858 n.3 (9th Cir. 1980). A salaried government undercover agent is not an "informer," however. *United States v. Hoyos,* 573 F.2d 1111, 1115 (9th Cir. 1978).

The court may not deny a request for such an instruction if the evidence of guilt, other than the informer's testimony, is relatively weak, or if the testimony is unreliable for reasons other than the witness' status as an informer (*e.g.*, the informer is a drug addict). *Dela Rosa,* 644 F.2d at 1260. *Dela Rosa* treats the cautionary instruction about informers as essentially similar to the instruction for accomplice-witnesses. *Id.* Hence, the same rule should apply to this instruction, that the court need not give it sua sponte except in the exceptional case where the testimony is almost entirely uncorroborated and is critical and suspect. *See United States v. Monzon-Valenzuela,*186 F.3d 1181, 1183 (9th Cir. 1999); *United States v. Martin,* 489 F.2d 674, 677 n.3 (9th Cir. 1973), *cert. denied,* 417 U.S. 948 (1974); *Caldwell v. United States,* 405 F.2d 613, 615–16 (9th Cir. 1969), *cert. denied,* 397 U.S. 956 (1970). *Cf. United States v. Busby,* 484 F.2d 994, 997 (9th Cir. 1973) (failure to give instruction not prejudicial error where the testimony was corroborated), *cert. denied,* 415 U.S. 980 (1974).

Where there are several reasons for discounting the credibility of a witness, they may be combined in a single cautionary instruction concerning credibility. *Bernard,* 625 F.2d at 858–59.

4.11 TESTIMONY OF ACCOMPLICE

You have heard testimony from [*witness*] who [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. You should consider such testimony with greater caution than that of other witnesses.

Comment

An accomplice is defined as "one who could have been indicted for the same offense either as an accessory or principal." *Guam v. Dela Rosa,* 644 F.2d 1257, 1260–61 (9th Cir. 1980). Where the court gives a general instruction charging jurors to weigh the other evidence, the specific caution about accomplice witnesses may not be required. *See United States v. McSweaney,* 507 F.2d 298, 301 (9th Cir. 1974). But failure to give the accomplice-witness instruction is prejudicial error when the testimony is "important" to the case(*i.e.*, where other evidence is weak and the determination of guilt will rest largely on the accomplice's testimony). *United States v. Bernard,* 625 F.2d 854, 857–58 (9th Cir. 1980). The presence of other factors indicating that the testimony might be unreliable (*e.g.*, where the witness is a drug addict or a paid informer) also militates in favor of a specific caution. *Id.* at 858. Where the testimony is not corroborated, and is both critical and suspect, the failure to give an accomplice instruction may constitute plain error. *See United States v. Martin,* 489 F.2d 674, 677 n.3 (9th Cir. 1973), *cert. denied,* 417 U.S. 948 (1974); *Caldwell v. United States,* 405 F.2d 613, 615–16 (9th Cir. 1969), *cert. denied,* 397 U.S. 956 (1970). *Cf. United States v. Busby,* 484 F.2d 994, 997 (9th Cir. 1973) (court not required to give instruction sua sponte when accomplice testimony is corroborated), *cert. denied,* 415 U.S. 980 (1974).

A separate accomplice-witness caution need not be given if the jury has been instructed to treat the witness' testimony with caution for another reason (*e.g.*, where the witness has also been granted immunity). But the better practice is to include the various reasons for caution in a single instruction regarding the credibility of that witness. *Bernard,* 625 F.2d at 858–59.

4.12 WITNESS WHO HAS PLEADED GUILTY

[*Witness*] has 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' believability. You should consider this witness' testimony with great caution, giving it the weight you feel it deserves.

Comment

The jury should be instructed that guilty plea evidence can only be used to determine the credibility of the witness; failure to give such an instruction may be prejudicial error. *See United States v. Rewald*, 889 F.2d 836, 865 (9th Cir. 1989), *amended by* 902 F.2d 18, *cert. denied,* 498 U.S. 819 (1990); *United States v. Halbert,* 640 F.2d 1000, 1006 (9th Cir. 1981) (reversible error for trial court to fail to instruct jury that co-defendants' pleas were admitted only as to the witnesses' credibility and could "not be considered as evidence of the defendant's guilt." (citation omitted.))

It is preferable that the district court instruct the jury regarding the limited purpose for which the prior conviction is being admitted both contemporaneously with proof of the prior conviction and in the final charge to the jury. *Rewald*, 889 F.2d at 865 ("'The most effective practice would be to instruct the jury when the evidence of the plea is admitted, and again in final instructions.'") (quoting *Halbert,* 640 F.2d at 1006).

4.13 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 are not precluded from engaging in stealth and deception, such as the use of informants and undercover agents, in order to apprehend persons engaged in criminal activities. Undercover agents and informants may properly make use of false names and appearances and may properly assume the roles of members in criminal organizations. The government may utilize a broad range of schemes and ploys to ferret out criminal activity.

Comment

See United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996) (permissible for undercover agents to deny they are police officers); *United States v. Ritter*, 989 F.2d 318, 322 (9th Cir. 1993); *United States v. North*, 746 F.2d 627, 631 (9th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985), *overruled on other grounds by Jacobson v. United States,* 503 U.S. 540 (1992).

4.14 EYEWITNESS IDENTIFICATION

In any criminal case, the government must prove beyond a reasonable doubt that the defendant was the perpetrator of the crime[s] alleged.

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

In addition to those factors, in evaluating eyewitness identification testimony, you may also take into account:

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;
2. whether the identification was the product of the eyewitness' own recollection or was the result of subsequent influence or suggestiveness;
3. any inconsistent identifications made by the eyewitness;
4. whether the witness had known or observed the offender at earlier times; and
5. the totality of circumstances surrounding the eyewitness' identification.

Comment

If the district court concludes that an eyewitness identification instruction is appropriate, the Committee recommends that this instruction be given. Early versions of the MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT included an eyewitness identification instruction. *See* MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT, § 4.13 (1984); MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT, § 4.13 (1985). Since 1989, the Committee has recommended against the giving of an eyewitness identification instruction. *See, e.g.,* MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT, § 4.13 (1989).

Ninth Circuit case law now indicates that an eyewitness identification instruction may be appropriate, particularly 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) ("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).

4.15 CHILD WITNESS

Comment

The Committee recommends that no instruction be given and that the matter be left to the jury under the general credibility instruction, Instruction 3.9 (Credibilty of Witnesses).

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. Pancheco*, 154 F.3d 1236, 1239 (10th Cir. 1998), *cert. denied,* 119 S. Ct. 886 (1999).

4.16 MISSING WITNESS

Comment

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, 1318 n.2 & 1320-21 (9th Cir. 1993) (trial court's refusal to give instruction upheld); *United States v. Bautista,* 509 F.2d 675, 678–79 (9th Cir.) (deferring to the discretion of the trial court in deciding not to give the instruction), *cert. denied,* 421 U.S. 976 (1975).

4.17 OPINION EVIDENCE, EXPERT WITNESS

You have heard testimony from persons who, because of education or experience, are permitted to state opinions and the reasons for their opinions.

Opinion testimony should be judged just 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' 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).

4.18 SUMMARIES NOT RECEIVED IN EVIDENCE

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. 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 where the charts and summaries are not received into evidence and are used for demonstrative purposes. *See United States v. Johnson,* 594 F.2d 1253 (9th Cir.), *cert. denied sub. nom. Richey v. United States*, 444 U.S. 964 (1979).
See also JURY COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 3.10 (1998).

4.19 CHARTS AND SUMMARIES IN EVIDENCE

Certain charts and summaries have been received into 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. *See also* JURY COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 3.10 (1998). This instruction may be unnecessary if there is no dispute as to the accuracy of the chart or summary.

5. RESPONSIBILITY

Instruction

5.1 AIDING AND ABETTING

A defendant may be found guilty of [*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 aiding and abetting, the government must prove beyond a reasonable doubt:

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

Second, the defendant knowingly and intentionally aided, counseled, commanded, induced or procured that person to commit [*crime charged*]; and

Third, 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 [*crime charged*].

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

Comment

This instruction conforms to language approved in *United States v. Avila-Macias*, 577 F.2d 1384, 1390 n.5 (9th Cir. 1978). The language set forth in paragraphs five and six was expressly approved as adequately addressing a claim of mere presence. *United States v. Burgess*, 791 F.2d 676, 679 (9th Cir. 1986).

The last paragraph has been expressly approved in *United States v. Vaanderling*, 50 F.3d 696, 702 (9th Cir. 1995). 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.

In *United States v. Cruz-Ventura*, 979 F.2d 146, 149 (9th Cir. 1992), citing **Manual of Model Criminal Jury Instructions for the Ninth Circuit, §§ 5.01** (1992), the Ninth Circuit stated that "an aider and abetter is a person who knowingly and intentionally helps another to commit a crime."

A person may be convicted for 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.), *cert. denied,* 400 U.S. 920 (1970). It is necessary, however, that the government prove that defendant aided and abetted in each essential element of the offense. *United States v. Jones,* 678 F.2d 102, 105-06 (9th Cir. 1982).

An aiding and abetting instruction is proper even where the indictment does not specifically charge that offense, since all indictments are read to embody that offense in each count. *United States v. Vaanderling*, 50 F.3d at 702; *United States v. Armstrong*, 909 F.2d 1238, 1241-42 (9th Cir.), *cert. denied*, 498 U.S. 870 (1990); *Jones*, 678 F.2d at 104. *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).

5.2 ACCESSORY AFTER THE FACT
(18 U.S.C. § 3)

The defendant is charged with having been an accessory after the fact to the crime of [*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 [*principal*] had committed the crime of [*crime charged*]; and

Second, the defendant assisted [*principal*] with the intent 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.), *cert. denied,* 447 U.S. 925 (1980); *United States v. Jackson,* 448 F.2d 963, 971 (9th Cir. 1971), *cert. denied,* 405 U.S. 924 (1972).

An instruction requiring "positive knowledge in contrast to imputed or implied knowledge" is not required when the "specific purpose or design" language is used. *United States v. Mills,* 597 F.2d 693, 696-97 (9th Cir. 1979).

5.3 ATTEMPT

The defendant is charged in the indictment with attempting to commit [*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 commit [*crime charged*]; and

Second, the defendant did something which was a substantial step toward committing the crime, with all of you agreeing as to what constituted the substantial step.

It is a crime to commit [*crime charged*].

Mere preparation is not a substantial step toward the commission of the [*crime charged*].

Comment

"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 1304, 1314 (6th Cir. 1996) (citations omitted), *cert. denied*, 519 U.S. 1100 (1997). *See also United States v. Narcia,* 776 F. Supp. 491, 493 (D. Ariz. 1991). However, many federal statutes defining crimes also expressly proscribe attempts. This Manual contains model instructions for attempt to commit arson (8.1), passing counterfeit obligations (Instruction 8.23), escape (Instruction 8.37), murder (Instruction 8.93), kidnapping foreign official or official guest (Instruction 8.99), kidnapping federal officer or employee (Instruction 8.100), bank fraud (Instructions 8.105 and 8.107), mail theft (Instruction 8.114), extortion (Instructions 8.117 and 8.118), financial transaction to promote unlawful activity (Instruction 8.120), laundering monetary instruments (Instruction 8.121), transporting funds to promote unlawful activity (Instruction 8.122), transporting monetary instruments for purpose of laundering (Instruction 8.123), bank robbery (Instruction 8.132), aggravated sexual abuse (Instructions 8.134, 8.136, and 8.138), sexual abuse (Instructions 8.140, 8.142, 8.144 and 8.146), and controlled substance offenses (Instructions 9.14, 9.16, 9.15, 9.18 and 9.20). This list is not all-inclusive.

This instruction is appropriate when a defendant is accused of attempting to commit a crime for which there is no model instruction.

"[M]ost attempts are (and should be) specific intent crimes, whether or not the crime includes an element of specific intent." *United States v. Gracidas-Ulibarry*, 192 F.3d 926, 929 (9th Cir. 1999) (citation omitted) (but holding that attempt to violate 8 U.S.C. § 1326(a), attempted reentry into the United States following deportation, is not a specific intent crime).

See Instruction 7.9 (Specific Issue Unanimity).

5.4 SPECIFIC INTENT—GENERAL INTENT

Comment

The Committee recommends avoiding instructions that distinguish between "specific intent" and "general intent." The Ninth Circuit has stated: "We discourage the use of generic specific intent instructions and believe district courts should 'define the precise mental state required for the particular offense charged as an element of the offense which must be proved beyond a reasonable doubt.'" *United States v. Johnson*, 956 F.2d 197, 199-200 (9th Cir. 1992) (quoting MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT, § 5.04 (1989)).

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 after such examination the court perceives an ambiguity regarding Congress' intent to require a mens rea, the court should read such a requirement into the statute. *Nguyen,* 73 F.3d at 890-91.

Most attempt crimes require specific intent. *See United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1192 (9th Cir. 2000) (en banc). The crime of attempted illegal reentry is a specific intent offense. *Gracidas-Ulibarry*, 231 F.3d at 1190.

5.5 WILLFULLY

Comment

The Committee recommends that no instruction defining "willfully" be given unless the word is in the statute defining the offense being tried.

The Ninth Circuit has stated that "[w]ilfulness requires that an act be done knowingly and intentionally, not through ignorance, mistake or accident." *United States v. Morales*, 108 F.3d 1031, 1036 (9th Cir. 1997) (citing MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT, § 5.05 (1995)) (affirming convictions for the lesser included misdemeanor offenses of wilfully making false entries).

In *United States v. Sehnai*, 930 F.2d 1420, 1427 (9th Cir. 1991), a prosecution for making false statements on corporate tax returns, the Ninth Circuit approved the following instruction:

> An act is done wilfully if done voluntarily and intentionally with the purpose of violating a known legal duty.

See also Cheek v. United States, 498 U.S. 192, 199 (1991).

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

This instruction was approved as an accurate statement of the law for use when the criminal statute does not involve a different state of knowledge. *United States v. Gravenmeir*, 121 F.3d 526, 529-30 (9th Cir. 1997).

The second sentence of this instruction should not be given where 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. 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).

5.7 DELIBERATE IGNORANCE

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that [*e.g.*, drugs were in the defendant's automobile] and 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

This instruction was approved by the Ninth Circuit in *United States v. Jewell,* 532 F.2d 697 (9th Cir.) (en banc), *cert. denied,* 426 U.S. 951 (1976).

Great caution should be exercised in the giving of this instruction. *See, e.g., United States v. Baron*, 94 F.3d 1312, 1318 n.3 (9th Cir.) ("We emphasize again today, as we have in the past, that a *Jewell* instruction is rarely appropriate.") (citation omitted), *cert. denied*, 519 U.S. 1047 (1996).

"The instruction should be given only when the government presents specific evidence showing that a defendant (1) actually suspected that he or she might be involved in criminal activity, (2) deliberately avoided taking steps to confirm or deny those suspicions, and (3) did so in order to provide himself or herself with a defense in the event of prosecution." *Baron,* 94 F.3d at 1318 n.3.

"If the parties present evidence of actual knowledge as well as deliberate ignorance, a *Jewell* instruction is appropriate." *United States v. Shannon*, 137 F.3d 1112, 1117 (9th Cir. 1998) (citation omitted).

"A district court cannot give a *Jewell* instruction when the evidence points only to the defendant either having knowledge or not having knowledge." *Shannon,* 137 F.3d at 117 (citation omitted).

5.8 PRESUMPTIONS

Comment

The Committee recommends that extreme caution be used in instructing the jury regarding presumptions. In *Sandstrom v. Montana*, 442 U.S. 510, 517 (1979), the Supreme Court found unconstitutional an instruction stating that "*the law presumes* that a person intends the ordinary consequences of his voluntary acts" because the instruction could be misinterpreted by the jury as an irrebuttable presumption. (emphasis added).

5.9 ADVICE OF COUNSEL

As I have explained, one element which the government must prove beyond a reasonable doubt is that defendant had the unlawful intent to [*insert 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), *cert. denied*, 370 U.S. 952 (1962). 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. *Id.*

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6. SPECIFIC DEFENSES

Instruction

Introductory Comment

A defendant is entitled to an instruction on the theory of his or her case, but the instruction need not be given in the form requested. *United States v. Lopez-Alvarez,* 970 F.2d 583, 597 (9th Cir.) (holding that a defendant is "not entitled to any particular form of instruction nor is he entitled to an instruction that merely duplicates what the jury has already been told"), *cert. denied,* 506 U.S. 989 (1992). The failure to instruct on defendant's theory of defense, where the law and evidence support such an instruction, is per se reversible error. *United States v. Zuniga,* 6 F.3d 569, 571 (9th Cir. 1993).

6.1 ALIBI

Evidence has been introduced 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's presence 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 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. Hairston*, 64 F.3d 491, 495 (9th Cir. 1995); *United States v. Hoke,* 610 F.2d 678, 679 (9th Cir. 1980)*; United States v. Ragghianti,* 560 F.2d 1376, 1379 (9th Cir. 1977). "Even if the alibi evidence is 'weak, insufficient, inconsistent or of doubtful credibility,' the instruction should be given." *Hairston*, 64 F.3d at 495 (citations omitted).

This instruction is not appropriate in a case where the crime charged can be committed without proof that the defendant was present, such as in prosecutions where the government seeks a conviction on an aiding and abetting or conspiracy theory. *United States v. Guillette,* 547 F.2d 743, 752 (2d Cir. 1976), *cert. denied,* 434 U.S. 839 (1977); *United States v. Lee,* 483 F.2d 968, 970 (5th Cir. 1973).

"[A]n instruction [on alibi] is no less necessary when the government raises the issue." *Hairston*, 64 F.3d at 495.

6.2 ENTRAPMENT

The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped. The government must prove the following:

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.

Where 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.

Comment

Only slight evidence raising the issue of entrapment is necessary for submission of the issue to the jury. *United States v. Kessee*, 992 F.2d 1001, 1003 (9th Cir. 1993).

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."), *cert. denied*, 517 U.S. 1148 (1996); *United States v. Simas*, 937 F.2d 459, 462 (9th Cir. 1991) (in absence of inducement, evidence of lack of predisposition is irrelevant).

See also United States v. Manarite, 44 F.3d 1407, 1418 (9th Cir.) ("Inducement is government conduct that creates a substantial risk that an otherwise law-abiding person will commit a crime."), *cert. denied*, 516 U.S. 851 (1995); *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir. 1994) (listing examples of types of conduct that may constitute inducement), *cert. denied*, 513 U.S. 1171 (1995); *United States v. Garza–Juarez*, 992 F.2d 896, 909 (9th Cir. 1993), *cert. denied*, 510 U.S. 1058 (1994).

When there is evidence of entrapment, an additional element may be added to the instruction on the substantive offense, *e.g.*, "Fourth, the defendant was not entrapped." *See also* Instruction 6.7 (Self-Defense).

The defendant is not entitled to an instruction that the government must show prior violations to overcome a claim of entrapment. *United States v. Martinez*, 488 F.2d 1088, 1089 (9th Cir. 1973).

The government must prove that the defendant was disposed to commit the crime *prior* to being approached by the government. *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*).

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.), *cert. denied*, 434 U.S. 838 (1977).

The defendant is not entitled to an instruction allowing the jury to determine the fairness of government conduct, *United States v. Gonzales*, 539 F.2d 1238, 1240 n.1 (9th Cir. 1976), but unreasonable government conduct may result in a violation of due process. Such a violation is separate from an entrapment defense and is not a jury question. *United States v. Prairie*, 572 F.2d 1316, 1319 (9th Cir. 1978).

There are a significant number of Ninth Circuit cases describing the five factors that should be considered when determining "predisposition." It may also be helpful to include the time period requirement imposed by *Jacobsen,* 503 U.S. 540 (1992), as a factor. *See also United States v. Kim*, 176 F.3d 1126, 1128 n. 1 (9th Cir. 1993), *cert. denied,* 120 S. Ct. 142 (1999). The following instruction could be given:

In determining whether the defendant was predisposed to commit the crime before being approached by government agents you may consider the following:

1) the defendant's character and reputation;

2) whether the government initially suggested criminal activity;

3) whether the defendant engaged in activity for profit;

4) the nature of the government's inducement; and

5) any other factors related to predisposition.

See United States v. Tucker, 133 F.3d 1208, 1217 (9th Cir. 1998).

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. *Kim,* 176 F.3d at 1128.

6.3 ENTRAPMENT DEFENSE—
WHETHER WITNESS ACTED AS GOVERNMENT AGENT

The defendant claims [he] [she] was entrapped by a government agent. Whether or not [*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 for purposes of this case, you must look to all of 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. This is not an exhaustive list of the factors to be considered, but provides examples of the types of factors you should consider in deciding whether and when a person was acting as a government agent when engaging in activities in connection with the crimes charged in this case.

Comment

See Sanchez v. United States, 50 F.3d 1448, 1452 (9th Cir. 1995); *United States v. Fontenot*, 14 F.3d 1364, 1369 (9th Cir.), *cert. denied*, 513 U.S. 966 (1994).

6.4 INSANITY

Defendant claims to have been 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 if, but 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 acts.

The defendant must prove insanity at the time by clear and convincing evidence—that is, that it is highly probable that the defendant was insane. 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.

Comment

See Fed. R. Crim. P. 12.2 (Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition), as to notice of insanity defense.

See 18 U.S.C. § 4242 (determination of the existence of insanity at the time of the offense); Fed. R. Evid. 704 (prohibiting expert testimony as to whether the defendant did or did not have the requisite mental state; such issues are left to the determination of the trier of fact).

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). *See also United States v. Still,* 857 F.2d 671, 672 (9th Cir. 1988) (failing to instruct as to definition of clear and convincing evidence is not plain error).

6.5 DURESS, COERCION OR COMPULSION (TO REFUTE ELEMENT OF OFFENSE)

The defendant does not act [willfully] [intentionally] [voluntarily] if the defendant acts under [duress] [coercion] [compulsion] at time of the offense charged. If the government fails to prove the absence of duress beyond a reasonable doubt, then you must find the defendant not guilty.

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

1. there was an immediate 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; and

2. the defendant had a [well-grounded fear] [well-founded 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.

Comment

This instruction is to be used only when the offense charged has a mens rea element and duress is raised to rebut this element. *United States v. Dominguez–Mestas*, 929 F.2d 1379, 1381 (9th Cir.), *cert. denied*, 502 U.S. 958 (1991) (no implicit mens rea for crime of importation of heroin). In all other cases where duress is raised, use Instruction 6.6 (Duress, Coercion or Compulsion (Legal Excuse)).

Ninth Circuit decisions have used the language "well grounded" and "well founded" to describe the second element. *United States v. Keller*, 902 F.2d 1391, 1395 (9th Cir. 1990); *United States v. Beltran–Rios*, 878 F.2d 1208, 1213 (9th Cir. 1989). The Committee interprets "well founded" and "well grounded" to be an objective test and a judge may wish to use the language "reasonable belief" in describing the second element.

It is not error to refuse a duress instruction in the absence of substantial evidence of duress. *United States v. Shapiro*, 669 F.2d 593, 597 (9th Cir. 1982); *United States v. Hernandez*, 608 F.2d 741, 750 (9th Cir. 1979); *United States v. Hearst*, 563 F.2d 1331, 1337 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978).

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), *cert. denied*, 507 U.S. 924 (1993).

Where the defendant alleges that by virtue of duress, coercion, or compulsion, the defendant knowingly or intentionally committed the criminal act, use Instruction 6.6 (Duress, Coercion or Compulsion (Legal Excuse)). *See United States v. Meraz–Solomon*, 3 F.3d 298,

300 (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).

6.6 DURESS, COERCION OR COMPULSION (LEGAL EXCUSE)

[Duress] [coercion] [compulsion] legally excuses the crime of [*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.

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

1. there was an immediate 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] [well-founded 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, your verdict should be for the defendant.

Comment

This instruction is to be used only when the offense charged does not have a mens rea element of the offense. *United States v. Dominguez–Mestas*, 929 F.2d 1379, 1383 (9th Cir.) (defendant has burden of proving duress in prosecution for importation of heroin), *cert. denied*, 502 U.S. 958 (1991). *See also United States v. Hernandez–Franco*, 189 F.3d 1151, 1157-58 (9th Cir. 1999) (a defendant claiming duress in a prosecution for attempt to smuggle undocumented aliens in violation of 8 U.S.C. § 1324(a), must prove duress by a preponderance of the evidence). Where duress rebuts a mens rea element of the offense, use Instruction 6.5 (Duress, Coercion or Compulsion (To Refute Element of Offense)).

Use this instruction when the defendant alleges that by virtue of duress, coercion or compulsion, the defendant knowingly or intentionally committed the criminal act. *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).

The fourth element is to be used only in cases of prison escape. *United States v. Solano*, 10 F.3d 682, 683 (9th Cir. 1993).

This instruction requires that the defendant prove duress, coercion or compulsion by a preponderance of the evidence. *Compare* Instruction 6.5 (Duress, Coercion or Compulsion (to Refute Element of Offense) (requiring that the government disprove duress, coercion or compulsion beyond a reasonable doubt).

Ninth Circuit decisions have used the language "well grounded" and "well founded" to describe the second element. *United States v. Beltran–Rios*, 878 F.2d 1208, 1213 (9th Cir. 1989); *United States v. Keller*, 902 F.2d 1391, 1395 (9th Cir. 1990). The Committee interprets "well founded" and "well grounded" to be an objective test and a judge may wish to use the language "reasonable belief" in describing the second element.

It is not error to refuse a duress instruction in the absence of substantial evidence supporting the elements of the defense. *United States v. Shapiro*, 669 F.2d 593, 597 (9th Cir. 1982); *United States v. Hernandez*, 608 F.2d 741, 750 (9th Cir. 1979); *United States v. Hearst*, 563 F.2d 1331, 1337 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978).

