**3.2 Silence in the Face of Accusation**

**Comment**

 A silence in the face of accusation instruction is a permissive inference instruction and, as such, the Committee recommends that it generally not be given.

 If a defendant is in custody, silence in the face of an accusatory statement does not constitute an admission of the truth of the statements. *Doyle v. Ohio*, 426 U.S. 610, 617-19 (1976). Such evidence should not be received, and no instruction will be necessary. *Arnold v. Runnels*, 421 F.3d 859, 869 (9th Cir. 2005).

 If a defendant is not in custody, evidence of his refusal to answer an officer’s questions may be admissible as substantive evidence of guilt. *Salinas v. Texas*, 133 S. Ct. 2174, 2177-78 (2013) (holding that use at trial of petitioner’s silence to suggest “that he was guilty” was constitutional because petitioner did not invoke Fifth Amendment privilege against self-incrimination).

 The Committee includes former Instruction 4.2 for reference, as it recites the factual findings the court must make to admit into evidence silence in the face of accusation, and in some circumstances it may be appropriate to give the instruction if the facts warrant it and it is requested by the defendant. The text of the instruction is based on judicial interpretation*. See, e.g.*, *United States v. McKinney*, 707 F.2d 381, 384 (9th Cir. 1983); *United States v. Sears*, 663 F.2d 896, 904-05 (9th Cir. 1981); *United States v. Giese*, 597 F.2d 1170, 1195-96 (9th Cir. 1979).

 Former Instruction 4.2 in the Manual of Model Criminal Jury Instructions For The Ninth Circuit (2003) read as follows:

Evidence has been introduced that statements accusing the defendant of the crime charged in the indictment were made, and that the statements were neither denied nor objected to by the defendant. If you find that the defendant actually was present and heard and understood the statements, and that they were made under such circumstances that the statements would have been denied if they were not true, then you may consider whether the defendant’s silence was an admission of the truth of the statements.

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