

5.6 Insanity

The defendant contends [he] [she] was insane at the time of the crime. Insanity is a defense to the charge. The sanity of the defendant at the time of the crime charged is therefore a question you must decide.

A defendant is insane only if at the time of the crime charged:

> First, the defendant had a severe mental disease or defect; and

Second, as a result, the defendant was unable to appreciate the nature and quality or the wrongfulness of [his] [her] acts.

The defendant has the burden of proving the defense of insanity by clear and convincing evidence. Clear and convincing evidence of insanity means that it is highly probable that the defendant was insane at the time of the crime. Proof by clear and convincing evidence is a lower standard of proof than proof beyond a reasonable doubt.

You may consider evidence of the defendant's mental condition before or after the crime in deciding whether the defendant was insane at the time of the crime. Insanity may be temporary or extended.

Your finding on the question of whether the defendant was insane at the time of the crime must be unanimous.

[Your verdict form will allow you to select from three possible verdicts:

If you unanimously agree that the government has failed to prove the defendant guilty

beyond a reasonable doubt and (2) the defendant has not proven insanity by clear and convincing evidence, you must select "not guilty";

If you unanimously agree that (1) the government has proven the defendant guilty beyond a

reasonable doubt, you must select "guilty";

If you unanimously agree that the government has proven the defendant guilty beyond a

reasonable doubt, and you also unanimously agree that the defendant has proven by clear and convincing evidence that [he] [she] was insane at the time of the crime charged, you must select

"not guilty only by reason of insanity."]

Comment

The insanity defense and the burden of proof are set forth in 18 U.S.C. § 17. Clear and convincing evidence requires that the existence of a disputed fact be highly probable. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). When an affirmative defense of insanity is submitted to the jury, unanimity is required on both questions of guilt and sanity. “[A] jury united as to guilt but divided as to an affirmative defense (such as insanity) is necessarily a hung jury.” *United States v. Southwell*, 432 F.3d 1050, 1055 (9th Cir. 2005).

A special verdict is required to resolve an insanity defense if requested by the government or the defendant, or on the court’s own motion. *See* 18 U.S.C. § 4242(b). The final paragraph in the bracketed section should be included in such instances.

When asserting an insanity defense to a continuing offense, such as illegal reentry under 8 U.S.C. § 1326(a), a defendant must prove that he or she was legally insane for “virtually the entire duration” of his or her offense. *See United States v. Alvarez-Ulloa*, 784 F.3d 558, 568 (9th Cir. 2015) (approving supplemental jury instruction in 8 U.S.C. § 1326(a) prosecution informing jury that insanity defense is negated if defendant ceased being insane for period long enough that he could have reasonably left United States, but knowingly remained).

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