

5.8 Necessity (Legal Excuse)

The defendant contends that [he] [she] acted out of necessity. Necessity legally excuses the crime charged.

The defendant must prove necessity by a preponderance of the evidence. 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].

A defendant acts out of necessity only if at the time of the crime charged:

First, the defendant was faced with a choice of evils and chose the lesser evil;

Second, the defendant reasonably acted to prevent imminent harm;

Third, the defendant reasonably anticipated [his] [her] conduct would prevent such harm; [and]

Fourth, there were no other reasonable legal alternatives to violating the law[.] [; and]

[Fifth, the defendant surrendered to authorities as soon as it was safe to do so.]

If you find that each of these things has been proved by a preponderance of the evidence, you must find the defendant not guilty.

Comment

This defense traditionally covers situations “where physical forces beyond [an] actor’s control rendered illegal conduct as the less of two evils.” *United States v. Perdomo-Espana*, 522 F.3d 983, 987 (9th Cir. 2008) (quoting *Bailey*, 444 U.S. at 409-10). The defense of necessity is usually invoked when the defendant acted in the interest of the general welfare. *United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984). The defendant is not entitled to submit the defense of necessity to the jury unless the proffered evidence, construed most favorably to the defendant, establishes all the elements of the defense. *United States v. Cervantes-Flores*, 421 F.3d 825, 829 (9th Cir. 2005); see also *United States v. Chao Fan Xu*, 706 F.3d 965, 988 (9th Cir. 2013) (“Fear of prosecution for crimes committed is not an appropriate reason to claim necessity.”). The defendant’s proffered necessity defense is analyzed through an objective framework. *Perdomo-Espana*, 522 F.3d at 987; see *United States v. Powers*, 129 F.4th 617, 625-26 (9th Cir. 2025) (clarifying that reasonableness requirement applies to second, third, and fourth elements of necessity defense (citing *Perdomo-Espana*, 522 F.3d at 987-88)).

To be entitled to an instruction on necessity as a defense to the crime charged, an escapee must first offer evidence justifying his continued absence from custody. *See United States v. Bailey*, 444 U.S. 394, 412-13 (1980). The bracketed fifth element should be used in cases of escape only.

Although felon-in-possession cases in the Ninth Circuit are typically analyzed under the

justification defense (Instruction 5.9), *see United States v. Gomez*, 92 F.3d 770, 775 (9th Cir.

1996), the necessity defense may also be applicable to such cases. *See United States v. Barnes*, 895 F.3d 1194, 1204-05 nn.4 & 6 (9th Cir. 2018).

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