

3.0 Introductory Comment

The Committee believes that instructions on particular kinds of evidence should be avoided as much as possible. General instructions on direct and circumstantial evidence and on credibility of witnesses should in most instances suffice, obviating the need for more specific instructions. *See, for example, United States v. Holmes*, 229 F.3d 782, 787-88 (9th Cir. 2000); *United States v. Ketola*, 478 F.2d 64, 66 (9th Cir. 1973).

However, instructions on particular kinds of evidence may be necessary in two circumstances. First, when evidence is admissible for one purpose but not another, a limiting instruction may be required by Fed. R. Evid. 105. Second, certain specific instructions (including those specified in Instructions 3.9, 3.10, 3.11, 3.14, and 3.15) may need to be given when requested and may be advisable even if not requested. *See United States v. Bernard*, 625 F.2d 854, 857 (9th Cir. 1980) (holding that failure to give requested accomplice instruction was prejudicial error where accomplice's testimony was important to case).

The Committee believes that an instruction on circumstantial evidence generally eliminates the need to explain the same principle in terms of inferences. Thus, the Committee recommends against giving instructions on matters such as flight, resistance to arrest, a missing witness, failure to produce evidence, false or inconsistent exculpatory statements, failure to respond to accusatory statements, and attempts to suppress or tamper with evidence. These matters are generally better left to argument of counsel as examples of circumstantial evidence from which the jury may find another fact. *See United States v. Beltran-Garcia*, 179 F.3d 1200, 1206 (9th Cir. 1999) (in discussing jury instruction regarding inferring intent to possess for distribution from quantity of drugs, Ninth Circuit stated that “[a]lthough the instructions in this case were not delivered in error, we do not hesitate to point out the ‘dangers and inutility of permissive inference instructions.’” (citations omitted)). *See also United States v. Rubio-Villareal*, 967 F.2d 294, 300 (9th Cir. 1992) (en banc) (Ninth Circuit disapproved of instructing jury that knowledge of presence of drugs in vehicle may be inferred from defendant being driver).

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3.1 Statements by Defendant or Codefendant

You have heard testimony that the defendant made a statement. It is for you to decide (1) whether the defendant made the statement, and (2) if so, how much weight to give to it. In making those decisions, you should consider all the evidence about the statement, including the circumstances under which the defendant may have made it.

Comment

This instruction uses the word “statement” in preference to the more pejorative term, “confession.” The word “confession” implies an ultimate conclusion about the significance of

a defendant's statement, which should be left for the jury to determine. The language of this instruction was expressly approved in *United States v. Hoac*, 990 F.2d 1099, 1108 n.4 (9th Cir. 1993).

When voluntariness of a confession is an issue, the instruction is required by 18 U.S.C. § 3501(a), providing that after a trial judge has determined a confession to be admissible, the judge "shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." See also *United States v. Dickerson*, 530 U.S. 428, 432 (2000) (holding that *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny govern admissibility of accused person's statement during custodial interrogation and could not be in effect overruled by § 3501). Section 3501(e) defines "confession" as "any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing." See *Hoac*, 990 F.2d at 1107 (where defendant raises genuine issue at trial concerning voluntariness of statement, trial court is obligated by statute to instruct jury concerning weight to be accorded that statement). Failure to give the required instruction may constitute plain error. *Id.* at 1109.

In a joint trial, when a nontestifying defendant's statement directly inculcates a nonconfessing codefendant, the Confrontation Clause may bar the admission of the defendant's statement. *Bruton v. United States*, 391 U.S. 123, 137 (1968) (holding admission of nontestifying defendant's statement inculcating nonconfessing codefendant by name violated the Confrontation Clause, despite limiting instruction). In these circumstances, modification of the statement may be necessary to avoid directly identifying the nonconfessing codefendant and the court may be required to offer a limiting instruction that jurors may consider the statement only with respect to the confessing codefendant. See *Samia v. United States*, 599 U.S. 635 (2023) (holding that nontestifying codefendant's confession that substituted a codefendant's name with "other person," coupled with limiting instruction, did not violate the Confrontation Clause because it did not directly inculcate defendant); *Gray v. Maryland*, 523 U.S. 185, 194 (1998) (holding that obviously redacted statement substituting nonconfessing codefendant's name with "deleted" or "deletion" was "directly accusatory" and violated the Confrontation Clause, notwithstanding limiting instruction); *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (holding the Confrontation Clause did not bar admission of a redacted statement by the nontestifying codefendant because the statement did not implicate anyone else and the jury was instructed not to use the confession in any way against the defendant). See Model Instruction 2.12 Evidence for Limited Purpose for limiting instructions.

The trial court must make a preliminary finding by a preponderance of the evidence that the co-conspirator's statements fall within the scope of the hearsay exception for statement of co-conspirators. In *United States v. Ehmer*, 87 F.4th 1073, 1127-28 (9th Cir. 2023), one of the defendants contended that another co-conspirator's statements, which were made after the defendant had withdrawn from the conspiracy, were hearsay and erroneously admitted. The Ninth Circuit agreed and held that the trial court erred in not making a preliminary finding on the "threshold question" whether the co-conspirator's statements were made when the

defendant was part of the conspiracy. *Id.* at 1127 (rejecting the government’s argument that “the hearsay exception continues to apply, even as to persons who have withdrawn from the conspiracy, so long as the **declarant** remains in the conspiracy.”).

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3.2 Silence in the Face of Accusation

A silence in the face of accusation instruction is a permissive inference instruction and, as such, the Committee recommends that it generally not be given.

If a defendant is in custody, silence in the face of an accusatory statement does not constitute an admission of the truth of the statements. *Doyle v. Ohio*, 426 U.S. 610, 617-19 (1976). Such evidence should not be received, and no instruction will be necessary. *Arnold v. Runnels*, 421 F.3d 859, 869 (9th Cir. 2005).

If a defendant is not in custody, evidence of his refusal to answer an officer’s questions may be admissible as substantive evidence of guilt. *Salinas v. Texas*, 133 S. Ct. 2174, 2177-78 (2013) (holding that use at trial of petitioner’s silence to suggest “that he was guilty” was constitutional because petitioner did not invoke Fifth Amendment privilege against self-incrimination).

The Committee includes former Instruction 4.2 for reference, as it recites the factual findings the court must make to admit into evidence silence in the face of accusation, and in some circumstances it may be appropriate to give the instruction if the facts warrant it and it is requested by the defendant. The text of the instruction is based on judicial interpretation. *See, e.g., United States v. McKinney*, 707 F.2d 381, 384 (9th Cir. 1983); *United States v. Sears*, 663 F.2d 896, 904-05 (9th Cir. 1981); *United States v. Giese*, 597 F.2d 1170, 1195-96 (9th Cir. 1979).

Former Instruction 4.2 in the Manual of Model Criminal Jury Instructions For The Ninth Circuit (2003) read as follows:

Evidence has been introduced that statements accusing the defendant of the crime charged in the indictment were made, and that the statements were neither denied nor objected to by the defendant. If you find that the defendant actually was present and heard and understood the statements, and that they were made under such circumstances that the statements would have been denied if they were not true, then you may consider whether the defendant’s silence was an admission of the truth of the statements.

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