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), *cert. denied*, 507 U.S. 924 (1993).

6.7 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.

Comment

The Ninth Circuit has found that the language of this instruction adequately informs the jury of defendant's defense. *United States v. Keiser*, 57 F.3d 847, 850-52 (9th Cir. 1995), *cert. denied,* 516 U.S. 1029 (1995).

If there is evidence of self-defense, the court may add an additional element to the government's burden of proof, *e.g.,* "Fourth, [the defendant did not reasonably believe that force was necessary to defend against an immediate use of unlawful force] [the defendant used more force than was reasonably necessary in the circumstances]."

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) (quoting *United States v. Lemon,* 824 F.2d 763, 764 (9th Cir. 1987) (citations omitted)). Once the issue is raised, the jury should be instructed that the prosecution retains the burden of proof beyond a reasonable doubt to disprove the theory of self-defense. *Sanchez-Lima*, 161 F.3d at 549; *United States v. Jackson,* 726 F.2d 1466, 1469 (9th Cir. 1984).

Although a defender is not required to retreat before resorting to force, *United States v. Peterson,* 483 F.2d 1222, 1234 (D.C. Cir.), *cert. denied,* 414 U.S. 1007 (1973), the availability of retreat may be a factor for the jury to consider in evaluating a self-defense claim. *United States v. Loman,* 551 F.2d 164, 168 (7th Cir.), *cert. denied,* 433 U.S. 912 (1977).

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.

6.8 INTOXICATION—DIMINISHED CAPACITY

You may consider evidence of [intoxication] [abnormal mental condition] in deciding whether the government has proved beyond a reasonable doubt that the defendant acted with the intent to commit [*crime charged*].

Comment

"A defense based on voluntary intoxication is available only for a specific intent crime." (citations omitted). *United States v. Burdeau*, 168 F.3d 352, 355 (9th Cir.), *cert. denied,* 120 S. Ct. 388 (1999).

6.9 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 [*crime charged*], unless you find that the defendant was 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

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. *United States v. Negrete-Gonzales,* 966 F.2d 1277, 1282 (9th Cir. 1992).

Where the government's case rests primarily on the defendant's presence and nothing more, a mere presence instruction should be given. *United States v. Medrano*, 5 F.3d 1214, 1218 (9th Cir. 1993).

6.10 PUBLIC AUTHORITY OR GOVERNMENT AUTHORIZATION DEFENSE

If a defendant engages in conduct violative of a criminal statute at the request of a government enforcement officer, with the reasonable belief that the defendant is acting as an authorized government agent to assist in law enforcement activity, then the defendant may not be convicted of violating the criminal statute, because the requisite criminal intent is lacking. The government must prove beyond a reasonable doubt that the defendant did not have 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.

Comment

See Fed. R. Crim. P. 12.3 (Notice of Defense Based Upon Public Authority) regarding giving notice of the defense.

See United States v. Davis, 76 F.3d 311, 314 (9th Cir. 1996); *United States v. Mason*, 902 F.2d 1434, 1440–41 (9th Cir. 1990).

7. JURY DELIBERATIONS

Instruction

7.1 DUTY TO DELIBERATE

When you begin your deliberations, you should elect one member of the jury as your foreperson. That person 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

In the ordinary case, a general instruction that the jury's verdict must be unanimous will be sufficient. *United States v. Kim*, 196 F.3d 1079, 1082 (9th Cir. 1999); *United States v. Ferris*, 719 F.2d 1405, 1407 (9th Cir. 1983). However, when there is a genuine possibility of jury confusion, a more specific unanimity instruction—directing that the jury must be unanimous as to which facts satisfy particular elements of the crime—may be required. *Kim*, 196 F.3d at 1082; *United States v. Echeverry,* 719 F.2d 974, 975 (9th Cir. 1983). *See* Instruction 7.9 (Specific Issue Unanimity).

7.2 CONSIDERATION OF EVIDENCE

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. However, nothing that I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

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 the notes.

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. [Any explanation of the verdict form may be given at this time.] After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it and advise the Court that you are ready to return to the courtroom.

Comment

The judge may also wish to explain to the jury the particular form of verdict being used.

7.6 COMMUNICATION WITH COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with 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 the question of the guilt of the defendant, until after you have reached a unanimous verdict or have been discharged.

Comment

The court has a continuing duty to instruct the jury while it is deliberating. *McDowell v. Calderon*, 130 F.3d 833, 836 (9th Cir. 1997), *cert. denied,* 118 S. Ct. 1575 (1998).

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 that a supplemental instruction to encourage a deadlocked jury to reach a verdict should be given with great caution. An earlier form of instruction for a deadlocked jury was approved by the Supreme Court in *Allen v. United States*, 164 U.S. 492, 501 (1896). *See also, United States v. Daas,* 198 F.3d 1167, No. 98-10490, 2000 WL 1657, *10 (9th Cir. 1999) (citing Instruction 7.6 (Deadlocked Jury), now Instruction 7.7, with approval).

Before giving any supplemental jury instruction to a deadlocked jury, the Committee recommends the court review *United States v. Wills*, 88 F.3d 704, 716-18 (9th Cir.), *cert. denied*, 519 U.S. 1000 (1996)*; United States v. Ajiboye*, 961 F.2d 892 (9th Cir. 1992) (approving similar language to this instruction); *United States v. Nickell*, 883 F.2d 824, 827-29 (9th Cir. 1989); *United States v. Seawell,* 550 F.2d 1159 (9th Cir. 1977), *appeal after remand,* 583 F.2d 416 (9th Cir. 1978), *cert. denied,* 439 U.S. 991 (1978); and §**§ 5.5**, **Jury Committee of the Ninth Circuit**, **A Manual on Jury Trial Procedures** (1998). *See also, United States v. Steele*, 298 F.3d 906, 911 (9th Cir.) *cert. denied* 123 S. Ct 710 (2002).

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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 asking the foreperson of the jury the following:

> "In your opinion, is the jury hopelessly deadlocked?" [*If the foreperson's response is, "Yes," then ask the foreperson*] "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 foreperson's response is "No," then ask the following question of the entire panel*] "Do you feel there is a reasonable probability that the jury can reach a unanimous verdict if sent back to the jury room for further deliberation?"

You may wish to poll the jury and record their answers, which shall be yes or no. *See United States v. See*, 505 F.2d 845, 851 (9th Cir. 1974) (finding that "[t]he 'crucial factor' . . . is a statement from the jury that it is 'hopelessly deadlocked.'")

The courts have considered a number of factors in determining whether there has been an abuse of discretion in declaring a deadlocked jury. These include: "(1) a timely objection by defendant, (2) the jury's collective opinion that it cannot agree, (3) the length of the deliberations of the jury, (4) the length of the trial, (5) the complexity of the issues presented to the jury, (6) any proper communications which the Judge has had with the jury, and (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict." *Arnold v. McCarthy*, 566 F.2d 1377,1387 (9th Cir. 1978).

See also JURY COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 5.5 (1998).

7.9 SPECIFIC ISSUE UNANIMITY

Comment

"A jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." *Richardson v. United States*, 526 U.S.813 (1999) (continuing criminal enterprise prosecution).

The Ninth Circuit has stated that in certain cases, the general instruction regarding jury unanimity is insufficient. *See, e.g., 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).

The need for unanimity may arise in any case in which there is a "genuine possibility of jury confusion." *Echeverry*, 719 F.2d at 975. In particular, the potential for jury confusion exists when (1) the evidence is factually complex, (2) there is a discrepancy between the evidence and the indictment, (3) the indictment is broad or ambiguous, (4) the jury's questions indicate that it may be confused, or (5) some other particular factor creates such possibility of confusion. *See Richardson*, 119 S.Ct. at 1709 (finding that in a continuing criminal enterprise prosecution, there must be unanimity as to the specific violations which make up the "continuing series of violations"); *United States v. Kim*, 196 F.3d 1079, 1082-83 (9th Cir. 1999) (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); *Jeffries v. Blodgett,* 5 F.3d 1180, 1195 (9th Cir.) (juror unanimity required for murder charges), *cert. denied*, 510 U.S. 1994 (1994); *United States v. Anguiano*, 873 F.2d 1314, 1319–21 (9th Cir.), *cert. denied*, 493 U.S. 969 (1989) (multiple drug conspiracies; indicia of juror confusion not present); *United States v. Payseno*, 782 F.2d 832, 836–37 (9th Cir. 1986) (plain error to fail to give specific unanimity instruction when there was evidence of three separate extortion incidents charged in a single count under the Consumer Credit Protection Act); *Echeverry,* 719 F.2d at 975 (multiple drug conspiracies; juror questions suggested confusion). *But see United States v. Qualls*, 172 F.3d 1136, 1138 (9th Cir. 1999) (holding that under *Caron v. United States*, 524 U.S. 308 (1998), in felon in possession of firearm case, there was no longer a need for jury to agree on which firearm defendant possessed.)

The Committee recommends that when a specific unanimity instruction is necessary to avoid juror confusion, the substantive instruction should be amended to include the phrase " . . .with all of you agreeing [as to the particular fact requiring unanimity]."

OFFENSES UNDER TITLE 18

Instruction

8.35 Theft From Interstate Shipment (18 U.S.C. § 659).
8.36 Escape From Custody (18 U.S.C. § 751).
8.37 Attempted Escape (18 U.S.C. § 751).
8.38 Assisting Escape (18 U.S.C. § 752).
8.39 Threats Against the President (18 U.S.C. § 871).
8.40 Extortionate Credit Transactions (18 U.S.C. § 892).
8.41 False Impersonation of Citizen of United States (18 U.S.C. § 911).
8.42 False Impersonation of Federal Officer or Employee—Demanding or Obtaining Money (18 U.S.C. § 912).
8.43 Firearms.
8.44 Firearms—Fugitive From Justice Defined (18 U.S.C. § 921(a)(15)).
8.45 Firearms—Dealing, Importing or Manufacturing Without License (18 U.S.C. § 922(a)(1)(A) and (B)).
8.46 Firearms—Shipment or Transportation to a Person Not Licensed as a Dealer, Importer, Manufacturer or Collector (18 U.S.C. § 922(a)(2)).
8.47 Firearms—Evidence of No License.
8.48 Firearms—Transporting or Receiving in State of Residence (18 U.S.C. § 922(a)(3)).
8.49 Firearms—Unlawful Transportation of Destructive Device, Machine Gun, Short–Barreled Shotgun or Short–Barreled Rifle (18 U.S.C. § 922(a)(4)).
8.50 Firearms—Evidence of No Authorization.
8.51 Firearms—Unlawful Disposition by Unlicensed Dealer (18 U.S.C. § 922(a)(5)).
8.52 Firearms—False Statement or Identification in Acquisition or Attempted Acquisition (18 U.S.C. § 922(a)(6)).
8.53 Firearms—Unlawful Sale or Delivery (18 U.S.C. §§ 922(b)(1)–(3)).
8.54 Firearms—Unlawful Sale or Delivery Without Specific Authority (18 U.S.C. § 922(b)(4)).
8.55 Firearms—Unlawful Sale (18 U.S.C. § 922(d)).
8.56 Firearms—Delivery to Carrier Without Written Notice (18 U.S.C. § 922(e)).
8.57 Firearms—Unlawful Receipt (18 U.S.C. § 922(g)).
8.58 Firearms—Unlawful Shipment or Transportation (18 U.S.C. § 922(g)).
8.59 Firearms—Ammunition—Unlawful Possession (18 U.S.C. § 922(g)).
8.60 Firearms–Ammunition–Unlawful Possession–Justification.
8.61 Firearms—Transportation or Shipment of Stolen Firearm (18 U.S.C. § 922(i)).
8.62 Firearms—Transporting, Shipping or Receiving in Commerce With Removed or Altered Serial Number (18 U.S.C. § 922(k)).
8.63 Firearms—Shipment or Transportation by Person Under Indictment for Felony (18 U.S.C. § 922(n)).
8.64 Firearms—Receipt by Person Under Indictment for Felony (18 U.S.C. § 922(n)).
8.65 Firearms—Using or Carrying in Commission of Drug Trafficking Crime or Crime of Violence (18 U.S.C. § 924(c)).
8.66 False Statement to Government Agency (18 U.S.C. § 1001).
8.67 False Statement to a Bank (18 U.S.C. § 1014).
8.68 Counterfeit Access Devices—Production, Use, or Trafficking (18 U.S.C. § 1029(a)(1)).

8.133 Aggravated Sexual Abuse (18 U.S.C. § 2241(a)).
8.134 Attempted Aggravated Sexual Abuse (18 U.S.C. § 2241(a)).
8.135 Aggravated Sexual Abuse—Administration of Drug, Intoxicant or Other Substance (18 U.S.C. § 2241(b)(2)).
8.136 Attempted Aggravated Sexual Abuse—Administration of Drug, Intoxicant or Other Substance (18 U.S.C. § 2241(b)(2)).
8.137 Aggravated Sexual Abuse of Child (18 U.S.C. § 2241(c)).
8.138 Attempted Aggravated Sexual Abuse of Child (18 U.S.C. § 2241(c)).
8.139 Sexual Abuse—By Threat (18 U.S.C. § 2242(1)).
8.140 Attempted Sexual Abuse—By Threat (18 U.S.C. § 2242(1)).
8.141 Sexual Abuse—Incapacity of Victim (18 U.S.C. § 2242(2)).
8.142 Attempted Sexual Abuse—Incapacity of Victim (18 U.S.C. § 2242(2)).
8.143 Sexual Abuse of a Minor (18 U.S.C. § 2243(a)).
8.144 Attempted Sexual Abuse of Minor (18 U.S.C. § 2243(a)).
8.145 Sexual Abuse of a Person in Official Detention (18 U.S.C. § 2243(b)).
8.146 Attempted Sexual Abuse of Person in Official Detention (18 U.S.C. § 2243(b)).
8.147 Sexual Abuse—Defense of Reasonable Belief of Minor's Age (18 U.S.C. § 2243(c)(1)).
8.148 Abusive Sexual Contact—General (18 U.S.C. § 2244(a)).
8.149 Abusive Sexual Contact—Without Permission (18 U.S.C. § 2244(b)).
8.150 Sexual Exploitation of Child (18 U.S.C. § 2251(a)).
8.151 Sexual Exploitation of Child—Permitting or Assisting by Parent or Guardian (18 U.S.C. § 2251(b)).
8.152 Sexual Exploitation of Child—Notice or Advertisement Seeking or Offering (18 U.S.C. § 2251(c))
8.153 Sexual Exploitation of Child—Transportation of Child Pornography (18 U.S.C. § 2252(a)(1))
8.154 Sexual Exploitation of Child—Possession of Child Pornography (18 U.S.C. § 2252(a)(4)(B))
8.155 Sexual Exploitation of a Child—Defense of Reasonable Belief of Age.
8.156 Interstate Transportation of Stolen Vehicle or Aircraft (18 U.S.C. § 2312).
8.157 Sale or Receipt of Stolen Vehicle or Aircraft (18 U.S.C. § 2313).
8.158 Interstate Transportation of Stolen Property (18 U.S.C. § 2314).
8.159 Sale or Receipt of Stolen Goods, Securities and Other Property (18 U.S.C. § 2315).
8.160 Transportation for Prostitution (18 U.S.C. § 2421).
8.161 Persuading or Coercing to Travel to Engage in Prostitution (18 U.S.C. § 2422).
8.162 Transportation of Minor for Prostitution (18 U.S.C. § 2423).
8.163 Failure to Appear (18 U.S.C. § 3146(a)(1)).
8.164 Failure to Surrender (18 U.S.C. § 3146(a)(2)).
8.165 Failure to Appear or Surrender—Affirmative Defense (18 U.S.C. § 3146©)).
8.166A Falsely Made Immigration Document (18 U.S.C. § 1546(a))

8.166B Fraud–Use, Possession of Immigration Document Procured by Fraud (18 U.S.C. § 1546(a))

8.166C Fraud–False Statement on Immigration Document (18 U.S.C. § 1546(a))

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 form conducive to maximum comprehension.

Many statutes contain alternative prohibitions. Instructions to be used in a particular case should be limited to those words of the statute that apply to the facts in that case. The model instructions state the alternatives in brackets; the user should select the language in brackets appropriate to the case. The model instructions also contemplate insertion of specific descriptions based on the evidence in place of general language (*e.g.,* gun rather than deadly weapon).

8.1 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] [intended to set] fire to or burned [*e.g.*, a building on the Fort Ord Military Reservation]; [and]

Second, the defendant acted wrongfully and without justification[; and]

[Third, the defendant did something which was a substantial step toward committing the crime, with all of you agreeing as to what constituted the substantial step].

[Mere preparation is not a substantial step toward committing a crime.]

[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]].

[If you decide that the defendant is guilty, you must then decide whether the defendant's act placed the life of some person in danger.]

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 Instruction 7.9 (Specific Issue Unanimity).

8.2 ASSAULT ON FEDERAL OFFICER [WITH A DEADLY OR DANGEROUS WEAPON] (18 U.S.C. § 111)

The defendant is charged in [Count _____ of] the indictment with assault on a federal officer [with a dangerous or deadly weapon] in violation of Section 111 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 used force in [[assaulting] [resisting] [intimidating] [interfering with]] [[*federal officer*]]; and

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

[Third, the defendant [used a [*weapon*]] [inflicted bodily injury]].

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

There is a use of force when one person intentionally [strikes] [wounds] another, or when one person intentionally makes a display of force which reasonably causes a person to fear immediate bodily harm.

A [*e.g.*, United States Marshal] who is [*e.g.*, trying to arrest a person] is engaged in [his] [her] official duties.

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).

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). However, the last sentence of the instruction should be given only if the defendant denies knowledge that the person assaulted was a federal officer but does not claim to have acted in self-defense. If the defendant denied knowledge that the person assaulted was a federal officer and claims to have acted in self-defense, Instruction 8.3 (Assault on Federal Officer–Defenses) should be used.

8.3 ASSAULT ON FEDERAL OFFICER—DEFENSES

The defendant has offered evidence of having acted in self-defense. It is a defense to the charge if (1) the defendant did not know that [*federal officer*] was a federal officer, (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.

But 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 [*federal officer*] was a federal officer 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.), *cert. denied,* 474 U.S. 905 (1985) (emphasis in original).

In *United States v. Span*, 970 F.2d 573 (9th Cir.1992), *cert.denied,* 507 U.S. 921 (1993), 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.

8.4 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 [*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 intentionally [struck or wounded [*victim*]] [used a display of force that reasonably caused [*victim*] to fear immediate bodily harm]; and

Second, the defendant did so with the specific intent to commit [*felony*].

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).

Assaults proscribed by 18 U.S.C. § 113 are those committed "within the special maritime and territorial jurisdiction of the United States." An additional element should be added to the instruction if there is a dispute as to whether the alleged assault occurred within the special maritime and territorial jurisdiction of the United States.

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 felony the defendant intended to commit"). *See* Instruction 7.9 (Specific Issue Unanimity).

8.5 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 intentionally [struck or wounded [*victim*]] [used a display of force that reasonably caused [*victim*] to fear immediate bodily harm];

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

Third, the defendant used a [*weapon*].

[A [*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 following Instruction 8.2 (Assault on Federal Officer).

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, 1342 (11th Cir. 1982), *cert. denied,* 460 U.S. 1016 (1983).

8.6 ASSAULT BY STRIKING, BEATING OR WOUNDING (18 U.S.C. § 113(a)(4))

The defendant is charged in [Count _____ of] the indictment with assault by striking, beating or wounding in violation of Section 113(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 beyond a reasonable doubt that the defendant intentionally [[struck] [wounded]] [[*victim*]].

Comment

See Comment following Instruction 8.2 (Assault on Federal Officer).

The elements of assault are not necessary when the charge is assault by striking, beating or wounding, because the crime is actually a battery. *United States v. Johnson,* 637 F.2d 1224, 1242 n.26 (9th Cir.1980).

8.7 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 intentionally [[struck] [wounded]] [[*victim*]]; and

Second, as a result, [*victim*] suffered serious bodily injury.

Comment

See Comment following Instruction 8.2 (Assault on Federal Officer).

"Serious bodily injury" is defined in 18 U.S.C. §§ 113(b)(2) and 1365(g)(3).

8.8 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 to [*public official*]; and

Second, the defendant acted corruptly, that is, with the intent to [influence an official act by the [*public official*]] [persuade the [*public official*] to omit to do an act in violation of [*public official*]'s lawful duty].

Comment

See United States v. Strand, 574 F.2d 993, 996 (9th Cir.1978).

If there is any question in the case about the "official" character of the action sought by the defendant, insert a sentence following "duty" defining "official act:" "An official act is any decision or action on a question that may be brought before any public official in his official capacity." *See* 18 U.S.C. § 201(a)(3).

Actual power to do what defendant wants is not an element. *United States v. Carson,* 464 F.2d 424, 431 (2d Cir.), *cert. denied,* 409 U.S. 949 (1972). Nor does it matter whether the official actually accepted anything from defendant or was actually influenced.

There should be some connection between the offer and the official's duties. *United States v. Seuss,* 474 F.2d 385, 388 (1st Cir.), *cert. denied,* 412 U.S. 928 (1973).

Consult each statute that uses the term "corruptly" for the meaning of the term. "Corruptly" is capable of different meanings in different connections. *See United States v. Cohen,* 202 F. Supp. 587, 588 (D. Conn.1962).

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).

8.9 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 [*e.g.*, a special agent of the United States Customs Service];

Second, the defendant [solicited] [received] [agreed to receive] something of value [for being influenced in the performance of an official act] [for being persuaded [to omit] to do an act in violation of defendant's official duty]; and

Third, the defendant acted corruptly, that is, with the intent [of being influenced in the performance of an official act] [[to omit] to do an act in violation of defendant's official duty].

Comment

See Comment following Instruction 8.8 (Bribery of 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 bribe"). *See* Instruction 7.9 (Specific Issue Unanimity).

8.10 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, [*witness*] was to be a witness under oath at a [*e.g.*, trial before the United States District Court for the District of _____];

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

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

Comment

See Comment following Instruction 8.8 (Bribery of 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 defendant intended the witness to do in return for the bribe"). *See* Instruction 7.9 (Specific Issue Unanimity).

8.11 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 [*e.g.*, hearing before the National Labor Relations Board];

Second, the defendant [solicited] [received] [agreed to receive] something of value in return for [being influenced in the defendant's testimony] [being absent from the [*e.g.*, hearing]]; and

Third, the defendant acted corruptly, that is, with the intent of [being influenced in the defendant's testimony] [absenting [himself] [herself] from the [*e.g.*, hearing]].

Comment

See Comment following Instruction 8.8 (Bribery of 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 witness intended to do in return for the bribe"). *See* Instruction 7.9 (Specific Issue Unanimity).

8.12 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 beyond a reasonable doubt that the defendant [gave] [offered] [promised] something of value to [[*e.g.*, an agent of the Internal Revenue Service]] [[for] [because of]] an official act [performed] [to be performed] by the [*e.g.*, agent].

Comment

See Comment following Instruction 8.8 (Bribery of Public Official).

The essential difference between a bribe and an illegal gratuity is that bribery requires the defendant to have acted "corruptly." 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).

8.13 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 [*e.g.*, a special agent of the United States Customs Service]; and

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

Comment

See Comment following Instructions 8.8 (Bribery of Public Official) and 8.12 (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).

8.14 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 to [*witness*] [for testimony to be given for [*e.g.*, the grand jury]] [because of testimony given before _____] [for being absent from _____ so that [he] [she] could not testify as a witness].

Comment

See Comment following Instructions 8.8 (Bribery of Public Official) and 8.12 (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 defendant intended the witness to do in return for the gratuity"). *See* Instruction 7.9 (Specific Issue Unanimity).

8.15 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 from [*witness*]] [for testimony to be given under oath by the defendant as a witness at [*e.g.*, a hearing before an Examiner of the National Labor Relations Board]] [because of testimony given under oath by the defendant as a witness at _____] [for being absent from _____ so that the defendant could not testify as a witness].

Comment

See Comment following Instructions 8.8 (Bribery of Public Official) and 8.12 (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 witness intended to do in return for the gratuity"). *See* Instruction 7.9 (Specific Issue Unanimity).

8.16 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 for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed].

I shall discuss with you briefly the law relating to each of these elements.

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

In the aftermath of *Apprendi v. New Jersey,* __ U.S. __, 120 S.Ct. 2348 (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) ("[O]ur existing precedent to the contrary is overruled to the extent it is inconsistent with *Apprendi.*") (citations omitted). *See also United States v. Garcia-Guizar*, 227 F.3d 1125 (9th Cir. 2000). As a result, if applicable, the court should obtain a jury determination of the amount of drugs involved.

The third element of this instruction should be used only where the statute expressly requires proof of an overt act, *e.g.*, 18 U.S.C. § 371 (the general conspiracy statute) and 18 U.S.C. § 1511(a) (conspiracy to obstruct state or local law enforcement). *United States v. Shabani*, 513 U.S. 10, 15-16 (1994) (holding that proof of overt act not necessary for violation 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), *cert. denied*, 119 S. Ct. 267 (1998).

Some statutes do not require proof of an overt act. *See, e.g.,* 18 U.S.C. § 1951(a) (Conspiracy to Interfere with Commerce by Threats or Violence), § 1962(d) (Conspiracy to Engage in Racketeer Influenced and Corrupt Organizations), § 2384 (Seditious Conspiracy); 21 U.S.C. §§ 841, 846 (Conspiracy to Possess a Controlled Substance with Intent to Distribute), and §§ 960, 963 (Conspiracy to Import or Export a Controlled Substance).

See Instruction 7.9 (Specific Issue Unanimity).

