**12.3 Controlled Substance—Attempted Possession with Intent to Distribute**

**(21 U.S.C. §§ 841(a)(1) and 846)**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with attempted possession of [*specify* *controlled substance*] with intent to distribute in violation of Sections 841(a)(1) and 846 of Title 21 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 intended to possess any controlled substance with the intent to distribute it to another person; and

Second, 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.

To “possess with the intent to distribute” means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

**Comment**

*See* Comment to Instructions 12.1 (Controlled Substance–Possession with Intent to Distribute) and 12.2 (Determining Amount of Controlled Substance). *See United States v. Morales-Perez*, 467 F.3d 1219, 1222 (9th Cir. 2006) (citing *United States v. Davis*, 960 F.2d 820, 826-27 (9th Cir. 1992)); *United States v. Esquivel-Ortega*, 484 F.3d 1221, 1228 (9th Cir. 2007) (*citing to United States v. Estrada-Macias*, 218 F.3d 1064, 1066 (9th Cir. 2000) (jury instruction requiring government to prove that defendants knowingly associated themselves with crime and were not mere spectators)).

The Ninth Circuit has stated, in a case in which the defendant pleaded guilty to attempted possession of a controlled substance with the intent to distribute, in violation of § 841(a), and the government sought a sentence under the heightened penalty provisions of § 841(b) based on type and quantity, that the government was required to prove the defendant’s intent to possess a *particular* controlled substance. *United States v. Hunt*, 656 F.3d 906, 912-13 (9th Cir. 2011). By contrast, in a case in which the defendant pleaded guilty to actual importation of a controlled substance in violation of § 960(a) (an analogous statute), the Ninth Circuit held that “the government need not prove that the defendant knew the precise type or quantity of the drug he imported” for the heightened penalties based on drug type and quantity to apply. *United States v. Jefferson*, 791 F.3d 1013, 1014-15, 1019 (9th Cir. 2015); *see also* *United States v. Carranza*, 289 F.3d 634, 644 (9th Cir. 2002) (“A defendant charged with importing or possessing a drug is not required to know the type and amount of drug.”). The Committee believes that there may be tension between *Hunt* and *Jefferson* on the issue of a defendant’s knowledge or intent regarding drug type and quantity. At least one district judge has limited the holding in *Hunt* to attempt crimes. *See United States v. Rivera*, No. 10-cr-3310-BTM, 2014 WL 3896041, at \*2 (S.D. Cal., Aug. 7, 2014).

Regarding cases involving a “controlled substance analogue” as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in *McFadden v. United States*, 135 S. Ct. 2298 (2015), that, to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug schedules—regardless of whether he knew the particular identity of the substance—or “that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue.” *Id*. at 2305.

“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) (internal quotations omitted).

The “strongly corroborated” language in this instruction comes from *United States v. Snell*, 627 F.2d 186, 187 (9th Cir. 1980) (“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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