Chapter 5.00

ATTEMPTS

Table of Instructions

5.01 ATTEMPT – BASIC ELEMENTS

(1) Count ___ of the indictment accuses the defendant of attempting to commit the crime of _____ in violation of federal law. For you to find the defendant guilty of this crime, you must be convinced that the government has proved both of the following elements beyond a reasonable doubt:

(A) First, that the defendant intended to commit the crime of _____.

(B) And second, that the defendant did some overt act that was a substantial step towards committing the crime of _____.

(C) Merely preparing to commit a crime is not a substantial step. The defendant's conduct must go beyond mere preparation, and must strongly confirm that he intended to _____. But the government does not have to prove that the defendant did everything except the last act necessary to complete the crime. A substantial step beyond mere preparation is enough.

(2) If you are convinced that the government has proved both of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about either one of these elements, then you must find the defendant not guilty.

Committee Commentary 5.01
(current through December 31, 2007)

The Committee made no change in the instruction.

The Sixth Circuit has not addressed this instruction directly, but no significant change has occurred in the Sixth Circuit definition of attempt. The Sixth Circuit continues to rely on United States v. Pennyman, 889 F.2d 104, 106 (6th Cir. 1989), which is discussed below in the 1991 Commentary. *See, e.g.*, United States v. Price, 134 F.3d 340, 350 (6th Cir. 1998); United States v. Shelton, 30 F.3d 702, 705 (6th Cir. 1994) . In addition to relying on *Pennyman*, the court also continues to rely on United States v. Williams, 704 F.2d 315 (6th Cir. 1983) and United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974). *See* United States v. Bilderbeck, 163 F.3d 971, 975 (6th Cir. 1999).

Although no change has occurred, the court has articulated some refinements to attempt law. In a case relying on the *Pennyman* standard generally, the court also characterized evidence as sufficient to establish attempt if it shows that the "defendant's conduct goes beyond 'preliminary activities,' and 'a fragment of the crime [was] essentially ... in progress.'" United States v. Price, *supra* at 351, *quoting* United States v. Dolt, 27 F.3d 235, 239 (6th Cir. 1994) and United States v. Hadley, 918 F.2d 848, 853 (9th Cir. 1990). The court has noted that attempt "is to be construed in a 'broad and all inclusive manner.'" United States v. Bilderbeck, *supra* at 975, *quoting* United States v. Reeves, 794 F. 2d 1101, 1103 (6th Cir. 1986). The proof of the substantial step need not be sufficient to prove the criminal intent, but only to corroborate it; the act and intent are ultimately separate inquiries. *Bilderbeck*, 163 F.3d at 975. The standard for

evaluating the substantial step element is objective: whether any reasonable person could find that the acts committed would corroborate the firmness of a defendant's criminal intent, assuming the defendant did, in fact, intend to commit the crime. *Id.* When a defendant engages in active negotiations to purchase drugs, he fulfills the substantial step requirement. *Id.* at 976, *citing Pennyman, supra; Williams, supra;* and United States v. Dworken, 855 F.2d 12, 19 (1st Cir. 1988). No defense of withdrawal, abandonment or renunciation exists after the crime of attempt is complete with proof of intent and acts constituting a substantial step toward the substantive offense. United States v. Shelton, *supra* at 706.

A frequent question is whether the defendant has met the substantial step element in attempted drug crimes. The court often finds this element satisfied. *See, e.g., Price*, 134 F.3d 340 (evidence of conduct sufficient based on defendant's action of assisting in driving, standing surveillance, participating in the examination of the cocaine, and carrying the bag of money).