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8.17 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

This instruction was cited approvingly in *United States v. Bauer,* 84 F.3d 1549, 1560–61 (9th Cir.1996), *cert. denied*, 519 U.S. 1131 (1997).

Absent variance between the allegations of the indictment and the evidence presented, there is no need to instruct the jury on the issue of multiple conspiracies. *United States v. Zemek,* 634 F.2d 1159, 1167-69 (9th Cir.1980), *cert. denied,* 450 U.S. 916 (1981); *United States v. Mayo,* 646 F.2d 369, 374 (9th Cir.), *cert. denied,* 454 U.S. 1127 (1981). But where there is variance, *e.g.,* where the indictment charges a single conspiracy and the evidence indicates two or more possible conspiracies, a multiple conspiracy instruction is proper. *United States v. Perry,* 550 F.2d 524, 533 (9th Cir.), *cert. denied,* 431 U.S. 918, 434 U.S. 827 (1977) (citing *United States v. Varelli,* 407 F.2d 735, 746 (7th Cir.1969)).

In cases where the conspiracy charged involves only two persons, it is useful to instruct the jury that should it find either conspirator not guilty of conspiracy it must acquit both. *United States v. Coven,* 662 F.2d 162, 173 (2d Cir.1981), *cert. denied,* 456 U.S. 916 (1982); *See also United States v. Glickman,* 604 F.2d 625, 631–33 (9th Cir.1979) (holding that, where the indictment did not charge that the defendant and co-defendant were the only members of the conspiracy, a determination by the jury that there were other members of the conspiracy would not preclude a finding that the defendant and co-defendant were guilty of conspiracy), *cert. denied,* 444 U.S. 1080 (1980).

8.18 CONSPIRACY—KNOWING 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 it is proved 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 no 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.), *cert. denied,* 449 U.S. 856 (1980); *United States v. Kearney,* 560 F.2d 1358, 1362 (9th Cir.), *cert. denied,* 434 U.S. 971 (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), *cert. denied,* 423 U.S. 1074 (1976). *See also 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"); *United States v. Perry,* 550 F.2d 524, 528 (9th Cir.) (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”), *cert. denied,* 431 U.S. 918, 434 U.S. 827 (1977).

8.19 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.

The government has the burden of proving that the defendant did not withdraw from the conspiracy before the overt act—on which you all agreed—was committed by some member of the conspiracy.

Comment

It is proper to instruct that continued participation in a conspiracy is presumed unless there is evidence of withdrawal. *United States v. Krasn,* 614 F.2d 1229, 1236 (9th Cir.1980). *See also United States v. Basey,* 613 F.2d 198, 202 (9th Cir.1979), *cert. denied,* 446 U.S. 919 (1980).

If requested, an instruction on the government's burden of disproving withdrawal should be given. *United States v. Read,* 658 F.2d 1225, 1237 (7th Cir.1981) (holding that, under the circumstances of the case, the failure to instruct the jury on the government's burden of disproving withdrawal constituted reversible error).

In the absence of a statute of limitations defense, do not use this instruction if the conspiracy charged in the indictment requires no proof of an overt act charged, since the crime is complete upon entering into the conspiracy. *United States v. Grimmett,* 150 F.3d 958, 961 (8th Cir. 1998). If the statute of limitations is a defense, this instruction should be modified to require the government to disprove withdrawal before the limiting date. *Id.* at 961.

8.20 CONSPIRACY—PINKERTON CHARGE

A conspiracy is a kind of criminal partnership—an agreement between two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful.

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 the crime. Before you may consider the statements or acts of a co-conspirator, you must first determine whether the acts or statements were made during the existence of and in furtherance of an unlawful scheme, and whether any offense was one which could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement.

Therefore, you may find the defendant guilty of [e.g., distributing cocaine] as charged in Count _____ of the indictment if the government has proved each of the following elements beyond a reasonable doubt:

1. a person named in Count _____ of the indictment committed the crime of [e.g., distribution of cocaine] as alleged in that count;

2. the person was a member of the conspiracy charged in Count _____ of the indictment;

3. the person committed the crime of [e.g., distribution of cocaine] in furtherance of the conspiracy;

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

5. 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

Where this instruction is appropriate, it should be given in addition to Instruction 8.16 (Conspiracy—Elements).

This instruction is based upon *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1202-1203 (9th Cir.2000), 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, 996-997 (9th Cir.), *cert. denied*, 525 U.S. 917 (1998).

The *Pinkerton* charge derives its name from *Pinkerton v. United States*, 328 U.S. 640 (1946).

8.21 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 charge 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." *See United States v. Montgomery,* 150 F.3d 983, 995-96 (9th Cir.), *cert. denied,* 119 S. Ct. 267 (1998).

8.22 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] [altered]] [[*e.g.*, a ten dollar bill]]; and

Second, the defendant acted with intent to defraud.

To be counterfeit, a bill must have a likeness or resemblance to genuine currency.

Comment

For a definition of "intent to defraud," see Instruction 3.17 (Intent to Defraud–Defined).

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

The defendant is charged in [Count _____ of] the indictment with [passing] [attempting to pass] 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] [intended to pass] a [[falsely made] [forged] [counterfeit] [altered]] [[*obligation*]];

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

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

[Fourth, the defendant did something which was a substantial step toward committing the crime, with all of you agreeing as to what constituted the substantial step].

[Mere preparation is not a substantial step toward committing a crime.]

To be counterfeit, a bill must have a likeness or resemblance to genuine currency.

Comment

For a definition of "intent to defraud," see Instruction 3.17 (Intent to Defraud–Defined).

The government's burden of proving the defendant's knowledge is stated in *United States v. Lorenzo,* 570 F.2d 294, 299 (9th Cir.1978). Intent and knowledge may be inferred from defendant's actions. *Id.*

See Instruction 7.9 (Specific Issue Unanimity).

8.24 CONNECTING PARTS OF FEDERAL RESERVE NOTES (18 U.S.C. § 484)

The defendant is charged in [Count _____ of] the indictment with connecting parts of two federal reserve notes 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 federal reserve notes; and

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

Comment

For a definition of "intent to defraud," see Instruction 3.17 (Intent to Defraud–Defined).

8.25 FORGERY
(18 U.S.C. § 495)

The defendant is charged in [Count _____ of] the indictment with forgery 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] the name of the payee of a [*e.g.*, United States Treasury check]; and

Second, the defendant did so with the intent that the defendant or someone else obtain money from the United States.

Comment

The requisite intent to defraud is present even if the defendant believes that someone other than the United States, *e.g.,* a government employee, will be defrauded. It is enough to show intent to interfere with a government function, *e.g.,* paying employees. *United States v. Dimond,* 445 F.2d 866 (9th Cir.1971).

Forgery is defined in *United States v. Price,* 655 F.2d 958, 960 (9th Cir. 1981), which also discusses the relationship of forgery to false making. It is not necessary that anyone actually received money from the United States as a result of the forgery or that anyone was actually deceived.

8.26 PASSING FORGED WRITING
(18 U.S.C. § 495)

The defendant is charged in [Count _____ of] the indictment with [passing] [attempting to pass] a forged writing for the purpose of obtaining money 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 [passed] [attempted to pass] a [[falsely made] [altered] [forged] [counterfeited]] [[*document*]];

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

Third, the defendant acted with the intent to defraud.

[Fourth, the defendant did something which was a substantial step toward committing [*crime charged*], with all of you agreeing as to what constituted the substantial step. Mere preparation is not a substantial step toward the commission of [*crime charged*].]

Comment

The bracketed fourth element should be used when defendant is charged with attempt to pass a forged writing.

See Comment following Instruction 8.25 (Forgery).

For a definition of "intent to defraud," see Instruction 3.17 (Intent to Defraud–Defined).

For a definition of "attempt," see Instruction 5.3 (Attempt).

8.27 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 3.17 (Intent to Defraud–Defined).

See Comment to Instruction 8.25 (Forgery).

8.28 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] [attempting to utter] [attempting to 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] [attempted to utter] [attempted to 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.

Comment

For a definition of "intent to defraud," see Instruction 3.17 (Intent to Defraud–Defined).

For a definition of "attempt," see Instruction 5.3 (Attempt).

See Comment to Instruction 8.25 (Forgery).

8.29 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 [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.

[Fourth, the defendant did something which was a substantial step toward committing [*crime charged*], with all of you agreeing as to what constituted the substantial step. Mere preparation is not a substantial step toward the commission of [*crime charged*].]

Comment

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.

This instruction is based upon the first paragraph of 18 U.S.C. § 545. The first two paragraphs of section 545 set forth two separate offenses. *Olais-Costro v. United States*, 416 F.2d 1155, 1157-58 (9th Cir. 1969). Note that if the offense falls under the second paragraph of 18 U.S.C. § 545, the government is not required to prove specific intent. *United States v. Davis,* 597 F.2d 1237, 1239 (9th Cir.1979).

The statute also provides that proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section. *See United States v. Salas-Camacho*, 859 F.2d 788, 790 (9th Cir. 1988) (holding that importer must stop and declare at first opportunity).

See also U.S. 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).

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8.30 RECEIVING, CONCEALING, BUYING OR SELLING SMUGGLED PROPERTY (18 U.S.C. § 545)

The defendant is charged in [Count _____ of] the indictment with [receiving] [concealing] [buying] [selling] smuggled property 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 United States Customs law; and

Second, the defendant [received] [concealed] [bought] [sold] the merchandise knowing that it had been brought into the United States contrary to law.

Comment

See Comment following Instruction 8.29 (Smuggling Goods).

8.31 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 stole [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

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.), *cert. denied,* 400 U.S. 957 (1970).

See United States v. Campbell, 42 F.3d 1199, 1205 (9th Cir.1994), *cert. denied*, 514 U.S. 1091 (1995) (government must prove that defendant stole property with the intention of depriving the owner of the use or benefit of the property). *See also United States v. Burton*, 871 F.2d 1566, 1570 (11th Cir. 1989).

Theft of money or property having a value of $1,000 or less is a misdemeanor. 18 U.S.C. § 641.

8.32 POSSESSION OF STOLEN GOVERNMENT MONEY OR PROPERTY (18 U.S.C. § 641)

The defendant is charged in [Count _____ of] the indictment with possession of stolen 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 stolen from the United States; and

Fourth, the defendant intended to possess the [money] [property] for [his] [her] own use or gain; and

Fifth, the value of the [money] [property] was more than $1,000.

Comment

See Comment following Instruction 8.31 (Theft of Government Money or Property).

8.33 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 [*e.g.*, teller of the [*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 $1000;

Third, the defendant acted with the intent to injure or defraud the bank;

Fourth, the bank was an insured bank; 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

It is suggested that the court take judicial notice that the bank is a national or federally insured bank and so instruct the jury, unless the defendant asks that the issue be submitted to the jury. A defendant must act "willfully" in taking the money. *United States v. Schoenhut*, 576 F.2d 1010, 1024 (3rd Cir.), *cert. denied,* 440 U.S. 921 (1979). Misapplication, as distinguished from embezzlement, "does not require a showing of prior lawful possession of the funds." *United States v. Hazeem,* 679 F.2d 770, 772 (9th Cir.), *cert. denied,* 459 U.S. 848 (1982).

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); *United States v. Beattie,* 594 F.2d 1327, 1329 (9th Cir.1979); *Ramirez v. United States,* 318 F.2d 155, 157–58 (9th Cir.1963). "Intent to injure or defraud" a bank requires that the defendant act knowingly and the result of the conduct would be to injure or defraud the bank, regardless of the motive. *Schoenhut,* 576 F.2d at 1024. Reckless disregard of the interests of the bank is not itself sufficient to impose criminal liability although the requisite intent under section 656 may be inferred from a defendant's disregard of the bank's interests. *Stozek,* 783 F.2d at 893.

If the amount taken is in dispute, the jury should be instructed to make a finding of

whether the amount taken was more than $1,000.

8.34 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 8.33 (Theft, Embezzlement or Misapplication of Bank Funds) should be used with appropriate modifications. Section 656 and Section 657 contain essentially the same elements.

8.35 THEFT FROM INTERSTATE SHIPMENT
(18 U.S.C. § 659)

The defendant is charged in [Count __ of] the indictment with theft from an interstate 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 goods from a shipment in interstate commerce; and

Second, the defendant did so with the intent to deprive the owner of the use or benefit of the goods.

A shipment is in interstate commerce if it begins in one state and moves into another state. It becomes an interstate shipment as soon as it is assembled for interstate movement and remains one until it has been delivered to its destination.

8.36 ESCAPE FROM CUSTODY
(18 U.S.C. § 751)

The defendant is charged in [Count _____ of] the indictment with escape from custody in violation of Section 751 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 custody of [*e.g.*, the United States Bureau of Prisons]; and

Second, the defendant knowingly and voluntarily left custody without permission.

Comment

Intention of avoiding confinement is not an element of escape. *United States v. Bailey,* 444 U.S. 394, 408 (1980).

Whether the defendant is in custody, pursuant to process or lawful arrest, is a question of law for the court and need not be submitted to the jury in the absence of a factual dispute. *See United States v. Keller*, 912 F.2d 1058, 1061 & n.5 (9th Cir. 1990), *cert. denied*, 498 U.S. 1095 (1991).

Proof of conviction by exemplified copy of judgment and a certification of commitment is sufficient to establish the custody element. *United States v. Rosas–Garduno,* 427 F.2d 352, 353 (9th Cir.1970). If defendant knew he or she was under arrest, then the defendant was in custody for purpose of this offense. *Tennant v. United States,* 407 F.2d 52, 53 (9th Cir.1969).

8.37 ATTEMPTED ESCAPE
(18 U.S.C. § 751)

The defendant is charged in [Count _____ of] the indictment with attempted escape in violation of Section 751 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 [*e.g.*, John Jones, a Deputy United States Marshal];

Second, the defendant intended to escape from custody; and

Third, the defendant did something that was a substantial step toward escaping from custody, with all of you agreeing as to what constituted the substantial step.

Mere preparation is not a substantial step toward committing the crime of escape.

Comment

See Comment following Instruction 8.36 (Escape from Custody).

See Instruction 7.9 (Specific Issue Unanimity).

8.38 ASSISTING ESCAPE
(18 U.S.C. § 752)

The defendant is charged in [Count _____ of] the indictment with assisting escape in violation of Section 752 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, [[*escapee*]] [[left] [attempted to leave]] [[his] [her]] [[*custody authorized under any federal process*]] without permission;

Second, the defendant knew that [*escapee*] did not have permission to leave; and

Third, the defendant assisted [*escapee*] in [leaving] [attempting to leave].

Comment

Why the prisoner was in custody is a matter of sentencing enhancement only and need not be submitted to the jury. *Cf. Alemendarez-Torres v. United States,* 523 U.S. 224 (1998) (nature of defendant's prior convictions in illegal reentry prosecution is matter of sentencing enhancement and not element of offense of illegal reentry).

Whether a prisoner was in custody pursuant to process or lawful arrest is a question of law for the court and need not be submitted to the jury in the absence of a factual dispute. *United States v. Keller*, 912 F.2d 1058, 1061 & n.5 (9th Cir. 1990), *cert. denied*, 498 U.S. 1095 (1991).

8.39 THREATS AGAINST THE PRESIDENT
(18 U.S.C. § 871)

The defendant is charged in [Count _____ of] the indictment with making a threat against the President of the United States in violation of Section 871 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 threatened, either in writing or orally, to [kill] [injure] [kidnap] the President of the United States; and

Second, under the circumstances in which the threat was made, a reasonable person would foresee that it would be understood by persons hearing or reading it as a serious expression of an intention to [kill] [injure] [kidnap] the President of the United States.

Comment

If the defendant is charged with threatening the Vice President or another officer next in the order of succession to the office of President, the instruction should be modified accordingly.

8.40 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 [*debtor*]; and

Second, at the time the credit was extended, the defendant as a creditor and [*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.

8.41 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 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; and

Third, the defendant made such false representation willfully, that is, the misrepresentation was voluntarily and deliberately made.

Comment

"Willfully" requires proof "that the misrepresentation was deliberate and voluntary." *See Chow Bing Kew v. United States*, 248 F.2d 466, 469 (9th Cir.), *cert. denied*, 355 U.S. 889 (1957). *See also Hernandez-Robledo v. INS*, 777 F.2d 536, 539 (9th Cir. 1985) (determining that willfully, as used in 8 U.S.C. § 1182(a)(19), false representation of citizenship, requires proof that the misrepresentation was deliberate and voluntary); *Espinoza-Espinoza v. INS*, 544 F.2d 921, 925 (9th Cir. 1977) (finding that willfully, as used in 8 U.S.C. § 1182(a)(19), requires proof that "the misrepresentation was voluntarily and deliberately made") (quoting *Chow Bing Kew*, 248 F.2d at 469.)

8.42 FALSE IMPERSONATION OF FEDERAL OFFICER OR EMPLOYEE—DEMANDING OR OBTAINING MONEY (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 beyond a reasonable doubt that while pretending to be an officer or employee acting under the authority of the United States, the defendant demanded or obtained [money] [paper] [a document] [a thing of value].

Comment

The statute, since its amendment in 1948, no longer requires proof of specific intent to deceive. All that must be shown is that defendant by deceit sought to cause another person to act in a way other than how the person would have acted in the absence of the deceitful conduct. *United States v. Robbins,* 613 F.2d 688, 690–91 (8th Cir.1979). *See also United States v. Bushrod*, 763 F.2d 1051, 1053 (9th Cir. 1985); *United States v. Mitman,* 459 F.2d 451, 453 (9th Cir.), *cert. denied,* 409 U.S. 863 (1972).

8.43 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)(4)(A)(iii); 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.

8.44 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) & (g).

8.45 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 have a license as a firearms [dealer] [importer] [manufacturer].

Comment

For a person to engage in the business of dealing in firearms, it is not necessary to prove that buying and selling firearms was the defendant's primary source of income, or to prove a specific number of sales, or to prove a specific dollar volume of sales.

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. Breier*, 813 F.2d 212, 214-15 (9th Cir.1987), *cert. denied*, 485 U.S. 960 (1988) (citing *United States v. Wilmoth*, 636 F.2d 123 (5th Cir.1981). 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 (1998).

8.46 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 [*firearm*] [from one state to another] [to/from a foreign nation from/to the United States]; and

Third, the defendant [shipped] [transported] the [*firearm*] to a person who was not licensed as a firearms [dealer] [importer] [manufacturer] [collector].

Comment

See Comment at Instruction 8.41 (False Impersonation of Citizen of United States).

While section 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. §§ 178.41(c) & (d), 178.50 & 178.93.

8.47 FIREARMS—EVIDENCE OF NO LICENSE

Exhibit _____ is a certificate of the custodian of the records of the Department of Treasury of the United States of the licenses issued to firearms [dealers] [importers] [manufacturers] [collectors]. A certificate is a written statement of facts signed by a public official.

The certificate states that the custodian made a diligent search of those records and found no record that the defendant was licensed as [a dealer] [an importer] [a manufacturer] [a collector] within the dates set forth in the indictment. From this certificate you may, but need not, decide that the defendant was not licensed to [deal] [import] [manufacture] [collect] firearms.

8.48 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 [*firearm*] that the defendant purchased or otherwise obtained outside that state.

Comment

See Comment at Instructions 8.43 (Firearms) and 8.46 (Shipment or Transportation to a Person Not Licensed as a Dealer, Importer, Manufacturer or Collector).

8.49 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 [*e.g.*, a hand grenade, a machine gun, a shotgun having one or more barrels less than 18 inches in length, a shotgun modified so that its overall length is less than 26 inches, a rifle having one or more barrels less than 16 inches in length or a rifle modified so that its overall length is less than 26 inches] from [one state to another] [a foreign nation to the United States]; and

Third, that the defendant did so without specific authorization by the Secretary of the Treasury of the United States.

Comment

See Comment at Instructions 8.43 (Firearms) and 8.46 (Shipment or Transportation to a Person Not Licensed as a Dealer, Importer, Manufacturer or Collector).

8.50 FIREARMS—EVIDENCE OF NO AUTHORIZATION

Exhibit _____ is a certificate of the custodian of records of the Department of Treasury of the United States of those unlicensed persons specifically authorized to transport weapons [from one state to another] [from a foreign nation to the United States]. A certificate is a written statement of facts signed by a public official.

The certificate states that the custodian made a diligent search of those records and found no record that the defendant had been specifically authorized by the Secretary of the Treasury to transport a weapon in [interstate] [foreign] commerce.

From this certificate you may, but need not, decide that the defendant was not authorized to transport a weapon in [interstate] [foreign] commerce.

Comment

See 18 U.S.C. § 922(a)(4).

8.51 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] a [*firearm*] to [*unlicensed dealer*];

Second, neither the defendant nor [*unlicensed dealer*] was licensed as a firearm [dealer] [importer] [manufacturer] [collector]; and

Third, the defendant knew or had reasonable cause to believe that [*unlicensed dealer*] was not a resident of the same state in which the defendant resided.

Comment

See Comment at Instructions 8.43 (Firearms) and 8.46 (Shipment or Transportation to a Person Not Licensed as a Dealer, Importer, Manufacturer or Collector).

8.52 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] a 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, [*seller*] was a licensed firearms [dealer] [importer] [manufacturer] [collector];

Second, in connection with [buying] [attempting to buy] a [*firearm*] from [*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 intended or likely to deceive [*seller*] into believing that [*firearm*] the could be lawfully sold to the defendant.

8.53 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] a [*firearm*] to [*unauthorized purchaser*]; and

Third, the defendant knew or had reasonable cause to believe that [[*unauthorized purchaser*] was less than eighteen years of age] [purchase or possession of the firearm by [*unauthorized purchaser*] would be in violation of [*applicable state law or published ordinance*]] [[*unauthorized purchaser*] did not reside in the same state in which the defendant's place of business was located].

Comment

See Comment at Instruction 8.43 (Firearms).

8.54 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 firearm 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]] [[*e.g.*, a hand grenade, a machine gun, a shotgun having one or more barrels less than 18 inches in length, a shotgun modified so that its overall length is less than 26 inches, a rifle having one or more barrels less than 16 inches in length or a rifle modified so that its overall length is less than 26 inches]] to [*purchaser*]; and

Third, the defendant did so without specific authorization by the Secretary of Treasury of the United States.

Comment

See Comment at Instruction 8.43 (Firearms).

8.55 FIREARMS—UNLAWFUL SALE
(18 U.S.C. § 922(d))

The defendant is charged in [Count _____ of] the indictment with selling a firearm 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 willfully sold a [*firearm*] to [*unauthorized purchaser*]; and

Second, the defendant knew or had reasonable cause to believe that [[*unauthorized purchaser*]] [[*e.g.*, was a fugitive from justice]].

Comment

See Comment at Instruction 8.43 (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" (*e.g.,* 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 8.59 (Unlawful Possession of Ammunition). 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 8.44 (Firearms–Fugitive From Justice Defined).

8.56 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 willfully [delivered] [caused to be delivered] to [*carrier*] a package or other container in which there was a [*firearm*];

Second, the package or container was to be shipped or transported [from one state to another] [to a foreign country from the United States];

Third, the package or container was to be shipped or transported to a person who was not licensed as a firearms dealer, manufacturer, or importer; and

Fourth, the defendant did not give written notice to [*carrier*] that there was a [*firearm*] in the package or container.

Comment

See Comment at Instruction 8.43 (Firearms).

8.57 FIREARMS—UNLAWFUL RECEIPT
(18 U.S.C. § 922(g))

The defendant is charged in [Count _____ of] the indictment with receiving a firearm 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 a [*firearm*] that had been shipped or transported from [one state to another] [a foreign nation to the United States]; and

Second, at the time the defendant received the [*firearm*], the defendant [*e.g.*, was a fugitive from justice].

If a person knowingly takes possession of a firearm, he has "received" it.

Comment

See Comment at Instruction 8.43 (Firearms).

For a definition of "fugitive from justice," see Instruction 8.44 (Firearms–Fugitive From Justice Defined).

8.58 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 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] a [*firearm*] from [one state to another] [a foreign nation to the United States]; and

Second, at the time of [shipment] [transportation] the defendant [*e.g.*, was addicted to heroin].

Comment

See Comment at Instruction 8.43 (Firearms).

For a definition of "fugitive from justice," see Instruction 8.44 (Firearms–Fugitive From Justice Defined).

8.59 FIREARMS—AMMUNITION—
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 [*firearm or ammunition*];

Second, the [*firearm or ammunition*] had been shipped or transported from [one state to another] [a foreign nation to the United States]; and

Third, at the time the defendant possessed the [*firearm or ammunition*], the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year. [[*Prior felony*] is a crime punishable by imprisonment for a term exceeding one year.]

[**Alternatively, upon the request of the defendant**:]

Third, at the time the defendant possessed the [*firearm or 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.

Comment

Defendant may seek to stipulate to the third element of the offense rather than have evidence of the prior convictions played out before 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 offers to stipulate to the third element without identifying the offense, unless the offense is relevant for other reasons the court must accept the stipulation even if the government refuses. *United States v. Hernandez*, 109 F.3d 1450, 1452 (9th Cir. 1997) (reversible error to reject defendant's offer to stipulate to prior felony and instead admit evidence of nature of prior felony). Where appropriate, the judge should instruct the jury as a matter of law that the alleged prior conviction is punishable by imprisonment for a term exceeding one year. Use the bracketed sentence in the third element if the defendant does not stipulate.

"[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. Montero-Camargo*, 177 F.3d 1118, *amended by* 183 F.3d 1172 (9th Cir. 1999) (citation omitted).

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 firearm or firearms the defendant possessed"). *See* Instruction 7.9 (Specific Issue Unanimity).

See United States v. Langley, 62 F.3d 602, 606 (4th Cir.1995) (not required that defendant have known the firearm traveled in interstate commerce), *cert. denied*, 516 U.S. 1083 (1996).

