The following redline/strikeouts show substantive changes to the Ninth Circuit Model Civil Instructions that took effect in December 2019. An article regarding these changes can be found in the Blog at https://www.trialdex.com/blog.htm.

1.1 DUTY OF JURY

Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations.

When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you.

Perform these duties fairly and impartially. You should not be influenced by any person's race, color, religious beliefs, national ancestry, sexual orientation, gender identity, gender, or economic circumstances. Also, do not allow yourself to be influenced by personal likes or dislikes, sympathy, prejudice, fear, public opinion, or biases, including unconscious biases. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias can affect how we evaluate information and make decisions.

Comment

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

The Supreme Court emphasized the importance of jury instructions as a bulwark against bias in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017). Accordingly, the Committee has incorporated stronger language regarding the jury's duty to act fairly and impartially into this instruction, Instruction 1.7 (Credibility of Witnesses), Instruction 3.1 (Duties of Jury to Find Facts and Follow Law), and Instruction 7.1 (Duty to Deliberate).

The United States District Court for the Western District of Washington has been at the vanguard of attempting to reduce the adverse effects of unconscious bias in federal court proceedings. That district court has prepared a ten-minute video that can be shown to jurors and also has developed proposed jury instructions that can be used before jury selection, before opening statements, and during closing instructions. *See* https://www.wawd.uscourts.gov/jury/unconscious-bias. In addition, the United States District Court for the Northern District of California has prepared a shortened version of that video to show to potential jurors before jury selection. *See*

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https://www.cand.uscourts.gov/attorneys/unconscious-bias-video-for-potential-jurors

The second paragraph of this instruction informs the jury that it is the duty of the jury to apply the law as the judge gives it to them, whether they agree with it or not. This type of caution against jury nullification is permissible. *United States v. Lynch*, 903 F.3d 1061, 1079 (9th Cir. 2018). "[N]ullifcation is, by definition, a violation of the juror's oath to apply the law as instructed by the court." *Id.* (quoting *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997)). "While jurors have the power to nullify a verdict, they have no right to do so." *Lynch*, 903 F.3d at 1080 (quoting *Merced v. McGrath*, 426 F.3d 1076, 1079 (9th Cir. 2005). An anti-nullification instruction will be improper if it states or implies that nullification would place jurors at risk of legal sanction or otherwise be invalid. *Lynch*, 903 F.3d at 1080 (holding that district court's admonition that nullification was violation of jury's duty to follow law did not deprive jurors of ability to nullify); *United States v. Kleinman*, 880 F.3d 1020, 1031-32 (9th Cir. 2018) (holding instruction erroneous but harmless that told jury "[t]here is no such thing as a valid jury nullification" and that "[y]ou would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case").

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3. INSTRUCTIONS AT END OF CASE

Instruction

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

Introductory Comment

~~The~~In 2019, the Ninth Circuit reversed a criminal conviction based on "structural error" because the district court did not orally instruct the jury but instead directed the jurors to read the instructions themselves and then confirmed with each juror that the juror had done so. *United States v. Becerra*, 939 F.3d 995 (9th Cir. 2019). As the reader encounters the model jury instructions that follow and begins to craft the instructions to be given at trial, the words from this decision provide valuable guidance and context:

> [M]any jurors may not adequately comprehend written instructions. It is no secret that jury instructions are often written in language more suitable for lawyers than laypersons. *See, e.g.*, Jonathan Barnes, Tailored Jury Instructions: Writing Instructions that Match a Specific Jury's Reading Level, 87 Miss. L.J. 193, 195 (2018); Prentice H. Marshall et al., Pattern Criminal Jury Instructions: Report of the Federal Judicial Center Committee to Study Jury Instructions, at vii, 79–83 (1982); Phil H. Cook, Instructionese: Legalistic Lingo of Contrived Confusion, 7 J. Mo. B. 113 (1951). Written instructions can be especially impenetrable for those jurors with limited reading comprehension skills. *See* Laurence J.Severance et. al., Toward Criminal Jury Instructions that Jurors Can Understand, 75 J. Crim. L. & Criminology 198, 224 (1984); Robert P. Charrow &

Veda R. Charrow, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions, 79 Colum. L. Rev. 1306, 1320–21 (1979). And even if a jury is comprised of an unusually educated cross-section of the community, many of us at times succumb to the temptation to glaze over a long paragraph of text or flip over a few pages of a lengthy stack of papers. When the instructions are read orally, tonal inflection can make the content of the instructions more accessible, as well as discourage the "tuning out" common when reading dense material. Oral instruction in the formal courtroom setting thus assures that jurors are exposed to the substance of the essential instructions by at least one sensual route.

The oral charge also performs a second, signaling function that cannot be replaced by a printout or a pamphlet. Jury instructions are not the judicial equivalent of a car manual or a cookbook. When an enrobed judge orally charges the jury, the jurors are impressed with the fact that they have been entrusted with the power to decide the defendant's fate. This oral, public ritual helps ensure that "jurors . . . recognize the enormity of their task and ... take [that task] seriously." Nancy S. Marder, Bringing Jury Instructions into the Twenty-First Century, 81 Notre Dame L. Rev. 449, 465 (2006). By analogy, reading a sermon is not the same as hearing it read in church or synagogue by a pastor or priest or rabbi. If it were, religious leaders would just hand out the sermons and end the services early.

For these reasons, the historic practice of oral jury instruction remains central to the fairness of jury trials.

