**11.2** **Conspiracy to Defraud the United States**

**(18 U.S.C. § 371 “Defraud Clause”)**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with conspiring to defraud the United States by obstructing the lawful functions of [*specify government agency*] by deceitful or dishonest means in violation of Section 371 of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, beginning on or about [*date*], and ending on or about [*date*], there was an agreement between two or more persons to defraud the United States by obstructing the lawful functions of [*specify government agency*] by deceitful or dishonest means as charged in the indictment;

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

Third, one of the members of the conspiracy performed at least one overt act [on or after [*date*]] for the purpose of carrying out the conspiracy.

An agreement to defraud is an agreement to deceive or cheat.

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

An overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The government is not required to prove that the defendant personally did one of the overt acts.

**Comment**

Use this instruction when the charged offense is conspiracy to defraud the United States under the “defraud clause” of 18 U.S.C. § 371; otherwise use Instruction 11.1 (Conspiracy— Elements).

In *United States v. Caldwell*,989 F.2d 1056 (9th Cir. 1993), the Ninth Circuit held that defrauding the government under 18 U.S.C. § 371 “means obstructing the operation of any government agency by any ‘deceit, craft or trickery, or at least by means that are dishonest.”’ *Id.* at 1058-59. Thus, an instruction that permitted conviction if a defendant merely agreed to defraud the United States by obstructing the Internal Revenue Service in ascertaining and collecting taxes, but did not require proof of deceit or dishonesty, was insufficient and required reversal. To “convict someone under the ‘defraud clause’ of 18 U.S.C. § 371, the government need only show (1) he entered into an agreement (2) to obstruct a lawful function of the government (3) by deceitful or dishonest means and (4) at least one overt act in furtherance of the conspiracy.” *Id.; accord United States v. Rodman*, 776 F.3d 638, 642 (9th Cir. 2015). Moreover, the conspiracy “need not aim to deprive the government of property,” and neither “the conspiracy’s goal nor the means used to achieve it” need to be illegal. *Caldwell*, 989 F.2d at 1058-59*.*

In *United States v. Miller*, the Ninth Circuit held that intent to defraud for purposes of wire fraud (18 U.S.C. § 1343) and mail fraud (18 U.S.C. § 1341) requires the intent to both “deceive *and* cheat – in other words, to deprive the victim of money or property by means of deception.” 953 F.3d 1095, 1103 (9th Cir. 2020) (emphasis in original).

If the evidence supports an argument the defendant did not act with the requisite intent to defraud because of a good faith misunderstanding about the requirements of law, consider modifying the fifth paragraph of the instruction as follows:

An agreement to defraud is an agreement to deceive or to cheat, but one who acts on an honest and good faith misunderstanding as to the requirements of the law does not act with an intent to defraud simply because [his] [her] understanding of the law is wrong or even irrational. Nevertheless, merely disagreeing with the law does not constitute a good faith misunderstanding of the law because all persons have a duty to obey the law whether or not they agree with it.

This language is derived by analogy to cases recognizing a “good faith” defense when the government must prove a defendant “willfully” violated tax laws. *See* Instruction 4.6 (Willfully) for violations of 26 U.S.C. §§ 201, 7203, 7206, and 7207; *but see United States v. Hickey*, 580 F. 3d 922, 931 (9th Cir. 2009) (no good faith instruction needed when jury properly instructed on intent to defraud).

As long as jurors agree that the government has proven each element of a conspiracy, they need not unanimously agree on the particular overt act that was committed in furtherance of the agreed-upon conspiracy. *See United States v. Gonzalez*, 786 F.3d 714, 718-19 (9th Cir. 2015) (rejecting defendant’s argument that district court erred in failing to instruct jury that it must unanimously agree on which act constituted conspiracy to murder underlying a VICAR charge).

*Revised March 2024*