8.60 FIREARMS–AMMUNITION UNLAWFUL POSSESSION– JUSTIFICATION

The defendant claims that [he] [she] was justified in committing the crime of [*e.g.*, felon in possession of a firearm]. This defense is known as justification. The defendant is justified in committing the crime of [*e.g.*, felon in possession of a firearm] 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 the defense of justification 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 the most extraordinary circumstances, *United States v. Perez*, 86 F.3d 735, 737 (7th Cir. 1996), as illustrated by *United States v. Gomez*, 92 F.3d 770 (9th Cir. 1996).

The burden is on the defendant to establish the elements of the defense. *Wofford*, 122 F.3d at 790; *Gomez*, 92 F.3d at 775; *United States v. Lemon*, 824 F.2d 763, 765 (9th Cir. 1987). 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), *cert. denied*, 119 S. Ct. 1359 (1999); *Perez*, 86 F.3d at 737.

8.61 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 firearm 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 _____ from [one state to another] [a foreign nation to the United States]; and

Second, the defendant knew or had reasonable cause to believe that the firearm had been stolen.

8.62 FIREARMS—TRANSPORTING, SHIPPING OR RECEIVING 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] a firearm which had the serial number removed 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 [*firearm*] from [one state to another] [a foreign nation to the United States];

Second, the serial number of the [*e.g.*, pistol] had been removed or altered; and

Third, the defendant knew that the serial number had been removed or altered.

8.63 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 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 [*felony*]; and

Second, the defendant willfully [shipped] [transported] a [*firearm*] [from one state to another] [from/to a foreign country to/from the United States].

8.64 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 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 [*felony*]; and

Second, the defendant willfully received a [*firearm*] that had been shipped or transported [from one state to another] [from/to a foreign country to/from 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).

8.65 FIREARMS—USING OR CARRYING IN COMMISSION OF DRUG TRAFFICKING CRIME OR CRIME OF VIOLENCE (18 U.S.C. § 924(c))

The defendant is charged in [Count ____ of] the indictment with [using] [carrying] [possessing] [brandishing] [discharging] a firearm during and in relation to a [crime of violence] [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 [*e.g.*, murder] [as charged in Count ____ of the indictment];

Second, the defendant knowingly [used] [carried] [possessed] [brandished] [discharged] a [*firearm*]; and

Third, the defendant [used] [carried] [possessed] [brandished] [discharged] the [*firearm*] during and in relation to the crime.

[A defendant has "used" a firearm if he or she has actively employed the firearm in relation to [*crime charged*].] [Use includes any of the following:

(1) [[brandishing] [displaying] [bartering] [striking with] [firing or attempting to fire] a firearm;]

(2) [referring to a firearm in the offender's possession [in order to bring about a change in the circumstances of the predicate offense];]

(3) [the silent but obvious and forceful presence of a firearm in plain view].]

A defendant carries a firearm if the defendant knowingly possesses or carries the firearm. Carrying is not limited to carrying weapons directly on the person, but can include circumstances such as carrying in a vehicle or a locked compartment of a vehicle.

A defendant takes such action "in relation to the crime" if the firearm facilitated or played a role in the crime.

Comment

If the crime of violence or drug trafficking 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).

Depending on the facts in evidence, it may be appropriate to amend this instruction with language requiring specific jury unanimity as to whether the firearm was possessed, brandished, or discharged. *See* Instruction 7.9 (Specific Issue Unanimity). In cases involving more than one firearm, the trial court should require the jury to submit a special verdict as to which firearm, or firearms, the defendant used or carried in connection with the offense. *United States v. Perez*, 129 F.3d 1340, 1342 (9th Cir. 1997); *United States v. Alerta*, 96 F.3d 1230, 1235–36 (9th Cir.1996). In addition, a special verdict may be required to determine whether the firearm was possessed, brandished or discharged.

"Carrying" and "using" are independent terms with different meanings. *Bailey v. United States*, 516 U.S. 137, 145 (1995) ("[A] firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing throughout a drug transaction."). *See also Muscarello v. United States,* 524 U.S. 125, 136 (1998) (explaining that while "use" must be construed narrowly, "carry" must be interpreted broadly to protect against the "undercutting [of] the statute's basic objective."); *United States v. Guess*, __F.3d __, 2000 WL 144389 (9th Cir. 2000) (holding that the defendant had not "used" his gun for purposes of section 924(c)(1) because the arresting agents "were unaware of the pistol until after he was arrested"); *United States v. Romero,* 183 F.3d 1145 (9th Cir. 1999) (in a prosecution for use or carrying a firearm in commission of drug trafficking crime or crime of violence, where the indictment alleged only that the defendant used a firearm and proof at trial established only that the defendant carried the firearm, the proof was insufficient to sustain the conviction.)

The Committee was unable to find a Ninth Circuit decision explicitly holding that it is always a question of law whether a crime is a "crime of violence." In practice, however, this question is decided as a matter of law. *See, e.g., United States v. Amparo*, 68 F.3d 1222, 1226 (9th Cir.1995) (as a matter of law, possession of an unregistered sawed-off shotgun is a crime of violence), *cert. denied*, 516 U.S. 1164 (1996); *United States v. Mendez*, 992 F.2d 1488, 1490-91 (9th Cir.1993) (as a matter of law, conspiracy to rob is a crime of violence), *cert. denied,* 510 U.S. 896 (1993); *United States v. Springfield*, 829 F.2d 860, 862–63 (9th Cir.1987) (as a matter of law, involuntary manslaughter is a crime of violence). To determine whether a crime is a crime of violence, the Ninth Circuit follows the "categorical approach," which precludes a factual inquiry into the defendant's conduct. *United States v. Becker*, 919 F.2d 568, 570 (9th Cir.1990), *cert. denied*, 499 U.S. 911 (1991); *United States v. Sherbondy*, 865 F.2d 996, 1007–10 (9th Cir.1988).

8.66 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 which contained a false statement] in a matter within the jurisdiction of the [*government agency or department*];

Second, the defendant acted willfully, that is deliberately and with knowledge that the statement was untrue; and

Third, the statement was material to the [*government agency or department*] activities or decisions.

A statement is material if it could have influenced the agency's decisions or activities.

Comment

No mental state is required with respect to the fact that a matter is within the jurisdiction of a federal agency. *United States v. Green,* 745 F.2d 1205, 1209–10 (9th Cir.1984), *cert. denied,* 474 U.S. 925 (1985). 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).

See United States v. Carrier, 654 F.2d 559, 561 (9th Cir.1981) (defining willful).

The statute proscribes "false, fictitious or fraudulent statements or representations." The Committee recommends that the issue be presented to the jury only in terms of a false statement because false, fictitious and fraudulent have the same meaning. *See United States v. Milton,* 602 F.2d 231, 233 (9th Cir.1979). Furthermore, to prove falsity, the government need only prove that the statement was known to be untrue, while proving that a statement was fraudulent requires the additional proof of an intent to deceive. *Id.*

It is suggested that 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—be made by the court as a matter of law.

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. *United States v. Gaudin*, 515 U.S. 506 (1995). 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).

8.67 FALSE STATEMENT TO A BANK
(18 U.S.C. § 1014)

The defendant is charged in [Count _____ of] the indictment with making a false statement to a federally insured [bank] [savings and loan association] for the purpose of influencing the bank 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 bank;

Second, the defendant made the false statement or report to the bank knowing it was false; and

Third, the defendant did so for the purpose of influencing in any way the action of the bank.

It is not necessary, however, to prove that the bank involved was, in fact, influenced or misled. What must be proved is that the defendant intended to influence the bank by the false statement.

Comment

See generally Comment to Instruction 8.66 (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 8.106 (Bank Fraud–Scheme to Defraud by False Promises or Statements).

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).

If the institution involved is not a federally insured bank or savings and loan association, this instruction should be modified to reflect the particular type of institution listed in the statute, as charged in the indictment.

8.68 COUNTERFEIT ACCESS DEVICES— PRODUCTION, USE, 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] [*specific type device, e.g., card number, plate number, code number, account number, personal identification number, etc.*];

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 or the United States and a foreign country.

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, 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).

[A "counterfeit access device" is any access device that is counterfeit, fictitious, altered or forged, or an identifiable component of an access device or a counterfeit access device.]

[One "produces" an access device by designing it, altering it, authenticating it, duplicating it, or assembling it.]

[One "traffics" in an access device by transferring it or otherwise disposing of it to another, or by obtaining control of it with intent to transfer or dispose of it.]

Comment

For a definition of "intent to defraud," see Instruction 3.17 (Intent to Defraud–Defined).

The legislative history of 18 U.S.C. § 1029 suggests that "'[w]ith intent to defraud' means that the offender has a conscious objective, desire or purpose to 'deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property.' " S. Rep. No. 368, 98th Cong., 2d Sess., reprinted in, 1984 U.S.C.C.A.N. 3647, 3652; *United States v. Jacobowitz*, 877 F.2d 162, 166 (2d Cir.), *cert. denied*, 493 U.S. 866 (1989). *But see* H.R. Rep. No. 98–894, 98th Cong., 2d Sess. at 17 (1984) (the term "with the intent" in section 1029 should involve "the same culpable state of mind as the term 'purpose' as used in the Model Penal Code (§ 2.02).").

18 U.S.C. §§ 1029 (e)(1), (2), (4) and (5) define terms "access device," "counterfeit,", "produce" and "traffic," respectively.

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). The third element of the instruction includes a definition of interstate commerce appropriate for most cases. Adjustments should be made to this element depending upon the circumstances alleged in the case (*e.g.*, commerce involving the territories, possessions or the District of Columbia).

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 8.16 (Conspiracy) as is appropriate.

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.) (submitting fictitious credit card applications to bank was functional equivalent to the manufacture of counterfeit access device), *cert. denied*, 498 U.S. 833 (1990); *United States v. Luttrell*, 889 F.2d 806, 810 (9th Cir.1989) (discussing the distinction between unauthorized and counterfeit access devices), *cert. denied*, 503 U.S. 959 (1992).

8.69 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] an unauthorized access device [*specific type of device, e.g., credit cards*] 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] a 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 or 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.]

Comment

For a definition of "intent to defraud," see Instruction 3.17 (Intent to Defraud–Defined) and comment to Instruction 8.68 (Counterfeit Access Devices–Production, Use, or Trafficking).

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 8.68 (Counterfeit Access Devices–Production, Use, or Trafficking).

For definitions of "access device," "traffic," and "unauthorized access device," see 18 U.S.C. § 1029(e).

See Comment to Instruction 8.68 (Counterfeit Access Devices–Production, Use, or Trafficking) regarding changes to the instruction when attempt or conspiracy is alleged in violation of 18 U.S.C. § 1029(a).

8.70 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 [*e.g.*, credit cards] 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 or the United States and a foreign country

Comment

See Comment to Instruction 8.69 (Unauthorized Access Devices–Using or Trafficking).

For definitions of "access device," "counterfeit," and "unauthorized," see 18 U.S.C. § 1029(e).

8.71 ACCESS DEVICES—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] access 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; and

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 or 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.

Comment

See Comment to Instruction 8.69 (Unauthorized Access Devices–Using or Trafficking).

For definitions of "access device," "counterfeit" access device, "trafficking," "produce," and "unauthorized" access device, see 18 U.S.C. § 1029(e).

8.72 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 $1000 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 or the United States and a foreign country.

Comment

See Comment to Instruction 8.69 (Unauthorized Access Devices–Using or Trafficking).

Note: Between October 25, 1994 and October 11, 1996, 18 U.S.C. § 1029 contained two subsections (a)(5). One subsection (a)(5) (fraudulent use of an access device) was created by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 250007, 108 Stat. 2087, effective September 13, 1994. Another subsection (a)(5) (use of altered telecommunications equipment) was created by the Communications Assistance for Law Enforcement Act of 1994, Pub. L. No. 103–414, § 206, 108 Stat. 4291, effective October 25, 1994. The Economic Espionage Act of 1996, Pub. L. No. 104–294, § 601 (l), 110 Stat. 3488, 3501 (October 11, 1996), resolved this difficulty by renumbering the subsection (a)(5) created by the 1994 Communications Assistance Law Enforcement Act as 28 U.S.C. § 1029(a)(7). An instruction for violations of this section is found at Instruction 8.74 (Telecommunications Instrument–Illegal Modification).

For a definition of "access device," see 18 U.S.C. § 1029(e)(1).

8.73 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 or the United States and a foreign country.

Comment

See Comment to Instruction 8.69 (Unauthorized Access Devices–Using or Trafficking).

Note: Between October 25, 1994 and October 11, 1996, 18 U.S.C. § 1029 contained two subsections (a)(6). One subsection (a)(6) (unauthorized solicitation and offer of access devices) was created by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 250007, 108 Stat. 2087, effective September 13, 1994. Another subsection (a)(6) (use or possession of scanning receiver) was created by the Communications Assistance for Law Enforcement Act of 1994, Pub. L. No. 103–414, § 206, 108 Stat. 4291, effective October 25, 1994. The Economic Espionage Act of 1996, Pub. L. No. 104–294, § 601 (l), 110 Stat. 3488, 3501 (October 11, 1996), resolved this difficulty by renumbering the subsection (a)(5) created by the Communications Assistance Law Enforcement Act as 28 U.S.C. § 1029(a)(8).

For a definition of "access device," see 18 U.S.C. § 1029(e)(1).

8.74 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 which 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 or the United States and a foreign country.

[One "produces" a telecommunications instrument by designing it, altering it, authenticating it, duplicating it, or assembling it.]

[One "traffics" in a telecommunications instrument by transferring it or otherwise disposing of it to another, or by obtaining control of it with intent to transfer or dispose of it.]

Comment

See Comment to Instruction 8.69 (Using or Trafficking Unauthorized Access Devices).

Note: Between October 25, 1994 and October 11, 1996, 18 U.S.C. § 1029(a)(7) had been denominated as a second subsection (a)(5) of § 1029. *See* Economic Espionage Act of 1996, Pub. L. No. 104–294, § 601 (l), 110 Stat. 3488, 3501 (October 11, 1996) (renumbering the subsection (a)(5) created by the Communications Assistance for Law Enforcement Act as 28 U.S.C. § 1029(a)(7)).

18 U.S.C. § 1029 does not define the term "telecommunications instrument."

For definitions of "produce" and "traffic," see 18 U.S.C. §§ 1029(e)(4) and (5).

8.75 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 states or between 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.]

[One "produces" a scanning receiver by designing it, altering it, authenticating it, duplicating it, or assembling it.]

[One "traffics" in a scanning receiver by transferring it or otherwise disposing of it to another, or by obtaining control of it with intent to transfer or dispose of it.]

Comment

For a definition of "intent to defraud," see Instruction 3.17 (Intent to Defraud–Defined).

For a definition of "knowingly," see Instruction 5.6 (Knowingly–Defined) and 5.7 (Deliberate Ignorance).

The Wireless Telephone Protection Act (Pub. L. No. 105-172, § 2, 112 Stat. 53 (April 24, 1998)) revised 18 U.S.C. § 1029(a)(8)-(a)(10). Subsection (a)(8) previously encompassed both scanning receivers and hardware or software used to obtain telecommunications service without authorization. Congress bifurcated former section (a)(8) into (a)(8) (scanning receivers) and (a)(9) (hardware or software used to alter telecommunications instruments).

18 U.S.C. § 1029(e)(7) 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 [*device*] is a scanning receiver. A scanning receiver is a device that can be used to illegally intercept a wire, oral, or electronic telecommunication.

For cases addressing the "affecting commerce" requirement, see Comment to Instruction 8.68 (Counterfeit Access Devices–Production, Use, or Trafficking).

18 U.S.C. § 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 8.16 (Conspiracy–Elements).

8.76 CREDIT CARD TRANSACTION FRAUD
(18 U.S.C. § 1029(a)(9))

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)(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, 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 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 or the United States and a foreign country.

Comment

See Comment to Instruction 8.69 (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).

For a definition of "access device," see 18 U.S.C. § 1029(e)(1).

The word "evidences" in the first element reflects the language of section 1029(a)(9).

8.77 OBTAINING INFORMATION BY COMPUTER—INJURIOUS TO THE 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 acted with the intent or 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]] to any person not entitled to receive it] [retained and failed to deliver to an officer or employee of the United States entitled to receive it] such information or data.

Comment

For a definition of "knowingly", see Instruction 5.6 (Knowingly–Defined). For purposes of the Computer Fraud and Abuse Act, the Senate Committee reporting this provision explained that the requirement that the access to (or exceeding access to) the computer be "knowing" meant that the defendant "is aware 'that the result is practically certain to follow from his conduct, whatever his desire may be as to that result.' " S. Rep. No. 99–432, at 5–6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2479, 2483, *quoting United States v. United States Gypsum Co.,* 438 U.S. 422, 425 (1978) (footnote omitted).

A defendant "exceeds authorized access" to a computer when the defendant accesses a computer with authorization but uses "such access to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6).

The "obtaining information" element of the offense "includes mere observation of the data. Actual asportation ... need not be proved in order to establish a violation.... " S. Rep. No. 99–432, at 6–7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2479, 2484.

The legislative history distinguishes a charge under 18 U.S.C. § 1030(a)(1) from alleged violations of other espionage laws. Under Section 1030(a)(1), "it is the use of the computer which is being proscribed, not the unauthorized possession of, access to, or control over the classified information itself." S. Rep. No. 104–357, at 6–7, 1996 WL 492169, at *16 (1996).

8.78 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 obtaining computer 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 [*financial institution or card issuer*]] [contained in a file of [*consumer reporting agency*] on [*consumer*]] [from any department or agency of the United States].

Comment

The requirement that the defendant "intentionally" access or exceed authorized access to a computer requires "a clear intent [by the defendant] to enter, without proper authorization, computer files or data belonging to another.... ' "[I]ntentional" means more than that one voluntarily engaged in conduct or caused a result. Such conduct or the causing of the result must have been the person's conscious objective.' " S. Rep. No. 99–432, at 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2479, 2484 (quoting another Senate report).

See Comment following Instruction 8.77 (Obtaining Information by Computer–Injurious to the United States or Advantageous to Foreign Nation) regarding "obtaining information" and the "exceeds authorized access" requirements.

Financial records are defined as "information derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution." 18 U.S.C. § 1030(e)(5). While it appears clear a record need not be on a particular customer, it must relate to a "customer's relationship" with the institution. *See* S. Rep. No. 99–432, *supra,* 1986 U.S.C.C.A.N. at 2484 (the Act concerns "financial records of all customers—individual, partnership, or corporate—of financial institutions.").

For definitions of "financial record," "financial institution," and "department of the United States," see 18 U.S.C. § 1030(e)(4), (5) and (7), respectively.

Adjustments must be made to the second element of this instruction, depending on the charged offense under 18 U.S.C. § 1030(a)(2):

1) When violation of Section 1030(a)(2)(A), clause one, is alleged, use the first alternative in the second element (*i.e.*, record of financial institution or card issuer as defined by 15 U.S.C. § 1602(n));

2) When violation of Section 1030(a)(2)(A), clause two, is alleged, use the second alternative in the second element (*i.e.*, file of consumer reporting agency as defined by 15 U.S.C. § 1681 et seq.);

3) When violation of Section 1030(a)(2)(B) is alleged, use the third alternative in the second element (*i.e.*, United States department or agency); or

4) When violation of Section 1030(a)(2)(C) is alleged, do not use this instruction, but use Instruction 8.79 (Obtaining Information from Protected Computer).

8.79 OBTAINING INFORMATION BY COMPUTER—"PROTECTED" COMPUTER (18 U.S.C. § 1030(a)(2)(C) and (e)(2))

The defendant is charged in [Count _____ of] the indictment with obtaining computer 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] [exceeded authorized access of] a computer;

Second, the defendant's access of that computer involved an interstate or foreign communication; and

Third, by [accessing without authorization] [exceeding authorized access to] a computer, the defendant obtained information from a computer [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 conduct affected the computer's use by or for the financial institution or government] [used in interstate or foreign commerce or communication].

Comment

See Comment following Instruction 8.78 (Obtaining Information by Computer–From Financial Institution or Government Computer) regarding the "intentionally" accessing element.

See Comment following Instruction 8.77 (Obtaining Information by Computer–Injurious to the United States or Advantageous to Foreign Nation) regarding the "exceeds authorized access" and the "obtaining information" requirements.

For a definition of "financial institution," see 18 U.S.C. § 1030(e)(4).

Provisions of the Computer Fraud and Abuse Act are not mutually exclusive. *See* S. Rep. No. 104–357, at 7–8, 1996 WL 492169, *20 (1996) ("Some conduct may violate more than one subsection of Section 1030(a)(2). For example, a particular Government computer might be covered by both sections 1030(a)(2)(B) (*see* Instruction 8.75 (Use or Control of a Scanning Receiver)) and (a)(2)(C) (*see* Instruction 8.76 (Credit Card Transaction Fraud)). This overlap serves to eliminate legal issues that may arise if the provisions were mutually exclusive.").

8.80 UNLAWFULLY ACCESSING NON-PUBLIC COMPUTER USED BY THE GOVERNMENT (18 U.S.C. § 1030(a)(3))

The defendant is charged in [Count _____ of] the indictment with unlawful access of 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 any non-public computer of [*department or agency of the United States*];

Second, the defendant lacked authorization to access any non-public computer of that department or agency; and

Third, the computer accessed by the defendant [was exclusively for the use of the Government of the United States] [was used non-exclusively by or for the Government, but the defendant's conduct affected that computer's use by or for the Government].

Comment

See Comment following Instruction 8.78 (Obtaining Information by Computer–From Financial Institution or Government Computer) regarding the "intentionally" accessing element.

In 1996, Congress amended the Computer Fraud and Abuse Act to limit the offense to use of "non-public" computers of the government. Congress expressed an intent to "make clear that unauthorized access is barred to any 'non-public' Federal Government computer and that a person who is permitted to access publicly available Government computers, for example, via an agency's World Wide Web site, may still be convicted under [18 U.S.C. § 1030](a)(3) for accessing without authority any nonpublic Federal Government computer." S. Rep. No. 104–357, at 9, 1996 WL 492169, *21 (1996).

For a definition of "department of the United States," see 18 U.S.C. § 1030(e)(7).

8.81 COMPUTER FRAUD—USE OF "PROTECTED" COMPUTER (18 U.S.C. § 1030(a)(4), (e)(2)(A), and (B))

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 of] a computer [that was exclusively for the use of a financial institution or the United States Government] [that was not exclusively used by a financial institution or the United States Government] [used in interstate or foreign commerce or communication];

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, if the use of the computer was the only object of the defendant's fraud, as well as the only thing of value the defendant obtained, the government must prove beyond a reasonable doubt that the total value of the defendant's computer use exceeded $5,000 during [any] [the] one year period [beginning [*date*], and ending [*date*]]; [and]

[Sixth, by [accessing the computer without authorization] [exceeding authorized access to the computer] the defendant affected the use of the computer by or for a financial institution or the Government].

Comment

See Comment following Instruction 8.77 (Obtaining Information by Computer–Injurious to the United States or Advantageous to Foreign Nation) for a definition of "knowingly" for purposes of the Computer Fraud and Abuse Act and regarding the "exceeds authorized access" requirements.

For a definition of "intent to defraud," see Instruction 3.17 (Intent to Defraud–Defined). For purposes of the Computer Fraud and Abuse Act, the showing of an intent to defraud may be more rigorous than for mail fraud or wire fraud. "[A] scheme ... to defraud should [not] fall under the ambit of [1030](a)(4) merely because the offender signed onto a computer at some point near to the commission or execution of the fraud. While such a tenuous link might be covered under current law where the instrumentality used is the mails or the wires, the Committee does not

consider that link sufficient with respect to computers. To be prosecuted under this subsection the use of the computer must be more directly linked to the intended fraud. That is, it must be used by an offender ... to obtain property of another, *which property furthers the intended fraud*." S. Rep. No. 99–432, at 9 (1986) *reprinted in* 1986 U.S.C.C.A.N. 2479, 2487 (emphasis added).

18 U.S.C. § 1030(a)(4) concerns the use of "protected computers" which are defined by Section 1030(e)(2)(A) to include computers used by a financial institution or the United States government. In addition, computers used in "interstate or foreign commerce or communication" are also deemed "protected." 18 U.S.C. § 1030(e)(2)(B).

Prior to the 1996 amendments, there was no crime under 18 U.S.C. § 1030(a)(4) where "the object of the fraud and the thing obtained consist[ed] only of the use of computer time." However, the 1996 amendments limited this statutory exception. Noting that hackers had broken into supercomputers for the purpose of running password cracking programs, consuming thousands of dollars in computer time, the Senate Judiciary Committee proposed a change. Congress adopted a revision to the Act so that only where the stolen computer use was less than $5,000 during any one year period would the defendant escape liability under Section 1030(a)(4).

The bracketed sixth element of this instruction should be used when it is alleged that the computer the defendant accessed was not exclusively for the use of the government or financial institution. *See* 18 U.S.C. § 1030(e)(2)(A).

8.82 INTENTIONAL DAMAGE TO A PROTECTED COMPUTER (18 U.S.C. § 1030(a)(5)(A), (e)(2)(A), and (B))

The defendant is charged in [Count _____ of] the indictment with transmitting a harmful [[program] [code] [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 without authorization;

Second, as a result of the transmission, the defendant intentionally impaired the [integrity] [availability] of [data] [a program] [a system] [information];

Third, the impairment of the [data] [program] [system] [information] resulted in [losses to one or more individuals totaling at least $5,000 in value at any time during a one-year period beginning [*date*], and ending [*date*]] [modification or impairment or potential modification or impairment of one or more individual's medical examination, diagnosis, treatment or care] [physical injury to any person] [a threat to public health or safety]; and

Fourth, the computer damaged was [used exclusively by a financial institution or the United States government] [used in interstate or foreign commerce or communication] [not used exclusively by 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

For a definition of "knowingly" for purposes of the Computer Fraud and Abuse Act, see Comment following Instruction 8.77 (Obtaining Information by Computer–Injurious to the United States or Advantageous to Foreign Nation).