Becerra, 939 F.3d at 1001. Further, the Federal Rules of Criminal Procedure permit the court to instruct the jury before or after arguments, or at both times. Fed. R. Crim. P. 30(c).

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5.8 DELIBERATE IGNORANCE

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

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

2. deliberately avoided learning the truth.

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

Comment

In *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (en banc), the Ninth Circuit revived its decision in *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc), on which the language of this instruction is based. In so doing, the en banc court reiterated that in deciding whether to give a deliberate ignorance instruction along with an instruction on actual knowledge, "the district court must determine whether the jury could rationally find willful blindness even though it has rejected the government's evidence of actual knowledge. If so, the court may also give a *Jewell* instruction." *Heredia*, 483 F.3d at 922; *see also United States v. Ramos-Atondo*, 732 F.3d 1113, 1120, 1124 (9th Cir. 2013) (deliberate ignorance instruction may be given in conspiracy case); *United States v. Yi*, 704 F.3d 800, 805 (9th Cir. 2013) (approving modified version of Instruction 5.8 when defendant knew of high probability of asbestos in condominium ceilings and deliberately avoided learning truth).

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

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

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

In *United States v. Hong*, 938 F.3d 1040 (9th Cir. 2019), the Ninth Circuit applied *Heredia* and discussed when a deliberate ignorance (or willful blindness) instruction should be given in the context of a charge of health care fraud. The Ninth Circuit explained:

> A deliberate ignorance—or "willful blindness"—instruction is only relevant if the jury rejects the government's evidence of actual knowledge. *United States v. Heredia*, 483 F.3d 913, 922 (9th Cir. 2007) (en banc). "In deciding whether to give a willful blindness instruction, in addition to an actual knowledge instruction, the district court must determine whether the jury could rationally find willful blindness even though it has rejected the government's evidence of actual knowledge." *Id*. A jury can believe some, but not all, evidence presented by a party. *Id*. at 923. As we have said before, "[t]he government has no way of knowing which version of the facts the jury will believe, and it is entitled (like any other litigant) to have the jury instructed in conformity with [different] rational possibilities. That these possibilities are mutually exclusive is of no consequence." *Id*. Still, "the district judge has discretion to refuse" the instruction even
> where its factual predicates are present. *Id*. at 924.

Hong, 938 F.3d at 1046-47.

Approved ~~3/2018~~12/2019

7.7 DEADLOCKED JURY

Members of the jury, you have ~~advised~~reported that you have been unable to ~~agree upon~~reach a unanimous verdict in this case. I have decided to suggest a few additional 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~~You should not, however, 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 also remind you that in your deliberations you are to consider the instructions that 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~~ What I have just said is not meant to rush you or pressure you into agreeing on a verdict. Take as much time as you need to discuss things. There is no hurry.

I ask that you now ~~retire~~return to the jury room and continue your deliberations with these additional comments in mind.

Comment

Before giving any supplemental jury instruction to a deadlocked jury and before declaring a mistrial or partial mistrial based on jury deadlock or partial deadlock, the Committee recommends the court review Jury Instructions Committee of the Ninth Circuit, A MANUAL ON JURY TRIAL PROCEDURES (2013) §§ 5.4, 5.5, and 5.6; *see also United States v. Hernandez-Guardado*, 228 F.3d 1017, 1029 (9th Cir. 2000) ("The most critical factor is the jury's own statement that it is unable to reach a verdict."); *Rogers v. United States*, 609 F.2d 1315, 1317 (9th Cir. 1979) (noting that before declaring mistrial based on jury deadlock, "the judge should question the jury . . . either individually or through its foreman, on the possibility that its current deadlock could be overcome by further deliberations") (internal quotation marks and citation omitted).

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

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

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

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

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that the charge had an impermissibly coercive effect on the jury.'" *United States v. Banks*, 514 F.3d 959, 974 (9th Cir. 2008) (quoting *United States v. Ajiboye*, 961 F.2d 892, 893 (9th Cir. 1992)). In assessing the coerciveness of an *Allen* charge, the Ninth Circuit considers "(1) the form of the instruction, (2) the time the jury deliberated after receiving the charge as compared to the total time of deliberation, and (3) any other indicia of coerciveness." *United States v. Freeman*, 498 F.3d 893, 908 (9th Cir. 2007) (~~quoting~~citing *United States v. Daas*, 198 F.3d 1167, 1179-80 (9th Cir. 1999)); *see also Warfield v. Alaniz*, 569 F.3d 1015, 1029 (9th Cir. 2009) (holding that weekend interval between "standard" *Allen* charge and ~~resumed~~resumption of deliberations "probably would have diluted any coercive effect.~~")~~").

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

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

United States v. Williams, 547 F.3d 1187, ~~1206-07~~1205 (9th Cir. 2008) (reversing conviction after neutral *Allen* charge when "hold-out" juror knew her identity was known by the court). *See Evanston*, 651 F.3d at 1085-88 (holding that district court committed reversible error ~~to allow~~by allowing supplemental closing arguments to deadlocked jury after court ~~has given~~gave *Allen* instruction and inquired as to reason for deadlock).

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

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8.83 FRAUD IN CONNECTION WITH IDENTIFICATION DOCUMENTS—AGGRAVATED IDENTITY THEFT (18 U.S.C. § 1028A)

The defendant is charged in [Count _____ of] the indictment with aggravated identity theft in violation of Section 1028A of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [transferred] [possessed] [used] without legal authority [a means of identification of another person] [a false identification document]; [and]

[Second, the defendant knew that the means of identification belonged to a real person; and]

[Second] [Third], the defendant did so during and in relation to [*specify felony violation*].

