

4.4 Attempt

The defendant is charged in the indictment with attempting to commit [*specify crime charged*]. 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 [*specify elements of crime charged*]; and

Second, the defendant did something that was a substantial step toward committing the crime.

A “substantial step” is conduct that strongly corroborated 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.

Comment

This definition should follow the elements instruction for the substantive crime.

Where this Manual provides a model instruction covering attempt to commit a specific offense, such instruction should be used instead of this generic attempt instruction. This instruction is appropriate only when a defendant is accused of attempting to commit a crime for which there is no specific model instruction.

This Manual contains model instructions for attempt to commit the following specific offenses:

Instruction 7.1 Alien–Bringing or Attempting to Bring to the United States (Other than Designated Place)

Instruction 7.2 Alien–Illegal Transportation or Attempted Transportation

Instruction 7.3 Alien–Harboring or Attempted Harboring

Instruction 7.5 Alien–Bringing or Attempting to Bring to the United States (Without Authorization)

Instruction 7.7 Alien–Deported Alien Reentering United States Without Consent–Attempt

Instruction 9.4 Attempted Bank Robbery

Instruction 9.5 Hobbs Act–Extortion or Attempted Extortion by Force

Instruction 9.6 Hobbs Act–Extortion or Attempted Extortion by Nonviolent Threat

Instruction 9.7 Hobbs Act–Extortion or Attempted Extortion Under Color of Official
Right

Instruction 9.8 Hobbs Act–Robbery or Attempted Robbery

Instruction 12.3 Controlled Substance–Attempted Possession with Intent to Distribute

Instruction 12.7 Controlled Substance–Attempted Distribution or Manufacture

Instruction 12.9 Controlled Substance–Attempted Distribution to Person Under 21
Years

Instruction 12.11 Controlled Substance–Attempted Distribution in or Near School

Instruction 12.13 Controlled Substance–Attempted Employment of Minor to Violate
Drug Laws

Instruction 13.2 Passing or Attempting to Pass Counterfeit Obligations

Instruction 13.8 Passing or Attempting to Pass Forged Endorsement on Treasury
Check, Bond, or Security of United States

Instruction 15.38 Attempted Bank Fraud–Scheme to Deprive Bank of Intangible Right
of Honest Services

Instruction 15.40 Attempted Bank Fraud–Scheme to Defraud by False Promises

Instruction 16.5 Attempted Murder

Instruction 17.5 Attempted Kidnapping–Foreign Official or Official Guest

Instruction 17.6 Attempted Kidnapping–Federal Officer or Employee

Instruction 18.1 Travel Act–Interstate or Foreign Travel in Aid of Racketeering
Enterprise

Instruction 18.3 Financial Transaction or Attempted Transaction to Promote Unlawful
Activity

Instruction 18.4 Laundering or Attempting to Launder Monetary Instruments

Instruction 18.5 Transporting or Attempting to Transport Funds to Promote Unlawful Activity

Instruction 18.6 Transporting or Attempting to Transport Monetary Instruments for the Purpose of Laundering

Instruction 18.8 Violent Crime or Attempted Violent Crime in Aid of Racketeering Enterprise

Instruction 20.2 and 20.4 Attempted Aggravated Sexual Abuse

Instruction 20.4 Attempted Aggravated Sexual Abuse—Administration of Drug, Intoxicant, or Other Substance

Instruction 20.6 Attempted Aggravated Sexual Abuse of Child

Instruction 20.8 Attempted Sexual Abuse—By Threat

Instruction 20.10 Attempted Sexual Abuse—Incapacity of Victim

Instruction 20.12 Attempted Sexual Abuse of Minor

Instruction 20.14 Attempted Sexual Abuse of Person in Official Detention

Instruction 20.27 Transportation or Attempted Transportation for Prostitution or Criminal Sexual Activity

Instruction 20.28 Persuading or Coercing to Travel in Prostitution or Sexual Activity

Instruction 20.29 Using or Attempting to Use the Mail or a Means of Interstate Commerce to Persuade or Coerce a Minor to Travel to Engage in Prostitution or Sexual Activity

Instruction 21.1 Smuggling or Attempting to Smuggle Goods

Instruction 21.2 Smuggling or Attempting to Smuggle Goods from the United States

Instruction 21.3 Passing or Attempting to Pass False Papers Through Customhouse

Instruction 22.7 Forcible or Attempted Rescue of Seized Property

Instruction 23.11 Attempted Mail Theft

Instruction 24.2 Arson or Attempted Arson

Instruction 24.5 Attempted Escape

“There is no general federal ‘attempt’ statute. A defendant therefore can only be found guilty of an attempt to commit a federal offense if the statute defining the offense also expressly proscribes an attempt.” (citations omitted). *United States v. Hopkins*, 703 F.2d 1102, 1104 (9th Cir. 1983). However, many federal statutes defining crimes also expressly proscribe attempts.

“[A]ttempt is a term that at common law requires proof that the defendant had the specific intent to commit the underlying crime and took some overt act that was a substantial step toward committing that crime.” *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1192 (9th Cir. 2000) (en banc). 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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