Chapter 14.00

CONTROLLED SUBSTANCES OFFENSES

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Introduction to Controlled Substance Elements Instructions

Chapter 14 includes elements instructions for selected controlled substances offenses based on the frequency of prosecution. The instructions cover the following:

– offenses codified in 21 U.S.C. § 841(a)(1)
  – Possession of a controlled substance with intent to distribute
  – Distribution of a controlled substance,
  – Dispensing or distribution of a controlled substance by a practitioner
  – Manufacture of a controlled substance
  – Manufacture of a controlled substance by a practitioner
– the offense codified in 21 U.S.C. § 844, possession of a controlled substance;
– one offense codified in 21 U.S.C. § 846, conspiracy; and
– the offense and sentence enhancement codified in 21 U.S.C. § 860(a), distribution of a controlled substance in or near schools or colleges.

In addition, this chapter includes three instructions to cover the jury's role in sentencing under Alleyne v. United States, 133 S. Ct. 2151 (2013) and Apprendi v. New Jersey, 530 U.S. 466 (2000) and special verdict forms for the jury.

Title 21 U.S.C. § 841(a)(1) provides, "[I]t shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."

The instructions cover the most frequently prosecuted offenses under § 841(a)(1) as follows:

14.01 Possession of a Controlled Substance with Intent to Distribute (21 U.S.C. § 841(a)(1))

14.02A Distribution of a Controlled Substance (21 U.S.C. § 841(a)(1))

14.02B Dispensing or Distribution of a Controlled Substance by a Practitioner (21 U.S.C. § 841(a)(1))

14.03A Manufacture of a Controlled Substance (21 U.S.C. § 841(a)(1))

14.03B Manufacture of a Controlled Substance by a Practitioner (21 U.S.C. § 841(a)(1))

Section 844(a) provides, "It shall be unlawful for any person knowingly or intentionally to possess a controlled substance . . . ." This offense is covered by Instruction 14.04 Possession of a Controlled Substance (21 U.S.C. § 844).

Section 846 provides, "Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." The Committee did not draft

an instruction for attempted drug crimes because an instruction may be compiled by combining the substantive crime instructions in this chapter with the instructions in Chapter 5 Attempts. The conspiracy offense established by § 846 is covered in this chapter by Instruction 14.05 Conspiracy (21 U.S.C. § 846) because it has some features requiring treatment distinct from the conspiracy offenses covered in Chapter 3 Conspiracy.

Section 860(a) provides, "Any person who violates [§§ 841(a)(1) or 856] by distributing, possessing with intent to distribute, or manufacturing a controlled substance . . . within one thousand feet of [a school, playground or public housing facility], or within 100 feet of a [youth center, public swimming pool or video arcade facility] is . . . subject to . . . [increased] maximum punishment . . . ." The Committee drafted Instruction 14.06 Distribution in or near Schools or Colleges to cover the basic offense of distributing a controlled substance near a prohibited place. This instruction covers only the crime of distributing a controlled substance near a prohibited area; if the § 860(a) offense charged is not distributing but rather possessing with intent to distribute or manufacturing in the prohibited area, the instruction may be modified. If the underlying violation is based on § 856 rather than § 841, the instruction may be modified. If the charged conduct is based not on § 860(a) but on §§ 860(b) regarding second offenders or 860(c) regarding employing children, the instruction may be modified.

In addition, this chapter includes three instructions for cases where jury unanimity is required based on increased punishment.

Inst. 14.07A Unanimity Required – Determining Amount of Controlled Substance (§ 841) and Inst. 14.07B Unanimity Required – Determining Amount of Controlled Substance (§ 846)
cover the amount of controlled substances when it increases the sentence. These two instructions explain the background to the jury, and special verdict forms are provided for the jury to work through and record its decisions.

Instruction 14.07C Unanimity Required – Determining Whether Death or Serious Bodily Injury Resulted for Distributing/Dispensing or Manufacturing (§ 841) covers cases requiring jury unanimity on whether death or serious bodily injury resulted from the distribution, dispensing, or manufacturing of a controlled substance, see § 841(b)(1)(A) - (C) and (b)(1)(E)(i) & (ii). This instruction explains the background to the jury and includes a special verdict form.

