**12.1 Controlled Substance—Possession with**

**Intent to Distribute (21 U.S.C. § 841(a)(1))**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with possession of [*specify* *controlled substance*] with intent to distribute in violation of Section 841(a)(1) 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 knowingly possessed any controlled substance; and

Second, the defendant possessed it with the intent to distribute it to another person.

[The government is not required to prove the amount or quantity of [*specify* *controlled* *substance*]. It need only prove beyond a reasonable doubt that there was a measurable or detectable amount of [*specify* *controlled substance*].]

It does not matter whether the defendant knew that the substance was [*specify* *controlled substance*]. It is sufficient that the defendant knew that it was some kind of a federally controlled substance.

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

**Comment**

*See* Comment to Instruction 12.4 (Controlled Substance—Distribution or Manufacture), if death or serious bodily injury occurred.

Use the bracketed paragraph only when quantity is not at issue.

The defendant does not need to know what the controlled substance is so long as the defendant knows that he or she has possession of such a substance. *United States v. Jewell*, 532 F.2d 697, 698 (9th Cir. 1976) (en banc). *See also United States v. Soto-Zuniga*, 837 F.3d 992, 1004-05 (9th Cir. 2016) (knowledge of type and quantity of drugs not element of offense).

After *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Ninth Circuit has held that where the amount of drugs “increases the prescribed statutory maximum penalty to which a criminal defendant is exposed,” the amount of drugs must be decided by a jury beyond a reasonable doubt. *See United States v. Garcia-Guizar*, 234 F.3d 483, 488 (9th Cir. 2000). However, the government need not prove that the defendant knew the type or quantity of controlled substance he possessed to obtain either a conviction under § 841(a) or a particular sentence under § 841(b). It is sufficient that the jury finds beyond a reasonable doubt that the defendant actually possessed a certain type and quantity of drugs. *United States v. Jefferson*, 791 F.3d 1013, 1015 (9th Cir. 2015) (holding in context of parallel statute, 21 U.S.C. § 960, that government is not required to prove defendant’s knowledge of type or quantity of drugs either for conviction or for heightened statutory penalties to apply). As a result, if applicable, the court should obtain a jury determination of the amount of drugs involved. *See also United States v. Booker*, 543 U.S. 220 (2005); *United States v. Ameline*,409 F.3d 1073 (9th Cir. 2005) (en banc). When it is necessary to determine an amount of controlled substance, use this instruction with Instruction 12.2 (Determining Amount of Controlled Substance), together with a verdict form similar to the example provided in the Comment to Instruction 12.5. *But see United States v. Hunt*, 656 F.3d 906 (9th Cir. 2011) (discussing effect on sentencing of knowledge of type of drug in attempted possession with intent to distribute case).

The defendant may be entitled to a jury instruction on a lesser included offense of simple possession, 21 U.S.C. § 844(a). *See* Instruction 6.15. *See also United States v. Hernandez*, 476 F.3d 791, 798-800 (9th Cir. 2007).

Possession of a controlled substance with intent to distribute requires the jury to find that the defendant (1) knowingly possessed drugs and (2) possessed them with the intent to deliver them to another person. *See, for example*, *United States v. Orduno-Aguilera*, 183 F.3d 1138, 1140 (9th Cir. 1999); *United States v. Seley*, 957 F.2d 717, 721 (9th Cir. 1992). *See also United States v. Magallon-Jimenez*, 219 F.3d 1109, 1112 (9th Cir. 2000).

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*, 576 U.S. 186 (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 194-95. With respect to the definition of “controlled substance analogue” as meaning “a substance . . . (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II,” 21 U.S.C. § 802(32)(A)(i), substances are “substantially similar” for purposes of the statute if he two chemicals “share a common core of identical chemical structural features and that the subset of differences between the two chemicals does not make a difference in the substance’s ‘relevant characteristics’” *United States v. Galecki*, 89F.4th 713, 731 (9th Cir. 2023) (quoting *United States v. Roberts*, 363 F.3d 118, 124 (2d Cir. 2004)).

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