The pages that follow are redline ~~strikeout~~ copies of 9th Circuit criminal jury instructions that had extensive edits in April 2019.

4.11 EYEWITNESS IDENTIFICATION

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

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

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

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

(3) any inconsistent identifications made by the eyewitness;

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

(5) the strength of earlier and later identifications;

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

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

Comment

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

It is within the trial court's sound discretion to instruct a jury both on eyewitness identification and general witness credibility. The need for heightened jury instructions should correlate with the amount of corroborative evidence. See United States v. Masterson, 529 F.2d 30, 32 (9th Cir. 1976).

The Ninth Circuit has approved the giving of a comprehensive eyewitness jury instruction ~~where~~, at least when the district court has determined that proffered expert witness testimony regarding eyewitness identification should be excluded. See, e.g., United States v. Hicks, 103 F.3d 837, 847 (9th Cir. 1996), overruled on other grounds, United States v. W.R. Grace, 526 F.3d 499 (9th Cir. ~~2008) ("The district court may exercise its discretion to exclude expert testimony if it finds that~~

~~. . . the trier of fact . . . [would] be better served through a . . . comprehensive jury instruction."); United States v. Rincon, 28 F.3d 921, 925-26 (9th Cir. 1994).~~

~~The Third Circuit has appointed a Task Force on Eyewitness Identification to make recommendations regarding "jury instructions, use of expert testimony, and other procedures and policies intended to promote reliable practices for eyewitness identification and to effectively deter unnecessarily suggestive identification procedures, which raise the risk of a wrongful conviction." Third Circuit Order, September 9, 2016, available at:~~

~~http://www.ca3.uscourts.gov/sites/ca3/files/TFEyewitnessIdOrder_11042016.pdf~~

2008).

4.20 UNTIMELY DISCLOSURE OF EXCULPATORY OR IMPEACHMENT EVIDENCE

A trial court has discretion in shaping the remedies for violations of Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). For example, in United States v. Garrison, 888 F.3d 1057, 1061 (9th Cir. 2018), "the government made grave mistakes in its prosecution of the case by repeatedly failing to timely disclose information to the defense." Rather than dismiss the case, the district court instructed the jury that "the government's failure to timely comply with its constitutional obligations . . . could lead the jury to find reasonable doubt" as to guilt. The Ninth Circuit held that there was no error. Id. at 1066.

6.2B ENTRAPMENT BY ESTOPPEL DEFENSE

The defendant contends that [if] [although] [he] [she] committed the acts charged in the indictment, [he] [she] did so reasonably relying upon the affirmative advice of an authorized [federal government official] [agent of the federal government].

To establish this defense, the defendant has the burden to show by a preponderance of the evidence that:

First, an authorized [federal government official] [agent of the federal government] was empowered to render the claimed erroneous advice;

Second, the [federal government official] [agent of the federal government] had been made aware of all the relevant historical facts;

Third, the [federal government official] [agent of the federal government] affirmatively told the defendant the proscribed conduct was permissible;

Fourth, the defendant relied on the false information; and

Fifth, this reliance was reasonable.

In deciding this, you should consider all of the relevant circumstances, including the identity of the federal government [official] [agent], what the [official] [agent] said to the defendant, and how closely the defendant followed any instructions the [official] [agent] gave.

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

If you find that the defendant has proved that [he] [she] reasonably relied upon the affirmative advice of the federal government [official] [agent], you must find the defendant not guilty of [specify crime charged].

Comment

For applications of this defense, see, e.g., United States v. Lynch, 903 F.3d 1061, 1075-78 (9th Cir. 2018) (marijuana dispensary); United States v. Schafer, 625 F.3d 629, 637 (9th Cir.

2010) (marijuana manufacturing); United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004) (firearms offense); United States v. Ramirez-Valencia, 202 F.3d 1106, 1109-10 (9th Cir. 2000) (immigration offense).

This defense applies only to advice from federal officials or authorized agents of the federal government, and not state or local officials. See, e.g., United States v. Mack, 164 F.3d

467, 474 (9th Cir. 1999) (rejecting entrapment by estoppel defense "because Mack did not rely on the advice or authority of federal officials or agents"); United States v. Collins, 61 F.3d 1379, 1385 (9th Cir. 1995) (noting entrapment by estoppel defense applies only when defendant relies either on "a federal government official empowered to render the claimed erroneous advice, or on an authorized agent of the federal government, who has been granted the authority from the federal government to render such advice.") (citation omitted).

Regarding "authorized agents," the Ninth Circuit has held that "[c]learly, the United States Government has made licensed firearms dealers federal agents in connection with the gathering and dispensing of information on the purchase of firearms. Under these circumstances, we believe that a buyer has the right to rely on the representations of a licensed firearms dealer, who has been made aware of all the relevant historical facts . . . ." United States v. Tallmadge, 829 F.2d 767, 774 (9th Cir. 1987). See also United States v. Brebner, 951 F.2d 1017, 1027 (9th Cir. 1991) (noting defendant may rely on advice of either federal government official, or "an authorized agent of the federal government who, like licensed firearms dealers, has been granted the authority from the federal government to render such advice").

"To establish affirmative authorization, a defendant must do more than show that the government made vague or even contradictory statements. Instead, the defendant must show that the government affirmatively told him the proscribed conduct was permissible." Lynch, 903 F.3d at 1076 (citations and internal quotations marks omitted) (rejecting entrapment by estoppel defense when government official advised that legality of marijuana business "was up to the cities and counties to decide how they wanted to handle the matter," because statement was too vague and ambiguous to qualify as affirmative authorization).

Reasonable reliance occurs if "a person sincerely desirous of obeying the law would

have accepted the information as true, and would not have been put on notice to make further inquiries." Lynch, 903 F.3d at 1077 (citation omitted). See also Batterjee, 361 F.3d at 1217 (holding that defendant dealing with complicated intersection of immigration and criminal law, who was told by federal licensee that he was "legally purchasing and possessing a firearm," could reasonably rely on those assurances because he had no reason to believe he needed to inquire any further).