14.01 POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE (21 U.S.C. § 841(a)(1))

(1) The defendant is charged with the crime of possession of [*name controlled substance*] with intent to distribute. [*Name controlled substance*] is a controlled substance. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, the defendant knowingly [or intentionally] possessed [*name controlled substance*].

(B) Second, the defendant intended to distribute [*name controlled substance*].

(2) Now I will give you more detailed instructions on some of these terms.

(A) [*Insert applicable definition of possession from Instructions 2.10, 2.10A, and 2.11 here or as a separate instruction*].

(B) To prove that the defendant "knowingly" possessed the [*name controlled substance*], the defendant did not have to know that the substance was [*name controlled substance*]. It is enough that the defendant knew that it was some kind of controlled substance. Further, the defendant did not have to know how much [*name controlled substance*] he possessed. It is enough that the defendant knew that he possessed some quantity of [*name controlled substance*].

(C) The phrase "intended to distribute" means the defendant intended to deliver or transfer a controlled substance sometime in the future. [The term distribute includes the actual, constructive, or attempted transfer of a controlled substance.] [To distribute a controlled substance, there need not be an exchange of money.]

[(3) In determining whether the defendant had the intent to distribute, you may consider all the facts and circumstances shown by the evidence, including the defendant's words and actions. Intent to distribute can be inferred from the possession of a large quantity of drugs, too large for personal use alone. You may also consider the estimated street value of the drugs, the purity of the drugs, the manner in which the drugs were packaged, the presence or absence of a large amount of cash, the presence or absence of weapons, and the presence or absence of equipment used for the sale of drugs. The law does not require you to draw such an inference, but you may draw it.]

(4) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

The bracketed sentences in paragraph (2)(C) should be used only if relevant.

Optional paragraph (3) should be given only when a basis for inferring the defendant's intent to distribute has been admitted into evidence.

This instruction covers possession with intent to distribute; if the charges include increased penalties based on the amount of the controlled substance, see Inst. 14.07A Unanimity Required – Determining Amount of Controlled Substance (§ 841).

Committee Commentary Instruction 14.01
(current through May 29, 2026)

Title 21 U.S.C. § 841(a)(1) provides that except as authorized by that subchapter, "[I]t shall be unlawful for any person knowingly or intentionally-- (1) to . . . possess with intent to . . . distribute a controlled substance . . . ."

In paragraph (1), the second sentence recognizes that the court determines whether the substance the defendant is charged with possessing falls within the definition of a controlled substance under 21 U.S.C. § 812.

The list of elements in paragraph (1) is adapted from United States v. Russell, 595 F.3d 633, 645 (6th Cir. 2010) (*quoting* United States v. Coffee, 434 F.3d 887, 897 (6th Cir. 2006)).

Paragraph (1)(A), which requires that the defendant knowingly possessed a controlled substance, is based on Sixth Circuit case law. The instruction requires a mens rea of knowingly and then offers in brackets the option of adding an alternative mens rea of intentionally. As noted above, the statute states that the defendant must "knowingly or intentionally" possess a controlled substance. However, the Sixth Circuit often omits the optional term "intentionally" from the list of elements. *See, e.g.,* United States v. Russell, 595 F.3d 633, 645 (6th Cir. 2010) (*quoting* United States v. Coffee, 434 F.3d 887, 897 (6th Cir. 2006)) ("The elements of [possession with intent to distribute] are that the defendant: (1) knowingly, (2) possessed a controlled substance, (3) with intent to distribute it."). *See also* United States v. Jackson, 55 F.3d 1219, 1225 (6th Cir. 1995); United States v. Peters, 15 F.3d 540, 544 (6th Cir. 1994). Based on this case law, the basic instruction uses the term knowingly. This approach is consistent with the mens rea for possession generally, see Inst. 2.10A Actual Possession. The phrase "or intentionally" is provided in brackets as an option for inclusion based on the language in § 841(a) and for cases where the government used that phrase in the indictment.

