

16.2 Murder—Second Degree (18 U.S.C. § 1111)

The defendant is charged in [Count _____ of] the indictment with murder in the second degree in violation of Section 1111 of Title 18 of the United States Code. 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; and

Third, 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.

Comment

See Comment to Instruction 16.1 (Murder—First Degree). Because the difference between first- and second-degree murder is the element of premeditation, *United States v. Quintero*, 21 F.3d 885, 890 (9th Cir. 1994), most of that Comment is applicable to second degree murder.

This instruction is derived from several sources. It is primarily based upon *Ornelas v. United States*, 236 F.2d 392, 394 (9th Cir. 1956) (defendant could be convicted of second-degree murder at most when premeditation not part of murder charge). See also *Quintero*, 21 F.3d at 890.

As to the second element, the standard of malice was approved in *United States v. Houser*, 130 F.3d 867, 871 (9th Cir. 1997) (in second degree murder prosecution, malice aforethought means “to kill either deliberately and intentionally or recklessly with extreme disregard for human life”), and *United States v. Begay*, 33 F.4th 1081, 1091 (9th Cir. 2022) (en banc) (quoting standard of malice aforethought in Ninth Cir. Model Crim. Jury Instruction 16.2).

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

The necessity for an additional element if a defense is raised is considered in *United States v. Lesina*, 833 F.2d 156, 160 (9th Cir. 1987) (when defendant raised defense of accident to second degree murder charge, government bore burden of proving lack of heat of passion).

If there is evidence that the defendant acted in self-defense, *see* Instruction 5.10 (Self-Defense).

Evidence that the defendant acted upon a sudden quarrel or heat of passion “acts in the nature of a defense to the murder charge Once such evidence is raised, the burden is on the government to prove . . . the absence of sudden quarrel or heat of passion before a conviction for murder can be sustained.” *Quintero*, 21 F.3d at 890; *see Begay*, 33 F.4th at 1088. The following language might be added to address such circumstances:

The defendant claims to have acted in sudden quarrel or in the heat of passion caused by adequate provocation, and therefore without malice aforethought. Heat of passion may be provoked by fear, rage, anger, or terror. Provocation, to be adequate, must be such as might arouse a reasonable and ordinary person to kill someone.

To show that the defendant acted with malice aforethought, the government must prove the absence of heat of passion beyond a reasonable doubt.

The heat of passion standard set forth above is suggested by *United States v. Roston*, 986 F.2d 1287, 1291 (9th Cir. 1993).

The Ninth Circuit has noted that heat of passion is not the only condition that might serve as a defense to a murder charge and reduce the offense to manslaughter. In *Kleeman v. United States Parole Commission*, 125 F.3d 725, 732 (9th Cir. 1997), the circuit suggested that an “extremely irrational and paranoid state of mind that severely impairs a defendant’s capacity for self control” may also negate the malice attached to an intentional killing. If such a defense is raised, it may be appropriate to instruct the jury regarding the effect of such a theory. A defendant is not automatically entitled to a voluntary manslaughter instruction. There must be some evidence which 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 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 court of appeals 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.

The trial judge is obligated to give an instruction on involuntary manslaughter in a murder case if the law and evidence satisfy a two part test. *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007). 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.*

It is reversible error if the instructions “make it appear as though there is no difference between the severity of second degree murder and manslaughter” *United States v.*

Lesina, 833 F.2d 156, 158-59 (9th Cir. 1987) (language used in instructions did not provide meaningful distinction between second degree murder and involuntary manslaughter).

Voluntary and involuntary manslaughter are lesser included offenses of murder. *Arnt*, 474 F.3d at 1163, however they are not lesser included offenses of felony murder. *United States v. Miguel*, 338 F.3d 995, 1004-06 (9th Cir. 2003). If any construction of the evidence would rationally support a jury’s conclusion that the killing was unintentional or accidental, even if there is conflicting evidence, an involuntary manslaughter instruction must be given. *United States v. Anderson*, 201 F.3d 1145, 1150 (9th Cir. 2000).

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