No Ninth Circuit authority clearly sets out the burden that a defendant must satisfy to make out an entrapment by estoppel defense. However, the Ninth Circuit has held that the entrapment by estoppel defense is very similar to the public authority defense, and the preponderance standard applies to the public authority defense. See, e.g., United States v. Doe, 705 F.3d 1134, 1146 (9th Cir. 2013) (holding that defendant had burden of proving public authority defense by preponderance of the evidence because defense did not serve to negate any elements of charged offenses); United States v. Burrows, 36 F.3d 875, 882 (9th Cir. 1994) ("The difference between the entrapment by estoppel defense and the public authority defense is not great."). See also United States v. Beaty, 245 F.3d 617, 623 (6th Cir. 2001) (applying preponderance standard); United States v. Stewart, 185 F.3d 112, 124 (3rd Cir. 2000) (applying preponderance standard).
Approved 4/2019

8.7A ASSAULT BY STRIKING OR WOUNDING (18 U.S.C § 113(a)(4))

The defendant is charged in [Count of] the information with assault with a dangerous weapon 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 each of the following elements beyond a reasonable doubt:

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

Second, the assault took place on [specify place of federal jurisdiction]

Comment

See United States v. Pierre, 254 F.3d 872, 875 (9th Cir. 2001) (holding that assault by striking, beating, or wounding is not lesser included offense of assault with dangerous weapon).

8.10B ASSAULT OF SPOUSE, INTIMATE PARTNER, OR DATING PARTNER (18 U.S.C. § 113(a)(7))

The defendant is charged in [Count of] the indictment with assaulting a [[spouse] [intimate partner] [or] [dating partner]] resulting in substantial bodily injury in violation of Section 113(a)(7) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

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

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

Third, [name of victim] was a [[spouse] [intimate partner] [or] [dating partner]] of the defendant; and

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

[["Spouse"] ["Intimate partner"] ["dating partner"]] includes any of the following:

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

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

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

Comment

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

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

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

First, the defendant was a public official;

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

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

Comment

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

It is recommended that the instruction specifically describe the thing of value just as described in the indictment to avoid a variance. See Comment to Instruction 8.12 (Bribery of Public Official).

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

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

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

8.181 SEXUAL EXPLOITATION OF CHILD
(18 U.S.C. § 2251(a))

The defendant is charged in [Count _____ of] the indictment with sexual exploitation of a child in violation of Section 2251(a) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, at the time, [name of victim] was under the age of eighteen years;

Second, the defendant

[[employed] [used] [persuaded] [coerced] ~~[~~[name of victim~~]~~] to take part in sexually explicit conduct]

or

[had [name of victim] assist any other person to engage in sexually explicit conduct]

or

[transported [name of victim] [[across state lines] [in foreign commerce] [in any Territory or Possession of the United States]] with the intent that [name of victim] engage in sexually explicit conduct]

for the purpose of producing a visual depiction of such conduct; and

Third,

[the defendant knew or had reason to know that the visual depiction would be mailed or transported across state lines or in foreign commerce.]

or

[the visual depiction was produced using materials that had been mailed, shipped, or transported across state lines or in foreign commerce.]

or

[the visual depiction was mailed or actually transported across state lines or in foreign commerce.]

or

[the visual depiction affected interstate commerce.]

In this case, "sexually explicit conduct" means [specify statutory definition].

In this case, "producing" means [specify statutory definition].

In this case, "visual depiction" means [specify statutory definition].

Comment

"Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

"Producing" is defined in 18 U.S.C. § 2256(3).

"Visual depiction" is defined in 18 U.S.C. § 2256(5).

This instruction does not address that portion of the statute that prohibits "transmitting a live visual depiction." If that is the charge before the court, this instruction should be modified accordingly.

Knowledge of the age of the minor victim is not an element of the offense. United States v. United States District Court, 858 F.2d 534 (9th Cir. 1988). See also United States v. X-Citement Video, Inc., 513 U.S. 64, 76 n. 5 (1994) ("[P]roducers may be convicted under § 2251(a) without proof they had knowledge of age . . ."") (dicta). But see Instruction 8.186 (Sexual Exploitation of a Child-Defense of Reasonable Belief of Age).

Transportation in interstate or foreign commerce can be accomplished by any means, including by a computer. 18 U.S.C. § 2251(b). For a definition of computer, see 18 U.S.C. §§ 1030(e) and 2256(6).

See United States v McCalla, 545 F.3d 750, ~~753-56~~756 (9th Cir. 2008) (holding that applying § 2251(a) to noncommercial intrastate production did not violate ~~the~~ Commerce Clause; Congress had ~~a~~ broad interest in preventing interstate sexual exploitation of children and it was rational ~~that~~for Congress ~~would regulate intrastate production).~~

~~A defendant who simply possesses, transports, reproduces, or distributes~~"to conclude that homegrown child pornography affects interstate commerce").

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. ~~does not sexually exploit a minor~~The defendant must also have been "directly involved in ~~violation of 18 U.S.C. § 2251, even though~~ the ~~materials possessed, transported, reproduced, or distributed "involve" such~~actual sexual abuse or exploitation ~~by the producer.~~of minors." See United States v. Kemmish, 120 F.3d 937, ~~942~~941-42 (9th Cir. 1997).

The term "used" in the second element of the instruction means "to put into action or service," "to avail oneself of," or "[to] employ." United States v. Laursen, 847 F.3d 1026, 1032 (9th Cir. 2017).

The third element of the instruction reflects § 2251(a)'s three alternative grounds for federal jurisdiction. Only the first of the three grounds requires a particular mental state of the defendant. The "knows or has reason to know" language from the statute's first jurisdictional clause does not impute a knowledge requirement to the other two clauses. United States v. Sheldon, 755 F.3d 1047 (9th Cir. 2014) (testimony at trial that video recorder used in Montana was manufactured in China sufficient to satisfy jurisdictional element of § 2251(a)).