In paragraph (2)(A), possession is defined by cross-reference to Pattern Instructions 2.10, 2.10A, and 2.11.

Paragraph (2)(B), which states that to act "knowingly," the defendant is not required to know the type or quantity of controlled substance involved, is based on United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003) (*quoting* United States v. Garcia, 252 F.3d 838, 844 (6th Cir.

2001)). Knowledge that the defendant possessed "some type of controlled substance" is sufficient. United States v. Stapleton, 297 F. App'x 413, 426 (6th Cir. 2008) (unpublished) (*citing Villarce, supra*). Also, knowledge that the defendant possessed "some quantity" of the controlled substance is sufficient. *Villarce, supra* at 438 (italics omitted). This authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

The definition of "intended to distribute" in paragraph (2)(C) is based on several sources. The terms deliver and transfer are drawn from the statute. The term "distribute" is defined as "to deliver . . . a controlled substance." § 802(11). The terms "deliver" and "delivery" are defined as "the actual, constructive, or attempted transfer of a controlled substance . . . ." § 802(8). In United States v. Vincent, 20 F.3d 229, 233 (6th Cir. 1994), the court used the term deliver and cited § 802(11). The phrase "sometime in the future" is based on United States v. Pope, 561 F.2d 663 at 670 (6th Cir. 1977) (holding that omission to instruct on intent-to-distribute element was plain error and suggesting that § 802(11) definition should be given). The first bracketed sentence is drawn from § 802(8), quoted *supra*. The second bracketed sentence, stating that distribution does not require an exchange of money, is based on United States v. Vincent, *supra* (citing United States v. Coady, 809 F.2d 119, 124 (1st Cir. 1987)). *Accord*, United States v. Campbell, 1995 WL 699614 (6th Cir. 1995) (unpublished).

The mens reas of knowledge and intent to distribute need not be proved directly. Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge under § 841(a). *See, e.g., Stapleton, supra* at 427-28.

Paragraph (3) identifies specifically some circumstances the jury may consider and the inferences it may draw regarding the defendant's intent to distribute the controlled substance. The second sentence ("Intent to distribute can be inferred from the possession of a large quantity of drugs, too large for personal use alone.") is drawn verbatim from United States v. Jackson, 55 F.3d 1219, 1226 (6th Cir. 1995). The Sixth Circuit frequently cites the quantity of drugs as a basis for inferring intent to distribute. *See, e.g.*, United States v. Hill, 142 F.3d 305, 311 (6th Cir. 1998); United States United States v. Phibbs, 999 F.2d 1053, 1065-66 (6th Cir. 1993); United States v. Giles, 536 F.2d 136, 141 (6th Cir. 1976). The reference to the estimated street value is based on *Hill, supra*; United States v. Jackson, 55 F.3d 1219, 1226 (6th Cir. 1995); United States v. Vincent, 20 F.3d 229, 233 (6th Cir. 1994); and United States v. Dotson, 871 F.2d 1318, 1323 (6th Cir. 1989), *vacated in part on other grounds*, 895 F.2d 263 (6th Cir. 1990). The reference to purity of the drugs is based on *Vincent, supra*. The manner in which the controlled substance was packaged was approved in United States v. Coffee, 434 F.3d 887, 897 (6th Cir. 2006) and *Dotson, supra*. The presence or absence of a large amount of cash is based on United States v. Stewart, 69 F. App'x 213, 216 (6th Cir. 2003) (unpublished) and United States v. Wade, 1991 WL 158674, 1991 U.S. App Lexis 19418 at *5 (6th Cir. 1991) (unpublished). The presence or absence of weapons is based on *Coffee, supra*, and the presence or absence of equipment used for the sale of drugs is based on *Coffee, supra*; *Hill, supra* (noting presence of a scale, a blender, currency, razor blades and packaging materials); *Vincent, supra* (noting presence of hand scales suitable for weighing and measuring marijuana, growing lamps and a book describing how to grow marijuana); and *Dotson, supra*. In United States v. White, 932 F.2d 588, 590 (6th Cir.