The fourth element covers the requirement of 18 U.S.C. § 1030(a)(5) that a "protected computer" be affected. This term is defined by 18 U.S.C. § 1030(e)(2). The second and third elements concern the requirement of 18 U.S.C. § 1030(a)(5) that "damage" occur. The term "damage" is defined by 18 U.S.C. § 1030(e)(8). *See also* S. Rep. No. 104–357, at 11, 1996 WL 492169, at *25 (1996) (purpose of 1030(a)(5) is that persons authorized access to a computer "face criminal liability only if they intend to cause damage." By contrast, those not authorized to access a computer are "punished for any intentional, reckless, or other damage they cause by their trespass.").

In *United States v. Middleton*, 231 F.3d 1207 (9th Cir. 2000) the Ninth Circuit discussed

the definitions of "protected computer" and "damage."

8.83 RECKLESS DAMAGE TO A PROTECTED COMPUTER

(18 U.S.C. § 1030(a)(5)(B), (e)(2)(A), and (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] [program] [a system] [information];

Third, the impairment of the [data] [program] [system] [information] resulted in [losses to one or more individuals totaling at least $5,000 in value at any time during a one-year period beginning [*date*], and ending [*date*]] [modification or impairment or potential modification or impairment of one or more individual's medical examination, diagnosis, treatment or care] [physical injury to any person] [a threat to public health or safety]; and

Fourth, the computer damaged was [used exclusively by a financial institution or the United States government] [used in interstate or foreign commerce or communication] [not used exclusively by a financial institution or the United States government, but the defendant's access affected the computer's use by or for a financial institution or the United States government].

Comment

See Comment following Instruction 8.78 (Obtaining Information by Computer–From Financial Institution or Government Computer) regarding the "intentionally accessing" requirement.

See Comment following Instruction 8.82 (Intentional Damage to a Protected Computer) regarding the "protected" computer and the "damage" requirements.

8.84 NEGLIGENT OR ACCIDENTAL DAMAGE TO A PROTECTED COMPUTER (18 U.S.C. § 1030(a)(5)(C), (e)(2)(A), and (B))

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] [program] [a system][information];

Third, the impairment of the [data] [program] [system] [information] resulted in [losses to one or more individuals totaling at least $5,000 in value at any time during a one-year period beginning [*date*], and ending [*date*]] [modification or impairment or potential modification or impairment of one or more individual's medical examination, diagnosis, treatment or care] [physical injury to any person] [a threat to public health or safety]; and

Fourth, the computer damaged was [used exclusively by a financial institution or the United States government] [used in interstate or foreign commerce or communication] [not used exclusively by a financial institution or the United States government, but the defendant's access affected the computer's use by or for a financial institution or the United States government].

Comment

See Comment following Instruction 8.77 (Obtaining Information by Computer–Injurious to the United States or Advantageous to Foreign Nation) regarding the "intentionally accessing" requirement.

See Comment following Instruction 8.82 (Intentional Damage to a Protected Computer) regarding the "protected" computer and the "damage" requirements.

18 U.S.C. § 1030(c)(5)(C) is intended to cover "outside hackers into a computer who negligently or accidentally cause damage." S. Rep. No. 104–357, at 10–11, 1996 WL 492169, *25 (1996).

8.85 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] [and/or] [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 in some way affected commerce between one state and [an]other state[s] or between a state or the United States and a foreign country] [or] [the computer was used by or for the government of the United States].

Comment

For a definition of "knowingly" for purposes of the Computer Fraud and Abuse Act, see Comment following Instruction 8.77 (Obtaining Information by Computer–Injurious to the United States or Advantageous to Foreign Nation).

For a definition of "intent to defraud," see Comment following Instruction 8.81 (Computer Fraud–Use of "Protected" Computer).

For a definition of "traffic," see 18 U.S.C. § 1029(e)(5).

While not defined by the Computer Fraud and Abuse Act, the Senate Committee reporting the legislation noted that it should be "clear that 'password' ... does not mean only a single word that enables one to access a computer. The Committee recognizes that a 'password' may actually be comprised of a set of instructions or directions for gaining access to a computer and intends that the word 'password' be construed broadly enough to encompass both single words and longer more detailed explanations on how to access others' computers." S. Rep. No. 99–432, at 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2479, 2491.

8.86 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 in interstate or foreign commerce a communication containing any threat to cause damage to a computer;

Second, the defendant threatened to damage a computer that was [used exclusively by a financial institution or the United States government] [used in interstate or foreign commerce or communication] [not used exclusively by 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]; and

Third, the defendant acted with intent to extort money or any other thing of value from any person, firm, association, educational institution, financial institution, government entity or other legal entity.

Comment

The second element covers the requirement of 18 U.S.C. § 1030(a)(5) that a "protected computer" be affected. This term is defined by 18 U.S.C. § 1030(e)(2).

18 U.S.C. § 1030(a)(7) covers "computer-age blackmail" involving any "interstate or international transmission of threats against computers, computer networks, and their data and programs whether the threat is received by mail, a telephone call, electronic mail, or through a computerized messaging service." S. Rep. No. 104–357, at 12, 1996 WL 492169, at *29 (1996).

The threats proscribed by Section 1030(a)(7) include those to interfere "in any way with the normal operation of the computer or system ... such as denying access to authorized users, erasing or corrupting data or programs, slowing down the operation of the computer or system, or encrypting data and then demanding money for the key." *Id.*

For definitions of "financial institution" and "government entity," see 18 U.S.C. § 1030(e).

8.87 CONCEALING PERSON FROM ARREST
(18 U.S.C. § 1071)

The defendant is charged in [Count _____ of] the indictment with 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 warrant had been issued for the arrest of [*person*];

Second, the defendant knew that a warrant had been issued for the arrest of [*person*]; and

Third, the defendant knowingly concealed [*person*] with the intent to prevent arrest.

8.88 CONCEALING ESCAPED PRISONER
(18 U.S.C. § 1072)

The defendant is charged in [Count _____ of] the indictment with 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, [*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]] [*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).

8.89 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 [*victim*];

Second, the defendant killed [*victim*] with malice aforethought;

Third, the killing was premeditated; and

Fourth, the killing occurred at [*location stated in indictment*].

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 (poison, lying in wait, arson, rape, burglary, robbery, *etc.*) 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, a fifth element may be added. For example, "Fifth, the defendant did not act in self-defense," as is appropriate.

Killing with "extreme disregard" refers not only to acts endangering the public at large, but also to acts directed solely to the person killed. *United States v. Houser*, 130 F.3d 867, 890 (9th Cir. 1997). 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*, ___ F.3d ___, 2000 WL 52461 (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. According to the court of appeals, "[e]ven when the evidence is conflicting, if any construction of the evidence and testimony would rationally support a jury's conclusion that the killing was unintentional or accidental, an involuntary manslaughter instruction must be given. When the defendant maintains that the killing was unintentional, the instruction is necessary even when there is also testimony by others that the defendant stated his intention to kill the deceased."

8.90 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 [*victim*];

Second, the defendant killed [*victim*] with malice aforethought; and

Third, the killing occurred at [*location stated in indictment*].

To kill with malice aforethought means to kill either deliberately and intentionally or recklessly with extreme disregard for human life.

Comment

See Comment following Instruction 8.89 (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 comments to Instruction 8.89 (Murder–First Degree) are 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, a fourth element should be added. For example, "fourth, the defendant did not act in 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 in the above paragraph is suggested by *United States v. Roston*, 986 F.2d 1287, 1291 (9th Cir. 1993) (quoting *United States v. Wagner*, 834 F.2d 1475, 1487 (9th Cir. 1987). *But see Roston*, 986 F.2d at 1294 (concurring view on how the standard articulated in *Roston* may differ from the standard used in earlier versions of the circuit instructions).

The circuit has recently 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 (9th Cir. 1997), the circuit suggested that an "extremely irrational and paranoid state of mind which 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.

In *Warren*, 984 F.2d at 330, the Ninth Circuit found that an instruction similar to 8.89 (Murder–First Degree), particularly its treatment of the premeditation element, focused "on the nature of 'premeditation' rather than upon what must be premeditated . . . ." Accordingly, the appellate court concluded that if the jury indicates confusion about what must be premeditated, the judge should provide a direct answer to their question.

Manslaughter is a lesser included offense within second degree murder. *United States v. Celestine*, 510 F.2d 457, 460 (9th Cir. 1975). 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. *United States v. Roston*, 986 F.2d 1287, 1290-91 (9th Cir. 1993).

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*, ___ F.3d ___ , 2000 WL 52461 (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. According to the court of appeals, "[e]ven when the evidence is conflicting, if any construction of the evidence and testimony would rationally support a jury's conclusion that the killing was unintentional or accidental, an involuntary manslaughter

instruction must be given. When the defendant maintains that the killing was unintentional, the instruction is necessary even when there is also testimony by others that the defendant stated his intention to kill the deceased."

8.91 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 [*victim*];

Second, while in a sudden quarrel or heat of passion, caused by adequate provocation:

a) the defendant intentionally killed [*victim*]; or

b) the defendant killed [*victim*] recklessly with extreme disregard for human life; and

Third, the killing occurred at [*location stated in indictment*].

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. *Untied 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); *United States v. 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 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 (9th Cir. 1997), the circuit suggested that an "extremely irrational and paranoid state of mind which 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, a fourth element should be added. For example, "fourth, the defendant did not act in 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.

Manslaughter is a lesser included offense within second degree murder. *United States v. Celestine*, 510 F.2d 457 (9th Cir. 1975). Second degree murder is reduced to voluntary manslaughter if the unlawful killing is done upon a sudden quarrel or heat of passion caused by adequate provocation. *See United States v. Quintero*, 21 F.3d at 890-91, regarding the government's burden on voluntary manslaughter as a lesser included offense.

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*, ___ F.3d ___, 2000 WL 52461 (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. According to the court of appeals, "[e]ven when the evidence is conflicting, if any construction of the evidence and testimony would rationally support a jury's conclusion that the killing was unintentional or accidental, an involuntary manslaughter instruction must be given. When the defendant maintains that the killing was unintentional, the instruction is necessary even when there is also testimony by others that the defendant stated his intention to kill the deceased."

8.92 INVOLUNTARY MANSLAUGHTER
(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 unlawful act not amounting to a felony, or committed a lawful act, done either in an unlawful manner or with wanton or reckless disregard for human life, which might produce death;

Second, the defendant's act was the proximate cause of the death of the victim. A proximate cause is one which 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;

Third, the killing was unlawful;

Fourth, 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

Fifth, the killing occurred at [*location stated in indictment*].

Comment

See United States v. Main, 113 F.3d 1046, 1049 (9th Cir.1997) (criticizing 1992 version of Ninth Circuit Model Criminal Jury Instruction 8.92 (Involuntary Manslaughter) (then titled 8.24D)); *United States v. Shortman*, 91 F.3d 80, 82 (9th Cir.1996); *United States v. Paul*, 37 F.3d 496, 499 (9th Cir.1994).

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*, ___ F.3d ___, 2000 WL 52461 (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. According to the court of appeals, "[e]ven when the evidence is conflicting, if any construction of the evidence and testimony would rationally support a jury's conclusion that the killing was unintentional or accidental, an involuntary manslaughter instruction must be given. When the defendant maintains that the killing was unintentional, the instruction is necessary even when there is also testimony by others that the defendant stated his intention to kill the deceased."

While the fourth element is not in the statute, it is required by *United States v. Keith*, 605 F.2d 462, 463 (9th Cir.1979).

Use the bracketed language if you are giving this instruction as a lesser included offense.

If there is evidence of justification or excuse, the following language should be included:

"A killing is unlawful within the meaning of this instruction if it was [not justifiable] [not excusable] [neither justifiable nor excusable]."

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).

8.93 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 [*intended victim*], with all of you agreeing as to what constituted the substantial step; and

Second, when the defendant took that substantial step, the defendant intended to kill [*intended victim*].

Mere preparation is not a substantial step toward committing a crime.

Comment

See Instruction 7.9 (Specific Issue Unanimity).

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." (citing 4 C. Torcia, Wharton's Criminal Law § 743, p. 572 (14th ed. 1982).) Although one acting "recklessly with extreme disregard for human life" can be convicted of murder if a killing results (*see* Instruction 8.89 (Murder–First Degree) and 8.90 (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 (2nd 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).

8.94 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 (8.89, Murder–First Degree or 8.90, Murder–Second Degree), manslaughter instruction (8.91, Manslaughter–Voluntary or 8.92, Involuntary Manslaughter) or attempted murder instruction (8.93, Attempted Murder) should be used but modified to require the jury to find that the victim was a federal officer or employee. The fourth element of Instruction 8.89 (Murder–First Degree) is not necessary here.

8.95 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] [*kidnapped person*];

Second, the defendant held [*kidnapped person*] for ransom, reward or other benefit; and

Third, the defendant intentionally transported [*kidnapped person*] across state lines.

8.96 KIDNAPPING—WITHIN SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES (18 U.S.C. § 1201(a)(2))

The defendant is charged in [Count _____ of] the indictment with kidnapping [*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]] [*kidnapped person*] within [*special maritime or territorial jurisdiction*]; and

Second, the defendant held [*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).

8.97 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] [*kidnapped person*];

Second, [*kidnapped person*] was [*e.g.*, the Prime Minister of Canada]; and

Third, the defendant held [*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).

8.98 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] [*kidnapped person*];

Second, at the time [*kidnapped person*] was [*federal office or employment position*];

Third, the defendant acted while [*kidnapped person*] was engaged in, or on account of, the performance of official duties; and

Fourth, the defendant held [*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.

8.99 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, with all of you agreeing as to what constituted the substantial step.

Mere preparation is not a substantial step toward committing a crime.

Comment

See Comment following Instruction 8.97 (Kidnapping Foreign Official or Official Guest).

See Instruction 7.9 (Specific Issue Unanimity).

8.100 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 or 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, 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, with all of you agreeing as to what constituted the substantial step.

Mere preparation is not a substantial step toward committing a crime.

Comment

See Comment following Instruction 8.98 (Kidnapping Federal Officer or Employee).

See Instruction 7.9 (Specific Issue Unanimity).

8.100A HOSTAGE TAKING

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.

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). 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.*

Rev. 3/2003

8.100B SEIZED OR DETAINED DEFINED

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."

Rev. 3/2003

8.101 MAIL FRAUD——SCHEME 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 made up a scheme or plan for obtaining money or property by making false promises or statements, with all of you agreeing on at least one particular false promise or statement that was made;

Second, the defendant knew that the promises or statements were false;

Third, the promises or statements were material, that is they would reasonably influence a person to part with money or property;

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

Fifth, the defendant used, or caused to be used, the mails to carry out or attempt to carry out an essential part of the scheme.

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

Where more than one false promise or statement is charged, a judge might consider submitting special interrogatories to the jury to assure unanimity on at least one promise or statement. *See* Instruction 7.9 (Specific Issue Unanimity).

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). Materiality is a question of fact for the jury. *United States v. Carpenter*, 95 F.3d 773, 776 (9th Cir.1996). The Ninth Circuit favorably discussed this definition of materiality in *U.S. v. Johnson*, 297 F.3d 845, 866 (9th Cir. 2002), *cert. denied* 123 S.Ct. 1376 and *cert denied* by *Eames v. United States* (Mar. 31, 2003) 2003 WL 730241 and *U.S. v. Tam*, 240 F.3d 797, 802-803 (9th Cir. 2001).

Success of the scheme is immaterial. *United States v. Utz,* 886 F.2d 1148, 1150-1151 (9th Cir. 1989), *cert. denied,* 497 U.S. 1005 (1990).

See Schmuck v. United States, 489 U.S. 705, 712 (1989) (mailing that is "incident to an essential part of the scheme" satisfies mailing element of offense); *United States v. Hubbard*, 96 F.3d 1223, 1228—29 (9th Cir.1996) (same).

See U.S. v. LeVeque, 283 F.3d 1098, 1102 (9th Cir. 2002) (Government issued license does not constitute property for purposes of §§ 1341).

Rev. 6/2003

8.101A SCHEME TO DEFRAUD – VICARIOUS LIABILITY

Each member of a scheme to defraud is responsible for other co-schemers' actions during the course of and in furtherance of the scheme.

If you decide that a defendant was a member of a scheme to defraud and that the defendant had the intent to defraud, that defendant is responsible for what other co-schemers said or did to carry out the scheme, even if the defendant did not know what they said or did.

For a defendant to be guilty of an offense committed by a co-schemer [as part] [in furtherance] of the scheme, the offense must be one that could reasonably be foreseen 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, 1115-1116, 1117-1118 (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).

Where this instruction is appropriate, it should be given in addition to Instructions 8.101 (Mail Fraud – Scheme to Obtain Money or Property by False Promises 18 U.S.C. § 1341), 8.102 (Mail Fraud – Scheme to Defraud 18 U.S.C. §§ 1341, 1346), 8.103 (Wire Fraud 18 U.S.C. § 1343) or 8.106 (Bank Fraud–Scheme to Defraud by False Statement 18 U.S.C. § 1344). *See Id.,* at 1118-1120.

On co-schemer liability generally, see *United States v. Lothian*, 976 F.2d 1257, 1262-1263 (9th Cir. 1992) (similarity of co-conspirator and co-schemer liability); *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. 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.").

Rev. 3/2003

8.102 MAIL FRAUD—SCHEME TO DEFRAUD
(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 made up a scheme or plan to deprive [*victim*] of [his] [her] right to honest services;

Second, the defendant acted with the intent to deprive [*victim*] of [his] [her] right to honest services; and

Third, the defendant used, or caused someone to use, the mails to carry out or to attempt to carry out the scheme or plan.

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 an important part of the scheme, nor does it matter whether the scheme or plan was successful or that any money or property was obtained.

Comment

See Comment following Instruction 8.101 (Mail Fraud–Scheme to Obtain Money or Property by False Promises).

8.103 WIRE FRAUD
(18 U.S.C. § 1343)

Comment

"To convict a person of wire fraud, the government must prove beyond a reasonable doubt that the accused (1) participated in a scheme to defraud; and (2) used the wires to further the scheme." *United States v. Ciccone*, 219 F.3d 1078, 1083 (9th Cir. 2000) (citation omitted).

"To sustain a conviction for fraud . . . , the government must prove beyond a reasonable doubt the element of specific intent." *Ciccone,* 219 F.3d at 1082 (citation omitted).

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. In a wire fraud or attempted wire fraud case, the Committee recommends that the applicable mail fraud instructions (Instructions 8.101 (Mail Fraud–Scheme to Obtain money or Property by False Promises) and 8.102 (Mail Fraud–Scheme to Defraud)), be modified appropriately.

As with mail fraud, materiality is an essential element of the crime of wire fraud. *Neder v. United States*, 527 U.S. 1 (1999).

Rev.2000

8.104 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 knowingly carried out a scheme or plan to deprive the [*financial institution*] of the intangible right of honest services;

Second, the defendant acted with the intent to deprive the [*financial institution*] of the intangible right of honest services; and

Third, the [*financial institution*] was federally [chartered] [insured].

Comment

See Comment following Instruction 8.101 (Mail Fraud–Scheme to Obtain Money or Property by False Promises).

For a definition of "financial institution," see 18 U.S.C. § 20.

8.105 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 knowingly made up a plan or scheme to deprive the [*financial institution* of the intangible right of honest services;

Second, the defendant acted with the intent to deprive the [*financial institution*] of the intangible right of honest services;

Third, the defendant did something that was a substantial step toward carrying out the plan or scheme, with all of you agreeing as to what constituted the substantial step; and

Fourth, the [*financial institution*] was federally [chartered] [insured].

Mere preparation is not a substantial step toward the commission of the crime of bank fraud.

Comment

See Comment following Instruction 8.101 (Mail Fraud–Scheme to Obtain Money or Property by False Promises).

For a definition of "financial institution," see 18 U.S.C. § 20.

See Instruction 7.9 (Specific Issue Unanimity).

8.106 BANK FRAUD—SCHEME TO DEFRAUD BY FALSE PROMISES OR STATEMENTS (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 [*financial institution*] by making false statements or promises, with all of you agreeing on at least one particular false promise or statement that was made;

Second, the defendant knew that the statements or promises were false;

Third, the statements or promises were material, that is they would reasonably influence a bank to part with money or property;

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

Fifth, [*financial institution*] was federally [chartered] [insured].

Comment

In *United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993), *cert. denied*, 513 U.S. 1059 (1994), 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.

See Comment following Instruction 8.101 ((Mail Fraud–Scheme to Obtain Money or Property by False Promises)). Materiality is an essential element of the crime of bank fraud. *Neder v. United States*, 527 U.S. 1 (1999). Materiality is a question of fact for the jury in prosecutions pursuant to 18 U.S.C. § 1344, but is not an element in false statement prosecutions pursuant to 18 U.S.C. § 1014. *See United States v. Nash,* 115 F.3d 1431, 1435 (9th Cir.1997) (citing *United States v. Wells,* 519 U.S. 482 (1997)).

For a definition of "financial institution," see 18 U.S.C. § 20.

Cf. United States v. Allen, 88 F.3d 765, 768–69 (9th Cir.1996) (in prosecution for making false statements to a federally insured financial institution, the institution's federally insured status is an element of the offense).

See Instruction 7.9 (Specific Issue Unanimity).

8.107 ATTEMPTED BANK FRAUD— SCHEME TO DEFRAUD BY FALSE PROMISES OR STATEMENTS (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 made up a plan or scheme to obtain money or property from the [*financial institution*] by false promises or statements;

Second, the promises or statements were material, that is they would reasonably influence a bank 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, with all of you agreeing as to what constituted the substantial step; and

Fifth, [*financial institution*] was federally [chartered] [insured].

Mere preparation is not a substantial step toward the commission of the crime of bank fraud.

Comment

In *United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993), *cert. denied*, 513 U.S. 1059 (1994), 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.

See Comment following Instruction 8.101 (Mail Fraud–Scheme to Obtain Money or Property by False Promises).

Materiality is an essential element of the crime of bank fraud. *Neder v. United States*, 527 U.S. 1 (1999).

For a definition of "financial institution," see 18 U.S.C. § 20.

See Instruction 7.9 (Specific Issue Unanimity).

8.108 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, [*juror*] was a [grand] juror;

Second, the defendant tried to influence or intimidate [*juror*] in the discharge of [his] [her] duties as a [grand] juror; and

Third, the defendant acted corruptly, or by threats of force, with the intent to obstruct justice.

Comment

See Comment at Instruction 3.16 (Corruptly–Defined).

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), *cert. denied,* 454 U.S. 1157 (1982).

8.109 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, [*juror*] was a [grand] juror [who assented to a [verdict] [indictment]];

Second, the defendant injured [*juror*] [or [his] [her] property] on account of [*juror*] having [been] [assented to the [verdict] [indictment] as] a [grand] juror; and

Third, the defendant acted corruptly or by threats or use of force, with the intent of [obstructing justice] [intimidating the [grand] juror].

Comment

See Comment to Instruction 8.108 (Obstruction of Justice–Influencing Juror).

8.110 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 [*false testimony*];

Second, the testimony was false;

Third, the false testimony was material to the matters before [*e.g.*, the grand jury]; and

Fourth, the defendant acted willfully, that is deliberately and with knowledge that the testimony was false.

[All of you must agree as to which statement was false.]

The testimony of one witness is not enough to support a finding that the testimony 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 of the evidence on the subject, you must be convinced beyond a reasonable doubt that the testimony was false.

Comment

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 8.66 (False Statement to Government Agency).

A statement which is literally true cannot support a conviction, even if it is misleading. *United States v. Cook*, 489 F.2d 286, 287 (9th Cir.1973). When the defendant is accused of multiple falsehoods, the jury must be unanimous on at least one of the charges in the indictment. *Vitello v. United States*, 425 F.2d 416, 423 (9th Cir.), *cert. denied*, 400 U.S. 822 (1970).

The next to last paragraph of this instruction should be given when the indictment charges that the defendant made more than one false statement. *See id. See also* Instruction 7.9 (Specific Issue Unanimity).

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 8.111 (Subornation of Perjury). In the case of a Section 1621 charge "the defendant" or the name of the defendant should be inserted. In the case of a Section 1622 charge, the name of the person alleged to have been suborned should be inserted.

A corroboration instruction is not required where a defendant is accused of violation of 18 U.S.C. § 1623. *See* Instruction 8.112 (False Declaration Before Grand Jury or Court).

Where 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), *cert. denied*, 350 U.S. 954 (1956).

8.111 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 persuaded [*witness*] to testify falsely before [*tribunal*];

Second, [*witness*] falsely testified under oath that [*false testimony*];

Third, the false testimony was material to [*e.g.*, the matters before the court]; and

Fourth, [*witness*] knew the testimony was false.

[All of you must agree as to which statement was false.]

Comment

See Comment following Instruction 8.110 (Perjury).

Regarding the final bracketed paragraph, see Instruction 8.110 (Perjury) and Instruction 7.9 (Specific Issue Unanimity).

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.

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, 915-916 (3d Cir.), *cert. denied*, 423 U.S. 924 (1975).

If the suborned testimony is in violation of 18 U.S.C. § 1621, the "two-witness" or "corroboration" rule applies. *See* Instruction 8.110 (Perjury). 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.

8.112 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 [*e.g.*, before a grand jury];

Second, the testimony was false; and

Third, the defendant knew that the testimony was false and material to [*e.g.*, the matters before the grand jury].

[All of you must agree as to which statement was false.]