8.182 SEXUAL EXPLOITATION OF CHILD-
PERMITTING OR ASSISTING
BY PARENT OR GUARDIAN
(18 U.S.C. § 2251(b))

The defendant is charged in [Count _____ of] the indictment with sexual exploitation of a child in violation of Section 2251(b) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, at the time, [name of victim] was under the age of eighteen years;

Second, the defendant was a [parent] [legal guardian] [person having custody or control] of [name of victim];

Third, the defendant knowingly permitted [name of victim] to [engage in sexually explicit conduct] [assist any other person to engage in sexually explicit conduct] for the purpose of producing a visual depiction of such conduct; and

Fourth,

[the defendant knew or had reason to know that the visual depiction would be mailed or transported across state lines or in foreign commerce.]

or

[the visual depiction was produced using materials that had been mailed, shipped, or transported across state lines or in foreign commerce.]

or

[the visual depiction was actually mailed or transported across state lines or in foreign commerce.]

or

[the visual depiction affected interstate commerce.]

The term "custody or control" includes temporary supervision over or responsibility for a minor, whether legally or illegally obtained.

In this case, "sexually explicit conduct" means [specify statutory definition].

In this case, "producing" means [specify statutory definition].

In this case, "visual depiction" means [specify statutory definition].

Comment

"Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

"Producing" is defined in 18 U.S.C. § 2256(3).

"Visual depiction" is defined in 18 U.S.C. § 2256(5).

"Custody or control" is defined in 18 U.S.C. § 2256(7).

This instruction does not address that portion of the statute that prohibits "transmitting a live visual depiction." If that is the charge before the court, this instruction should be modified accordingly.

Transportation in interstate or foreign commerce can be accomplished by any means, including by a computer. 18 U.S.C. § 2251(b). For a definition of computer, see 18 U.S.C. §§ 1030(e) and 2256(6).

See United States v McCalla, 545 F.3d 750, 756 (9th Cir. 2008) (holding that applying § 2251(a) to noncommercial intrastate production did not violate Commerce Clause; Congress had broad interest in preventing interstate sexual exploitation of children and it was rational for Congress "to conclude that homegrown child pornography affects interstate commerce").

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. The defendant must also have been "directly involved in the actual sexual abuse or exploitation of minors." See United States v. Kemmish, 120 F.3d 937, 941-42 (9th Cir. 1997).

~~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).~~

8.182A SEXUAL EXPLOITATION OF CHILD-
TRANSPORTATION OF VISUAL DEPICTION
INTO UNITED STATES
(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, [name of victim] was under the age of eighteen years;

Second, the defendant [[employed] [used] [persuaded] [induced] [enticed] [coerced]] [insert name of victim] to engage in sexually explicit conduct or assist any other person to engage in sexually explicit conduct outside of the United States, its territories, or possessions, for the purpose of producing a visual depiction of such conduct; and

Third, the defendant

[intended that the visual depiction be mailed or transported into the United States, its territories, or possessions~~.~~]
[by any means, including by using any means or facility of interstate commerce or mail.]

or

[actually mailed or transported the visual depiction into the United States, its territories, or possessions~~.~~]
[by any means, including by using any means or facility of interstate commerce or mail.]

In this case, "sexually explicit conduct" means [specify applicable statutory definition].

In this case, "producing" means [specify applicable statutory definition].

In this case, "visual depiction" means [specify applicable statutory definition].

Comment

"Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

"Producing" is defined in 18 U.S.C. § 2256(3).

"Visual depiction" is defined in 18 U.S.C. § 2256(5).

Transportation into the United States, its territories, or possessions can be accomplished by any means. 18 U.S.C. § 2251(c).

The age of the victim is a strict liability element; thus, a defendant may be properly convicted of a completed violation of § 2251(c) without a finding by the jury that the defendant knew or should have known that the victim was a minor. United States v. Jayavarman, 871 F.3d 1050, 1058 (9th Cir. 2017).

A defendant may be properly convicted of an attempt to violate § 2251(c) if the defendant believes the victim is a minor, even if the victim is actually an adult. Jayavarman, 871 F.3d at 1059.

8.183 SEXUAL EXPLOITATION OF CHILD-NOTICE OR ADVERTISEMENT SEEKING OR OFFERING
(18 U.S.C. § 2251(d))

The defendant is charged in [Count _____ of] the indictment with sexual exploitation of a child in violation of Section 2251(d) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, at the time, [name of victim] was under the age of eighteen years;

Second, the defendant knowingly [made] [printed] [published] [caused to be made] [caused to be printed] [caused to be published] a [notice] [advertisement];

Third, the [notice] [advertisement] ~~[~~[sought] [offered~~]~~]

[to [receive] [exchange] [buy] [produce] [display] [distribute] [reproduce] any visual depiction, if the production of the visual depiction utilized [name of victim] engaging in sexually explicit conduct and such visual depiction is of such conduct; and]

or

[participation in any act of sexually explicit conduct [by] [with] [[name of victim]] for the purpose of producing a visual depiction of such conduct; and]

[Fourth, the defendant knew or had ~~reasons~~reason to know that the [notice] [advertisement] would be transported ~~across state lines~~[using any means or facility of interstate commerce] [in or affecting interstate commerce] by any means including by computer or mailed~~, ~~.]

or ~~such~~

[Fourth, the [notice] [advertisement] was ~~actually~~ transported ~~across state lines~~[using any means or facility of interstate commerce] [in or affecting interstate commerce] by any means including by computer or mailed~~.~~
.]

In this case, "sexually explicit conduct" means [sexually explicit conduct definition].

In this case, "producing" means [producing definition].

In this case, "visual depiction" means [specify statutory definition].