[The government need not establish that the [means of identification of another person] [false identification document] was stolen.]

Comment

See United States v. Doe, 842 F.3d 1117, 1119-20 (9th Cir. 2016) (setting out elements for section 1028A). Both direct and circumstantial evidence can establish that a defendant knew that the means of identification belonged to a real person. *Id*. at 1120-22. If the case involves circumstantial evidence of knowledge, consider the following instruction from *Doe* at 1121:

> Repeated and successful testing of the authenticity of a victim's identifying information by submitting it to a government agency, bank or other lender is circumstantial evidence that you may consider in deciding whether the defendant knew the identifying information belonged to a real person as opposed to a fictitious one. It is up to you to decide whether to consider any such evidence and how much weight to give it.

For offenses charged under Section 1028A(a)(1), use only "a means of identification of another person" under the first element and select the applicable felony from Section 1028A(c)(1)–(11) for insertion in the last element. For offenses charged under Section 1028A(a)(2) [terrorism offense], select the applicable felony from 18 U.S.C. § 2332b(g)(5) for

insertion in the last element. Do not use the bracketed second element in cases charging a false identification document under Section 1028A(a)(2).

Section 1028(d) provides definitions for the terms: "false identification document" and "means of identification." The Ninth Circuit has held that a signature qualifies as a "means of identification." *United States v. Blixt*, 548 F.3d 882, 887 (9th Cir. 2008).

In *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), the Supreme Court held that Section 1028A requires that the government prove the defendant knew that the "means of identification" he or she unlawfully transferred, possessed or used belonged to a real person. The word "person" includes both living and deceased persons, and the government is not required to prove that the defendant knew the person was living when the defendant committed the crime of aggravated identity theft. *United States v. Maciel-Alcala*, 612 F.3d 1092, 1100-02 (9th Cir. 2010).

If the government offers evidence at trial of uncharged identity theft against victims not included in the indictment, or if the government's proof at trial includes uncharged conduct that would satisfy an element of the offense charged in the indictment, it may be necessary for the court to modify this instruction to name the specific victims whose identities the indictment accuses the defendant of stealing or to instruct the jury that it must find the conduct charged in the indictment before it may convict. *See United States v. Ward*, 747 F.3d 1184, 1192 (9th Cir. 2014) (holding it was reversible error to permit jury to convict on counts of aggravated identity theft against two victims named in indictment based on evidence presented at trial of uncharged conduct against identity-theft victims not named in indictment). *See* Instruction 3.10 (Activities Not Charged).

The government need not prove that the identification document was stolen. *United States v. Osuna-Alvarez*, 788 F.3d 1183, 1185 (9th Cir. 2015).

In *United States v. Hong*, 938 F.3d 1040, 1051 (9th Cir. 2019), the Ninth Circuit gave a narrow construction to the word "use" in connection with the statutory proscription against knowingly using, without lawful authority, a means of identification of another person during and in relation to another felony. That case involved massage services provided to patients to treat their pain and a scheme in which that treatment was misrepresented as a Medicare-eligible physical therapy service. Because neither the owner of the massage clinic nor the physical therapists attempted to pass themselves off as the patients, the fraudulent scheme did not constitute aggravated identity theft in violation of section 1028A, even though it did run afoul of other statutes.

Approved ~~9/2018~~12/2019

8.128A HEALTH CARE FRAUD
(18 U.S.C. § 1347)

The defendant is charged in [Count _____ of] the indictment with health care fraud in violation of Section 1347 of Title 18 of the United States Code. ~~In order for~~ For the 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 and willfully [executed][attempted to execute] a scheme or plan to [defraud a health care benefit program][obtain [money][property] [owned by][under the custody or control of] a health care benefit program by means of material false or fraudulent [pretenses][representations][promises]];

Second, the defendant acted with the intent to defraud;

Third, [*name of victim or attempted victim*] was a health care benefit program; and

Fourth, the [scheme][plan] was executed in connection with the [delivery][payment] for health care [benefits][items][services].

Comment

See Instructions 5.5 (Willfully) and 5.7 (Knowingly—Defined~~). .~~); *see also* Instruction 5.8 (Deliberate Ignorance). In *United States v. Hong*, 938 F.3d 1040 (9th Cir. 2019), the Ninth Circuit discussed when it might be appropriate to give a deliberate ignorance (or willful blindness) instruction in the context of a charge of health care fraud.

"Health care benefit program" means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract. 18 U.S.C. § 24(b).

The required showing regarding a defendant's intent may be satisfied by circumstantial evidence that he acted with reckless indifference to the truth or falsity of his statements. *United States v. Dearing*, 504 F.3d 897, 902 (9th Cir. 2007).

8.128B SOLICITING OR RECEIVING KICKBACKS IN CONNECTION WITH MEDICARE OR FEDERAL HEALTH CARE PROGRAM PAYMENTS (42 U.S.C. § 1320a-7b(b)(1)(A))

The defendant is charged in [Count _____ of] the indictment with [soliciting] [receiving] kickbacks in connection with [Medicare] [federal health care program] payments in violation of Section 1320a-7b(b)(1)(A), of Title 42 of the United States Code. For the 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 and willfully [solicited] [received] [*specify remuneration alleged*];

Second, the [*specify remuneration alleged*] was [solicited] [paid] primarily in order to [induce] [and] [or] [in exchange for] the referral of a patient insured by [Medicare] [*specify federal health care program*] for [furnishing] [arranging for the furnishing] of an item or service; [and]

Third, the patient's items or services [furnished] [arranged to be furnished] were covered, in whole or in part, by [Medicare] [specifiy federal health care program]; [and]

[Fourth, [Medicare] [*specify federal health care program*] is a federal health care program.]

