

6.32 Venue

The Indictment alleges that some act [or acts] in furtherance of the crime charged occurred in [*Name of venue*]. There is no requirement that [all aspects of the crime charged] [the entire conspiracy] take place here in [*Name of venue*]. Before you may return a verdict of guilty, however, if that is your decision, the government must convince you that [some act in furtherance of the crime charged] [either the agreement or one of the overt acts in furtherance of the agreement] [one of the expressly contemplated effects of the act [or acts]] took place in [*Name of venue*].

[*Define the specific geographic boundaries of the venue, if needed.*]

Unlike all the specific elements of the crime[s] charged that I have described elsewhere in these instructions, this fact regarding venue need only be proven by a preponderance of the evidence. This means the government need only convince you that it is more likely than not that [some act in furtherance of the crime charged] [part of the conspiracy] took place here.

The government, however, must prove all the offense-specific elements of any crime charged, as I have described elsewhere in these instructions, beyond a reasonable doubt. The lesser standard of preponderance of the evidence only applies to your decision on the issue of venue.

Comment

The Ninth Circuit has explained:

> Controlling circuit law establishes that, although venue is not an element of the offense, nevertheless it must still be proved by the government at trial. Venue is a question of fact that the government must prove by a preponderance of the evidence. It is a jury question. Normally it is not for the court to determine venue and *it is error to not give a requested instruction on venue*. Venue is part of the bedrock of our federal system, and proper venue is a constitutional right, not a mere technicality. The district court therefore could not properly decide venue itself and should have submitted the issue to the jury.

United States v. Moran-Garcia, 966 F.3d 966, 969 (9th Cir. 2020) (footnotes, quotation marks, and brackets omitted; emphasis added); *see also United States v. Ghanem*, 993 F.3d 1113, 1131 (9th Cir. 2021) (“In future cases with similarly muddled postures, a district court might consider using a special-verdict form requiring a venue finding separate from substantive guilt.”).

This instruction is based on the Third Circuit’s model criminal instruction § 3.09, the Sixth Circuit’s model criminal instruction § 3.07, and the Eighth Circuit’s model criminal instruction § 3.13.

In *Smith v. United States*, 599 U.S. 236 (2023), the Supreme Court held that a violation of the Constitution’s Venue Clause does not necessitate dismissal; rather, it warrants a new trial. Accord *United States v. Fortenberry*, 89 F.4th 702, 713 (9th Cir. 2023) (reversing defendant’s conviction obtained in wrong venue “so that he may be retried, if at all, in a proper venue”).

In *United States v. Abouammo*, 122 F.4th 1072 (9th Cir. 2024), the Ninth Circuit held that venue was proper for a prosecution under 18 U.S.C. § 1519 in the district where the false document was (or false documents were) prepared, or in the district where the false document was (or false documents were) intended to stymie an investigation that was ongoing or contemplated. *Id.* at 1092-93, 1096.

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