Comment

See Comment following Instructions 8.110 (Perjury) and 8.111 (Subornation of Perjury).

Regarding the final bracketed paragraph, see Instructions 8.110 (Perjury) , 8.111 (Subornation of Perjury) and 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 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 Untied States v. Leon-Reyes,* 177 F.3d 816, 819 (9th Cir. 1999).

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.

8.113 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 beyond a reasonable doubt that the defendant stole a [letter] [package] from a [mail box] [mail carrier].

Comment

See United States v. Ellison, 469 F.2d 413, 415 (9th Cir. 1972) (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).

If the letter or package was stolen from a mail depository other than a mail box or mail carrier, the instruction should be modified accordingly.

8.114 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 [mail box] [mail carrier]; and

Second, the defendant did something that was a substantial step toward stealing the mail, with all of you agreeing as to what constituted the substantial step.

Mere preparation is not a substantial step toward the commission of the crime of mail theft.

Comment

See Instruction 7.9 (Specific Issue Unanimity).

8.115 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] [package] was stolen from a mail box; and

Second, the defendant had possession of the [letter] [package] knowing that it had been stolen.

Comment

See Instruction 8.113 (Mail Theft) and Comment.

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).

8.116 THEFT 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 had possession of a [letter] [package] that was being sent through the mail; and

Second, the defendant took it, knowing that it belonged to someone else.

8.117 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 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 [*victim*] to part with property by the wrongful use of threat of force or fear;

Second, the defendant acted with the intent to obtain the property that the defendant knew [he] [she] was not entitled to receive;

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 of extortion by force, with all of you agreeing as to what constituted the substantial step].

[Mere preparation is not a substantial step toward the commission of the crime of extortion by force.]

Comment

Only a de minimis effect on interstate commerce is required to establish jurisdiction under the Act and the effect need only be probable or potential, not actual. *United States v. Nelson,* 137 F.3d 1094, 1102 (9th Cir. 1997) (citing *United States v. Atcheson,* 94 F.3d 1237, 1241 (9th Cir. 1996), *cert. denied,* 519 U.S. 1156 (1997) (citations omitted)), *cert. denied,* 119 S. Ct. 232 (1998). *See also United States v. Yankowski,* 184 F.3d 1071 (9th Cir. 1999) (holding that the commission or threat of violence may be a violation of the Hobbs Act as long as it is in furtherance of a plan to impede commerce by extortion or robbery).

"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. Zemek,* 634 F.2d 1159, 1174 (9th Cir.1980), *cert. denied,* 450 U.S. 916 (1981).

See Instruction 7.9 (Specific Issue Unanimity).

The bracketed language stating a fourth element applies to attempt to engage in extortion by force.

8.118 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][person acting under official right];

Second, the defendant [[obtained] [intended to obtain]] [*property*] which [he] [she] knew [he] [she] was not entitled to;

Third, the defendant knew that the [*property*] [[was] [would be]] given in return for [taking] [withholding] some 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 of extortion under color of official right, with all of you agreeing as to what constituted the substantial step].

[Mere preparation is not a substantial step toward the commission of the crime of extortion under color of official right.]

[The acceptance by a public official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act 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 of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.]

Comment

See Evans v. United States, 504 U.S. 255, 267 (1992) ("The Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts").

The final paragraph should be included in cases involving an alleged campaign contribution. *See Evans*, 504 U.S. at 257. Regarding the application of the Hobbs Act to campaign contribution cases, see *McCormick v. United States*, 500 U.S. 257 (1991) (*clarified in Evans*, 504 U.S. at 267).

The Hobbs Act applies to extortion of police officers and anyone acting "under the color of official right." *United States v. Freeman,* 6 F.3d 586, 593 (9th Cir. 1993) (approving "under color of official right" instruction relating to legislative aide).

See Instruction 7.9 (Specific Issue Unanimity).

See also Comment following Instruction 8.117 (Hobbs Act–Extortion or Attempted Extortion by Force).

The bracketed language stating a fifth element applies to attempt to engage in extortion under color of official right.

8.119 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 [*e.g.*, bookmaking];

Second, [*e.g.*, bookmaking] is illegal gambling in [*state*] [*city*];

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].

["Substantially continuous operation for more than thirty days" does not mean that the business had to be in operation every day for more than thirty days. It means that for more than thirty days the business operated upon a regular schedule.]

["Gross revenue" means the total amount of money wagered in one 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 (9th Cir.1988).

8.120 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 [*prior, separate criminal activity*];

Second, the defendant knew that the property represented the proceeds of [*prior, separate criminal activity*]; [and]

Third, the defendant acted with the intent to promote the carrying on of [*unlawful activity being promoted*] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime, with all of you agreeing as to what constituted the substantial step].

[Mere preparation is not a substantial step toward committing the crime of conducting a financial transaction to promote an unlawful activity.]

A financial transaction is a transaction involving [the movement of funds by wire or other means] [one or more monetary instruments] [the use of a financial institution which is engaged in _____ or the activities of _____] which affect interstate or foreign commerce in any way.

Comment

This instruction was approved in *United States v. Sayakhom,* 186 F.3d 928, 940 (9th Cir. 1999).

The government is not required to prove "as an element of the offense of money laundering, that the laundered money was obtained from prior, separate criminal activity." *Sayakhom*, 186 F.3d at 941 (explaining *United States v. Savage,* 67 F.3d 1435, 1441 (9th Cir. 1995)). The "prior, separate criminal activity" language of *Savage* "refers to the differentiation between money laundering and the predicate acts of mail fraud." 186 F.3d at 941.

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).

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), *cert. denied*, 513 U.S. 1181 (1995). *See also United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir.1997) (applying *Stein* retroactively).

See Instruction 7.9 (Specific Issue Unanimity).

The bracketed language stating a fourth element applies to an attempt to engage in a financial transaction to promote unlawful activity.

8.121 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 [*unlawful activity*];

Second, the defendant knew that the property represented the proceeds of [*prior, separate criminal 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 of [*prior, separate criminal activity*]] [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 of laundering money, with all of you agreeing as to what constituted the substantial step].

[Mere preparation is not a substantial step toward committing the crime of laundering money.]

A financial transaction is a transaction involving [the movement of funds by wire or other means] [one or more monetary instruments] [the use of a financial institution which is engaged in _____ or the activities of _____] which affect interstate or foreign commerce in any way.

The laws of the [United States] [state of _____] require the reporting of [*reporting requirement*].

Comment

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.

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), *cert. denied*, 513 U.S. 1181 (1995). *See also United States v. Turman*, 122 F.3d 1167, 1169 (9th Cir.1997) (applying *Stein* retroactively).

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).

See Comment to Instruction 8.120 (Financial Transaction to Promote Unlawful Activity).

The bracketed language stating a fourth element applies to attempt to launder monetary investments.

8.122 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 [*unlawful activity*] [; and]

[Third, the defendant did something that was a substantial step toward committing the crime, with all of you agreeing as to what constituted the substantial step].

[Mere preparation is not a substantial step toward committing the crime of transporting money to promote an unlawful activity.]

Comment

See Comments following Instructions 8.120 (Financial Transaction to Promote Unlawful Activity) and 8.121 (Laundering Monetary Instruments).

See Instruction 7.9 (Specific Issue Unanimity).

The bracketed language stating a third element applies to attempt to transport funds to promote unlawful activity.

8.123 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 [*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 [*prior, separate criminal activity*]] [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, with all of you agreeing as to what constituted the substantial step].

[Mere preparation is not a substantial step toward committing the crime of transporting money for the purpose of laundering.]

[The laws of the [United States] [State of _____] require the reporting of [*reporting requirement*].]

Comment

See Comments following Instructions 8.120 (Financial Transaction to Promote Unlawful Activity) and 8.121 (Laundering Monetary Instruments).

The bracketed language stating a fourth element applies to attempt to transport monetary instruments for the purpose of laundering.

8.124 RICO—RACKETEERING ACT— CHARGED AS SEPARATE COUNT IN THE INDICTMENT (18 U.S.C. § 1961(1))

The crimes of [*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 twelve 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).

8.125 RICO—RACKETEERING ACT— NOT CHARGED AS SEPARATE COUNT IN INDICTMENT (18 U.S.C. § 1961(1))

The crime of [*crime charged*] is a racketeering act. In order for you to find that the defendant committed [or aided and abetted others in committing] the crime of [*crime charged*], the government must prove each of the following elements beyond a reasonable doubt:

[*Elements of the crime.*]

[All twelve of you must agree on the same two racketeering acts that the defendant committed [or 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 can still be charged with the same crime in a RICO charge. *United States v. Licavoli,* 725 F.2d 1040, 1047 (6th Cir.), *cert. denied,* 467 U.S. 1252 (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.

8.126 RICO—PATTERN OF RACKETEERING ACTIVITY (18 U.S.C. § 1961(5))

A pattern of racketeering activity is at least two racketeering acts that have a relationship to each other and they amount to or pose a threat of continued criminal activity. Conduct forms a pattern if it consists of criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics. Sporadic activity or widely separated and isolated criminal activity does not form a pattern of racketeering activity.

Comment

If there is a genuine issue whether there were two racketeering activities within ten years, the instruction should be modified by inserting "within ten years" in the second line of the instruction after "racketeering acts."

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 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," those 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).

8.127 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 a 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] [*enterprise*]; and

Third, [*enterprise*] was engaged in or its activities in some way affected commerce between one state and [an]other state[s], or between a state or the United States and a foreign country.

Comment

When racketeering acts are charged as separate counts in the indictment, see Instruction 8.124 (RICO–Racketeering Act–Charged as Separate Count in the Indictment). If racketeering acts are not charged as separate counts, see Instruction 8.125 (RICO–Racketeering Act–Not Charged as Separate Count in the Indictment).

For a definition of pattern of racketeering activity, see Instruction 8.126 (RICO–Pattern of Racketeering Activity).

The enterprise in which a defendant invests must be an entity distinct from the defendant. *Schreiber Distributing Co. v. Serv–Well Furniture Co.,* 806 F.2d 1393, 1396 (9th Cir. 1986).

8.128 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 or control of [*enterprise*];

Second, the defendant did so through a pattern of racketeering activity or through collection of an unlawful debt; and

Third, [*enterprise*] engaged in or its activities in some way affected commerce between one state and [an]other state[s], or between a state or the United States and a foreign country.

Comment

When racketeering acts are charged as separate counts in the indictment, see Instruction 8.124 (RICO–Racketeering Act–Charged as Separate Count in the Indictment). If racketeering acts are not charged as separate counts, see Instruction 8.125 (RICO–Racketeering Act–Not Charged as Separate Count in the Indictment).

For a definition of pattern of racketeering activity, see Instruction 8.126 (RICO–Pattern of Racketeering Activity). *See also Schreiber Distributing v. Serv-Well Furniture Co.,* 806 F.2d 1393, 1398-99 (9th Cir. 1986).

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. Juvenile Male,* 118 F.3d 1344, 1347 (9th Cir. 1997).

Control under Section 1962(b) does not require "formal control." *Ikuno v. Yip,* 912 F.2d 306, 310 (9th Cir. 1990).

8.129 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 [*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 [*enterprise or union*];

Second, the defendant [conducted] [participated, directly or indirectly, in the conduct of] the affairs of [*enterprise or union*] through a pattern of racketeering activity or collection of unlawful debt; and

Third, [*enterprise or union*] engaged in or its activities in some way affected commerce between one state and [an]other state[s], or between a state or the United States and a foreign country.

Comment

When racketeering acts are charged as separate counts in the indictment, *see* Instruction 8.124 (RICO–Racketeering Act–Charged as Separate Count in the Indictment). If racketeering acts are not charged as separate counts, see Instruction 8.125 (RICO–Racketeering Act–Not Charged as Separate Count in the Indictment).

For a definition of pattern of racketeering activity, see Instruction 8.126 (RICO–Pattern of Racketeering Activity).

Since an enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union," 18 U.S.C. § 1981, 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).

8.130—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 enterprise 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; and

Fourth, the enterprise engaged in or its activities in some way affected commerce between one state and [an]other state[s], or between a state or the United States and a foreign country.

Comment

When racketeering acts are charged as separate counts in the indictment, see Instruction 8.124 (RICO–Racketeering Act–Charged as Separate Count in the Indictment). If racketeering acts are not charged as separate counts, see Instruction 8.125 (RICO–Racketeering Act–Not Charged as Separate Count in the Indictment).

For a definition of pattern of racketeering activity, see Instruction 8.126 (RICO–Pattern of Racketeering Activity).

The definition of "enterprise" in the first element of the instruction is from *United States v. Turkette,* 452 U.S. 576, 583 (1981).

8.131 BANK ROBBERY
(18 U.S.C. § 2113)

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 took money belonging to [*financial institution*];

Second, the defendant used force and violence, or intimidation in doing so; [and]

Third, the deposits of [*financial institution*] was then insured by the Federal Deposit Insurance Corporation[; and]

[Fourth, the defendant intentionally [struck or wounded [*victim*]] [made a display or force that reasonably caused [*victim*] to fear bodily harm] by using a [*e.g.*, pistol]].

Comment

Armed bank robbery occurs when the bank robber "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device." 18 U.S.C. § 2113(d). The Ninth Circuit has stated that there is no "difference of great magnitude" between "assault" and "put life in jeopardy." *United States v. Brannon*, 616 F.2d 413, 419 (9th Cir. 1980), *cert. denied*, 447 U.S. 908 (1980).

An object's ability to incite fear and violence because it appears to be dangerous is sufficient to render it a "dangerous weapon." *See United States v. Boyd*, 924 F.2d 945, 947 (9th Cir. 1991), *cert. denied*, 502 U.S. 828 (1991). For example, an unloaded firearm is a "dangerous weapon" within the meaning of the statute. *McLaughlin v. United States*, 476 U.S. 16 (1986). "Use" includes "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Bailey v. United States*, 516 U.S. 137 (1995). Finally, "[w]hen a defendant claims to possess a gun during a robbery, a jury may reasonably infer that the defendant possessed a gun during the robbery." *United States v. Jones*, 84 F.3d 1206, 1210-11 (9th Cir. 1996), *cert. denied*, 519 U.S. 973 (1996).

In order 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.*

The use of a note during a bank robbery does not constitute armed robbery, but may be

considered a crime of violence. *United States v. Sanchez,* 933 F.2d 742, 747 (9th Cir. 1991).

Bank robbery is a general intent crime. *See, e.g., United States v. Burdeau,* 168 F.3d 352, 356 (9th Cir.), *cert. denied,* 120 S. Ct. 388 (1999).

8.132 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 [*financial institution*];

Second, the deposits of [*financial institution*] was then insured by the Federal Deposit Insurance Corporation; and

Third, the defendant did something that was a substantial step toward committing the crime of bank robbery, with all of you agreeing as to what constituted the substantial step.

Mere preparation is not a substantial step toward the commission of the crime of bank robbery.

Comment

See Instruction 7.9 (Specific Issue Unanimity).

8.133 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 [*victim*] in fear that some person would be subject to death, serious bodily injury or kidnapping] to cause [*victim*] to engage in a sexual act; and

Second, the offense was committed [*location stated in indictment*].

In this case, "sexual act" means [*sexual act definition*].

Comment

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. § 2246(2).

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 or a federal prison is a question of law. *See United States v. Gipe,* 672 F.2d 777, 779 (9th Cir. 1982).

8.134 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 [*victim*] in fear that some person would be subjected to death, serious bodily injury, or kidnapping] to cause [*victim*] to engage in a sexual act;

Second, the defendant did something that was a substantial step toward committing the crime of aggravated sexual abuse, with all of you agreeing as to what constituted the substantial step; and

Third, the offense was committed [*location stated in indictment*].

In this case "sexual act" means [*sexual act definition*].

Mere preparation is not a substantial step toward the commission of the crime of aggravated sexual abuse.

Comment

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. § 2246(2).

See Comment to Instruction 8.133 (Aggravated Sexual Abuse).

See Instruction 7.9 (Specific Issue Unanimity).

8.135 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 [*victim*] [by force or threat of force] [without the knowledge or permission of [*victim*]];

Second, as a result, [*victim*]'s ability to judge or control conduct was substantially impaired;

Third, the defendant then engaged in a sexual act with [*victim*]; and

Fourth, the offense was committed [*location stated in indictment*].

In this case, "sexual act" means [*sexual act definition*].

Comment

See Comment to Instruction 8.133 (Aggravated Sexual Abuse).

8.136 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 [*victim*] after substantially impairing [*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 [*victim*];

Second, the defendant did something that was a substantial step toward committing the crime of aggravated sexual abuse, with all of you agreeing as to what constituted the substantial step; and

Third, the offense was committed [*location stated in indictment*].

In this case, "sexual act" means [*sexual act definition*].

Mere preparation is not a substantial step toward the commission of the crime of aggravated sexual abuse.

Comment

See Comment to Instruction 8.133 (Aggravated Sexual Abuse).

8.137 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 [*victim*];

Second, at the time, [*victim*] had not yet reached the age of twelve years; and

Third, the offense was committed [*location stated in indictment*].

In this case, "sexual act" means [*sexual act definition*].

Comment

See Comment to Instruction 8.133 (Aggravated Sexual Abuse).

8.138 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 [*victim*];

Second, [*victim*] was under the age of twelve years;

Third, the defendant did something that was a substantial step toward committing the crime, with all of you agreeing as to what constituted the substantial step; and

Fourth, the offense was committed [*location stated in indictment*].

In this case, "sexual act" means [*sexual act definition*].

Mere preparation is not a substantial step toward the commission of the crime of aggravated sexual abuse of a child.

Comment

See Comment to Instructions 8.133 (Aggravated Sexual Abuse).

8.139 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 [*victim*] to engage in a sexual act by threatening or placing [*victim*] in fear; and

Second, the offense was committed [*location stated in indictment*].

In this case, "sexual act" means [*sexual act definition*].

Comment

See Comment to Instruction 8.133 (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.

8.140 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 [*victim*] to engage in a sexual act by threatening or placing [*victim*] in fear;

Second, the defendant did something that was a substantial step toward committing the crime of sexual abuse, with all of you agreeing as to what constituted the substantial step; and

Third, the offense was committed [*location stated in indictment*].

In this case, "sexual act" means [*sexual act definition*].

Mere preparation is not a substantial step toward the commission of the crime of sexual abuse.

Comment

See Comment to Instructions 8.133 (Aggravated Sexual Abuse).

8.141 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 [*victim*];

Second, [*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 [*location stated in indictment*].

In this case, "sexual act" means [*sexual act definition*].

Comment

See Comment to Instruction 8.133 (Aggravated Sexual Abuse).

8.142 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, with all of you agreeing as to what constituted the substantial step; and

Third, the offense was committed [*location stated in indictment*].

Mere preparation is not a substantial step toward the commission of the crime of sexual abuse.

In this case, "sexual act" means [*sexual act definition*].

Comment

See Comment to Instructions 8.133 (Aggravated Sexual Abuse).

8.143 SEXUAL ABUSE OF A 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 [*victim*];

Second, [*victim*] had reached the age of twelve years but had not yet reached the age of sixteen years;

Third, [*victim*] was at least four years younger than the defendant; and

Fourth, the offense was committed [*location stated in indictment*].

In this case, "sexual act" means [*sexual act definition*].

Comment

See Comment to Instruction 8.133 (Aggravated Sexual Abuse).

8.144 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 [*victim*], who had reached the age of twelve years but had not reached the age of sixteen years;

Second, [*victim*] was at least four years younger than the defendant;

Third, the defendant did something that was a substantial step toward committing the crime, with all of you agreeing as to what constituted the substantial step; and

Fourth, the offense was committed [*location stated in indictment*].

Mere preparation is not a substantial step toward the commission of the crime of sexual abuse of a minor.

In this case, "sexual act" means [*sexual act definition*].

Comment

See Comment to Instructions 8.133 (Aggravated Sexual Abuse).

8.145 SEXUAL ABUSE OF A 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 [*victim*];

Second, at the time, [*victim*] was in official detention at [*special maritime and territorial jurisdiction of the United States or Federal prison*]; and

Third, at the time [*victim*] was under the custodial, supervisory or disciplinary authority of the defendant.

In this case, "sexual act" means [*sexual act definition*].

In this case, "official detention" means [*official detention definition*].

Comment

See Comment to Instruction 8.133 (Aggravated Sexual Abuse).

"Official detention" is defined in 18 U.S.C. § 2246(5).

8.146 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 [*victim*], who at the time was in official detention at [*special maritime and territorial jurisdiction of the United States or federal prison*] 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, with all of you agreeing as to what constituted the substantial step.

Mere preparation is not a substantial step toward the commission of the crime of sexual abuse of a person in official detention.

In this case, "sexual act" means [*sexual act definition*].

In this case, "official detention" means [*official detention definition*].

Comment

See Comment to Instructions 8.133 (Aggravated Sexual Abuse).

For a definition of "Official detention," see 18 U.S.C. § 2246(5).

8.147 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.

8.148 ABUSIVE SEXUAL CONTACT—GENERAL
(18 U.S.C. § 2244(b))

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.

8.149 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 [*victim*];

Second, the sexual contact was without [*victim*]'s permission; and

Third, the offense was committed [*location stated in indictment*].

In this case, "sexual contact" means [*sexual contact 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).

8.150 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, [*victim*] was under the age of eighteen years;

Second, the defendant:

a) [employed] [used] [persuaded] [coerced] [*victim*] to take part in sexually explicit conduct for the purpose of producing a [*e.g.*, video tape] of such conduct; or

b) had [*victim*] assist any other person to engage in sexually explicit conduct; or

c) transported [*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:

a) the defendant knew or had reason to know that such visual depiction [*e.g.*, video tape] would be mailed or transported across state lines or in foreign commerce; or

b) the visual depiction was produced using materials that had been mailed, shipped, or transported across state lines or in foreign commerce; or

c) the visual depiction was mailed or actually transported across state lines or in foreign commerce.

In this case, "sexually explicit conduct" means [*sexually explicit conduct definition*].

In this case, "producing" means [*producing definition*].

Comment

The previous version of this instruction (Instruction 8.39.1) has been revised to reflect 1996 statutory changes to 18 U.S.C. § 2251.

The term "sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

The term "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 8.155 (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).

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).

8.151 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, [*victim*] was under the age of eighteen years;

Second, the defendant was a [parent] [legal guardian] [person having custody or control] of [*victim*];

Third, the defendant knowingly permitted [*victim*] to:

a) engage in sexually explicit conduct; or

b) assist any other person to engage in sexually explicit conduct

for the purpose of producing a visual depiction [*e.g.*, video tape] of such conduct; and

Fourth:

a) the defendant knew or had reason to know that the visual depiction [*e.g.*, the video tape] would be mailed or transported across state lines or in foreign commerce; or

b) the visual depiction was produced using materials that had been mailed, shipped, or transported across state lines or in foreign commerce; or

c) the visual depiction was actually mailed or transported across state lines or in foreign commerce.

In this case, "sexually explicit conduct" means [*sexually explicit conduct definition*].

In this case, "producing" means [*producing definition*].

Comment

Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. § 2256(2).

Acts that fall within the meaning of "producing" are listed 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).

8.152 SEXUAL EXPLOITATION OF CHILD–NOTICE OR ADVERTISEMENT SEEKING OR OFFERING (18 U.S.C. § 2251(c))

The defendant is charged in [Count _____ of] the indictment with sexual exploitation of a child in violation of Section 2251(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, at the time, [*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]] either:

a) to [receive] [exchange] [buy] [produce] [display] [distribute] [reproduce] any visual depiction [*e.g.* video tape], if the production of the visual depiction utilized [*victim*] engaging in sexually explicit conduct and such visual depiction is of such conduct; or

b) participation in any act of sexually explicit conduct [by] [with] [*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

Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. § 2256(2).

Acts that fall within the meaning of "producing" are listed in 18 U.S.C. § 2256(3).

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).

8.153 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

Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. § 2256(2).

Acts that fall within the meaning of "producing" are listed in 18 U.S.C. § 2256(3).

For a definition of "computer," see 18 U.S.C. §§ 1030 and 2256(6).

For a definition of "visual depiction," see 18 U.S.C. § 2256(5).

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.

8.154 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] which 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 that has been stored on computer disk or data that has been stored by electronic means and that is 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 media 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 an element whether defendant knew the "matter" in question contained unlawful visual depictions; such a depiction may be "produced" when a defendant downloads visual depictions from the internet).

Undeveloped film may constitute a "visual depiction," *United States v. Smith*, 795 F.2d 841 (9th Cir. 1986), as well as computer graphic interchange format (GIF) files from which pornographic images could be retrieved. *See United States v. Hockings*, 129 F.3d 1069 (9th Cir. 1997).

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.

8.155 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 [*victim*] was under 18 years of age.

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).

8.156 INTERSTATE TRANSPORTATION OF STOLEN VEHICLE OR AIRCRAFT (18 U.S.C. § 2312)

The defendant is charged in [Count _____ of] the indictment with interstate transportation of a stolen [motor vehicle] [aircraft] 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 defendant moved a stolen [motor vehicle] [aircraft] from one state to another;

Second, the defendant knew it was stolen at the time the [vehicle] [aircraft] moved across state lines; and

Third, the defendant intended to deprive the owner of the [vehicle] [aircraft] of its use temporarily or permanently.

The word "stolen" means taken without the owner's consent with the intent to deprive the owner of the use of the [vehicle] [aircraft].

[It is not necessary that the taking of the [vehicle] [aircraft] be unlawful. Even if possession is lawfully acquired, the [vehicle] [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 [vehicle] [aircraft] for the defendant's own use.]

Comment

The elements of this crime are stated in *United States v. Albuquerque,* 538 F.2d 277, 278 (9th Cir.1976).