Comment

This instruction is largely based on the Eighth Circuit's Model Criminal Instruction 6.42.1320, as modified per the Ninth Circuit's decision in *United States v. Hong*, 938 F.3d 1040, 1048-49 (9th Cir. 2019).

Approved 12/2019

8.142 HOBBS ACT—EXTORTION OR ATTEMPTED EXTORTION BY FORCE (18 U.S.C. § 1951)

The defendant is charged in [Count _____ of] the indictment with [attempted] extortion by force, violence or fear in violation of Section 1951 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [[induced] [intended to induce]] [*name of victim*] to part with property by the wrongful use of actual or threatened force, violence, or fear;

Second, the defendant obtained the property with [*name of victim*]'s consent;

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

Fourth, 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 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.]

Comment

For an instruction on extortion or attempted extortion by nonviolent threat, *see* Instruction 8.142A (Hobbs Act—Extortion or Attempted Extortion by Nonviolent Threat).

For a definition of "affecting interstate commerce," *see* Instruction 8.143B (Hobbs Act—Affecting Interstate Commerce).

Only a de minimis effect on interstate commerce is required to establish jurisdiction under the Hobbs Act, and the effect need only be probable or potential, not actual. *United States v. Lynch*, 437 F.3d 902, 908-09 (9th Cir. 2006) (en banc). The interstate nexus may arise from either direct or indirect effects on interstate commerce. *Id*. at 909-10. When the effects are only indirect it may be appropriate to measure the adequacy of proof of interstate nexus by applying the test articulated in *United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994).

"Property" under the Hobbs Act is not limited to tangible things; it includes the right to make business decisions and to solicit business free from coercion. *United States v. Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985) (citing *United States v. Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980)). The Hobbs Act is not limited to lawful property and includes contraband. *United States v. Cortes*, 732 F.3d 1078, 1093 (9th Cir. 2013).

Actual or threatened force standing alone does not violate the statute. "We conclude that Congress did not intend to create a freestanding physical violence offense in the Hobbs Act. It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the statute refers to as robbery or extortion (and related attempts or conspiracies)." *Scheidler v. Nat'l Org. for Women, Inc.* 547 U.S. 9, 23 (2006).

A defendant's claim of right to the property is not a defense. "'Congress meant to punish as extortion any effort to obtain property by inherently wrongful means, such as force or threats of force . . . regardless of the defendant's claim of right to the property . . . .'" *United States v. Daane*, 475 F.3d 1114, 1120 (9th Cir. 2007) (quoting with approval from *United States v. Zappola*, 677 F.2d 264, 268-69 (2d Cir. 1982)). There is an exception to this proposition, but it is confined to cases involving certain types of labor union activity. *Id*. at 1119-20.

The bracketed language stating 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).

It is unclear whether 18 U.S.C. § 1951 requires specific intent as an element. In *United States v. Ornelas*, 906 F.3d 1138 (9th Cir. 2018), the Ninth Circuit discussed the intent element

in statutory offenses that appear to "simply punish" common law crimes. In footnote 2, however, the Ninth Circuit distinguished federal statutes that "simply punish" a common law offense (thus requiring importation of common law elements) from federal statutes that provide their own elements (and thus not requiring importation of common law elements). *Ornelas*, 906 F.3d at 1143 n.2. The circuits are currently split as to whether the Hobbs Act requires specific intent to steal. *Compare United States v. Thomas*, 8 F.3d 1552, 1562–63 (11th Cir.1993), with *United States v. Nedley*, 255 F.2d 350, 355 (3d Cir.1958).

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8.142A HOBBS ACT—EXTORTION OR ATTEMPTED EXTORTION BY NONVIOLENT THREAT (18 U.S.C. § 1951)

The defendant is charged in [Count _____ of] the indictment with [attempted] extortion by threat of [economic harm] [*specify other nonviolent harm*] in violation of Section 1951 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [[induced] [intended to induce]] [*name of victim*] to part with property by wrongful threat of [economic harm] [*specify other nonviolent harm*];

Second, the defendant acted with the intent to obtain property;

Third, commerce from one state to another [was] [would have been] affected in some way[.] [; and]

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

A threat is wrongful [if it is unlawful] [or] [if the defendant knew [he] [she] was not entitled to obtain the property].

Comment

See generally Comment to Instruction 8.142 (Hobbs Act—Extortion or Attempted Extortion by Force).

A nonviolent threat is prohibited by the Hobbs Act if it is "wrongful." 18 U.S.C. § 1951(b)(2) (defining extortion as "the obtaining of property from another, with his consent, induced by *wrongful* use of actual or threatened . . . fear" (emphasis added)); *United States v. Villalobos*,748 F.3d 953 (9th Cir. 2014) (error for jury instruction to essentially read out § 1951's "wrongful" element).

