**9.7 Hobbs Act—Extortion or Attempted Extortion Under**

**Color of Official Right** **(18 U.S.C. § 1951)**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with [attempted] extortion under color of official right in violation of Section 1951 of Title 18 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, the defendant was a public official;

Second, the defendant [[obtained] [intended to obtain]] [*specify property*] that the defendant knew [he] [she] was not entitled to receive;

[Third, the defendant knew that the [*specify property*] [[was] [would be]] given in return for [taking] [withholding] some official action; [and]]

*or*

[Third, the defendant knew that the [*specify property*] [[was] [would be]] given in return for an express promise to perform a particular official action; and]

Fourth, commerce or the movement of an article or commodity in commerce from one state to another [was] [would have been] affected in some way[.] [; 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.]

[The acceptance by a public official of a campaign contribution does not, in itself, constitute a violation of law even though the donor has business pending before the official. However, if a public official demands or accepts [money] [property] [some valuable right] in exchange for a specific requested exercise of official power, such a demand or acceptance does constitute a violation regardless of whether the payment is made in the form of a campaign contribution.]

**Comment**

If the defendant is not a public official, then this instruction should be modified to include a requirement that the government prove that the defendant either conspired with a public official or aided and abetted a public official. *United States v. McFall*, 558 F.3d 951, 960 (9th Cir. 2009). A Hobbs Act conspiracy may exist even if some members of the conspiracy are not public officials and thus cannot complete the offense. *Ocasio v. United States*, 136 S. Ct. 1423, 1429-32 (2016). The object of the conspiracy need not be to get property from a person outside the conspiracy; it is sufficient that the property comes from another member of the conspiracy. *Id*. at 1429, 1434-35.

If there is any question in the case about the “official” character of the action sought by the defendant, give Instruction 10.1 (Official Action—Defined). When using that instruction in connection with Instruction 9.7, the court should change the term “official act” to “official action.”

When the property is not a campaign contribution, the government need only show that the public official obtained payment to which he or she was not entitled knowing that the payment was made in exchange for some official act. *See* *United States v. Kincaid-Chauncey*,556 F.3d 923, 937-38 (9th Cir. 2009). In such a case the first version of the third element should be used and the final paragraph should not be included.

The second version of the third element, and the final paragraph should be included in cases involving an alleged campaign contribution. *See* *McCormick v. United States*, 500 U.S. 257 (1991); *Kincaid-Chauncey*,556 F.3d at 936. The express promise need not actually be carried out. It is sufficient if the promise to act is given in exchange for the property. *See Evans v. United States*,504 U.S. 255, 267 (1992).

“To 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).

It is unclear whether 18 U.S.C. § 1951 requires specific intent as an element. In *United States v. Ornelas*, 906 F.3d 1138 (9th Cir. 2018), the Ninth Circuit discussed the intent element in statutory offenses that appear to “simply punish” common law crimes. In footnote 2, however, the Ninth Circuit distinguished federal statutes that “simply punish” a common law offense (thus requiring importation of common law elements) from federal statutes that provide their own elements (and thus not requiring importation of common law elements). *Id.* at 1143 n.2. The circuits are currently split as to whether the Hobbs Act requires specific intent to steal. *Compare United States v. Thomas*, 8 F.3d 1552, 1562-63 (11th Cir.1993), *with* *United States v. Nedley*, 255 F.2d 350, 355 (3d Cir. 1958).

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