

11.1 Conspiracy—Elements

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

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

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

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

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

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

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

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

Comment

When the charged offense is conspiracy to defraud the United States (or any agency thereof) under the “defraud clause” of 18 U.S.C. § 371, use Instruction 11.2 (Conspiracy to Defraud the United States) in place of this general conspiracy instruction. When the charged offense is conspiracy to distribute or manufacture a controlled substance pursuant to 21 U.S.C.

§§ 841(a), 846, use Instruction 12.5 (Controlled Substance—Conspiracy to Distribute or

Manufacture).

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

To prove an agreement to commit a crime, it is not sufficient for the government to prove that the defendant committed the crime in question. It must prove that the defendant agreed with at least one other person to commit that crime. *United States v. Loveland*, 825 F.3d 555 (9th Cir. 2016). “The agreement need not be explicit; it is sufficient if the conspirators knew or had reason to know of the scope of the conspiracy and that their own benefits depended on the success of the venture.” *United States v. Montgomery*, 384 F.3d 1050, 1062 (9th Cir. 2004) (citing *United States v. Romero*, 282 F.3d 683, 687 (9th Cir. 2002)). “An agreement to commit a crime can be explicit or tacit, and can be proved by direct or circumstantial evidence, including inferences from circumstantial evidence.” *United States v. Kaplan*, 836 F.3d, 1199 (9th Cir. 2016) (quotation marks and citation omitted). *See also United States v. Gonzalez*, 906 F.3d 784, 792 (9th Cir. 2018) (noting that tacit agreement is sufficient for conspiracy conviction). A conspiracy may exist even if some members of the conspiracy cannot complete the offense, so long as the object of the conspiracy is that at least one conspirator complete the offense. *Ocasio v. United States*, 578 U.S. 282, 287-92 (2016). A defendant who conspires only with a government agent is not guilty of conspiracy; however, a conspiracy conviction is permitted if at least one co-conspirator is not a government agent. *United States v. Barragan*, 871 F.3d 689, 710-11 (9th Cir. 2017); *see also* Instruction 11.7 (Conspiracy—Sears Charge).

Use the third element in this instruction only if the applicable statute requires proof of an overt act, *e.g.*, 18 U.S.C. § 371 (first clause) or 18 U.S.C. § 1511(a) (conspiracy to obstruct state or local law enforcement) but omit the third element when the applicable statute does not require proof of an overt act. *See Whitfield v. United States*, 543 U.S. 209, 212-15 (2005) (proof of overt act not necessary for conspiracy to commit money laundering); *United States v. Shabani*, 513 U.S. 10, 15-16 (1994) (proof of overt act not necessary for conspiracy to violate drug statutes); *Gonzalez*, 906 F.3d at 792 (noting that proof of overt act is not necessary for

conspiracy to violate civil rights).

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

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

See Instruction 6.27 (Specific Issue Unanimity). When the evidence establishes multiple conspiracies, failure to give a specific unanimity instruction may be plain error and the court may have a duty to *sua sponte* give the instruction requiring the jurors to unanimously agree on which conspiracy the defendant participated in. *United States v. Lapier*, 796 F.3d 1090 (9th Cir. 2015) (failure to give specific unanimity instruction was plain error because half of jury could have found defendant guilty of joining one conspiracy while other half of jury could have found defendant guilty of joining second, completely independent conspiracy).

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

See Instruction 4.8 (Knowingly).

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