If a nonviolent threat is to be carried out by *unlawful* means, then the Hobbs Act's "wrongful" requirement is satisfied, regardless of whether the defendant had a lawful claim of

right to the property demanded. *Id.* at 957-58. For example, threats to cooperate with, or alternatively, impede an ongoing investigation, contingent on payment, are unlawful and therefore clearly wrongful. *Id.*

A nonviolent threat is prohibited by the Hobbs Act if it is "wrongful." 18 U.S.C. § 1951(b)(2) (defining extortion as "the obtaining of property from another, with his consent, induced by *wrongful* use of actual or threatened . . . fear" (emphasis added)); *United States v. Villalobos*,748 F.3d 953 (9th Cir. 2014) (error for jury instruction to essentially read out § 1951's "wrongful" element).

If a nonviolent threat is to be carried out by *unlawful* means, then the Hobbs Act's "wrongful" requirement is satisfied, regardless of whether the defendant had a lawful claim of right to the property demanded. *Id.* at 957-58. For example, a defendant's threat to cooperate with, or alternatively, impede an ongoing investigation, contingent upon payment are unlawful and therefore clearly wrongful. *Id.*

If, on the other hand, a nonviolent threat is to be carried out by *lawful* means (for example, a threat of economic harm), a claim of right instruction is necessary. *See United States v. Dischner*, 974 F.2d 1502, 1515 (9th Cir. 1992) (holding that wrongfully obtaining property by threat of economic harm is sufficient to convict of extortion under Hobbs Act and noting that "[o]btaining property is generally 'wrongful' if the alleged extortionist has no lawful claim to that property" (citing *United States v. Enmons*, 410 U.S. 396, 400 (1973))), *overruled on other grounds by United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997).

It is unclear whether the claim of right instruction to be given in lawful-threat cases must require that the defendant *knew* he or she was not entitled to obtain the property. At least one other circuit so requires, *see United States v. Sturm*, 870 F.2d 769, 773-74 (1st Cir. 1989), but the Ninth Circuit has yet to impose such a requirement. *See United States v. Greer*, 640 F.3d 1011, 1019 n.4 (9th Cir. 2011) ("Because the district court's instructions satisfied the First Circuit's requirement in *Sturm*, we need not decide whether to adopt *Sturm* as the law of this circuit."); *Dischner*, 974 F.2d at 1515 (declining to "decide whether the government must prove that the defendant knew he had no entitlement" to property because district court's jury instructions necessarily required such finding). Until the Ninth Circuit decides the question, the Committee recommends the above instruction, which requires the government to prove that the defendant knew he or she was not entitled to obtain the property.

A general instruction that the defendant need not have known that his or her conduct was unlawful does not negate the instruction in lawful-threat cases that a threat is wrongful if the defendant knew he or she was not entitled to obtain the property. Knowledge that one has no entitlement to property is distinguishable from knowledge that an act violates the Hobbs Act. *Greer*, 640 F.3d at 1019-20.

The bracketed language stating 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).

It is unclear whether 18 U.S.C. § 1951 requires specific intent as an element. In *United States v. Ornelas*, 906 F.3d 1138 (9th Cir. 2018), the Ninth Circuit discussed the intent element in statutory offenses that appear to "simply punish" common law crimes. In footnote 2, however, the Ninth Circuit distinguished federal statutes that "simply punish" a common law offense (thus requiring importation of common law elements) from federal statutes that provide their own elements (and thus not requiring importation of common law elements). *Ornelas*, 906 F.3d at 1143 n.2. The circuits are currently split as to whether the Hobbs Act requires specific intent to steal. *Compare United States v. Thomas*, 8 F.3d 1552, 1562-63 (11th Cir.1993), with *United States v. Nedley*, 255 F.2d 350, 355 (3d Cir.1958).

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8.143 HOBBS ACT—EXTORTION OR ATTEMPTED EXTORTION UNDER COLOR OF OFFICIAL RIGHT (18 U.S.C. § 1951)

The defendant is charged in [Count _____ of] the indictment with [attempted] extortion under color of official right in violation of Section 1951 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was a public official;

Second, the defendant [[obtained] [intended to obtain]] [*specify property*] that the defendant knew [he] [she] was not entitled to receive;

[Third, the defendant knew that the [*specify property*] [[was] [would be]] given in return for [taking] [withholding] some official action; [and]]

or

[Third, the defendant knew that the [*specify property*] [[was] [would be]] given in return for an express promise to perform a particular official action; and]

Fourth, commerce or the movement of an article or commodity in commerce from one state to another [was] [would have been] affected in some way[.] [; and]

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

[The acceptance by a public official of a campaign contribution does not, in itself, constitute a violation of law even though the donor has business pending before the official. However, if a public official demands or accepts [money] [property] [some valuable right] in exchange for a specific requested exercise of official power, such a demand or acceptance does constitute a violation regardless of whether the payment is made in the form of a campaign contribution.]

Comment

If the defendant is not a public official, then this instruction should be modified to include a requirement that the government prove that the defendant either conspired with a public official or aided and abetted a public official. *United States v. McFall*, 558 F.3d 951, 960 (9th Cir. 2009). A Hobbs Act conspiracy may exist even if some members of the conspiracy are not public officials and thus cannot complete the offense. *Ocasio v. United States*, 136 S.Ct. 1423, 1429-32 (2016). The object of the conspiracy need not be to get property from a person outside the conspiracy; it is sufficient that the property comes from another member of the conspiracy. *Id*. at 1434-35.

