**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*].]

**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).

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.

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). 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*, 135 S. Ct. 2298 (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 2305.

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*, 142 S.Ct. 2370, 2376 (2022).

*Revised Sept. 2022*