The defendant must have had the intent to permanently or temporarily deprive the owner of the rights and benefits of ownership. *Jones v. United States,* 378 F.2d 340, 340 (9th Cir.1967).

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.), *cert. denied,* 412 U.S. 907 (1973).

8.157 SALE OR RECEIPT OF STOLEN VEHICLE 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] [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 defendant [received] [possessed] [concealed] [stored] [bartered] [sold] [disposed of] stolen [motor vehicle] [aircraft] which was in interstate commerce; and

Second, at the time, the defendant knew that the [motor vehicle] [aircraft] had been stolen.

Something is in interstate commerce if its movement begins in one state and continues into another state.

A movement becomes interstate when the property comes into the possession of anyone who is helping to move it from one state to another and continues until the property is delivered to its destination.

The government is not required to prove who stole the [motor vehicle] [aircraft].

Comment

Section 2313 of Title 18 relates to the receipt or sale of stolen motor vehicles and aircraft. Unlike Section 2315, which relates to the receipt or sale of stolen money, securities or other property, Section 2313 does not have a requirement that the property be worth more than $5,000.

The defendant's knowledge that the stolen property was moving in interstate commerce is not an element of the offense. United States v. Muncy, 526 F.2d 1261, 1263 (5th Cir.1976).

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.), *cert. denied*, 439 U.S. 1051 (1978).

8.158 INTERSTATE TRANSPORTATION OF STOLEN PROPERTY (18 U.S.C. § 2314)

The defendant is charged in [Count _____ of] the indictment with interstate transportation of stolen property 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 [moved] [caused] stolen money or property worth at least $5,000 [to be moved] from one state to another;

Second, at the time the money or property crossed state lines, the defendant knew it was stolen; and

Third, the defendant intended to deprive the owner of the use of the money or property temporarily or permanently.

It is not necessary to prove who stole the money or 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), *cert. denied,* 436 U.S. 904 (1978).

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.

8.159 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] [pledging as security] [accepting as security] stolen [*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] stolen [[*stolen property*]] [[worth $5,000 or more]] which was in interstate commerce; and

Second, at the time, the defendant knew that the [*stolen property*] had been stolen.

Something is in interstate commerce if its movement begins in one state and continues into another state.

A movement becomes interstate when the property comes into the possession of anyone who is helping to move it from one state to another and continues until the property is delivered to its destination.

The government is not required to prove who stole the property.

Comment

Section 2315 of Title 18 relates to the receipt or sale of stolen money, securities or other property. Unlike Section 2313, which relates to the receipt or sale of stolen motor vehicles and aircraft, Section 2315 has a requirement in the case of stolen merchandise, securities or money that such property be worth more than $5,000.

8.160 TRANSPORTATION FOR PROSTITUTION (18 U.S.C. § 2421)

The defendant is charged in [Count _____ of] the indictment with transporting, or 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].

8.161 PERSUADING OR COERCING TO TRAVEL TO ENGAGE IN PROSTITUTION (18 U.S.C. § 2422)

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

That 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].

8.162 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 [*victim*] from _____ to _____;

Second, the defendant did so with the intent that [*victim*] engage in prostitution; and

Third, [*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).

8.163 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

"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).

8.164 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 following Instruction 8.163 (Failure to Appear).

8.165 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.

8.166A 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 the charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [forged] [counterfeited] [altered] [falsely made] an [immigrant] [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];

Second, the defendant acted knowingly.

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8.166B FRAUD– USE, 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] [nonimmigrant] [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 [was procured by means of any false claim or statement] or [to have been otherwise procured by fraud] or [unlawfully obtained].]
or [the defendant knew the document was [forged] [counterfeited] [altered] [falsely made].]

Comment

Use this instruction with respect to a crime charged under 18 U.S.C. § 1546(a), first paragraph.

Only documents whose primary purpose is to facilitate entry into the country are included within the purview of "document[s] required for entry into the United States." *United States v. Campos-Serrano,* 404 U.S. 293, 299 (1971).

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).

"Uttered" is a word that the court may wish to define for the jury. In this context, the word "utter" is defined as "to put or send a document into circulation." BLACK'S LAW DICTIONARY 1545 (7th ed. 1999).

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8.166C FRAUD–FALSE STATEMENT ON IMMIGRATION DOCUMENT (18 U.S.C. § 1546(a))

The defendant is charged in [Count __ of] the indictment with 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 Immigration and Naturalization Service's activities or decisions;

Fourth, the statement was made under oath; and

Fifth, the statement was made on an [application] [affidavit] [other document] required by immigration laws or regulations prescribed thereunder.

A statement is material if it is capable of affecting or influencing a governmental decision. It need not have actually influenced the agency decision in order to meet the materiality requirement.

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). A statement is material if it is capable of affecting or influencing a governmental decision. Id. It need not have actually influenced the agency decision in order to meet the materiality requirement. *Id.* (citing *United States v. Serv. Deli, Inc.,* 151 F.3d 938, 941 (9th Cir. 1998)).

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9. OFFENSES UNDER OTHER TITLES

Instruction

9.32 Firearms—Possession of Unregistered Firearm—Component Parts (26 U.S.C. § 5861(d)).
9.33 Firearms—Evidence of No Registration.
9.34 Firearms—Possession Without Serial Number (26 U.S.C. § 5861(i)).
9.35 Income Tax Evasion (26 U.S.C. § 7201).
9.36 Failure to Pay Tax or File Tax Return (26 U.S.C. § 7203).
9.37 Filing False Tax Return (26 U.S.C. § 7206(1)).
9.38 Aiding or Advising False Income Tax Return (26 U.S.C. § 7206(2)).
9.39 Filing False Tax Return (26 U.S.C. § 7207).
9.40 Forcible Rescue of Seized Property (26 U.S.C. § 7212(b)).
9.41 Failure to Report Exporting or Importing Monetary Instruments (31 U.S.C. § 5316(a)).

9.1 ALIEN—BRINGING INTO UNITED STATES (8 U.S.C. § 1324(a)(1)(A)(i))

The defendant is charged in [Count _____ of] the indictment with bringing an alien into 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 a person who was an alien into 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 or to otherwise elude United States immigration officials.

An alien is a person who is not [a natural-born or naturalized citizen] [a national] of the United States.

Comment

See 8 U.S.C. § 1325(a); *United States v. Nguyen*, 73 F.3d 887, 894 (9th Cir.1995) ("The jury should have been instructed that it must find that the defendant knew that the individuals were aliens and that he off-loaded them at other than a port of entry, intending to violate the law."). *See also United States v. Barajas–Montiel,* 185 F.3d 947, 953 (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 defendant raises the defense that he or she is a national, the court may wish to define the term national as "a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22)(B).

Section 1182 lists aliens who are excluded from the United States. An alien who falls within one of the excluded categories is not lawfully entitled to enter or reside in the United States. *United States v. Bunker,* 532 F.2d 1262 (9th Cir.1976). Where there is evidence that the alien falls within one of the excluded classes, the last clause of the instruction should be so worded as to require the jury to make a finding that the person is within that class.

This instruction may need to be tailored to fit the specific crime charged under Section 1324(a)(1). *See, e.g.,* Instructions 9.2 (Alien–Illegal Transportation), 9.3 (Alien–Concealment) and 9.4 (Alien–Encouraging Illegal Entry).

9.2 ALIEN—ILLEGAL TRANSPORTATION
(8 U.S.C. § 1324(a)(1)(A)(ii))

The defendant is charged in [Count _____ of] the indictment with 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, [*alien*] was an alien;

Second, [*alien*] was not lawfully in the United States;

Third, the defendant [knew] [was in reckless disregard of the fact] that [*alien*] was not lawfully in the United States; and

Fourth, the defendant knowingly transported or moved, or attempted to transport or move [*alien*] in order to help [him] [her] remain in the United States illegally.

An alien is a person who is not a natural-born or naturalized citizen [or national] of the United States. An alien is not lawfully in this country if [the person was not duly admitted by an Immigration Officer] [the person [*e.g.*, entered the United States for the purpose of performing labor]].

Comment

See Comment following Instruction 9.1 (Alien–Bringing into United States).

"Reckless disregard" is not defined in Title 8, United States Code, and the case law has not defined the phrase as used in this context. *Cf.* Model Penal Code, § 2.02 (recklessly defined).

Pending further statutory or case law guidance, the trial judge must decide whether to define "reckless disregard" as deliberate ignorance, as traditional recklessness, or not to define it at all.

The legislative history of 8 U.S.C. § 1324 refers to "willful blindness," which raises the question of whether the "reckless disregard" in the statute is intended to mean deliberate ignorance. 1986 U.S. Code Cong. and Admin. News, p. 5649, 5669–70, House Report No. 99–682(I). For a definition of deliberate ignorance, see Instruction 5.7 (Deliberate Ignorance).

If the defendant raises the defense that he or she is a national, the court may wish to define the term national as: "[A] person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22)(B).

See United States v. Barajas–Montiel, 185 F.3d 947, 953 (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)).

See also *U.S. v. Hernandez-Garcia*, 284 F.3d 1135, 1137-38 (9th Cir. 2002) (Proof of "entry" not required under § 1324(a)(1)(A)(ii) because statute can be violated by transporting an alien who has "come to" the United States unlawfully).

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9.3 ALIEN—CONCEALMENT
(8 U.S.C. § 1324(a)(1)(A)(iii))

The defendant is charged in [Count _____ of] the indictment with concealment 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, [*alien*] was an alien;

Second, [*alien*] was not lawfully in the United States;

Third, the defendant [knew] [was in reckless disregard of the fact] that [*alien*] was not lawfully in the United States; and

Fourth, the defendant concealed [*alien*] for the purpose of avoiding [*alien*]'s detection by immigration authorities.

An alien is a person who is not [a natural-born or naturalized citizen] [national] of the United States. An alien is not lawfully in this country if [the person was not duly admitted by an Immigration Officer] [the person [*e.g.*, entered the United States for the purpose of performing labor]].

Comment

See Comments following Instructions 9.1 (Alien–Bringing into United States) and 9.2 (Alien–Illegal Transportation).

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, [*alien*] was an alien;

Second, the defendant encouraged or induced [*alien*] to enter the United States in violation of law; and

Third, the defendant [knew] [was in reckless disregard of the fact] that [*alien*]'s entry into the United States would be in violation of the law.

An alien is a person who is not a [natural-born or naturalized citizen] [national] of the United States. An alien enters into the United States in violation of law if not duly admitted by an Immigration Officer.

Comment

See Comments following Instructions 9.1 (Alien–Bringing into United States) and 9.2 (Alien–Illegal Transportation).

9.5 ALIEN — REENTRY OF DEPORTED ALIEN (8 U.S.C. § 1326(a))

The defendant is charged in [Count _____ of] the indictment with reentry of deported alien 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 is an alien;

Second, the defendant was deported from the United States; and

Third, the defendant reentered the United States without the consent of the Immigration and Naturalization Service.

An alien is a person who is not a natural-born or naturalized citizen [or a national] of the United States.

Comment

"Section 1326 sets forth 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) (indictment charging "found in" United States, without reference to unlawful entry, was adequate on facts presented to charge violation of section 1326 for being found in the United States).

If the defendant raises the defense that he or she is a national, the court may wish to define the term national as: "[A] person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22)(B).

"Because the lawfulness of the prior deportation is not an element of the offense under § 1326, [defendant is] not entitled to have the issue determined by a jury." *United States v. Alvarado–Delgado*, 98 F.3d 492, 493 (9th Cir.1996) (en banc) (overruling *United States v. Ibarra*, 3 F.3d 1333, 1334 (9th Cir. 1993), *cert. denied,* 510 U.S. 1205 (1994)), *cert. denied*, 519 U.S. 1155 (1997). *See also United States v. Lara–Aceves,* 183 F.3d 1007, 1010 (9th Cir. 1999); *United States v. Medina*, 236 F.3d 1028 (9th Cir. 2001) ("With regard to the element of prior deportation, the government merely needs to prove that a deportation proceeding actually occurred with the end result of [the defendant] being deported," holding that a deportation order or warrant is sufficient to establish deportation and rejecting defendant's claim that the government was required to produce a tape recording or transcript as proof of prior deportation).

The statute provides that consent must be given by the Attorney General. Most jurors are probably not aware that the Immigration and Naturalization Service is a Division of the Department of Justice. Instructing them that reentry of a deported alien requires the express

consent of the Attorney General could be confusing to them. The court could take judicial notice that consent is given by the Immigration and Naturalization Service, acting as the Attorney General.

Although the crime of reentry of deported alien is a general intent crime, the crime of attempted reentry of deported alien requires proof of specific intent. *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1190 (9th Cir. 2000) (en banc).

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." *Gracidas-Ulibarry*, 231 F.3d at 1191 n.3 (citing *United States v. Pacheco-Medina*, 212 F.3d 1162, 1166 (9th Cir. 2000)). The reasoning of *Gracidas-Ulibarry* and *Pacheco-Medina* applies to prosecutions for being an alien found in the United States after deportation in violation of 8 U.S.C. 1326(a). *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).

9.5A ALIEN-REENTRY OF DEPORTED ALIEN-ATTEMPT

The defendant is charged in [Count___of] the indictment with attempted reentry of deported alien 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 had the conscious desire to reenter the United States without consent;

Second, the defendant committed an overt act that was a substantial step towards reentering without consent;

Third, the defendant was not a citizen of the United States;

Fourth, the defendant had previously been lawfully denied admission, excluded, deported or removed from the United States; and

Fifth, the United States Attorney General had not consented to the defendant's attempted reentry.

Comment

The elements of the crime of illegal reentry are set forth in *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) (en banc) (Defendant claimed he was asleep when he entered the United States.).

The crime of attempted illegal reentry is a specific intent offense. *Gracidas-Ulibarry,* 231 F.3d at 1190.

An alien has not reentered the United States for purposes of the crime of illegal reentry after deportation "until he or she is physically present in the country and free from official restraint." *Gracidas-Ulibarry*, 231 F.3d at 1191 n.3 (citing *United States v. Pacheco-Medina*, 212 F.3d 1162, 1166 (9th Cir.2000).

9.6 ALIEN—REENTRY OF DEPORTED ALIEN AFTER CONVICTION FOR A FELONY OR AN AGGRAVATED FELONY

(8 U.S.C. § 1326(b)(1) and (2))

Former Instruction 9.1.2 is withdrawn.

See Instruction 9.5.

Comment

The Committee recommends that when a defendant is allegedly a deported alien who has illegally reentered the United States after having been convicted of a felony and/or aggravated felony, the jury should be instructed on the crime of alien-reentry of deported alien, Instruction 9.5 (Alien–Reentry of Deported Alien), and no reference should be made to the existence of a felony or aggravated felony conviction.

This change is mandated by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) and *United States v. Alviso*, 152 F.3d 1195 (9th Cir. 1998).

In *Almendarez-Torres*, 523 U.S. at 244, 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 because the conviction constitutes a sentencing enhancement pursuant to 8 U.S.C. § 1326(b)(2).

Thereafter, in *Alviso*, 152 F.3d at 1199, the Ninth Circuit held that in a prosecution for illegal reentry after deportation following a felony conviction, in light of *Almendarez-Torres*, "a prior felony conviction is not an element of the offense described in 8 U.S.C. § 1326(a)" and should therefore not be presented to the jury as proof thereof. The Ninth Circuit stated that although *Almendarez-Torres* involved a prior aggravated felony conviction, the same reasoning would apply to a non-aggravated felony conviction.

"The [Supreme] Court's opinion in *Apprendi* [*v. New Jersey,* ___ U.S. ___, 120 S.Ct. 2348 (2000)] expressed doubt concerning the correctness of *Almendarez-Torres v. United States,* 523 U.S. 224 (1998), which permitted a defendant to be subjected at sentencing to higher maximum penalties because of prior convictions, even though those convictions had not been set forth in the indictment to which the defendant pleaded guilty. *Apprendi* stated that it was "arguable that *Almendarez-Torres* was incorrectly decided and that a logical application of our reasoning today should apply if the recidivist issue were contested." *United States v. Nordby,* 225 F.3d 1053, 1057, n.1 (9th Cir. 2000) (quoting *Apprendi,* 120 S.Ct. at 2362).

However, the Ninth Circuit has stated that "until the Supreme Court expressly overrules it, *Almendarez-Torres* controls." *United States v. Pacheco-Zepeda*, ___F.3d___ (9th Cir.2000) ("Under *Almendarez-Torres*, the government was not required to include Pacheco-Zepeda's prior aggravated felony convictions in the indictment, submit them to a jury, or prove them beyond a reasonable doubt, and the district court properly considered such convictions in sentencing.").

Rev 12/2000

9.7 SECURITIES FRAUD
(15 U.S.C. § 78j(b))

The defendant is charged in [Count _____ of] the indictment with securities fraud in violation of Section 78j(b) of Title 15 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 [used a device or scheme to defraud someone] [made an untrue statement of a material fact] [failed to disclose a material fact which resulted in making the defendant's statements misleading];

Second, the defendant's [acts were] [failure to disclose was] in connection with the purchase or sale of [*e.g.*, bond, notes, stock];

Third, the defendant used the mail or the telephone in connection with [these acts] [this failure to disclose]; and

Fourth, the defendant acted for the purpose of defrauding buyers or sellers of securities.

To defraud someone means to make a statement or representation which is untrue and known to the defendant to be untrue [or knowingly to fail to state something which is necessary to make other statements true] and which relates to something important to the purchase or sale.

It is not necessary that the untrue statement itself passed through the mail or over the telephone so long as the mail or telephone was used as a part of the purchase or sale transaction.

It is also not necessary that the defendant made a profit or that anyone actually suffered a loss.

Comment

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 on a particular untrue statement of material fact"). *See* Instruction 7.9 (Specific Issue Unanimity).

The Ninth Circuit has held reckless disregard for truth or falsity to be sufficient to sustain a conviction of securities fraud. *See United States v. Farris,* 614 F.2d 634, 638 (9th Cir. 1980).

9.8 TRAFFICKING IN ARCHAEOLOGICAL RESOURCES (16 U.S.C. §§ 470EE(b)(2) and (d))

The defendant is charged in [Count _____ of] the indictment with trafficking in archaeological resources in violation of Section 470ee(b)(2) and (d) 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 [[sold] [purchased] [exchanged] [transported] [received] [offered to sell] [offered to purchase] [offered to exchange]] [[*archaeological resource*]] that was of archaeological interest and at least 100 years of age; and

Second, the [*archaeological resource*] had been removed from [*e.g.*, the Tonto National Forest] without a permit from the [*e.g.*, Chief of the United States Forest Service].

The government is not required to prove that the defendant knew that the [*archaeological resource*] had been removed from public lands.

Comment

Knowledge that the archaeological resource was on government land is not an element of the offense. *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).

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.

For a definition of "archaeological resource," see 16 U.S.C. § 470bb(1).

In a prosecution under § 470ee(a), the Ninth Circuit stated that for a felony conviction, the prosecution must prove that a person charged under ARPA knew, or at least had reason to know, that the object taken is an "archaeological resource." *United States v. Lynch*, 233 F.3d 1139, 1145-46 (9th Cir. 2000).

9.9 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 person acts knowingly if he or 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

See 16 U.S.C. §§ 3372(a)(1) & 3373 (d)(1)(A).

Necessary Adjustments of Instruction for Various Predicate Offenses Charged Under 16 U.S.C. § 3372

This instruction is a model for any case involving a violation of 16 U.S.C. § 3373 (d)(1)(A). Under that section of the Lacey Act, criminal liability is premised on a finding of a violation of one of five subsections of 16 U.S.C. § 3372. Accordingly, adjustments must be made to this instruction depending on the charged offense under section 3372.

A) When violation of 16 U.S.C. § 3372(a)(1) (U.S. Laws, Treaties) is alleged, use this instruction without change.

B) When violation of 16 U.S.C. § 3372(a)(2)(A) (Fish or Wildlife taken in violation of State or Foreign Laws) is alleged, in lieu of the second element insert:

> "Second, the defendant knew that the [fish] [wildlife] had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under [state law] [state regulations] [foreign law]."

C) When violation of 16 U.S.C. § 3372(a)(2)(B) (Plants taken in violation of State law) is alleged, insert in lieu of the second element:

> "Second, the defendant knew that the plants had been [taken] [possessed] [transported] [sold] in violation of state [law] [regulations]."

D) When violation of 16 U.S.C. § 3372(a)(3)(A) (Fish or Wildlife in Special U.S. Jurisdictions) is alleged, insert in lieu of the second element:

> "Second, the defendant possessed [fish] [wildlife] within the Special Maritime and Territorial Jurisdiction of the United States;"

and add a third element:

> "Third, the defendant knew the [fish] [wildlife] had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under [state law] [state regulations] [foreign law] [tribal law]."

E) When violation of 16 U.S.C. § 3372(a)(3)(A) (Plants in Special U.S. Jurisdictions) is alleged, insert in lieu of the second 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 or in a manner unlawful under state [law] [regulations]."

Cautionary Note

A judge using this Lacey Act instruction should use care to articulate the correct scienter requirements under that Act. *See United States v. Stein*, 37 F.3d 1407, 1410 (9th Cir.1994) (use of a general scienter instruction which conflicted with specific scienter required by the law was reversible error), *cert. denied*, 513 U.S. 1181 (1995). Therefore, do not give Instruction 5.6 with this instruction.

A distinction exists between "knowingly" importing or exporting fish, wildlife or plants and "knowing" these were taken in violation of underlying relevant law. The meaning of "knowingly" in this instruction contemplates volitional conduct as explained in the last paragraph to the instruction. That a defendant volitionally acts "knowing" of the illegal nature of the fish, wildlife or plants involved should be self-apparent. The meaning of this is addressed in the legislative history of the Lacey Act. *See* Lacey Act Amendments of 1981, S. Rep. No. 97–123, 97th Cong., 1st Sess. 10–12 (1981); 1981 U.S.C.C.A.N. 1758–59 ("Upon proof of his knowledge of the illegal nature of the taker's conduct, that is, that the wildlife had been taken in violation of foreign law, and proof of importation, the importer will be subject to the felony penalty scheme.... ").

Requirement that defendant know that the wildlife was possessed in violation of "a particular law" is not an element of the offense. *See, e.g., 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.

16 U.S.C. § 3373(d)(2) (lack of due care that fish, wildlife or plants were illegally taken), which is covered by Instruction 9.11, constitutes a lesser included offense of a violation of 16 U.S.C. § 3373(d)(1)(A) covered by this instruction. *See United States v. Parker*, 991 F.2d 1493, 1496 (9th Cir.1993); *United States v. Hansen–Sturm*, 44 F.3d 793, 794-95 (9th Cir.1995).

Where 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.

Where 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.

Rev. 2/2003

9.10 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 or purchase] [the offer to sell or purchase it] [the intent to sell or purchase it].

A person acts knowingly if he or 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

See 16 U.S.C. §§ 3372(a)(1) & 3373 (d)(1)(B).

Necessary Adjustments of Instruction for Various Predicate Offenses Under 16 U.S.C. § 3372

This instruction is a model for any case involving a violation of 16 U.S.C. § 3373 (d)(1)(B). Under that section of the Lacey Act, criminal liability is premised on a finding of a violation of one of five subsections of 16 U.S.C. § 3372. Accordingly, adjustments must be made to this instruction depending on the charged offense under section 3372.

A) When violation of 16 U.S.C. § 3372(a)(1) (U.S. Laws, Treaties) is alleged, use this instruction without change.

B) When violation of 3372(a)(2)(A) (Fish or Wildlife taken in violation of State or Foreign Law) is alleged, in lieu of the first and third elements insert:

"First, the defendant knew that the [fish] [wildlife] had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under [state law] [state regulations] [foreign law];

"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 or purchase] [the offer to sell or purchase them] [the intent to sell or purchase them]."

C) When violation of 3372(a)(2)(B) (Plants taken in violation of State Law) is alleged, insert in lieu of the first and third elements:

"First, the defendant knew that the plants had been [taken] [possessed] [transported] [sold] in violation of or in a manner unlawful under [state law] [state regulations];

"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 or purchase] [offer of sale or purchase of] [intent to sell or purchase] the plants."

D) When violation of 3372(a)(3)(A) (Fish or Wildlife in Special U.S. Jurisdiction) is alleged, 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 [state law] [state regulations] [foreign law] [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 [state law] [state regulations] [foreign law] [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]."

E) When violation of 16 U.S.C. 3372(a)(2)(B) (Plants in Special Maritime Jurisdiction) is involved, 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 [state law] [state regulations];

"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 [state law] [state regulations]; 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]."

See Comment following Instruction 9.27 (Lacey Act–Import or Export of Illegally Taken Fish, Wildlife or Plants) concerning scienter requirements of 16 U.S.C. § 3373(d)(1).

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) (willing seller and buyer is appropriate definition of market value; where case involves purchases made by government agents it is advisable to instruct jury that price paid by government agent is not conclusive evidence of market value) and *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).

For a definition of special maritime and territorial jurisdiction of the United States, see 18 U.S.C. § 7.

For a definition of interstate commerce or foreign commerce in cases involving violation of 16 U.S.C. § 3372(a)(2), see 18 U.S.C. § 10.

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*, 122 S.Ct. 38 (2001).

"[T]he jury must find that [the defendant] sold or purchased the [wildlife]," and "an underlying violation of the Lacey Act...." *Fejes,* 232 F.3d at 702.

See also U.S. v. LeVeque, 283 F.3d 1098 (9th Cir. 2002) (Lacey Act violation under

§ 3373(d)(1)(B) requires government to prove the defendant actually knew that the taking was illegal).

Rev.2/2003

9.11 LACEY ACT–WITH DUE CARE DEFENDANT SHOULD HAVE KNOWN THAT 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].

An act is done knowingly if the defendant 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

See 16 U.S.C. §§ 3372(a)(1) & 3373(d)(2) (misdemeanor violation).

