**21.3 Passing or Attempting to Pass False Papers**

**Through Customhouse** **(18 U.S.C. § 545)**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with [passing] [attempting to pass] a [[false] [forged] [fraudulent]] [*specify writing*] in violation of Section 545 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, the defendant knowingly [[passed] [attempted to pass]] [*specify writing*] through a customhouse of the United States;

Second, the defendant knew that the [*specify writing*] was [false] [forged] [fraudulent];

Third, the defendant acted willfully with intent to defraud the United States; [and]

Fourth, the [*specify writing*] had a natural tendency to influence, or was capable of influencing, action by the United States[.] [; and]

[Fifth, the defendant did something that was a substantial step toward committing the crime.

A “substantial step” is conduct that strongly corroborated the defendant’s intent to commit the crime. To constitute a substantial step, a defendant’s act or actions must unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances. Mere preparation is not a substantial step toward committing the crime.

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime.]

**Comment**

*See* Comment to Instruction 4.6 (Willfully).

This instruction may be used when the defendant is charged with the crime of passing false papers through a customhouse. The bracketed fifth element should be used when defendant is charged with an attempt to do so. For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of the crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

This instruction relates to the second clause of the first paragraph of 18 U.S.C. § 545. If the charge is based on the first clause of the first paragraph, use Instruction 21.1 (Smuggling or Attempting to Smuggle Goods). Instructions 21.4 (Importing Merchandise Illegally) and 21.5 (Receiving, Concealing, Buying, or Selling Smuggled Merchandise) concern violations of the second paragraph of § 545.

In *Neder v. United States*, 527 U.S. 1 (1999), the Court explained that materiality is a necessary aspect of the legal concept of fraud, which is incorporated into criminal statutes concerning fraud unless the statute says otherwise. *Id*. at 22-23 (holding materiality of falsehood must be proved in prosecution under bank, mail, and wire fraud statutes). The common law test for materiality in the false statement statutes, as reflected in the third element of this instruction, is the preferred formulation. *United States v. Peterson*, 538 F.3d 1064, 1072 (9th Cir. 2008).

The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, “[t]o constitute a substantial step, a defendant’s actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances.” *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007) (per curiam) (quoting *United States v. Nelson*, 66 F.3d 1036, 1042 (9th Cir. 1995)).

The “strongly corroborated” language in this instruction comes from *United States v. Snell*, 627 F.2d 186, 187 (9th Cir. 1980) (per curiam) (“A conviction for attempt requires proof of culpable intent and conduct constituting a substantial step toward commission of the crime that strongly corroborates that intent.”) and *United States v. Darby*, 857 F.2d 623, 625 (9th Cir. 1988) (same).

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

“[A] person may be convicted of an attempt to commit a crime even though that person may have actually completed the crime.” *United States v. Rivera-Relle*, 333 F.3d 914, 921 (9th Cir. 2003).

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