**4.1 Aiding and Abetting (18 U.S.C. § 2(a))**

A defendant may be found guilty of [*specify crime charged*], even if the defendant personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To “aid and abet” means intentionally to help someone else commit a crime. To prove a defendant guilty of [*specify crime charged*] by aiding and abetting, the government must prove each of the following beyond a reasonable doubt:

First, someone else committed [*specify crime charged*];

Second, the defendant aided, counseled, commanded, induced, or procured that person with respect to at least one element of [*specify crime charged*];

Third, the defendant acted with the intent to facilitate [*specify crime charged*]; and

Fourth, the defendant acted before the crime was completed.

It is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit [*specify crime charged*].

A defendant acts with the intent to facilitate the crime when the defendant actively participates in a criminal venture with advance knowledge of the crime [and having acquired that knowledge when the defendant still had a realistic opportunity to withdraw from the crime].

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

**Comment**

Use this instruction with an instruction on the elements of the underlying substantive crime.

The Supreme Court has stated that the federal aiding and abetting statute has two primary components: “a person is liable under § 2 if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense’s commission.” *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014). The defendant’s conduct need not facilitate each and every element of the crime; a defendant can be convicted as an aider and abettor even if the defendant’s conduct “relates to only one (or some) of a crime’s phases or elements.”  *Id*. at 1246-47. The intent requirement is satisfied when a person actively participates in a criminal venture with advance knowledge of the circumstances constituting the elements of the charged offense. *Id*. at 1248–49; *see* *also* *United States v. Goldtooth*, 754 F.3d 763, 769 (9th Cir. 2014) (reversing defendants’ convictions for aiding and abetting robbery on Indian reservation because there was no evidence that defendants had foreknowledge that robbery was to occur).

In *Rosemond*, the defendant was charged with aiding and abetting the crime of using a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. § 924(c). The Supreme Court held that the government need not necessarily prove that the defendant took action with respect to any firearm, so long as the government proves that the defendant facilitated another element—drug trafficking. *Rosemond*, 134 S. Ct. at 1247. It was necessary, however, that the government prove that the defendant had advance knowledge of the firearm. *Id.* at 1249-50. *See* Instruction 14.22 (Firearms—Using, Carrying, or Brandishing in Commission of Crime of Violence or Drug Trafficking Crime).

If, as in *Rosemond*, there is an issue as to when the defendant learned of a particular circumstance that constitutes an element of the crime, the judge should further instruct the jury that the defendant must have learned of the circumstance at a time when the defendant still had a realistic opportunity to withdraw from the crime. *See Rosemond*, 134 S. Ct. at 1251-52 & n.10 (instruction telling jury to consider whether Rosemond “knew his cohort used a firearm” was erroneous because instruction “failed to convey that Rosemond had to have advance knowledge . . . that a confederate would be armed” such that “he c[ould] realistically walk away”).

Aiding and abetting is not a separate and distinct offense from the underlying substantive crime but is a different theory of liability for the same offense. *United States v. Garcia*, 400 F.3d 816, 820 (9th Cir. 2005). An aiding and abetting instruction is proper even when the indictment does not specifically charge that theory of liability because all indictments are read as implying that theory in each count. *United States v. Vaandering*, 50 F.3d 696, 702 (9th Cir. 1995); *United States v. Armstrong*, 909 F.2d 1238, 1241-42 (9th Cir. 1990); *United States v. Jones*, 678 F.2d 102, 104 (9th Cir. 1982)*. See also United States v. Gaskins*,849 F.2d 454, 459 (9th Cir. 1988); *United States v. Sayetsitty,* 107 F.3d 1405, 1412 (9th Cir. 1997).

A person may be convicted of aiding and abetting despite the prior acquittal of the principal. *Standefer v. United States,* 447 U.S. 10, 20 (1980); *United States v. Mejia-Mesa*, 153 F.3d 925, 930 (9th Cir. 1998). Moreover, the principal need not be named or identified; it is necessary only that the offense was committed by somebody and that the defendant intentionally did an act to help in its commission. *Mejia-Mesa*, 153 F.3d at 930 (citing *Feldstein v. United States,* 429 F.2d 1092, 1095 (9th Cir. 1970)).

The defendant’s deliberate ignorance of the actions taken by another person who commits a crime is sufficient to satisfy the knowledge required for the offense of aiding and abetting that crime. *United States v. Nosal*, 844 F.3d 1024, 1039-40 (9th Cir. 2016) (approving instruction that defendant acted “knowingly” if he “was aware of a high probability that [other employees] had gained unauthorized access to a computer . . . or misappropriated trade secrets . . . without authorization . . . and deliberately avoided learning the truth.”). For a definition of “deliberate ignorance,” *see* Instruction 4.9 (Deliberate Ignorance).

No specific unanimity instruction on the issue of who acted as principal or aider and abettor is necessary, *id.*, nor does the jury need to reach unanimous agreement on the manner (e.g., “procured,” “aided,” “abetted,” “counseled,” “induced,” or “commanded”) by which the defendant provided assistance. *United States v. Kim*, 196 F.3d 1079, 1083 (9th Cir. 1999).

The last paragraph of this instruction has been expressly approved in *Vaandering*, 50 F.3d at 702. It may be unnecessary to give the last paragraph if there is no dispute as to the identities of

the principal and the aider and abettor.

*Revised Sept. 2019*