1991), the court reversed a conviction based on, inter alia, insufficient evidence to support an inference of intent to distribute.

There is no requirement that the government prove that the defendant knew that the drugs he possessed were subject to federal regulation. United States v. Balint, 258 U.S. 250 (1922).

14.02A DISTRIBUTION OF A CONTROLLED SUBSTANCE (21 U.S.C. § 841(a)(1))

(1) The defendant is charged with the crime of distributing [*name controlled substance*]. [*Name controlled substance*] is a controlled substance. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) The defendant knowingly [or intentionally] distributed [*name controlled substance*]; and

(B) That the defendant knew at the time of distribution that the substance was a controlled substance.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "distribute" means the defendant delivered or transferred a controlled substance. [The term distribute includes the actual, constructive, or attempted transfer of a controlled substance.] [The term distribute includes the sale of a controlled substance.]

(B) To prove that the defendant "knowingly" distributed the [*name controlled substance*], the defendant did not have to know that the substance was [*name controlled substance*]. It is enough that the defendant knew that it was some kind of controlled substance. Further, the defendant did not have to know how much [*name controlled substance*] he distributed. It is enough that the defendant knew that he distributed some quantity of a controlled substance.

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

This instruction covers simple distributing of a controlled substance. If the defendant is a practitioner, use Inst. 14.02B Dispensing or Distribution of a Controlled Substance by a Practitioner.

If the charges include increased penalties based on the amount of the controlled substance, see also Inst. 14.07A Unanimity Required: Determining Amount of Controlled Substance (§ 841). If the conduct charged includes distributing with death or serious bodily injury resulting, see also Instruction 14.07C Unanimity Required: Determining Whether Death or Serious Bodily Injury Resulted.

If the first bracketed sentence in paragraph (2)(A) is given, the court should further define the terms actual, constructive, or attempted transfer. The terms actual and constructive are defined in the context of possession in Instructions 2.10 and 2.10A. The term attempt is defined

in Instruction 5.01.

Committee Commentary Instruction 14.02A
(current through May 29, 2026)

Title 21 U.S.C. § 841(a)(1) provides that except as authorized by that subchapter, "[I]t shall be unlawful for any person knowingly or intentionally-- (1) to . . . distribute . . . a controlled substance . . . ."

The list of elements in paragraph (1) is adapted from United States v. Harris, 293 F.3d 970, 974 (6th Cir. 2002).

In paragraph (1), the second sentence recognizes that the court determines whether the substance the defendant is charged with possessing falls within the definition of a controlled substance under 21 U.S.C. § 812.

In paragraph (1)(A), the requirement that the defendant "knowingly [or intentionally]" distributed a controlled substance is based on the statute and Sixth Circuit case law. The instruction requires a mens rea of knowingly, and then offers in brackets the option of adding an alternative mens rea of intentionally. As noted above, the statute states that the defendant must "knowingly or intentionally" distribute a controlled substance. However, as noted in the commentary to Instruction 14.01 on possession with intent to distribute, the Sixth Circuit often omits the optional term intentionally from the list of elements for that crime. Based on these cases construing the same statute, the instruction for distribution uses the term knowingly, and then provides the phrase "or intentionally" in brackets as an option for inclusion based on the language in § 841(a) and for cases where the government used that term in the indictment.

In paragraph (1)(B), the language requiring the defendant to know at the time of distribution that the substance was a controlled substance is based on *Harris, supra* and United States v. Gibbs, 182 F.3d 408 (6th Cir. 1999).

The definition of "distribute" in paragraph (2)(A) is based on several sources. The term "distribute" is defined as "to deliver . . . a controlled substance." § 802(11). The terms "deliver" and "delivery" are defined as "the actual, constructive, or attempted transfer of a controlled substance . . . ." § 802(8). In United States v. Vincent, 20 F.3d 229, 233 (6th Cir. 1994), the court used the term deliver and cited § 802(11). The first bracketed sentence is drawn from § 802(8), quoted *supra*. The second bracketed sentence, stating that distribution includes the sale of a controlled substance, is based on United States v. Robbs, 75 F. App'x 425, 431 (6th Cir. 2003) (unpublished).