Comment

"Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

"Producing" is defined in 18 U.S.C. § 2256(3).

"Visual depiction" is defined in 18 U.S.C. § 2256(5).

"Notice" and "advertisement" are not defined in the statute, but what constitutes a notice or advertisement is a factual question, not a legal one. See United States v. Brown, 859 F.3d 730 (9th Cir. 2017) (holding Sixth Amendment violated when trial court precluded defendant from arguing that charged postings, encrypted and on closed, password-protected online bulletin board, did not constitute notice or advertisement).

See United States v. McCalla, 545 F.3d 750, 756 (9th Cir. 2008) (holding that applying § 2251(a) to noncommercial intrastate production did not violate Commerce Clause; Congress had broad interest in preventing interstate sexual exploitation of children and it was rational for Congress "to conclude that homegrown child pornography affects interstate commerce").

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. The defendant must also have been "directly involved in the actual sexual abuse or exploitation of minors." See United States v. Kemmish, 120 F.3d 937, ~~942~~941-42 (9th Cir. 1997).

Under 18 U.S.C. § 2251(d)(1)(A) "[t]here is no requirement that a defendant personally produce child pornography in order for criminal liability to attach." United States v. Williams, 660 F.3d 1223, 1225 (9th Cir. 2011).

8.184 SEXUAL EXPLOITATION OF CHILD-
TRANSPORTATION OF CHILD PORNOGRAPHY
(18 U.S.C. § 2252(a)(1))

The defendant is charged in [Count _____ of] the indictment with [shipping] [transporting] child pornography in violation of Section 2252(a)(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant knowingly [transported] [shipped] a visual depiction ~~in~~ [using any means or facility of interstate commerce] [in or affecting interstate commerce] by any means~~,~~ including ~~a~~by computer or mail;

Second, that the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;

Third, that such visual depiction was of a minor engaged in sexually explicit conduct;

Fourth, that the defendant knew that such visual depiction was of sexually explicit conduct; and

Fifth, the defendant knew that at least one of the persons engaged in sexually explicit conduct in such visual depiction was a minor.

Comment

"Interstate commerce" is defined by 18 U.S.C. § 10.

"Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

"Producing" is defined in 18 U.S.C. § 2256(3).

"Visual depiction" is defined in 18 U.S.C. § 2256(5).

"Computer" is defined in 18 U.S.C. §§ 1030(e) and 2256(6).

Although the term "knowingly" in the text of 18 U.S.C. § 2252(a)(1) and (2) appears only to modify the act of transportation or shipment, the United States Supreme Court has held that the knowledge requirement also applies to the sexually explicit nature of the material as well as the minority status of the persons depicted. See United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994).

See United States v. McCalla, 545 F.3d 750, 756 (9th Cir. 2008) (holding that applying § 2251(a) to noncommercial intrastate production did not violate Commerce Clause;
Congress had broad interest in preventing interstate sexual exploitation of children
and it was rational for Congress "to conclude that homegrown child pornography affects

interstate commerce").

Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999), sets forth a legislative history of the various federal acts dealing with child pornography.

8.185 SEXUAL EXPLOITATION OF CHILD-
POSSESSION OF CHILD PORNOGRAPHY
(18 U.S.C. § 2252(a)(4)(B))

The defendant is charged in [Count _____ of] the indictment with possession of child pornography in violation of Section 2252(a)(4)(B) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant knowingly possessed [books] [magazines] [periodicals] [films] [video tapes] [matters] that the defendant knew contained [a] visual depiction[s] of [a] minor[s] engaged in sexually explicit conduct;

Second, the defendant knew [each] [the] visual depiction contained in the [[books] [magazines] [periodicals] [films] [video tapes] [matters]] [[was of] [showed]] [a] minor[s] engaged in sexually explicit conduct;

Third, the defendant knew that production of such [a] visual depiction[s] involved use of a minor in sexually explicit conduct; and

Fourth, that [each] [the] visual depiction had been ~~either~~

~~a) [~~

[[mailed] [shipped] [transported] ~~in~~ [using any means or facility of interstate ~~or foreign~~ commerce~~,~~] [in or

~~b)~~ affecting interstate commerce]]

or

[produced using material that had been [mailed] [shipped] [transported] [using any means or facility of interstate commerce] [in or affecting interstate ~~or foreign~~ commerce~~[~~] by any means including by computer~~[or other means]].~~
].

"Visual depiction" includes undeveloped film and video tape, and data stored on a computer disk or data stored by electronic means and capable of conversion into a visual image.

A "minor" is any person under the age of 18 years.

"Sexually explicit conduct" means actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person.

"Producing" means producing, directing, manufacturing, issuing, publishing, or advertising.

Comment

Prior to 1998, 18 U.S.C. § 2252(a)(4) required the possession of at least three visual depictions before an offense had occurred. As part of the Protection of Children From Sexual Predators Act of 1998, Congress amended section 2252(a) to prohibit possession of one visual depiction. At the same time, Congress added 18 U.S.C. § 2252(c), which provides an affirmative defense when, under certain circumstances, the defendant possessed "less than three matters containing any visual depiction." If such a defense has been raised, care should be taken in revising the instruction so that the jury is not confused.

The definitions of "minor," "sexually explicit conduct," "producing," and "visual depiction" are derived from 18 U.S.C. § 2256(1), (2), (3) and (5), respectively. Interstate or foreign commerce is defined by 18 U.S.C. § 10. "Matter" is a physical medium capable of containing images such as a computer hard drive or disk. United States v. Lacey, 119 F.3d 742, 748 (9th Cir. 1997).

See Lacey, 119 F.3d at 748 (jury instruction for possession of child pornography must include as element whether defendant knew "matter" in question contained unlawful visual depictions; such depiction may be "produced" when defendant downloads visual depictions from Internet); see also United States v. Romm, 455 F.3d 990, 1002-05 (9th Cir. 2006).

