**6.2 Charge Against Defendant Not Evidence—Presumption**

**of Innocence—Burden of Proof**

The indictment is not evidence. The defendant has pleaded not guilty to the charge[s]. The defendant is presumed to be innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. In addition, the defendant does not have to testify or present any evidence. The defendant does not have to prove innocence; the government has the burden of proving every element of the charge[s] beyond a reasonable doubt.

**Comment**

The trial judge has wide discretion as to whether the jury should be provided with a copy of the indictment for use during jury deliberations. The Ninth Circuit has said that when a district judge permits the jury to have a copy of the indictment, the court should caution the jury that the indictment is not evidence.  *See United States v. Utz*, 886 F.2d 1148, 1151-52 (9th Cir. 1989) (per curiam) (permissible to give each juror a copy of indictment if judge cautions jury that indictment is not evidence).

In *United States v. Garcia-Guizar*, 160 F.3d 511, 524 (9th Cir. 1998), the Ninth Circuit held that failure to give a presumption-of-innocence instruction at the end of the case is not plain error if the record indicates the jury was aware of the presumption of innocence. Nonetheless, “it is preferable for the court” to give one “when charging the jury.” *Id.* “Although the Constitution does not require jury instructions to contain any specific language, the instructions must convey both that a defendant is presumed innocent until proven guilty and that he may only be convicted upon a showing of proof beyond a reasonable doubt.” *Gibson v. Ortiz*, 387 F.3d 812, 820 (9th Cir. 2004), *overruled on other grounds by* *Byrd v. Lewis*, 566 F.3d 855 (9th Cir. 2009). “Any jury instruction that ‘reduce[s] the level of proof necessary for the Government to carry its burden . . . is plainly inconsistent with the constitutionally rooted presumption of innocence.’” *Id.* (quoting *Cool v. United States*, 409 U.S. 100, 104 (1972)) (alteration and omission in original). The words “unless and until” adequately inform the jury of the presumption of innocence. *United States v. Lopez*, 500 F.3d 840, 847 (9th Cir. 2007).

*See also* Jury Instructions Committee of the Ninth Circuit, A Manual on Jury Trial Procedures § 4.6 (2013).

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