Paragraph (2)(B), which states that to act "knowingly," the defendant is not required to know the type or quantity of controlled substance involved, is based on United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003) (*quoting* United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001)). Knowledge that the defendant distributed "some type of controlled substance" is sufficient. United States v. Stapleton, 297 F. App'x 413, 426 (6th Cir. 2008) (unpublished)

(*citing Villarce, supra*). Also, knowledge that the defendant distributed "some quantity" of the controlled substance is sufficient. *Villarce, supra* at 438 (italics omitted). This authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

Knowledge need not be proved directly. Pattern Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge under § 841(a). *See, e.g.*, United States v. Stapleton, 297 F. App'x 413, 427-28 (6th Cir. 2008) (unpublished). The Sixth Circuit has identified particular circumstances the jury may consider and the inferences it may draw regarding the defendant's knowing distribution of the controlled substance. This issue often arises in the context of the crime of possession with intent to distribute. For that crime, the Sixth Circuit frequently cites the quantity of drugs as a basis for inferring intent to distribute. *See, e.g.*, United States v. Hill, 142 F.3d 305, 311 (6th Cir. 1998); United States United States v. Phibbs, 999 F.2d 1053, 1065-66 (6th Cir. 1993); United States v. Giles, 536 F.2d 136, 141 (6th Cir. 1976). The estimated street value is also relevant, *see Hill, supra*; United States v. Jackson, 55 F.3d 1219, 1226 (6th Cir. 1995); United States v. Vincent, 20 F.3d 229, 233 (6th Cir. 1994); and United States v. Dotson, 871 F.2d 1318, 1323 (6th Cir. 1989), *vacated in part on other grounds*, 895 F.2d 263 (6th Cir. 1990). The purity of the drugs may be considered, *see Vincent, supra*. The manner in which the controlled substance was packaged was approved in United States v. Coffee, 434 F.3d 887, 897 (6th Cir. 2006) and *Dotson, supra*. The presence or absence of a large amount of cash is relevant, see United States v. Stewart, 69 F. App'x 213, 216 (6th Cir. 2003) (unpublished) and United States v. Wade, 1991 WL 158674, 1991 U.S. App Lexis 19418 at *5 (6th Cir. 1991) (unpublished). The presence or absence of weapons may be considered, *see Coffee, supra*, as may the presence or absence of equipment used for the sale of drugs, *see Coffee, supra; Hill, supra* (noting presence of a scale, a blender, currency, razor blades and packaging materials); *Vincent, supra* (noting presence of hand scales suitable for weighing and measuring marijuana, growing lamps and a book describing how to grow marijuana); and *Dotson, supra*. In United States v. White, 932 F.2d 588, 590 (6th Cir. 1991), the court reversed a conviction for possession with intent to distribute based on, *inter alia*, insufficient evidence to support an inference of intent to distribute.

The offense of simple distribution covered in Inst. 14.02A is a lesser included offense of distribution when death or serious bodily injury results covered in Inst. 14.07C. *See* Burrage v. United States, 134 S. Ct. 881, 887 & note 3 (2014).

14.02B DISPENSING OR DISTRIBUTION OF A CONTROLLED SUBSTANCE BY A PRACTITIONER (21 U.S.C. § 841(a)(1))

(1) The defendant is charged with the crime of dispensing [distributing] [*name controlled substance*]. [*Name controlled substance*] is a controlled substance. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) The defendant knowingly [or intentionally] dispensed [distributed] [*name controlled substance*];

(B) The defendant knew at the time of dispensing [distribution] that the substance was a controlled substance;

(C) The defendant's dispensing [distribution] was unauthorized, that is to say the dispensing [distribution] was not for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice; and

(D) The defendant knew [or intended] that his dispensing [distribution] was unauthorized.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

(B) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance. [The term "distributor" means a person who so delivers a controlled substance.] [The term "distribute" includes the actual, constructive, or attempted transfer of a controlled substance.] [The term "distribute" includes the sale of a controlled substance.]

