

16.1 Murder—First Degree (18 U.S.C. § 1111)

The defendant is charged in [Count _____ of] the indictment with murder in the first degree in violation of Section 1111 of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant unlawfully killed [name of victim];

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

Third, the killing was premeditated; and

Fourth, the killing occurred at [specify place of federal jurisdiction].

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

Premeditation means with planning or deliberation. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must be long enough, after forming the intent to kill, for a killer to have been fully conscious of the intent and to have considered the killing.

Comment

The applicable statute, 18 U.S.C. § 1111, also contains a first-degree felony murder provision. When felony murder is charged, the instruction relevant to premeditation should be appropriately modified. For examples, see the Tenth Circuit’s Criminal Pattern Jury Instructions

2.52.1 (2011 ed., updated Feb. 2018) and the Eleventh Circuit’s Pattern Jury Instructions O45.2 (2019 ed.).

The elements for first degree murder are discussed in *United States v. Free*, 841 F.2d 321, 325 (9th Cir. 1988) (“The essential elements of first-degree murder are: (1) the act . . . of killing a human being; (2) doing such act . . . with malice aforethought; and (3) doing such act . . . with premeditation.”).

As to the second element, in *United States v. Houser*, 130 F.3d 867, 872 (9th Cir. 1997), the Ninth Circuit approved the use of a jury instruction that defined malice aforethought as “either deliberately and intentionally or recklessly with extreme disregard for human life.”

Killing with “extreme disregard” refers not only to acts endangering the public at large,

but also to acts directed solely to the person killed. *Houser*, 130 F.3d at 890. In addition, the court should exercise caution regarding the “troublesome issue” of providing a permissive inference instruction on malice aforethought. *Id.* at 869-71.

As to the fourth element, whether the crime alleged occurred at a particular location is a question of fact. *United States v. Warren*, 984 F.2d 325, 327 (9th Cir. 1993). Whether the location is within the special maritime and territorial jurisdiction of the United States, or a federal prison is a question of law. See *United States v. Gipe*, 672 F.2d 777, 779 (9th Cir. 1982).

If there is evidence that the defendant acted in self-defense or with some other justification or excuse, see Instruction 5.10 (Self-Defense).

Voluntary and involuntary manslaughter are lesser included offenses of murder. *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007). However, they are not lesser included offenses of felony murder. *United States v. Miguel*, 338 F.3d 995, 1004-06 (9th Cir. 2003).

The trial judge may be obligated to give an instruction on involuntary manslaughter in a murder case even when the defense does not offer the instruction. In *United States v. Anderson*, 201 F.3d 1145, 1150 (9th Cir. 2000), the Ninth Circuit held that it was plain error for the court not to instruct the jury on involuntary manslaughter, even though the defendant had not requested such an instruction, because there was evidence in the record to support the theory that the killing was accidental. A defendant is not automatically entitled to a voluntary manslaughter instruction. There must be some evidence that supports the proposition that the defendant was acting out of passion rather than malice, such as evidence of provocation. *United States v. Begay*, 673 F.3d 1038 (9th Cir. 2011) (en banc). The district court, which instructed the jury following Instruction 8.89 (2003) (now this instruction), properly instructed the jury on the correct definition of premeditation. *Id.* at 1043.

The trial judge is obligated to give an instruction on a lesser included offense in a murder case if the law and evidence satisfy a two-part test. *Arnt*, 474 F.3d at 1163. The first step is a legal question: “Is the offense for which the instruction is sought a lesser-included offense of the charged offense?” *Id.* “The second step is a factual inquiry: Does the record contain evidence that would support conviction of the lesser offense?” *Id.*

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