See United States v. McCalla, 545 F.3d 750, 756 (9th Cir. 2008) (holding that applying § 2251(a) to noncommercial intrastate production did not violate Commerce Clause; Congress had broad interest in preventing interstate sexual exploitation of children and it was rational for Congress "to conclude that homegrown child pornography affects interstate commerce").

Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999), sets forth a legislative history of the various federal acts dealing with child pornography.

The statute was unconstitutionally applied to a mother who possessed a family photo showing herself and her young daughter exposed because the photo was meant entirely for personal use, no economic or commercial use was intended, and such possession had no connection with, or effect on, the national or international commercial child pornography market. United States v. McCoy, 323 F.3d 1114, 1132 (9th Cir. 2003); but see United States v. McCalla, 545 F.3d 750, 756 (9th Cir. 2008) (holding that any reasoning in McCoy relying on local nature of activity was overruled by Gonzalez v. Raich, 545 U.S. 1 (2005).

Expert testimony is not required for the government to establish that the images depicted an actual minor (i.e., that the images were not

computer generated). United States v. Salcido, 506 F.3d 729, 733-34 (9th Cir. 2007).

The simultaneous possession of different materials containing offending images at a single time and place constitutes a single violation of the statute. United States v. Chilaca, 909 F.3d 289, 295 (9th Cir. 2018).

Possession of materials involving the sexual exploitation of minors under § 2254(a)(4)(B) may be ~~a lesser-included offense of receipt of such materials under § 2252(a)(2). United States v. Schales, 546 F.3d 966, 977 (9th Cir. 2008). However, possession of materials involving the sexual exploitation of minors under § 2254(a)(4)(B) is not~~, but is not necessarily, a lesser-included offense of distribution of such materials under § 2252(a)(2). See United States v. McElmurry, 776 F.3d 1061, 1063-65 (9th Cir. 2015). However, possession is always a lesser-included offense of receiving child pornography, because "[i]t is impossible to 'receive' something without, at least at the very instant of 'receipt,' also 'possessing' it." United States v. Davenport, 519 F.3d 940, 943 (9th Cir. 2008). When possession is charged along with either receipt or distribution ~~and a "lesser-included offense" instruction is not given~~, the court should ensure that the "separate conduct" requirement under the Double Jeopardy Clause has been satisfied. This could be done either with an appropriate instruction directing that separate conduct be found or by providing the jury with a special verdict form that requires the jury to identify the conduct supporting each conviction. See United States v. Teague, 722 F.3d 1187, 1193 (9th Cir. 2013)

9.1 ALIEN-BRINGING OR ATTEMPTING TO BRING TO THE UNITED STATES (OTHER THAN DESIGNATED PLACE) (8 U.S.C. § 1324(a)(1)(A)(i))

The defendant is charged in [Count _____ of] the indictment with [bringing] [attempting to bring] an alien to the United States in violation of Section 1324(a)(1)(A)(i) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [brought] [attempted to bring] a person who was an alien to the United States at a place other than a designated port of entry or at a place other than as designated by a United States immigration official;

Second, the defendant knew that the person was an alien; [and]

Third, the defendant acted with the intent to violate the United States immigration laws by assisting that person to enter the United States at a time or place other than as designated by a United States immigration official[.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

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

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime.]

An alien is a person who is not a natural-born or naturalized citizen of the United States.

Comment

Bringing an alien to the United States does not require that the alien be free from official restraint as is required for offenses under 8 U.S.C. § 1326 for aliens illegally reentering or being found in the United States. United States v. Lopez, 484 F.3d 1186, 1193 (9th Cir. 2007); United States v. Hernandez-Garcia, 284 F.3d 1135, 1137-38 (9th Cir.), cert. denied, 537 U.S. 932 (2002); see also Comment to Instruction 9.6 (Alien-Deported Alien Reentering United States Without Consent).

The offense of bringing an alien to the United States is a continuing offense; "although all of the elements of the 'bringing to' offense are satisfied once the aliens cross the border, the crime does not terminate until the initial transporter who brings the aliens to the

United States ceases to transport them-in other words, the offense continues until the initial transporter drops off the aliens on the U.S. side of the border." Lopez, 484 F.3d at 1187-88. Thereafter, the offense is illegal "transport within" the United States, 8 U.S.C. § 1324(a)(1)(A)(ii). Id. at 1194-98. Lopez overrules United States v. Ramirez-Martinez, 273 F.3d 903 (9th Cir. 2001) (applying immediate destination analysis of whether the alien had reached the ultimate or intended destination within the United States); United States v. Angwin, 271 F.3d 786, 271 F.3d 786 (9th Cir. 2001) (same)). Lopez at 1191.

Aiding and abetting, involving a state-side transporter, requires proof of the specific intent to facilitate the commission of the "bringing to" offense and evidence that the state-side transporter involved himself in the bringing to offense prior to its completion. See United States v. Singh, 532 F.3d 1053, 1057-59 (9th Cir. 2008). Aiding and abetting a "bringing to" offense may take place entirely on the United States side of the border. United States v. Noriega-Perez, 670 F.3d 1033, 1039 (9th Cir. 2012).

Statutory maximum sentences under § 1324 are increased for offenses causing serious bodily injury, placing the life of any person in jeopardy, or resulting in the death of a person. In such cases, a special jury finding is required.

An alien is also defined as being a person who is not a national. In the rare event that there is an issue as to the alien being a national, the definition of alien in the last paragraph of the instruction should be modified accordingly. See 8 U.S.C. § 1101(a)(22); Perdomo-Padilla v. Ashcroft, 333 F.3d 964, 967-68 (9th Cir. 2003); United States v. Sotelo, 109 F.3d 1446, 1447-1448 (9th Cir. 1997).