(C) The phrase "a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice" means acting in accordance with generally recognized and accepted professional standards in the field in which the individual practices. In considering whether the defendant acted for a legitimate medical purpose in the usual course of professional practice, you may consider all of the defendant's actions and the circumstances surrounding them.

[(D) The term "practitioner" means a physician [dentist, veterinarian, scientific investigator, pharmacy, hospital or other person] licensed [registered, or otherwise permitted] by the United States or the jurisdiction in which he practices, to distribute or dispense a controlled substance in the course of professional practice.]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

This instruction covers dispensing or distributing a controlled substance by a practitioner; if the defendant is not a practitioner, use Inst. 14.02A Distribution of a Controlled Substance.

This instruction covers simple dispensing or distributing of a controlled substance by a practitioner. If the charges include increased penalties based on the amount of the controlled substance, see also Inst. 14.07A. If the conduct charged includes distributing with death or serious bodily injury resulting, see also Instruction 14.07C.

This instruction should be given only after the defendant produces evidence that he or she was authorized as a practitioner to dispense or distribute controlled substances; this burden on the defendant to produce evidence is discussed below in the commentary.

If the bracketed sentence in paragraph (2)(B) defining distribution to include the actual, constructive and attempted transfer is given, the court should further define the terms actual, constructive, or attempted transfer. The terms "actual" and "constructive" are defined in the context of possession in Instructions 2.10 and 2.10A. The term "attempt" is defined in Instruction 5.01.

In paragraph (2)(C), the instruction refers to an individual practitioner "acting in accordance with generally recognized and accepted professional standards in the field in which the individual practices." Standards for the different kinds of professional practice are set by various organizations. The law applicable to this offense does not define this phrase further.

The definition of "practitioner" in paragraph (2)(D) is based on the statutory definition in § 802(21); if the case involves a type of practitioner not specifically listed, the definition may be modified to cover a qualifying "other person."

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary Instruction 14.02B

(current through May 29, 2026)

Title 21 U.S.C. § 841(a)(1) provides, "Except as authorized . . . , it shall be unlawful for any person knowingly or intentionally-- (1) to . . . distribute, or dispense . . . a controlled substance . . . ." Practitioners may be prosecuted under this provision if their conduct is unauthorized, i.e., not for a legitimate medical purpose in the usual course of professional practice. 21 C.F.R. § 1306.04(a); United States v. Ruan, 142 S. Ct. 2370, 2374 (2022); United

States v. Moore, 96 S. Ct. 335, 337 (1975); *see also* United States v. Godofsky, 943 F.3d 1011, 1017, 1029 (6th Cir. 2019); United States v. Chaney, 921 F.3d 572, 589 (6th Cir. 2019) (*quoting* United States v. Johnson, 71 F.3d 539, 542 (6th Cir. 1995) (cleaned up)); and United States v. Kirk, 584 F.2d 773, 784 (6th Cir. 1978). The instruction uses "dispense" as the primary term and offers "distribute" as an option in brackets. Sixth Circuit cases can be found to support the use of either term, *see, e.g.*, United States v. Seelig, 622 F.2d 207, 211 (6th Cir. 1980) (approving use of term "distribute" in instruction but finding error on other grounds) and United States v. Voorhies, 663 F.2d 30, 33 (6th Cir. 1981) (approving instruction that used term "dispense"). The Committee decided to use "dispensing" as the primary term based on this term's repeated use by the Supreme Court in *Ruan*, *see, e.g.*, 142 S. Ct. 2370, 2375; *see also* United States v. Fabode, 2022 WL 16825408, 6-7 (6th Cir. 2022) (unpublished).

In paragraph (1), the elements are based on the statute, regulation and cases cited in the paragraph above. In paragraph (1)(A), the requirement that the defendant "knowingly [or intentionally]" distributed a controlled substance is based on § 841(a)(1) and Sixth Circuit case law. The instruction requires a mens rea of knowingly, and then offers in brackets the option of adding an alternative mens rea of intentionally. As quoted above, the statute states that the defendant must "knowingly or intentionally" distribute a controlled substance. However, as noted in the commentary to Instruction 14.01 on possession with intent to distribute, the Sixth Circuit often omits the optional term "intentionally" from the list of elements for that crime. Based on these cases construing the same statute, the instruction for dispensing or distribution by a practitioner uses the term knowingly, and then provides the phrase "or intentionally" in brackets as an option for inclusion based on the language in § 841(a) and for cases where the government used that term in the indictment.