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There is no general federal statute prohibiting attempts. United States v. Rovetuso, 768 F.2d 809, 821 (7th Cir.1985), cert. denied, 474 U.S. 1076, 106 S.Ct. 838, 88 L.Ed.2d 809 (1986). But many federal statutes defining substantive crimes include express provisions proscribing an attempt to commit the substantive offense. See for example 18 U.S.C. s 2113, which expressly prohibits an attempted bank robbery as well as a completed robbery. In United States v. Williams, 704 F.2d 315 (6th Cir.), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983), the Sixth Circuit generally defined the two requisite elements of an attempt as: "(1) an intent to engage in criminal conduct and (2) the performance of one or more overt acts which constitute a substantial step towards the commission of the substantive offense." Id. at 321. Accord United States v. Pennyman, 889 F.2d 104, 106 (6th Cir.1989) ("the government must establish two essential elements: (1) the intent to engage in the proscribed criminal activity, and (2) the commission of an overt act which constitutes a substantial step towards commission of the proscribed criminal activity"). See also Ninth Circuit Instruction 5.03.

The main case cited by the Sixth Circuit in Williams in support of this general definition was the Second Circuit's decision in United States v. Manley, 632 F.2d 978 (2d Cir.1980), cert. denied, 449 U.S. 1112, 101 S.Ct. 922, 66 L.Ed.2d 841 (1981). In Manley, the Second Circuit said that the "substantial step" required to convict must be "something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime." Id. at 987. The Second Circuit said that the defendant's behavior must be of such a nature that "a reasonable observer viewing it in the context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute." Id. at 988.

The second case cited by the Sixth Circuit in Williams in support of this general definition was the Fifth Circuit's decision in United States v. Mandujano, 499 F.2d 370 (5th Cir.1974), cert. denied, 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed.2d 812 (1975). In Mandujano, the Fifth Circuit approvingly quoted instructions stating that the "substantial step" required to convict must be "conduct strongly corroborative of the firmness of the defendant's criminal

intent." Id. at 376. This language is consistent with the criminal attempt provisions of the Model Penal Code, from which the "substantial step" test was taken. See Model Penal Code s 5.01(2) ("(c)onduct shall not be held to constitute a substantial step ... unless it is strongly corroborative of the actor's criminal purpose").

See generally Seventh Circuit Instruction 5.10, Eighth Circuit Instruction 8.01 and Ninth Circuit Instruction 5.03.

5.02 SHAM CONTROLLED SUBSTANCE CASES

(1) The fact that the substance involved in this case was not real _____ is no defense to the attempt charge. But the government must convince you that the defendant actually thought he was buying [selling] real _____.

(2) The government must show that the defendant's actions uniquely marked his conduct as criminal. In other words, the defendant's conduct, taken as a whole, must clearly confirm beyond a reasonable doubt that he actually thought he was buying [selling] real _____.

Use Note

This instruction should be used when the defendant is charged with an attempted controlled substance offense based on a sale or purchase of sham drugs. This instruction should be given in addition to an instruction outlining the elements of attempt.

If the defendant is charged with buying or selling sham drugs knowing they were sham, the defendant lacks the mens rea for an attempted controlled substances crime and this instruction should not be given.

Committee Commentary 5.02
(current through December 31, 2007)

The Committee made no change in the text of the instruction.

The Committee did change the Use Note in two significant ways. In the first paragraph, the second sentence was added to clarify that in sham drugs cases, this instruction alone is not sufficient but is to be given with the instruction setting out the elements of attempt. Also, the word “fake” was replaced with “sham.” This is not a substantive change but is made for consistency.

The second paragraph in the Use Note is new. It was added to indicate that an attempted controlled substances offense is only implicated if the defendant believed that the substance involved was a real controlled substance. Thus, if the defendant knew that the substance involved was not a controlled substance but was sham drugs, this instruction is not appropriate. In this situation, *i.e*, the drug is sham and the defendant knows it, the appropriate instruction should be based on 21 U.S.C. §§ 802(32) and 813 (the Controlled Substance Analogue Enforcement Act of 1986).

The Sixth Circuit law on sham controlled substances has not changed since the 1991 edition of this instruction. *See, e.g.,* United States v. Allen, 1993 WL 445082 at 4, 1993 U.S. App. LEXIS 28778 at 5 (6th Cir. 1993)(unpublished)(relying on and quoting the *Pennell* standard discussed in the 1991 Committee Commentary).

