

6.14 Lesser Included Offense

The crime of [*specify crime charged*] includes the lesser crime of [*specify lesser included crime*]. If (1) [any] [all] of you are not convinced beyond a reasonable doubt that the defendant is guilty of [*specify crime charged*]; and (2) all of you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime of [*specify lesser included crime*], you may find the defendant guilty of [*specify lesser included crime*].

For the defendant to be found guilty of the lesser crime of [*specify lesser included crime*], the government must prove each of the following elements beyond a reasonable doubt:

[*List elements of lesser included crime.*]

Comment

When a lesser included offense instruction is appropriate, a defendant has the right to elect whether all or only some of the jurors must not be convinced beyond a reasonable doubt of guilt of the greater offense. *United States v. Peneda-Doval*, 614 F.3d 1019, 1030 (9th Cir. 2010); *United States v. Jackson*, 726 F.2d 1466, 1469-70 (9th Cir. 1984).

Pursuant to Fed. R. Crim. P. 31(c), “[a] defendant may be found guilty of . . . an offense necessarily included in the offense charged.” Moreover, a defendant in a capital case has a due process right to a lesser included offense instruction when the facts would allow the jury to impose a life sentence rather than death. *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980). The Ninth Circuit has not yet decided whether a defendant’s right to a lesser included instruction in a noncapital case springs solely from Fed. R. Crim. P. 31(c) or also from the Fifth Amendment Due Process Clause. *United States v. Torres-Flores*, 502 F.3d 885, 887 n.3 (9th Cir. 2007).

Whether an offense is a lesser included offense of a charged crime is a question of law. *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007). “A defendant is entitled to an instruction on a lesser-included offense if the law and evidence satisfy a two-part test: 1) ‘the elements of the lesser offense are a subset of the elements of the charged offense,’ *Schmuck v. United States*, 489 U.S. 705, 716 (1989); and 2) ‘the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit [her] of the greater,’ *Keeble v. United States*, 412 U.S. 205, 208 (1973).” *Arnt*, 474 F.3d at 1163 (alterations in original); see also *United States v. Rivera-Alonzo*, 584 F.3d 829, 835 (9th Cir. 2009) (holding that although simple assault is lesser included offense of both 8- and 20-year felonies described in 18 U.S.C. § 111, defendant was not entitled to lesser included offense instruction when there was “undisputed evidence of physical contact” that precluded conviction on simple assault); *Torres-Flores*, 502 F.3d at 888 (holding that trial court appropriately refused lesser included offense instruction when jury could not have convicted on the lesser offense without also finding all elements of the greater offense); see *United States v. Hernandez*, 476 F.3d 791, 801-02 (9th Cir. 2007) (holding it was reversible error in prosecution for intent to distribute methamphetamine not to instruct on lesser offense of possession of controlled substances when

evidence would permit rational jury to find defendant guilty of lesser offense and acquit him of greater offense).

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