In paragraph (1)(B), the language requiring the defendant to know at the time of dispensing or distribution that the substance was a controlled substance is supported by United States v. Godofsky, 943 F.3d 1011, 1017 & 1029 (6th Cir. 2019). *See also* United States v. Harris, 293 F.3d 970, 974 (6th Cir. 2002) (requiring this knowledge for distribution by non-practitioners) and United States v. Gibbs, 182 F.3d 408 (6th Cir. 1999) (same).

In paragraph (1)(C), the requirement that the defendant's dispensing or distribution was unauthorized, that is to say the dispensing [distribution] was not for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice, is based on 21 C.F.R. § 1306.04(a), United States v. Ruan, 142 S. Ct. 2370 (2022), and United States v. Moore, 96 S. Ct. 335, 337 (1975); *see also* United States v. Campbell, 135 F.4th 376, 386 (6th Cir. 2025) (discussing *Ruan*); United States v. Godofsky, 943 F.3d 1011, 1017, 1029 (6th Cir. 2019); United States v. Chaney, 921 F.3d 572, 589 (6th Cir. 2019) (*quoting* United States v. Johnson, 71 F.3d 539, 542 (6th Cir. 1995) (cleaned up)); and United States v. Kirk, 584 F.2d 773, 784 (6th Cir. 1978).

In paragraph (1)(D), the requirement that the defendant knew or intended that his dispensing or distribution was unauthorized is based on *Ruan*, 142 S. Ct. 2370, 2382; *see also* United States v. Campbell, 135 F.4th 376, 386 (6th Cir. 2025).

In paragraph (2), the definitions of dispense, distribute, and practitioner in paragraphs

(A), (B), and (D) are drawn primarily from the definitions in 18 U.S.C. §§ 802(10); 802(11) and 802(8); and 802(21), respectively. Some of these definitions have been edited to use plain English and to fit the usual case.

The definition of "dispense" in paragraph (2)(A) uses the language of § 802(10) verbatim. The definition of "distribute" in paragraph (2)(B) is based on §§ 802(11) and 802(8). Section 802(11) defines "distribute" as "to deliver (other than by administering or dispensing) a controlled substance." Section 802(8) then defines the terms "deliver" and "delivery" as "the actual, constructive, or attempted transfer of a controlled substance . . . ." The first bracketed sentence (defining "distributor") is drawn from § 802(11), and the second bracketed sentence (defining "distribute" to include actual, constructive, or attempted transfers of a controlled substance) is drawn from § 802(8). The third bracketed sentence (defining distribution to include the sale of a controlled substance) is based on United States v. Robbs, 75 F. App'x 425, 431 (6th Cir. 2003) (unpublished). Sixth Circuit authority recognizes that the term "distribute" includes the act of writing a prescription, *see* United States v. Johnson, 831 F.2d 124, 128 (6th Cir. 1987) and United States v. Flowers, 818 F.2d 464, 467 (6th Cir. 1987). The instruction covers the conduct of writing prescriptions under the definition of "dispense."

In paragraph (2)(C), the phrase "a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice" is defined to mean "acting in accordance with generally recognized and accepted standards of that individual's professional practice." *See* United States v. Campbell, 135 F.4th 376, 394 (6th Cir. 2025):

> The government can prove knowledge of a lack of authorization "by reference to objective criteria," such as "objective standard[s] [of] medicine" and "accepted limits" of medical practice. *Ruan*, 597 U.S. at 467, 142 S.Ct. 2370 (quotations omitted). Indeed, it is "impossible" for the government to prove that a defendant was "acting outside the usual course of professional practice . . . without mentioning the usual standard of care." *United States v. Volkman*, 736 F.3d 1013, 1023 (6th Cir. 2013) (quotations omitted), *vacated on other grounds*, 574 U.S. 955, 135 S.Ct. 13, 190 L.Ed.2d 286 (2014).