If there is any question in the case about the "official" character of the action sought by the defendant, give Instruction 8.11A (Official Action—Defined). When using that instruction in connection with Instruction 8.143, the court should change the term "official act" to "official action."

When the property is not a campaign contribution, the government need only show that the public official obtained payment to which he or she was not entitled knowing that the payment was made in exchange for some official act. *See United States v. Kincaid-Chauncey*, 556 F.3d 923, 937-38 (9th Cir. 2009). In such a case the first version of the third element should be used and the final paragraph should not be included.

The second version of the third element, and the final paragraph should be included in cases involving an alleged campaign contribution. *See McCormick v. United States*, 500 U.S. 257 (1991); *Kincaid-Chauncey*, 556 F.3d at 936. The express promise need not actually be carried out. It is sufficient if the promise to act is given in exchange for the property. *See Evans v. United States*, 504 U.S. 255, 267 (1992).

The bracketed language stating a fifth element applies 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).

It is unclear whether 18 U.S.C. § 1951 requires specific intent as an element. In *United States v. Ornelas*, 906 F.3d 1138 (9th Cir. 2018), the Ninth Circuit discussed the intent element in statutory offenses that appear to "simply punish" common law crimes. In footnote 2, however, the Ninth Circuit distinguished federal statutes that "simply punish" a common law offense (thus requiring importation of common law elements) from federal statutes that provide their own elements (and thus not requiring importation of common law elements). *Ornelas*, 906 F.3d at 1143 n.2. The circuits are currently split as to whether the Hobbs Act requires specific intent to steal. *Compare United States v. Thomas*, 8 F.3d 1552, 1562-63 (11th Cir.1993), with *United States v. Nedley*, 255 F.2d 350, 355 (3d Cir.1958).

Approved 412/2019

8.143A HOBBS ACT—ROBBERY OR ATTEMPTED ROBBERY
(18 U.S.C. § 1951)

The defendant is charged in [Count _____ of] the indictment with [attempted] robbery in violation of Section 1951 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [obtained] [attempted to obtain] money or property from or in the presence of [*name of victim*];

Second, the defendant [did so] [attempted to do so] by means of robbery;

Third, the defendant believed that [*name of victim*] [parted] [would part] with the money or property because of the robbery; [and]

Fourth, the robbery [affected] [would have affected] interstate commerce[; 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.]

"Robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence [or fear of injury, immediate or future, to his person or property, or to property in his custody or possession, or to the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining].

Comment

Give the bracketed language appropriate to either a completed crime or an attempt. Only that portion of the definition of robbery that is relevant to the issues in the trial should be given to the jury.

Only a de minimis effect on interstate commerce is required to establish jurisdiction under the Hobbs Act, and the effect need only be probable or potential, not actual. *United States v. Lynch*, 437 F.3d 902, 908-09 (9th Cir. 2006) (en banc). The interstate nexus may arise

from either direct or indirect effects on interstate commerce. *Id*. at 909-10. When the effects are only indirect it may be appropriate to measure the adequacy of proof of interstate nexus by applying the test articulated in *United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994).

For a definition of "affecting interstate commerce," *see* Instruction 8.143B (Hobbs Act—Affecting Interstate Commerce).

When the defendant has been charged with robbing or attempting to rob a drug dealer, the government satisfies the "affecting commerce" element of this crime if it shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds. *Taylor v. United States*, 136 S. Ct. 2074 (2016). "[T]he Government need not show that the drugs that a defendant stole or attempted to steal either traveled or were destined for transport across state lines." *Id.* at 2081.

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).

It is unclear whether 18 U.S.C. § 1951 requires specific intent as an element. In *United States v. Ornelas*, 906 F.3d 1138 (9th Cir. 2018), the Ninth Circuit discussed the intent element in statutory offenses that appear to "simply punish" common law crimes. In footnote 2, however, the Ninth Circuit distinguished federal statutes that "simply punish" a common law offense (thus requiring importation of common law elements) from federal statutes that provide their own elements (and thus not requiring importation of common law elements). *Ornelas*, 906 F.3d at 1143 n.2. The circuits are currently split as to whether the Hobbs Act requires specific intent to steal. *Compare United States v. Thomas*, 8 F.3d 1552, 1562-63 (11th Cir.1993), with *United States v. Nedley*, 255 F.2d 350, 355 (3d Cir.1958).

8.150 MONEY LAUNDERING
(18 U.S.C. § 1957)

The defendant is charged in [Count _____ of] the indictment with money laundering in violation of Section 1957 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly engaged or attempted to engage in a monetary transaction;

Second, the defendant knew the transaction involved criminally derived property;

Third, the property had a value greater than $10,000;

Fourth, the property was, in fact, derived from [*describe the specified unlawful activity alleged in the indictment*]; and

Fifth, the transaction occurred [[in the [United States] [special maritime and territorial jurisdiction of the United States]] [*specify defendant's status which qualifies under 18 U.S.C. § 1957(d)(2)*].

The term "monetary transaction" means the [deposit] [withdrawal] [transfer] or [exchange], in or affecting interstate commerce, of funds or a monetary instrument by, through, or to a financial institution. [The term "monetary transaction" does not include any transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution.]

The term "financial institution" means [*identify type of institution listed in 31 U.S.C. § 5312 as alleged in the indictment*].

