**20.27 Transportation or Attempted Transportation for**

**Prostitution or Criminal Sexual Activity (18 U.S.C. § 2421)**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with [transporting] [attempting to transport] a person with intent that the person engage in [prostitution] [criminal sexual activity] in violation of Section 2421 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 knowingly [transported] [attempted to transport] a person in [interstate commerce] [foreign commerce] [*specify territory or possession of the United States*]; [and]

Second, the defendant [transported] [attempted to transport] a person with the intent that such person engage in [prostitution] [*describe criminal sexual activity*] [.] [;] [; and]

[Third, that [if the sexual activity had occurred] [based upon the sexual activity that occurred], the defendant could have been charged with a criminal offense under the laws of [the United States] [*insert the state or territory*]. [In [*state or territory*], it is a criminal offense to [*describe proposed sexual activity*]] [.] [; and]]

[*If the defendant is charged with attempt:* [Third] [Fourth], 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.]

A defendant transports a person with the intent that such person engage in [prostitution] [*describe criminal sexual activity*] if the intended [prostitution] [*describe criminal sexual activity*] was a dominant, significant, or motivating purpose of the transportation.

**Comment**

The bracketed language setting forth the first option for the third element is to be used when the defendant is charged with transporting or attempting to transport an individual with the intent that the individual engages in “any sexual activity for which any person can be charged with a criminal offense.” 18 U.S.C. § 2421(a). Further, “[w]here a federal prosecution hinges on an interpretation or application of state law, it is the district court’s function to explain the relevant state law to the jury.” *United States v. Lopez*, 4 F.4th 706, 730 (9th Cir. 2021) (quoting *United States v. Davila-Nieves*, 670 F.3d 1, 8 (1st Cir. 2012)). While the court in *Lopez* considered a conviction under 18 U.S.C. § 2422(b), its conclusions with respect to the jury instructions are also applicable here. In *Lopez*, the evidence against the defendant implicated a sexual conduct offense in Guam. 4 F.4th at 713, 724*.* The court held that while the district court was not required to instruct the jury on the elements of the particular predicate offense as if they were elements of the offense charged, the district court nonetheless erred in failing to instruct the jury on the applicable criminal laws of Guam against which the defendant’s proposed sexual conduct was to be evaluated. *Id.* at 729-31.

The bracketed language stating an additional element (starting “Third/Fourth”) 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).

“In interpreting the elements for transportation and travel offenses, we have consistently held that a dominant, significant, or motivating purpose to engage in criminal sexual activity satisfies the intent requirement.” *United States v. Flucas*, 22 F.4th 1149, 1154 (9th Cir. 2022). In *Flucas*, the court held that the district court “correctly instructed the jury . . . with respect to the intent requirement[]” in § 2421(a) when the district court instructed that it was “sufficient if the government proves beyond a reasonable doubt that the sexual activity was a significant, dominating or motivating purpose.” *Id.* at 1154-55, 1164. *See also United States v. Pepe*, 81 F.4th 961, 977 (9th Cir. 2023) (“Ninth Circuit precedent clearly establishes that a defendant can have mixed motives for traveling.”).

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 Dec. 2023*