**12.8 Controlled Substance—Distribution to Person Under 21 Years**

**(21 U.S.C. §§ 841(a)(1), 859)**

 The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with distribution of [*specify* *controlled substance*] to a person under the age of 21 years in violation of Section 841(a)(1) and 859 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 [*specify* *controlled substance*] to [*name of underage person*];

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

 Third, the defendant was at least eighteen years of age; and

 Fourth, [*name of underage person*] was under twenty-one years of age.

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

**Comment**

 *See* Comment to Instruction 12.1 (Controlled Substance—Possession with Intent to Distribute). *See also* Instruction 12.2 (Determining Amount of Controlled Substance).

 Knowledge by the defendant that the person to whom the controlled substance is distributed is under twenty-one years of age is not an essential element.  *United States v. Valencia-Roldan*, 893 F.2d 1080, 1083 (9th Cir. 1990).

 The government is required to establish beyond a reasonable doubt that the defendant: (1) “knowingly and intentionally” (2) distributed (3) a controlled substance (4) while the defendant was over the age of 18 and (5) the victim was under the age of twenty-one. *United States v. Durham*, 464 F.3d 976, 980-81 (9th Cir. 2006).

 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.

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