

5.13 Public Authority or Government Authorization Defense

The defendant contends that [[if] [although]] [[he] [she]] committed the acts charged in the indictment, [he] [she] did so at the request of a government agent. Government authorization of the defendant's acts legally excuses the crime charged.

The defendant must prove by a preponderance of the evidence that:

First, the defendant believed [he] [she] was acting as an authorized government agent to assist in law enforcement activity at the time of the offense charged in the indictment; and

Second, the defendant's belief was reasonable.

In deciding this, you should consider all of the relevant circumstances, including the identity of the government official, what the official said to the defendant, and how closely the defendant followed any instructions the official gave.

A preponderance of the evidence means that you must be persuaded that the things the defendant seeks to prove are more probably true than not true. This is a lesser burden of proof than the government's burden to prove beyond a reasonable doubt each element of [specify crime charged].

If you find that the defendant has proved that [he] [she] reasonably believed that [he] [she] was acting as an authorized government agent as provided in this instruction, you must find the defendant not guilty of [specify crime charged].

Comment

In *United States v. Doe*, 705 F.3d 1134 (9th Cir. 2013), the Ninth Circuit held that a defendant had the burden of proving the public authority defense by a preponderance of the evidence because the defense did not serve to negate any of the elements of the crimes with which the defendant was charged. *Id.* at 1146. The court quoted the Seventh Circuit in explaining “when a statute is silent on the question of affirmative defenses and when the affirmative defense does not negate an essential element of the offense, we must presume that the common law rule that places the burden of persuasion on the defendant reflects the intent of Congress.” *Id.* at 1147 (quoting *United States v. Jumah*, 493 F.3d 868, 873 (7th Cir. 2007)); see *Dixon v. United States*, 548 U.S. 1, 13-14 (2006). However, the *Doe* court cautioned that “[t]his is not to suggest that there is a *per se* rule that the public authority defense must always be proven by the defendant by a preponderance of the evidence. To the contrary, the burden of proof for the public authority defense depends on both the statute at issue and the facts of the specific case.” 705 F.3d at 1147. “[W]hen confronted with an affirmative defense, the court must always look closely to the statutory language of the specific offense charged and determine (1) whether the public authority defense negates an element of the charged offense that the government must prove beyond a reasonable doubt and (2) whether Congress intended

to alter the common law rules governing the public authority defense [in the statute at issue].” *Id.* (citation omitted).

See Fed. R. Crim. P. 12.3 (Notice of a Public-Authority Defense) regarding giving notice of the defense. The failure to comply with Rule 12.3 allows the court to exclude the testimony of any undisclosed witness except the defendant, regarding the public authority defense. *United States v. Bear*, 439 F.3d 565, 571 n.1 (9th Cir. 2006). The public authority defense is properly used when the defendant reasonably believed that a government agent authorized her to engage in illegal acts. *Id.* at 568. It is plain error for the court not to instruct on the public authority defense sua sponte when the defendant actually presents and relies on that theory of defense. *Id.* at 568-70.

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