The term "criminally derived property" means any property constituting, or derived from, the proceeds of a criminal offense. The government must prove that the defendant knew that the property involved in the monetary transaction constituted, or was derived from, proceeds obtained by some criminal offense. The government does not have to prove that the defendant knew the precise nature of that criminal offense, or knew the property involved in the transaction represented the proceeds of [*specified unlawful activity as alleged in the indictment*].

Although the government must prove that, of the property at issue more than $10,000 was criminally derived, the government does not have to prove that all of the property at issue was criminally derived.

Comment

The above definition of "criminally derived property" refers to the "proceeds" of a criminal offense. For cases involving conduct on or after May 20, 2009, "proceeds" means "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1957(f)(3); 18 U.S.C. § 1956(c)(9) (§ 1957 subsection (f)(3) was modified by Pub. L. 111-21, 123 Stat. 1618, which also added § 1956 subsection (c)(9)). For cases involving conduct prior to May 20, 2009, "proceeds" means "gross receipts" unless the money laundering transactions were a "central component" of the criminal scheme. *United States v. Phillips*, 704 F.3d 754 (9th Cir. 2012); *see also United States v. Van Alstyne*, 584 F.3d 803, 814 (when defining "proceeds" as "gross receipts" would present a merger problem, "proceeds" means "profits"). *See* Instruction 8.149.

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The term "specified unlawful activity" in 18 U.S.C. § 1957 has the same meaning as that term is given in 18 U.S.C. § 1956. *See* 18 U.S.C. § 1957(f)(3). In § 1956(c)(7)(B)(iv), the "specified unlawful activity" of bribery "should be interpreted to take the ordinary, contemporary, common meaning" of that word at the time Congress enacted the statute. *See United States v. Chi*, 936 F.3d 888, 893 (9th Cir. 2019) (applying term "bribery" to include bribery under foreign law and not restricted to federal bribery statute, 18 U.S.C. § 201, or foreign law that mirrors federal bribery statute).

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8.192 PERSUADING OR COERCING TO TRAVEL TO ENGAGE IN PROSTITUTION OR SEXUAL ACTIVITY (18 U.S.C. § 2422(a))

The defendant is charged in [Count _____ of] the indictment with [persuading] [inducing] [enticing] [coercing] travel to engage in [prostitution] [sexual activity] in violation of Section 2422(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,~~[That [on] [between] [*insert dates alleged*] 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, that is [*insert title of sexual offense*].]

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or

[First, that [on] [between] [*insert dates alleged*] the defendant knowingly attempted to [persuade] [induce] [entice] [coerce] an individual to travel in [interstate] [foreign] commerce to engage in [prostitution] [any sexual activity for which any person can be charged with a criminal offense~~]; and~~, that is [*insert title of sexual offense*]; and

Second, 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.]

Comment

Both 18 U.S.C. § 2422(a) and (b) use the common terms "persuade," "induce," and "entice." Those terms "have plain and ordinary meanings within the statute, and [a] court [has] no obligation to provide further definitions." *See United States v. Dhingra*, 371 F.3d 557, 567 (9th Cir. 2004) (*Dhingra* involved a prosecution under 18 U.S.C. § 2422(b)).

The fact that women desired to leave Russia and travel to the United States did not preclude the finding that defendant persuaded, induced, enticed or coerced them to do so. *United States v. Rashkovski*, 301 F.3d 1133, 1136–37 (9th Cir. 2002). The statutory language does not require defendant to "have created out of whole cloth the women's desire to go to the United States; it merely requires that he have convinced or influenced [them] to actually undergo

the journey, or made the possibility more appealing." *Id.* "[I]t is the defendant's intent that forms the basis for his criminal liability, not the victims'." *Id.* at 1137.

The bracketed language stating alternative elements 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).

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8.192A USING OR ATTEMPTING TO USE THE MAIL OR A MEANS OF INTERSTATE COMMERCE TO PERSUADE OR COERCE A MINOR TO TRAVEL TO ENGAGE IN PROSTITUTION OR SEXUAL ACTIVITY (18 U.S.C. § 2422(b))

The defendant is charged in [Count ____ of] the indictment with Coercion and Enticement of a Minor in violation of Section 2422(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 beyond a reasonable doubt:

First, that [on][between] [*insert dates alleged*] the defendant [used] [attempted to use] [the mail] [a means or facility of [interstate][foreign] commerce, that is [*insert means or facility of interstate or foreign commerce*]], to knowingly [persuade] [induce] [entice] [coerce] an individual to engage in [prostitution][any sexual activity for which someone could be charged with an offense, that is [*insert title of sexual offense*]]; [and]

[Second, the individual the defendant [persuaded] [induced] [enticed] [coerced] was under the age of 18.]

or

[Second, the individual the defendant attempted to [persuade] [induce] [entice] [coerce] was under the age of 18; and

Third, 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.]

Comment

Both 18 U.S.C. § 2422(a) and (b) use the common terms "persuade," "induce," and "entice." Those terms "have plain and ordinary meanings within the statute, and [a] court [has] no obligation to provide further definitions." *See United States v. Dhingra*, 371 F.3d 557, 567 (9th Cir. 2004) (involving prosecution under 18 U.S.C. § 2422(b)).

The fact that a group of women desired to leave Russia and travel to the United States did not preclude the finding that defendant persuaded, induced, enticed or coerced them to do so.

United States v. Rashkovski, 301 F.3d 1133, 1136–37 (9th Cir. 2002). The statutory language does not require defendant to "have created out of whole cloth the women's desire to go to the United States; it merely requires that he have convinced or influenced [them] to actually undergo the journey, or made the possibility more appealing." *Id*. "[I]t is the defendant's intent that forms the basis for his criminal liability, not the victims'." *Id*. at 1137.