The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, "[t]o constitute a substantial step, a defendant's actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." United States v. Goetzke, 494 F.3d 1231, 1237 (9th Cir. 2007) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("A conviction for attempt requires proof of culpable intent and conduct constituting a substantial step toward commission of the crime that strongly corroborates that intent") and United States v. Darby, 857 F.2d 623, 625 (9th Cir. 1988) (same).

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

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

9.2 ALIEN-ILLEGAL TRANSPORTATION OR ATTEMPTED TRANSPORTATION (8 U.S.C. § 1324(a)(1)(A)(ii))

The defendant is charged in [Count _____ of] the indictment with [attempted] illegal transportation of an alien in violation of Section 1324(a)(1)(A)(ii) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [name of alien] was an alien;

Second, [name of alien] was not lawfully in the United States;

Third, the defendant [knew] [acted in reckless disregard of the fact] that [name of alien] was not lawfully in the United States; [and]

Fourth, the defendant knowingly [transported or moved] [attempted to transport or move] [name of alien] in order to help [him] [her] remain in the United States illegally[.] [; and]

[Fifth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

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

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime.]

An alien is a person who is not a natural-born or naturalized citizen of the United States. An alien is not lawfully in this country if the person was not duly admitted by an ~~Immigration Officer~~immigration officer.

A person acts with reckless disregard if: (1) the person is aware of facts from which a reasonable inference could be drawn that the alleged alien was in fact an alien in the United States unlawfully; and (2) the person actually draws that inference.

Comment

See Comment to Instruction 9.1 (Alien-Bringing to the United States (Other than Designated Place)).

"Reckless disregard" is not defined in Title 8, United States Code, but the Ninth Circuit has clarified that "reckless disregard" includes both an objective prong and a subjective prong. United States v. Rodriguez, 880 F.3d 1151, 1161 (9th Cir. 2018) ("a correct definition of

'reckless disregard,' consistent with Supreme Court and Ninth Circuit law, would include the defendant's disregard of a risk of harm of which the defendant is aware.") (internal brackets omitted).

Statutory maximum sentences under § 1324 are increased for offenses done for commercial advantage or private financial gain, or which caused serious bodily injury, placed the life of any person in jeopardy, or resulted in the death of a person. In such cases, a special jury finding is required.

If the defendant is charged with transportation of illegal aliens resulting in deaths under 8 U.S.C. § 1324(a)(1)(A)(ii) and (a)(1)(B)(iv), the government must ~~proves~~prove beyond a reasonable doubt that the defendant's conduct was the proximate cause of the charged deaths. United States v. Pineda-Doval,614 F.3d 1019, 1026-28 (9th Cir. 2010). In such cases, the instruction should be modified to instruct on the proximate cause element of "resulting in death."

The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, "[t]o constitute a substantial step, a defendant's actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." United States v. Goetzke, 494 F.3d 1231, 1237 (9th Cir. 2007) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("A conviction for attempt requires proof of culpable intent and conduct constituting a substantial step toward commission of the crime that strongly corroborates that intent") and United States v. Darby, 857 F.2d 623, 625 (9th Cir. 1988) (same).

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

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

9.3 ALIEN-HARBORING OR ATTEMPTED HARBORING
(8 U.S.C. § 1324(a)(1)(A)(iii))

The defendant is charged in [Count _____ of] the indictment with [attempted] harboring of an alien in violation of Section 1324(a)(1)(A)(iii) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [name of alien] was an alien;

Second, [name of alien] was not lawfully in the United States;

Third, the defendant [knew] [acted in reckless disregard of the fact] that [name of alien] was not lawfully in the United States; [and]

Fourth, the defendant [harbored, concealed, or shielded from detection] [attempted to harbor, conceal, or shield from detection] [name of alien] ~~for the purpose of avoiding [his] [her] detection by immigration authorities[.]~~with intent to violate the law[.] [; and]

[Fifth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

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

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime.]

An alien is a person who is not a natural-born or naturalized citizen of the United States. An alien is not lawfully in this country if the person was not duly admitted by an Immigration Officer.

A person acts with reckless disregard if: (1) the person is aware of facts from which a reasonable inference could be drawn that the alleged alien was in fact an alien in the United States unlawfully; and (2) the person actually draws that inference.

Comment

See Comment to Instructions 9.1 (Alien-Bringing to United States (Other than Designated Place)) and 9.2 (Alien-Illegal Transportation).

Statutory maximum sentences under § 1324 are increased for offenses done for commercial advantage or private financial gain, or which caused serious bodily injury, placed the life of any person in jeopardy, or resulted in the death of a person. In such cases, a special jury finding is required.

The defendant acts with "reckless disregard" only if "the defendant herself [is] aware of facts from which an inference of risk could be drawn and the defendant . . . actually draw[s] that inference." United States v. Tydingco, 909 F.3d 297, 304 (emphasis in original) (citing United States v. Rodriguez, 880 F.3d 1151, 1159-62 (9th Cir. 2018)).

The defendant must "intend to violate the law." Tydingco, 909 F.3d at 302-03. Prior versions of this instruction required the jury to specifically find that the defendant harbored the alien "for the purpose of avoiding the alien's detection by immigration authorities." However, although proving that the defendant sought to avoid the alien's detection is one way to demonstrate the requisite intent, it is not the only way. Id. at 304. "For example, a defendant who chooses to publicize her harboring of an illegal alien in order to call attention to what she considers an unjust immigration law intends to violate the law, even though she does not intend to prevent detection." Id.

The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, "[t]o constitute a substantial step, a defendant's actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." United States v. Goetzke, 494 F.3d 1231, 1237 (9th Cir. 2007) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("A conviction for attempt requires proof of culpable intent and conduct constituting a substantial step toward commission of the crime that strongly corroborates that intent") and United States v. Darby, 857 F.2d 623, 625 (9th Cir. 1988) (same).

"To harbor" means to provide "shelter to." Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1017 n.9 (9th Cir. 2013).

