**12.4 Controlled Substance—Distribution or Manufacture**

 **(21 U.S.C. § 841(a)(1))**

 The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with [distribution] [manufacture] of [*specify* *controlled substance*] 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 [[distributed] [manufactured]] [*specify* *controlled substance*]; and

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

 [“Distributing” means delivering or transferring possession of [*specify* *controlled substance*] to another person, with or without any financial interest in that transaction.]

 [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*].]

[If you find that the defendant is guilty of [[distributing] [manufacturing]] [*specify*

*controlled substance*], then you must determine whether [*name of decedent*]’s [[death] [serious bodily injury]] was a result of the use of the [*specify controlled substance*] [[distributed] [manufactured]] by the defendant. To find that the use of a drug resulted in [[death] [serious bodily injury]], you must unanimously and beyond a reasonable doubt find that “but for” the use of the [*specify controlled substance*] that the defendant [[distributed] [manufactured]], [*name of decedent*] would not have died.

To find a particular controlled substance [[distributed] [manufactured]] by the defendant was a “but for” cause of death, you must find beyond a reasonable doubt that, but for the decedent’s use of the [*specify controlled substance*], the decedent would not have died.

The government does not have the burden of establishing that the defendant intended that death result from the use of [*specify controlled substance*]. Nor does the government have the burden of establishing that the defendant knew, or should have known, that death would result

from the use of the [*specify controlled substance*] that the defendant [[distributed] [manufactured]].

**Comment**

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

A similar instruction was explicitly approved in *United States v. Houston*, 406 F.3d 1121, 1122 n.2 (9th Cir. 2005) (“In order for the defendant to be found guilty of this charge, the

government must prove each of the following elements beyond a reasonable doubt: First, the

defendant knowingly delivered methadone to Trina Bradford. Second, the defendant knew it was

methadone or some other prohibited drug.”).

 Although the government must prove that death or serious bodily injury resulted from the use of the controlled substance for this enhancement to apply, the government need not prove that the death was a foreseeable result of the distribution of the controlled substance. *Houston*, 406 F.3d at 1125 (“Cause-in-fact is required by the ‘results’ language, but proximate cause, at least insofar as it requires that the death have been foreseeable, is not a required element.”).

 “[W]hen Congress made it a crime to ‘knowingly . . . possess with intent to manufacture, distribute, or dispense, a controlled substance . . . , it meant to punish not only those who know they possess a controlled substance, but also those who don’t know because they don’t want to know.” *United States v. Heredia*, 483 F.3d 913, 918 (9th Cir. 2007) (en banc). *See also* Instruction 4.9 (Deliberate Ignorance).

 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)).

It is also unlawful under 21 U.S.C. § 841(a)(1) to dispense or possess with intent to dispense a controlled substance. If that crime is charged, the instruction should be modified accordingly.

In prosecutions involving a physician charged with distributing controlled substances not

“as authorized,” if the defendant produces evidence that his or her conduct was “authorized,” the government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner. *Ruan v. United States*, 597 U.S. 450, 457 (2022); *see also United States v. Pham*, 120 F.4th 1368, 1370-71 (9th Cir. 2024) (providing that a defendant’s “admission that he prescribed controlled substances with intent to act outside the usual course of professional practice and without a legitimate medical purpose” was an admission to the “requisite knowledge of the elements that made his prescriptions not authorized”).

The last four paragraphs of the instruction may be used where the government is seeking

a sentencing enhancement “if death or serious bodily injury results from the use of such

[controlled] substance[s].” 21 U.S.C. § 841(b)(1)(A)-(D). Several of the penalty sections for a violation of 21 U.S.C. §§ 841(a)(1), 846, 859, 860, and/or 861(a)(1) increase the sentence “if death or serious bodily injury results from the use of such [controlled] substance[s].” 21 U.S.C. § 841(b)(1)(A)-(C). “Because the ‘death results’ enhancement increased the minimum and

maximum sentences to which [the defendant] was exposed, it is an element that must be

submitted to the jury and found beyond a reasonable doubt.” *Burrage v. United States*, 571 U.S. 204, 210 (2014). “[A] phrase such as ‘results from’ imposes a requirement of but-for causation.” *Id.* at 214. In *Burrage*, the Supreme Court declined to accept or reject a special rule allowing the government to satisfy the causation requirement by showing that use of the controlled substance was an independently sufficient cause of death or bodily injury. *Id.* at 214-15; *see id.* at 218-19 (“We hold that, at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim’s death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U. S. C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury.”). And although the government must prove that death or serious bodily injury resulted from the use of the controlled substance for this enhancement to apply, the government need not prove that the death was a foreseeable result of the distribution of the controlled substance. *Houston*, 406 F.3d at 1125 (“Cause-in-fact is required by the ‘results’ language, but proximate cause, at least insofar as it requires that the death have been foreseeable, is not a required element.”).

*See* Comment to Instruction 12.21 (Controlled Substance—Statutory Enhancement Based

on Prior Serious Drug Felony or Serious Violent Felony).

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