**7.3 Alien—Harboring or Attempted Harboring**

**(8 U.S.C. § 1324(a)(1)(A)(iii))**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with [attempted] harboring of an alien in violation of Section 1324(a)(1)(A)(iii) 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 [[harbored, concealed, or shielded from detection] [attempted to harbor, conceal, or shield from detection]] [*name of alien*] with intent to violate the law[.] [; 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.]

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 Instructions 7.1 (Alien—Bringing or Attempting to Bring to United States (Other than Designated Place)) and 7.2 (Alien—Illegal Transportation or Attempted Illegal Transportation).

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.

The defendant acts with “reckless disregard” only if “the defendant herself [is] aware of

facts from which an inference of risk could be drawn and the defendant . . . actually draw[s] that

inference.” *United States v. Tydingco*, 909 F.3d 297, 304 (2018) (emphasis in original) (citing *United States v. Rodriguez*, 880 F.3d 1151, 1159-62 (9th Cir. 2018)).

The defendant must “intend[] to violate the law.” *Tydingco*, 909 F.3d at 302-03. Prior

versions of this instruction required the jury to specifically find that the defendant harbored the

alien “for the purpose of avoiding the alien’s detection by immigration authorities.” However,

although proving that the defendant sought to avoid the alien’s detection is one way to demonstrate the requisite intent, it is not the only way. *Id*. at 304. “For example, a defendant who chooses to publicize her harboring of an illegal alien to call attention to what she considers an unjust immigration law intends to violate the law, even though she does not intend to prevent detection.” *Id*.

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).

“To harbor” means to provide “shelter to.” *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1017 n.9 (9th Cir. 2013).

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).

*Revised May 2023*