**12.5 Controlled Substance—Conspiracy to Distribute**

**or Manufacture** **(21 U.S.C. §§ 841(a) and 846)**

The defendant is charged in [Count \_\_\_\_\_ of] the indictment with conspiracy to [[distribute] [manufacture]] [*specify controlled substance*] in violation of Section 841(a) and Section 846 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, beginning on or about [*date*] and ending on or about [*date*], there was an agreement between two or more persons to [[distribute] [manufacture]] [*specify* *controlled substance*]; and

Second, the defendant joined in the agreement knowing of its purpose and intending to help accomplish that purpose.

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

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object or purpose of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by knowingly participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who knowingly joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

**Comment**

This instruction is for use with Instructions 12.1, 12.2, 12.4, 12.8, 12.10, and 12.12. Instruction 4.8 (Knowingly).

Concerning the elements of the crime, *see, e.g.*, *United States v. Jaimez*, 45 F.4th 1118, 1123 (9th Cir. 2022); *United States v. Collazo*, 984 F.3d 1308, 1319 (9th Cir. 2021) (en banc); *United States v. Garrison*, 888 F.3d 1057, 1064-65 (9th Cir. 2018); *United States v. Reed*, 575 F.3d 900, 923 (9th Cir. 2009).

To prove an agreement to commit a crime, it is not sufficient for the government to prove that the defendant committed the crime in question. It must prove that the defendant agreed with at least one other person to commit that crime. *United States v. Loveland*, 825 F.3d 555, 557 (9th Cir. 2016).

*See United States v. Shabani*,513 U.S. 10, 15-16 (1994), holding that to establish a violation of 21 U.S.C. § 846, the government is not required to prove commission of overt acts in furtherance of the conspiracy. The Court contrasted § 846, which is silent as to whether there must be an overt act, with the general conspiracy statute, 18 U.S.C. § 371, which contains the explicit requirement that a conspirator “do any act to effect the object of the conspiracy.”  *Id*. at 14.

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)).

When the prosecution relies on circumstantial evidence to establish an agreement to distribute drugs, “what we are looking for is evidence of a prolonged and actively pursued course of sales and . . . knowledge of and shared stake in the . . . drug operation.” *United States v. Mendoza*, 25 F.4th 730, 736 (9th Cir. 2022). *See generally id.* at 735-741 for analysis of evidence that would or would not meet this threshold. *See* Comment to Instruction 12.6.

When it is necessary to determine the amount of a controlled substance, the court might consider submitting the following special verdict form to the jury:

**SUGGESTED VERDICT FORM**

WE, THE JURY, FIND THE DEFENDANT, [*name of defendant*], AS FOLLOWS:

AS TO COUNT [*insert count number*] OF THE INDICTMENT:

|  |  |  |
| --- | --- | --- |
| NOT GUILTY  \_\_\_\_\_\_\_\_ | GUILTY  \_\_\_\_\_\_\_\_ | of conspiring to distribute [*insert controlled substance*] in violation of Title 21 United States Code §§ 846 and 841(a)(1) |

SPECIAL VERDICTS

|  |  |
| --- | --- |
| 1. Having found the defendant [*name of defendant*] guilty of the offense charged in [*insert count number*], do you unanimously find beyond a reasonable doubt that (a) the conspiracy charged in [*insert count number*] involved [*insert applicable amount and type of controlled substance , e.g.*, 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine]?  If you answered yes to this question, you need not answer further questions. Sign and date the verdict form.  2. Having found the defendant [*name of defendant*] guilty of the offense charged in [*insert count number*], do you unanimously find beyond a reasonable doubt that (a) the conspiracy charged in [*insert count number*] involved [*insert applicable amount and type of controlled substance, e.g.*, 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine]? | \_\_\_\_Yes \_\_\_\_No  \_\_\_\_Yes \_\_\_\_No |

DATE FOREPERSON

*Revised June 2024*