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

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

~~Note: this instruction is under review in light of United States v. Sineneng-Smith, No. 15-10614, 2018 WL 6314287 (9th Cir. Dec. 4, 2018).~~

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.~~ Comment

In United States v. Sineneng-Smith, 910 F.3d 461, 485 (9th Cir. 2018), the Ninth Circuit held that 8 U.S.C. § 1324(a)(1)(A)(iv) is unconstitutionally overbroad in violation of the First Amendment. The Committee has therefore withdrawn the previously adopted and published jury instruction for this offense.

~~In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:~~

~~First, [name of alien] was an alien;~~

~~Second, the defendant encouraged or induced [name of alien] to [come to] [enter] [reside in] the United States in violation of law; and~~

~~Third, the defendant [knew] [acted in reckless disregard of the fact] that [name of alien]'s [coming to] [entry into] [residence in] the United States would be in violation of the law.~~

~~An alien is a person who is not a natural-born or naturalized citizen of the United States. An alien enters the United States in violation of law if not duly admitted by an Immigration Officer.~~

~~Comment~~

~~See Comment to Instructions 9.1 (Alien-Bringing to United States (Other than Designated Place)) and 9.2 (Alien-Illegal Transportation).~~

~~Statutory maximum sentences under § 1324 are increased for offenses done for commercial advantage or private financial gain, or which caused serious bodily injury, placed the life of any person in jeopardy, or resulted in the death of a person. In such cases, a special jury finding is required.~~

9.6 ALIEN-DEPORTED ALIEN REENTERING UNITED STATES WITHOUT CONSENT (8 U.S.C. § 1326(a))

The defendant is charged in [Count _____ of] the indictment with being an alien who, after [removal] [deportation], reentered the United States in violation of Section 1326(a) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [[the defendant was [removed] [deported] from the United States]] [[the defendant departed the United States while an order of [removal] [deportation] was outstanding]];

Second, thereafter the defendant knowingly and voluntarily reentered the United States without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security, to reapply for admission into the United States; and

Third, the defendant was an alien at the time of reentry.

An alien is a person who is not a natural-born or naturalized citizen –of the United States.

Comment

Section 1326 provides three separate offenses for a deported alien: to enter; to attempt to enter, and to be found in the United States without permission. United States v. Castillo-Mendez, 868 F.3d 830, 835 (9th Cir. 2017); United States v. Parga-Rosas, 238 F.3d 1209, 1213 (9th Cir. 2001). Entry and being "found in" are general intent crimes; attempting reentry is a specific intent crime. Castillo-Mendez, 868 F.3d at 835-36. Use this instruction for "entered," Instruction 9.7 (Alien-Deported Alien Reentering United States Without Consent-Attempt) for "attempted reentry," and Instruction 9.8 (Alien-Deported Alien Found in United States) for "found in."

As to the second element of this instruction, it should be noted that although 8 U.S.C. § 1326(a) provides that the statute is violated by an alien who "enters, attempts to enter, or is at any time found in, the United States, unless . . . prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented" to the alien's reapplying for admission, it is common for the charging indictment in such prosecutions to refer to the lack of consent by the Secretary of the Department of Homeland Security.

"The Attorney General's consent to reapply must come after the most recent deportation." United States v. Hernandez-Quintania, 874 F.3d 1123, 1126 (9th Cir. 2017). If there is any evidence presented that the defendant obtained such consent, the second element should be supplemented to clarify that the government must only prove that the defendant did not obtain consent since the defendant's most recent deportation.

An alien has not reentered the United States for purposes of the crime of reentry of deported alien "until he or she is physically present in the country and free from official restraint." United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1191 n.3 (9th Cir. 2000) (citing United States v. Pacheco-Medina, 212 F.3d 1162, 1166 (9th Cir. 2000)). An alien is under official restraint if, after crossing the border, he is "'deprived of his liberty and prevented from going at large within the United States.'" United States v. Cruz-Escoto, 476 F.3d 1081, 1185 (9th Cir. 2007) (citations omitted). An alien need not be in physical custody to be officially restrained. Id. (citing United States v. Ruiz-Lopez, 234 F.3d 445, 448 (9th Cir. 2000)). "'[R]estraint may take the form of surveillance, unbeknownst to the alien.'" Id. (quoting Pacheco-Medina, 212 F.3d at 1164). The government has the burden of proving the defendant was free from official restraint, but need not respond to a defendant's free floating speculation that he might have been observed the whole time. United States v. Castellanos-Garcia, 270 F.3d 773, 777 (9th Cir. 2001).

In Almendarez-Torres v. United States, 523 U.S. 224, 244 (1998), the Supreme Court held that in a prosecution for illegal re-entry after deportation in violation of 8 U.S.C. § 1326(a), the existence of a prior aggravated felony conviction need not be alleged in the indictment and presented to the jury because the conviction constitutes a sentencing enhancement pursuant to 8 U.S.C. § 1326(b)(2) and "[a] prior felony conviction is not an element of the offense described in 8 U.S.C. § 1326(a)." United States v. Alviso, 152 F.3d 1195, 1199 (9th Cir. 1998). The ~~[~~Supreme~~]~~ Court's opinion in Apprendi v. New Jersey, 530 U.S. ~~446~~466 (2002) expressed doubt concerning the correctness of Almendarez-Torres; however, the Ninth Circuit has stated that "until the Supreme Court expressly overrules it, Almendarez-Torres controls." United States v. Pacheco-Zepeda, 234 F.3d 411, 414-415 (9th Cir. 2000).