This instruction pertains to a misdemeanor provision of the Lacey Act, which has been held to be a lesser included offense of the felony provisions of the Lacey Act. *United States v. Hansen–Sturm*, 44 F.3d 793, 794 (9th Cir.1995).

Necessary Adjustments of Instruction for Various Predicate Offenses Charged Under 16 U.S.C. § 3372

This instruction is a model for any case involving a violation of 16 U.S.C. § 3373(d)(2). Under that section of the Lacey Act, criminal liability is premised on a finding of a violation of one of five subsections of 16 U.S.C. § 3372. Accordingly, adjustments must be made to this instruction depending on the charged offense under section 3372.

A) When violation of 16 U.S.C. § 3372(a)(1) (U.S. Laws, Treaties) is alleged, use this instruction without change.

B) When violation of 3372(a)(2)(A) (Fish or Wildlife taken in violation of State or Foreign Law) is alleged, 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 [state law] [state regulations] [foreign law]."

C) When violation of 3372(a)(2)(B) (Plants taken in violation of State law) is alleged, 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 state [law] [regulations]."

D) When violation of 3372(a)(3)(A) (Fish or Wildlife in Special U.S. Jurisdiction) is alleged, 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 [state law] [state regulations] [foreign law] [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 [state Law] [state regulations] [foreign law] [tribal law]."

E) When violation of 3372(a)(3)(B) (Plants in Special U.S. Jurisdiction) is alleged, 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 state [law] [regulations]; 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 state [law] [regulations]."

In addition to proof of a volitional act, the Lacey Act also requires proof that the defendant volitionally acted when "in the exercise of due care" the defendant "should know" that the fish, wildlife or plants were taken in violation of the underlying relevant law. This due care requirement appears to be the traditional standard of due care.

As the legislative history of this section explains: "It is important to remember that a person can exercise due care without knowing for certain whether, for example, a particular importation is legal. Due care simply requires that a person facing a particular set of circumstances undertakes certain steps which a reasonable man would take to do his best to insure that he is not violating the law." Lacey Act Amendments of 1981, S. Rep. No. 97–123, 97th Cong., 1st Sess. 10–12 (1981); 1981 U.S.C.C.A.N. 1758–59.

The legislative committee elaborated on the application of the due care standard:

> [D]ue care means that degree of care which a reasonably prudent person would exercise under the same or similar circumstances. As a result, it is applied differently to different categories of persons with varying degrees of knowledge and responsibility. For example, zoo curator's [sic], as professionals, are expected to apply their knowledge to each purchase of wildlife. If they know that a reptile is Australian and that Australia does not allow export of that reptile without special permits, they would fail to exercise due care unless they checked for those permits. On the other hand, the airline company which shipped the reptile might not have the expertise to know that Australia does not normally allow that particular reptile to be exported. However, if an airline is notified of the problem and still transships the reptile, then it would probably fail to pass the due care test.

Id.

For a definition of special maritime and territorial jurisdiction of the United States, see 18 U.S.C. § 7.

For a definition of interstate commerce or foreign commerce, in cases involving violation of 16 U.S.C. § 3372(a)(2), see 18 U.S.C. § 10.

9.12 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].

An act is done knowingly if the defendant 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

Necessary Adjustments of Instruction for Various Predicate Offenses Charged Under 16 U.S.C. § 3372

This instruction is a model for 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 following Instruction 9.10 (Lacey Act–Commercial Activity In Illegally Taken Fish, Wildlife or Plants) concerning need for instruction concerning a definition of "market value."

For definition of interstate commerce or foreign commerce, see 18 U.S.C. § 10.

9.13 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 [*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 [*controlled substance*]; and

Second, the defendant possessed it with the intent to deliver it to another person.

It does not matter whether the defendant knew that the substance was [*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 a controlled substance to another person, with or without any financial interest in the transaction.

Comment

In the aftermath of *Apprendi v. New Jersey,* __ U.S.__, 120 S.Ct. 2348 (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) ("[O]ur existing precedent to the contrary is overruled to the extent it is inconsistent with *Apprendi.*") (citations omitted). *See also United States v. Garcia-Guizar*, 227 F.3d 1125 (9th Cir. 2000). As a result, if applicable, the court should obtain a jury determination of the amount of drugs involved.

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, e.g., 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).

The definition of possession with intent to deliver was expressly approved in *United States v. Morales-Cartagena*, 987 F.2d 849, 852 (1st Cir. 1993).

The use of "controlled substance" in jury instructions should be avoided. Instead, the specific controlled substance involved in the case should be referred to. *See also* Instruction 5.7 (Deliberate Ignorance) and comment thereto.

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9.14 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 [*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 [*controlled substance*] with the intent to deliver it to another person; and

Second, the defendant did something that was a substantial step toward committing the crime, with all of you agreeing as to what constituted the substantial step.

Mere preparation is not a substantial step toward the commission of the crime of possession of [*controlled substance*] with the intent to distribute.

To "possess with 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 following Instruction 9.13 (Controlled Substance–Possession with Intent to Distribute).

See Instruction 7.9 (Specific Issue Unanimity).

9.15 CONTROLLED SUBSTANCE— DISTRIBUTION (21 U.S.C. § 841(a)(1))

The defendant is charged in [Count _____ of] the indictment with distribution of [*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 delivered [*controlled substance*]; and

Second, the defendant knew that it was [*controlled substance*] or some other prohibited drug.

Comment

See Comment following Instruction 9.13 (Controlled Substance–Possession with Intent to Distribute).

9.16 CONTROLLED SUBSTANCE— ATTEMPTED DISTRIBUTION (21 U.S.C. §§ 841(a)(1) and 846)

The defendant is charged in [Count _____ of] the indictment with attempted distribution of [*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 deliver [*controlled substance*] to another person;

Second, the defendant knew that it was [*controlled substance*] or some other prohibited drug; and

Third, the defendant did something that was a substantial step toward committing the crime, with all of you agreeing as to what constituted the substantial step.

Mere preparation is not a substantial step toward the commission of the crime of distribution of [*controlled substance*].

Comment

See Comment following Instruction 9.13 (Controlled Substance–Possession with Intent to Distribute).

See Instruction 7.9 (Specific Issue Unanimity).

9.17 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 [*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 delivered [*controlled substance*] to [*underage person*];

Second, the defendant knew that it was [*controlled substance*] or some other prohibited drug;

Third, the defendant was at least eighteen years of age; and

Fourth, [*underage person*] was under twenty-one years of age.

Comment

See Comment following Instruction 9.13 (Controlled Substance–Possession with Intent to Distribute).

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.) (adopting *United States v. Pruitt,* 763 F.2d 1256, 1261 (11th Cir.1985), *cert. denied,* 474 U.S. 1084 (1986)), *cert. denied,* 495 U.S. 935 (1990).

9.18 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 [*e.g.*, heroin] 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 deliver [*controlled substance*] to [*underage person*];

Second, the defendant knew that it was [*controlled substance*] or some other prohibited drug;

Third, the defendant was at least eighteen years of age;

Fourth, [*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, with all of you agreeing as to what constituted the substantial step.

Mere preparation is not a substantial step toward the commission of the crime of distribution of [*controlled substance*] to a person under the age of twenty-one years.

Comment

See Comment following Instructions 9.13 (Controlled Substance–Possession with Intent to Distribute) and 9.17 (Controlled Substance–Distribution to Person Under 21 Years).

See Instruction 7.9 (Specific Issue Unanimity).

9.19 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 distributing [*e.g.*, heroin] 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 delivered [*controlled substance*] to another person;

Second, the defendant knew that it was [*controlled substance*] or some other prohibited drug; and

Third, the delivery took place in, on or within 1,000 feet of the [schoolyard] [campus] of [*school*].

Comment

See Comment following Instruction 9.13 (Controlled Substance–Possession with Intent to Distribute).

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) (adopting reasoning of *United States v. Falu,* 776 F.2d 46, 49 (2d Cir.1985)). Distance is measured by a straight line. *United States v. Ofarril,* 779 F.2d 791, 792 (2d Cir.1985), *cert. denied,* 475 U.S. 1029 (1986).

Section 860 applies not only to schools, but also to playgrounds and public housing facilities, as well as (within a 100 foot radius) youth centers, public swimming pools and video arcades. The instruction should be revised as necessary to match the facts of the case.

9.20 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 [*e.g.*, heroin] 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 deliver [*controlled substance*] to another person in, on, or within 1,000 feet of the [schoolyard] [campus] of [*school*];

Second, the defendant knew that it was [*controlled substance*] or some other prohibited drug; and

Third, the defendant did something that was a substantial step toward committing the crime, with all of you agreeing as to what constituted the substantial step.

Mere preparation is not a substantial step toward the commission of the crime of distribution of [*controlled substance*] in or near a school.

Comment

See Comment following Instructions 9.13 (Controlled Substance–Possession with Intent to Distribute) and 9.19 (Controlled Substance–Distribution In or Near a School).

See Instruction 7.9 (Specific Issue Unanimity).

9.21 CONTROLLED SUBSTANCE— EMPLOYMENT OF MINOR TO VIOLATE DRUG LAW (21 U.S.C. §§ 841(a)(1) and 861(a)(1))

The defendant is charged in [Count _____ of] the indictment with [hiring] [using] a minor to [*e.g.*, distribute] 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] [*minor*] [*e.g.*, to distribute];

Second, the defendant knew that it was [*controlled substance*] or some other prohibited drug;

Third, the defendant was at least eighteen years of age; and

Fourth, [*minor*] was under the age of eighteen years.

Comment

See Comment following Instruction 9.13 (Controlled Substance–Possession with Intent to Distribute).

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.), *cert. denied,* 495 U.S. 935 (1990).

This instruction can be modified for use in cases arising under Sections 861(a)(2) and (3).

9.22 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 [*e.g.*, distribute heroin] 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] [*minor*] [*e.g.*, to deliver heroin];

Second, the defendant knew that it was [*controlled substance*] or some other prohibited drug;

Third, the defendant was at least eighteen years of age;

Fourth, [*minor*] was under the age of eighteen years; and

Fifth, the defendant did something that was a substantial step toward committing the crime, with all of you agreeing as to what constituted the substantial step.

Mere preparation is not a substantial step toward the commission of the crime of [hiring] [using] a minor to violate the drug laws.

Comment

See Comment following Instructions 9.13 (Controlled Substance–Possession with Intent to Distribute) and 9.21 (Controlled Substance–Employment of a Minor to Violate Drug Law).

See Instruction 7.9 (Specific Issue Unanimity).

9.23 CONTROLLED SUBSTANCE—LISTED CHEMICAL, POSSESSION 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 [*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 [*listed chemical*];

Second, [*listed chemical*] is a listed chemical; and

Third, the defendant possessed it with the intent to manufacture [*controlled substance*].

It does not matter whether the defendant knew that [*listed chemical*] was a listed chemical. It is sufficient that the defendant knew that it was to be used to manufacture [*controlled substance*] or some other prohibited drug.

Comment

See Comment following Instruction 9.13 (Controlled Substance–Possession with Intent to Distribute).

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9.24 CONTROLLED SUBSTANCE—LISTED CHEMICAL, POSSESSION OR DISTRIBUTION (21 U.S.C. §§ 841(c)(2))

The defendant is charged in [Count _____ of] the indictment with [possession] [and] [distribution] of a listed chemical, knowing or having reasonable cause to believe it would be used to manufacture [*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] [and] [distributed] [*listed chemical*];

Second, [*listed chemical*] is a listed chemical; and

Third, the defendant [possessed] [and] [distributed] it knowing, or having reasonable cause to believe, that it would be used to manufacture [*controlled substance*].

It does not matter whether defendant knew that [*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 [*controlled substance*] or some other prohibited drug.

Comment

See Comment following Instruction 9.13 (Controlled Substance–Possession with Intent to Distribute).

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9.25 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).

See also United States v. Whitmore, 24 F.3d 32, 34 (9th Cir. 1994) (former instruction 9.04E erroneous due to failure to include intent component).

9.26 CONTROLLED SUBSTANCE— CONTINUING CRIMINAL ENTERPRISE (21 U.S.C. § 848)

The defendant is charged in [Count _____ of] the indictment with 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 offense[s] of [*e.g.*, distributing cocaine] [as charged in Count[s] _____ of the indictment];

Second, the offense[s] [was] [were] part of a series of three or more offenses committed by the defendant over a definite period of time;

Third, the defendant committed the offenses together with five or more other persons;

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.

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.

"Income and resources" means receipts of money or property.

Comment

Under the statute, to engage in a continuing criminal enterprise requires, in part, that a person violate one of the federal narcotics laws and that the violation be "a part of a continuing series of violations." A "series" consists of three or more federal narcotic law violations. *United States v. Baker,* 10 F.3d 1374, 1406 (9th Cir. 1993), *cert. denied,* 513 U.S. 934 (1994). For a series of violations to be "continuing," they must span a definite period of time. *United States v. Bergdoll,* 412 F. Supp. 1308, 1317 (D. Del.1976); *United States v. Collier,* 358 F. Supp. 1351, 1355 (E.D. Mich.1973). The jury must be unanimous as to the specific violations making up the "continuing series of violations." *Richardson v. United States*,(1999). *See also* Instruction 7.9 (Specific Issue Unanimity).

In most cases the "continuing series of violations" will consist of substantive counts alleged in the indictment. However, courts have allowed proof of violations which were not the bases for separate substantive counts. *See United States v. Sterling,* 742 F.2d 521, 526 (9th Cir. 1984), *cert. denied,* 471 U.S. 1099 (1985).

The defendant need not act "in concert with five or more other persons" at the same time, nor must the defendant have known all of them. *United States v. Jerome,* 942 F.2d 1328, 1330 (9th Cir. 1991).

"Organizer, supervisor, or other position of management" and "substantial income" are within the common understanding of jurors and do not require definition. *United States v. Apodaca,* 843 F.2d 421, 425-26 (9th Cir.), *cert. denied,* 488 U.S. 932 (1988).

9.27 CONTROLLED SUBSTANCE— UNLAWFUL IMPORTATION (21 U.S.C. §§ 952 and 960)

The defendant is charged in [Count _____ of] the indictment with unlawful importation of [*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 [*controlled substance*] into the United States; and

Second, the defendant knew that it was [*controlled substance*] or some other prohibited drug.

Comment

See Comment following Instruction 9.13 (Controlled Substance–Possession with Intent to Distribute).

In the aftermath of *Apprendi v. New Jersey,* __ U.S. __, 120 S.Ct. 2348 (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) ("[O]ur existing precedent to the contrary is overruled to the extent it is inconsistent with *Apprendi.*") (citations omitted). *See also United States v. Garcia-Guizar*, 227 F.3d 1125 (9th Cir. 2000). As a result, if applicable, the court should obtain a jury determination of the amount of drugs involved.

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9.28 CONTROLLED SUBSTANCE— MANUFACTURING OR DISTRIBUTING FOR PURPOSES OF IMPORTATION (21 U.S.C. §§ 959 and 960(a)(3))

The defendant is charged in [Count _____ of] the indictment with [manufacturing] [distributing] [*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] [distributed] [*controlled substance*] outside of the United States; and

Second, the defendant either intended that the [*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 [*controlled substance*] would be unlawfully brought into the United States.

9.29 CONTROLLED SUBSTANCE— DISTRIBUTION ABOARD AIRCRAFT (21 U.S.C. §§ 959(b) and 960(a)(3))

The defendant is charged in [Count _____ of] the indictment with distributing [*controlled substance*] aboard an aircraft in violation of Sections 959(b) 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 distributed [*controlled substance*] to another person while aboard an aircraft;

Second, the defendant knew it was [*controlled substance*] or some other prohibited drug; and

Third, [the defendant was a United States citizen] [the aircraft was owned by a United States citizen] [the aircraft was registered in the United States].

Comment

The statute covers manufacture and possession with intent to distribute as well. 21 U.S.C. §§ 959(b)(1) and (2). The instruction should be tailored to fit the crime charged.

9.30 CONTROLLED SUBSTANCE— ACTUAL AMOUNT CHARGED NEED NOT BE PROVED

The government is not required to prove that the amount or quantity of [*controlled substance*] was as charged in the indictment. It need only prove beyond reasonable doubt that there was a measurable or detectable amount of [*controlled substance*].

Comment

This instruction may no longer be appropriate in light of *Apprendi v. New Jersey,* __ U.S. __, 120 S.Ct. 2348 (2000), and the Ninth Circuit law thereafter.

Previously, the quantity of controlled substance involved in a case was not an element of the offense. *See United States v. Butler,* 74 F.3d 916, 923 (9th Cir.) ("Quantity is not an element of possession with intent to distribute."), *cert. denied,* 519 U.S. 967 (1996). *See also United States v. Sotelo-Rivera,* 931 F.2d 1317 (9th Cir. 1991), *cert. denied,* 502 U.S. 1100 (1992). "[W]e can find no statutory requirement or policy reason for distinguishing between 'measurable' amount and 'detectable' amount.... The real purpose of either term is to be able to determine that it is a controlled substance that was distributed." *United States v. McGeshick*, 41 F.3d 419, 421 (9th Cir.1994). However, in a possession case where there was conflicting evidence of the quantity, it was appropriate to submit the issue to the jury. *See id.*

In the aftermath of *Apprendi v. New Jersey,* __ U.S.__, 120 S.Ct. 2348 (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) ("[O]ur existing precedent to the contrary is overruled to the extent it is inconsistent with *Apprendi.*") (citations omitted). *See also United States v. Garcia-Guizar*, 227 F.3d 1125 (9th Cir. 2000). As a result, if applicable, the court should obtain a jury determination of the amount of drugs involved.

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9.31 FIREARMS—POSSESSION OF

UNREGISTERED FIREARM
(26 U.S.C. § 5861(d))

The defendant is charged in [Count _____ of] the indictment with possession 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 [*e.g.*, a shotgun having a barrel or barrels of less than 18 inches in length]; and

Second, the [*firearm*] was not registered to the defendant in the National Firearms Registration and Transfer Record.

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) ("to 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"). *See also United States v. Gergen*, 172 F.3d 719, 724 (9th Cir. 1999) (mens rea requirement that the defendant know of the particular characteristics of the firearm which bring it within the scope of the statute is "an essential element of a § 5861(d) violation).

9.32 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).

9.33 FIREARMS—EVIDENCE OF NO REGISTRATION

Exhibit _____ is a certificate of the custodian of the National Firearms Register and Transfer Record. A certificate is a written statement of facts signed by a public official.

The certificate states that the custodian made a diligent search of the record and found no record of any firearm being registered to the defendant. From this certificate you may, but need not, decide that the firearm described in [Count _____ of] the indictment was not registered to the defendant.

9.34 FIREARMS—POSSESSION WITHOUT SERIAL NUMBER (26 U.S.C. § 5861(i))

The defendant is charged in [Count _____ of] the indictment with possession 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 a [*firearm*]; and

Second, there was no serial number on the [*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).

9.35 INCOME TAX EVASION
(26 U.S.C. § 7201)

The defendant is charged in [Count _____ of] the indictment with income tax evasion 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;

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 an income tax; and

Fourth, in attempting to evade or defeat such additional tax, the defendant acted willfully.

Comment

For a definition of "intent to defraud," see Instruction 3.17 (Intent to Defraud–Defined).

The elements of tax evasion are stated in *United States v. Mal,* 942 F.2d 682, 685 (9th Cir.1991).

Sections 7201–7207 of the tax 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)).

The government has the burden of "negating a defendant's claim of ignorance of the law or 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." *Cheek*, 498 U.S. at 202. Such belief need not be reasonable; subjective good faith is sufficient for the defendant to prevail. *Id.*; *United States v. Powell*, 955 F.2d 1206, 1208 (9th Cir.1991). If there is evidence that the defendant had a good faith belief that he was not violating the provisions of the tax laws, add the following element to the government's burden of proof: "Fourth, the defendant did not have a good faith belief that [he] [she] was complying with the provisions of [the tax laws] [*applicable provision of the tax laws*]. A belief may be in good faith even if it is unreasonable."

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.), *cert. denied,* 449 U.S. 1012 (1980).

The tax deficiency need not be "substantial." *United States v. Marashi*, 913 F.2d 724, 735 (9th Cir.1990).

A defendant accused of tax evasion is not entitled to a lesser included offense instruction based on Section 7203 where the act constituting evasion was the filing of a false return. *Sansone v. United States,* 380 U.S. 343 (1965). However, where the evidence supports beyond a reasonable doubt a willful failure to pay tax but does not support beyond a reasonable doubt that the defendant acted with the specific intent to evade payment, the defendant may be found guilty of the lesser Section 7203 offense. *United States v. DeTar,* 832 F.2d 1110, 1113 (9th Cir.1987). For the instruction on lesser included offense, see Instruction 3.15 (Lesser Included Offense).

"[T]he statute of limitations for evasion of assessment begins to run from the occurrence of the last act necessary to complete the offense, normally, a tax deficiency." *United States v. Carlson*, 235 F.3d 466, 470 (9th Cir. 2000) (citations omitted) ("While it might have been preferable to instruct the jury that at least part of [defendant's] conduct must fall within the statute of limitations," failure to do so did not constitute reversible error on the facts presented). *Id.* at 471.

9.36 FAILURE TO PAY TAX OR FILE TAX RETURN (26 U.S.C. § 7203)

The defendant is charged in [Count _____ of] the indictment with failure [to pay tax] [to file a 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 income tax] [had a gross income of more than [*dollar amount*]] for the calendar year ending December 31, [*year*];

Second, the defendant failed to [pay the tax] [file an income tax return] by April 15, [*year*]; and

Third, the defendant acted for the purpose of evading [his] [her] duty under the tax laws and not as a result of accident or negligence.

Comment

See Comment following Instruction 9.35 (Income Tax Evasion).

9.37 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 made and signed a tax return for the year [*year*] that he knew contained false 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.

Comment

The false information was 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)); *United States v. Greenberg*, 735 F.2d 29, 31 (2nd Cir.1984); *United States v. Fawaz*, 881 F.2d 259, 263 (6th Cir.1989).

Materiality is a question of fact for the jury. *United States v. Uchimura*, 125 F.3d 1282, 1284 (9th Cir.1997)*, cert. denied,* 119 S. Ct. 151 (1998).

See Comment to Instruction 9.35 (Income Tax Evasion) regarding willfulness.

9.38 AIDING OR ADVISING FALSE INCOME TAX RETURN (26 U.S.C. § 7206(2))

The defendant is charged in [Count _____ of] the indictment with aiding or advising 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 willfully assisted or advised [*person*] in the preparation of an income tax return that was false; and

Second, the return was false as to something necessary to a determination of whether income tax was owed.

A person acts "willfully" by voluntarily and intentionally assisting or advising another to do something that the person knows disobeys or disregards the law. [A person does not act "willfully" if the person acts as a result of a good faith misunderstanding of the requirements of the law.]

The government is not required to prove that the taxpayer knew that the return was false.

[It is not a defense that the defendant believed the income tax laws are wrong or unconstitutional.]

Comment

See Comment following Instruction 9.35 (Income Tax Evasion).

To establish aiding the filing of a false tax return, "there must exist some affirmative participation which at least encourages the perpetrator." *United States v. Graham,* 758 F.2d 879, 885 (3d Cir.), *cert. denied,* 474 U.S. 901 (1985). There is an exception to the "willfulness" element for a good faith misunderstanding of the law. *United States v. Callery,* 774 F.2d 1456, 1458 (9th Cir.1985). *See also Cheek v. United States*, 498 U.S. 192, 202 (1991); *Richey v. United States*, 9 F.3d 1407 (9th Cir. 1993) (subjective good faith is sufficient). However, there is a distinction between misunderstanding the requirements of the law and believing that a law is unconstitutional or wrong. A belief that the law that includes wages in income is wrong or unconstitutional does not negate willfulness. *United States v. Mueller,* 778 F.2d 539, 541 (9th Cir.1985).

9.39 FILING FALSE TAX RETURN
(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 willfully filed a tax return knowing that it contained false information as to any material matter; and

Second, the defendant acted for the purpose of evading the defendant's duty under the tax laws and not as a result of accident or negligence.

Comment

See Comment following Instruction 9.35 (Income Tax Evasion).

9.40 FORCIBLE RESCUE OF SEIZED PROPERTY (26 U.S.C. § 7212(b))

The defendant is charged in [Count _____ of] the indictment with forcibly rescuing 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, someone authorized to do so under the Internal Revenue Code had seized [*property*];

Second, defendant knew that the property had been seized by one authorized to do so under the Internal Revenue Code; and

Third, the defendant forcibly retook 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.

Comment

To "forcibly rescue" property is to forcibly retake it. *See United States v. Hardaway,* 731 F.2d 1138, 1139 (5th Cir.), *cert. denied,* 469 U.S. 865 (1984).

9.41 FAILURE TO REPORT EXPORTING OR IMPORTING MONETARY INSTRUMENTS (31 U.S.C. § 5316(a))

The defendant is charged in [Count _____ of] the indictment with failure to report [exporting] [importing] monetary instruments in violation of Section 5316(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 [transported] [received] more than $10,000 in [*e.g.*, currency] [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 was required to be filed with the Secretary of Treasury; and

Third, the defendant willfully failed to file such report.

Comment

As used in the statute, the word "willful" means that the act was done "deliberately and with knowledge." *United States v. Carrier,* 654 F.2d 559, 561 (9th Cir.1981). *But see Ratzlaf v. United States*, 510 U.S. 135, 138–39 (1994) (In the context of 31 U.S.C. § 5324, the "willfulness" requirement means that the defendant must have known his or her actions were illegal.).

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The Ninth Circuit Jury Committee welcomes all suggestions for future revisions and updates to the Manual of Model Criminal Jury Instructions. Please complete the information below and send your suggestions to the following address:

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