The bracketed language regarding an "attempt" or "substantial step" 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).

"[A]n actual minor victim is not required for an attempt conviction under 18 U.S.C. § 2422(b)." *United States v. Meek*, 366 F.3d 705, 717 (9th Cir. 2004) (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).

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9.37 ATTEMPT TO EVADE OR DEFEAT INCOME TAX (26 U.S.C. § 7201)

The defendant is charged in [Count _____ of] the indictment with [*specify charge*] in violation of Section 7201 of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant owed more federal income tax for the calendar year [*specify year*] than was declared due on the defendant's income tax return for that calendar year;

Second, the defendant knew that more federal income tax was owed than was declared due on the defendant's income tax return;

Third, the defendant made an affirmative attempt to evade or defeat such additional tax; and

Fourth, in attempting to evade or defeat such additional tax, the defendant acted willfully.

Comment

See Instruction 9.42 (Willfully—Defined) as to " willfully" in the context of prosecutions for violations of Title 26.

The elements of attempted tax evasion under 26 U.S.C. § 7201 are stated in *United States v. Kayser*, 488 F.3d 1070, 1073 (9th Cir. 2007), as follows: (1) willfulness; (2) the existence of a tax deficiency; and (3) an affirmative act constituting an evasion or attempted evasion of the tax. (citing *Sansone v. United States*, 380 U.S. 343, 351 (1965) and *United States v. Marashi*, 913 F.2d 724, 735 (9th Cir. 1990)). "A tax deficiency occurs when a defendant owes more federal income tax for the applicable tax year than was declared due on the defendant's income tax return." *Kayser*, 488 F.3d at 1073.

The first element requires the government to prove there was a tax deficiency, but the deficiency need not be "substantial." *Marashi*, 913 F.2d at 735.

"A defendant may negate the element of tax deficiency in a tax evasion case with evidence of unreported deductions." *Kayser*, 488 F.3d at 1073-74 (rejecting an argument that the defendant was precluded from offering evidence that is inconsistent with information that he reported on his tax returns).

When a corporation makes a distribution to a stockholder initially characterized as a ~~dividend,~~"distribution," that "~~dividend~~distribution" may subsequently be legitimately

characterized as a non-taxable "return of capital ~~distribution~~" if the corporation has no earnings. ~~See~~ *Boulware v. United States*, 552 U.S. 421, ~~431~~430-31 (2008).

A defendant accused of tax evasion is not entitled to a lesser included offense instruction based on § 7203 if the act constituting evasion was the filing of a false return. *Sansone*, 380 U.S. at 351-52. In addition, because failure to file a return is an element of a § 7203 failure to file charge, but is not an element of a § 7201 tax evasion charge, the offense of failure to file is not a lesser included offense of tax evasion. *United States v. Nichols*, 9 F.3d 1420, 1422 (9th Cir. 1993). *See* Instruction 3.14 (Lesser Included Offense), and Instruction 9.38 (Willful Failure to Pay Tax or File Tax Return).

9.39 FILING FALSE TAX RETURN
(26 U.S.C. § 7206(1))

The defendant is charged in [Count _____ of] the indictment with filing a false tax return in violation of Section 7206(1) of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant signed and filed a tax return for the year [*specify year*] that [he] [she] knew contained [false] [incorrect] information as to a material matter;

Second, the return contained a written declaration that it was being signed subject to the penalties of perjury; and

Third, in filing the false tax return, the defendant acted willfully.

A matter is material if it had a natural tendency to influence, or was capable of influencing, the decisions or activities of the Internal Revenue Service.

Comment

See Instruction 9.42 (Willfully—Defined) as to " willfully" in the context of prosecutions for violations of Title 26.

Section 7206 creates several distinct crimes. This instruction applies to § 7206(1) and should be modified if the charge arises under § 7206(3), (4), or (5). If the charge arises under § 7206(2), see Instruction 9.40 (Aiding or Advising False Income Tax Return).

False information is material if it had a natural tendency to influence or was capable of influencing or affecting the ability of the IRS to audit or verify the accuracy of the tax return or a related return. *See United States v. Gaudin*, 515 U.S. 506, 509 (1995) (explaining that material statement has ~~a~~ "natural tendency to influence, or [be] capable of influencing, the decision of the decision making body to which it was addressed") (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)); *see also United States v. Peterson*, 538 F.3d 1064, 1067 (9th Cir. 2008) (suggesting that district courts should instruct on materiality "tracking the language" of *Gaudin*). A false statement "need not have actually influenced the agency, and the agency need not rely on the information in fact for it to be material." *United States v. Serv. Deli Inc*., 151 F.3d 938, 941 (9th Cir. 1998); *see also United States v. Matsumaru*, 244 F.3d 1092, 1101 (9th Cir. 2001).

When a corporation makes a distribution to a stockholder initially characterized as a ~~dividend,~~"distribution," that "~~dividend~~distribution" may subsequently be legitimately characterized as a non-taxable "return of capital ~~distribution~~" if the corporation has no earnings. ~~*See*~~ *Boulware v. United States*, 552 U.S. 421, ~~431~~430-31 (2008).

The tax return must have been filed. *See United States v. Boitano*, 796 F.3d 1160, 1163 (9th Cir. 2015).

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