**12.7 Controlled Substance—Attempted Distribution or Manufacture**

**(21 U.S.C. §§ 841(a)(1) and 846)**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with attempted [distribution] [manufacture] of [*specify controlled substance*] 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 [distribute [*specify* *controlled substance*] to another person] [manufacture [*specify* *controlled substance*]];

Second, the defendant knew that it was [*specify* *controlled substance*] or some other federally controlled substance; and

Third, 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 the commission of the crime of [distribution] [manufacture] of [*specify* *controlled substance*].

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 distribute” means to deliver or transfer possession of [*specify* *controlled substance*] to another person, with or without any financial interest in that transaction.]

**Comment**

*See* Comment to Instructions 12.1 (Controlled Substance–Possession with Intent to Distribute), 12.2 (Determining Amount of Controlled Substance), and 12.4 (Controlled Substance–Distribution or Manufacture).

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) (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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