**7.2 Alien—Illegal Transportation or Attempted**

**Transportation (8 U.S.C. § 1324(a)(1)(A)(ii))**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with [attempted] illegal transportation of an alien in violation of Section 1324(a)(1)(A)(ii) of Title 8 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, [*name of alien*] was an alien;

Second, [*name of alien*] was not lawfully in the United States;

Third, the defendant [knew] [acted in reckless disregard of the fact] that [*name of alien*] was not lawfully in the United States; [and]

Fourth, the defendant knowingly [[transported or moved] [attempted to transport or move]] [*name of alien*] to help [him] [her] remain in the United States illegally[.] [; and]

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

A “substantial step” is conduct that strongly corroborates a 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.]

An alien is a person who is not a natural-born or naturalized citizen of the United States. An alien is not lawfully in this country if the person was not duly admitted by an immigration officer.

A person acts with reckless disregard if: (1) the person is aware of facts from which a reasonable inference could be drawn that the alleged alien was in fact an alien in the United States unlawfully; and (2) the person actually draws that inference.

**Comment**

*See* Comment to Instruction 7.1 (Alien—Bringing or Attempting to Bring to the United States (Other than Designated Place)).

“Reckless disregard” is not defined in Title 8, United States Code, but the Ninth Circuit has clarified that “reckless disregard” includes both an objective prong and a subjective prong. *United States v. Rodriguez*, 880 F.3d 1151, 1161 (9th Cir. 2018) (“[A] correct definition of ‘reckless disregard,’ consistent with Supreme Court and Ninth Circuit law, would include ‘the defendant’s disregard of a risk of harm of which the defendant is aware.’”) (internal brackets omitted).

Statutory maximum sentences under § 1324 are increased for offenses done for commercial advantage or private financial gain, or which caused serious bodily injury, placed the life of any person in jeopardy, or resulted in the death of a person. In such cases, a special jury finding is required.

If the defendant is charged with transportation of illegal aliens resulting in deaths under 8 U.S.C. § 1324(a)(1)(A)(ii) and (a)(1)(B)(iv), the government must prove beyond a reasonable doubt that the defendant’s conduct was the proximate cause of the charged deaths.  *United States v. Pineda-Doval*, 614 F.3d 1019, 1026-28 (9th Cir. 2010). In such cases, the instruction should be modified to instruct on the proximate cause element of “resulting in death.”

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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