**18.11 Racketeering Enterprise—Proof of Purpose**

**(18 U.S.C. § 1959)**

 With respect to the fourth element in Instruction \_\_\_\_\_\_\_ [*insert cross reference to pertinent instruction, e.g. Instruction 18.8*], the government must prove beyond a reasonable doubt that the defendant’s purpose was to gain entrance to, or to maintain, or to increase [his] [her] position in the enterprise.

 It is not necessary for the government to prove that this motive was the defendant’s sole purpose, or even the primary purpose, in committing the charged crime. You need only find that enhancing [his] [her] status in [*name of enterprise*] was a substantial purpose of the defendant or that [he] [she] committed the charged crime as an integral aspect of membership in [*name of enterprise*].

 In determining the defendant’s purpose in committing the alleged crime, you must determine what [he] [she] had in mind. Because you cannot look into a person’s mind, you have to determine purpose by considering all the facts and circumstances before you.

**Comment**

 Use this instruction in conjunction with Instructions 18.8 (Violent Crime or Attempted Violent Crime in Aid of Racketeering Enterprise), 18.9 (Racketeering Enterprise—Enterprise Affecting Interstate Commerce—Defined), and 18.10 (Racketeering Activity—Defined). *See* Comment to Instruction 18.8. If the fourth element of Instruction 18.8 is modified, this instruction should also be modified.

 “[T]he purpose element is met if ‘the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership.’” *United States v. Banks*, 514 F.3d 959, 965 (9th Cir. 2008) (quoting *United States v. Pimentel*, 346 F.3d 285, 295-96 (2d Cir. 2003)).

 “VICAR’s purpose element is satisfied even if the maintenance or enhancement of his position in the criminal enterprise was not the defendant’s sole or principal purpose.” *Banks*, 514 F.3d at 965. The law, however, requires a defendant’s purpose be “more than merely incidental.” *Id.* at 969. “[T]he gang or racketeering enterprise purpose does not have to be the only purpose or the main purpose of [a] murder or assault. But it does have to be a substantial purpose.” *Id.* “Murder *while* a gang member is not necessarily a murder *for the purpose* of maintaining or increasing position in a gang, even if it would have the effect of maintaining or increasing position in a gang.” *Id.*

 The Ninth Circuit held that it was not error to instruct on an alternate *Pinkerton* theory

(co-conspirator’s liability), even though under *Pinkerton* it is not necessary that the defendant

personally act for the purpose of maintaining his position in the enterprise provided that he had

that intent when he joined the conspiracy. *United States v. Houston*, 648 F.3d 806, 818-19 (9th

Cir. 2011).

 In *United States v. Smith*, 831 F.3d 1207, 1217-18 (9th Cir. 2016), the Ninth Circuit considered whether it was error for the district court to instruct the jury that the defendant’s purpose “must be more than merely incidental.” The court noted this phrasing could imply a standard that was too low, which could result in error. *Id*. at 1219. The court noted, however, that the instruction should not use the word “dominant” to describe the defendant’s purpose because it “has a flavor” “suggest[ing] that the standard is very high.” *Id*. Ultimately the court declined to decide which word should be used but said that “[s]ubstantial would convey the idea with more precision.” *Id*..

*Revised Jan. 2019*