1991 Edition

In United States v. Pennell, 737 F.2d 521, 524-525 (6th Cir.1984), cert. denied, 469 U.S. 1158, 105 S.Ct. 906, 83 L.Ed.2d 921 (1985), the Sixth Circuit held that the defendant could be convicted of an attempt to possess a controlled substance even though the substance he purchased from government agents was not real cocaine. The Sixth Circuit agreed with the Third Circuit's analysis in United States v. Everett, 700 F.2d 900, 907-908 (3d Cir.1983), that "Congress intended to eliminate the impossibility defense in cases prosecuted under 21 U.S.C. ss 841(a)(1) and 846." Pennell, supra at 525. Accord United States v. Reeves, 794 F.2d 1101, 1104 (6th Cir.) ("there can be no question that the Congressional intent in fashioning the attempt provision as part of an all-out effort to reach all acts and activities related to the drug traffic was all inclusive and calculated to eliminate technical obstacles confronting law enforcement officials"), cert. denied, 479 U.S. 963, 107 S.Ct. 463, 93 L.Ed.2d 408 (1986).

To convict a defendant in a sham delivery case, the government "must, of course, prove the defendant's subjective intent to purchase (or sell) actual narcotics beyond a reasonable doubt." United States v. Pennell, supra, 737 F.2d at 525. And in order to avoid unjust attempt convictions in these types of cases, the Sixth Circuit has held that the following evidentiary standard must be met:

"In order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, (must) mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law." Id.

Accord, United States v. Reeves, supra, 794 F.2d at 1104 ("(t)his standard of proof has been adopted in this circuit").

What this means is that "the defendant's objective conduct, taken as a whole, must unequivocally corroborate the required subjective intent to purchase or sell actual narcotics." United States v. Pennell, supra, 737 F.2d at 525. Accord United States v. Pennyman, supra, 889 F.2d at 106.

5.03 ABANDONMENT OR RENUNCIATION

(No Instruction Recommended)

Committee Commentary 5.03
(current through December 31, 2007)

The Committee made no change in its approach to this instruction and continues to recommend that no instruction be given.

A panel of the Sixth Circuit has endorsed the approach of Instruction 5.03. In United States v. Tanks, 1992 WL 317179, 1992 U.S. App. LEXIS 28889 (6th Cir. 1992) (unpublished), the district court refused to give an instruction on abandonment. On appeal, the panel stated that a defendant is entitled to instructions only on recognized defenses, and since the abandonment defense was not recognized in the Sixth Circuit, he was not entitled to an instruction. The panel quoted the paragraph of commentary to the first edition of Pattern Instruction 5.03 in support of its conclusion that the defense was not recognized. The panel then stated that the defendant presented insufficient evidence to raise the defense at any rate.

In United States v. Shelton, 30 F.3d 702, 706 (6th Cir. 1994), the Sixth Circuit made clear that it does not recognize the defense of abandonment or renunciation, holding that "withdrawal, abandonment and renunciation, however characterized, do not provide a defense to an attempt crime." The court stated that the crime of attempt is "complete with proof of intent together with acts constituting a substantial step toward commission of the substantive offense," but noted that if a defendant withdraws prior to forming the required intent or taking the substantial step, then the question arises if he has committed the offense since the elements of the crime cannot be proved. *Id*.

1991 Edition

No federal cases have explicitly recognized voluntary abandonment or renunciation as a valid defense to an attempt charge. The closest the federal courts have come are two cases which assumed, without deciding, that even if abandonment or renunciation is a defense, the facts of the particular cases did not support a finding that a voluntary abandonment or renunciation had occurred. See United States v. Bailey, 834 F.2d 218, 226-227 (1st Cir.1987); and United States v. McDowell, 705 F.2d 426, 428 (11th Cir.1983). See generally Model Penal Code s 5.01(4).

Given the lack of clear case law supporting the existence of this defense, the Committee does not recommend any instruction on this point.