~~Under~~To trigger an increase in the statutory maximum sentence under § 1326(b)(1~~), a sentence based on a removal that was subsequent to a conviction for a felony or aggravated felony, the~~)-(2), the aggravating fact of the removal being subsequent to the predicate conviction must be submitted to the jury~~.~~ and proved beyond a reasonable doubt. See United States v. Martinez, 850 F.3d 1097, 1105 (9th Cir. 2017); United States v. Salazar-Lopez, 506 F.3d 748, 751-52 (9th Cir. 2007); ~~see also~~ United States v. Covian-Sandoval, 462 F.3d 1090, 1097-98 (9th Cir. 2006~~) (explaining it was error for a court to find the existence of a subsequent removal that was neither proven beyond a reasonable doubt at trial nor admitted by defendant).~~

~~The instruction directs the jury that it must find the alien re-entered after having been removed from the United States. A special jury finding is required as to the date the defendant was removed from the country or that removal was subsequent to a prior conviction, unless~~). However, if the temporal sequence of events is necessarily established by the evidence and jury verdict~~. See~~, then the absence of a special jury finding may not constitute reversible error. Compare United States v. Calderon-Segura, 512 F.3d 1104, 1110-11 (9th Cir. 2008) (holding that,

because all evidence of prior removal related only to one removal in 1999, jury necessarily found beyond reasonable doubt not only fact of prior removal~~,~~ but also that removal occurred subsequent to 1997 conviction~~); see also Butler v. Curry, 528~~), with Martinez, 850 F.3d ~~624, 645 (9th Cir. 2008).~~
at 1108-09 (holding that jury's finding of fact of prior removal could not be construed as finding that removal occurred subsequent to conviction where immigration documents submitted to jury contained mistakes).

The third element, alienage, is an element of the offense that the government must prove. United States v. Sandoval-Gonzalez, 642 F.3d 717, 722 (9th Cir. 2011). A defendant who contends that his or her citizenship derives from the citizenship of a parent is not raising an affirmative defense. Id. at 721-24. The burden remains on the government to prove the defendant is an alien. ~~See United States v. Sandoval-Gonzalez, 642 F.3d 717 (9th Cir. 2011).~~Id. Alienage cannot be proven either by a prior deportation order alone or a defendant's admission of noncitizenship alone without corroborating evidence. United States v. Gonzalez-Corn, 807 F.3d 989, 996 (9th Cir. 2015). These two facts taken together, however, may establish alienage. ~~Id. at 996.~~ See id. at 992, 996 (providing example of instruction addressing alienage).

A person who meets any of the qualifications set out in 8 U.S.C § 1401 is a national or a citizen at birth.

In the typical case the third element will turn on whether the defendant is a citizen, but in rare cases the issue could be whether the defendant is a national of the United States. See 8 U.S.C. § 1101(a)(22) for a definition of national of the United States. See also Perdomo-Padilla v. Ashcroft, 333 F.3d 964, 967-68 (9th Cir. 2003).

9.7 ALIEN-DEPORTED ALIEN REENTERING
UNITED STATES WITHOUT CONSENT-ATTEMPT
(8 U.S.C. § 1326(a))

The defendant is charged in [Count _____ of]] the indictment with being an alien who, after [removal] [deportation], attempted reentry into the United States in violation of Section 1326(a) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [[the defendant was [removed] [deported] from the United States]] [[the defendant departed the United States while an order of [removal] [deportation] was outstanding]];

Second, the defendant had the specific intent to enter the United States free from official restraint;

Third, the defendant was an alien at the time of the defendant's attempted reentry into the United States;

Fourth, the defendant had not obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission into the United States; and

Fifth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

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

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime.

An alien is a person who is not a natural-born or naturalized citizen of the United States.

Comment

The crime of attempted illegal reentry is a specific intent offense. United States v. Castillo-Mendez, 868 F.3d 830, 836 (9th Cir. 2017); see also United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1190 (9th Cir.2000) (en banc) (discussing elements of offense where defendant claimed he was asleep when he entered United States).

An alien has not reentered the United States for purposes of the crime of reentry of a deported alien "until he or she is physically present in the country and free from official restraint." ~~United States v.~~ Gracidas-Ulibarry, 231 F.3d ~~1188,~~ at 1191 n.3 ~~(9th Cir. 2000)~~ (citing

United States v. Pacheco-Medina, 212 F.3d 1162, 1166 (9th Cir. 2000)). In an attempt case, the government must prove that the alien had a specific intent to enter the country free from official restraint. ~~United States v.~~ Castillo-Mendez, 868 F.3d ~~830,~~at 836~~ (9th Cir. 2017);~~; United States v. Vazquez-Hernandez, 849 F.3d 1219, 1225 (9th Cir. 2017). "Official restraint" means restraint by any government official, and thus an alien who enters the United States with the intent to go to jail lacks specific intent to enter the country free from official restraint. United States v. Lombera-Valdovinos, 429 F.3d 927, 929-30 (9th Cir. 2005). "Official restraint" does not make substantial steps toward entry impossible, and thus an alien who was under official restraint so as to preclude a conviction for illegal reentry may still be guilty of attempted reentry. United States v. Leos-Maldonado, 302 F.3d 1061, 1063 (9th Cir. 2002). If there is conflicting evidence as to whether the defendant possessed any specific intention to remain free of restraint, the jury should decide the issue. See United States v. Argueta-Rosales, 819 F.3d 1149, 1156 (9th Cir. 2016) (holding that government must prove alien had specific intention to enter country free of official restraint, when alien presented evidence that attempt to enter was based on intent to be placed into protective custody).

For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. United States v. Hofus, 598 F.3d 1171, 1176 (9th Cir. 2010). The attempt coupled with the specification of the time and place of the attempted illegal reentry may provide the requisite overt act that constitutes a substantial step toward completing the offense. United States v. Resendiz-Ponce, 549 U.S. 102, 107-08 (2007).

Regarding sentencing, see the Comment to 9.6 (Alien-Deported Alien Reentering United States Without Consent) for a discussion of Almendarez-Torres v. United States, 523 U.S. 224 (1998).

The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("A conviction for attempt requires proof of culpable intent and conduct constituting a substantial step toward commission of the crime that strongly corroborates that intent") and United States v. Darby, 857 F.2d 623, 625 (9th Cir. 1988) (same).