As stated in the Use Note, standards for the different kinds of professional practice are set by various organizations.

In United States v. Chaney, 921 F.3d 572 (6th Cir. 2019) the three defendants (a physician, a clinic, and the CEO of the clinic) were convicted of distribution under § 841(a) and § 2. The defendants argued that the evidence they acted without a "legitimate medical purpose" was insufficient because the patients who received the drugs had various serious underlying conditions that justified the prescription of drugs. The trial court rejected this argument, and the Sixth Circuit affirmed, explaining:

> [The defendants'] arguments are incorrect.
> . . . .
> Instead, as the word "purpose" implies, we look at a provider's reason for issuing the prescription when determining whether it was issued for a legitimate medical

> purpose, rather than the patient's underlying conditions. As the district court made abundantly clear, a doctor prescribing opioid painkillers to anyone walking through the door is not saved if a person happens to have an underlying condition that could justify the prescription; likewise, a doctor who acts in good faith and with all due care but nevertheless issues a prescription to a patient who was merely faking symptoms is nevertheless acting with a legitimate medical purpose. To say otherwise would be absurdity.
> . . . .
> Evidence of the circumstances surrounding a prescription allows juries to infer that a physician's purpose was something other than legitimate medical treatment; the underlying conditions a patient may have had are not dispositive.

The minimum mens rea for this crime is knowingly, so the provisions of Inst. 2.09 Deliberate Ignorance are properly given in cases under Inst. 14.02B. See United States v. Bauer, 82 F.4th 522, 530-531 (6th Cir. 2023) (approving a jury instruction that was substantially the same as pattern Inst. 2.09 Deliberate Ignorance); United States v. Anderson, 67 F.4th 755, 766 (6th Cir. 2023) (same).

In United States v. Campbell, 135 F.4th 376, 387-388 (6th Cir. 2025), the court affirmed convictions of a doctor and a nurse practitioner for conspiracy to distribute drugs although the instructions did not specifically address the *Ruan* requirement that they knew their conduct was unauthorized. The court explained that the "instructions on the elements of unlawful distribution pointedly omit any reference to knowledge of a lack of authorization," so it was "doubtful" that the instructions "fully comported" with the *Ruan* requirements. *Id.* However, based on three cases holding that *Ruan* was satisfied when the court provided a deliberate ignorance instruction like Inst. 2.09, the court concluded it was bound to affirm the convictions. *Campbell* at 387-388, *citing* United States v. Stanton, 103 F.4th 1204 (6th Cir. 2024); United States v. Bauer, 82 F.4th 522 (6th Cir. 2023); and United States v. Anderson, 67 F.4th 755 (6th Cir. 2023). The *Campbell* court recognized that although it was compelled to affirm, these cases did not use the instructions that should be used in prosecuting practitioners for unauthorized distribution cases going forward. *Campbell* at 388 note 2, *quoting* United States v. Bauer, 82 F.4th 522, 533 (6th Cir. 2023).

This instruction is properly given only after the defendant meets the burden of producing evidence that he or she was authorized as a practitioner to dispense or distribute controlled substances. As the *Ruan* Court stated, "[O]nce a defendant meets the burden of producing 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*, 142 S. Ct. 2370, 2376 (2022). The Court did not define the burden on the defendant to produce evidence further; the concurring opinion noted that cert. was not granted on that question and no party briefed it. *Ruan*, *supra* at 2384 (Alito, Thomas, and Barrett, JJ., concurring in the judgment).

The instruction does not include a good faith defense and does not use the term good faith. See United States v. Bauer, 82 F.4th 522, 532 (6th Cir. 2023) (describing the good faith defense as one that "*Ruan* likely makes obsolete").

14.03A MANUFACTURE OF A CONTROLLED SUBSTANCE (21 U.S.C. § 841(a)(1))

(1) The defendant is charged with the crime of manufacturing [*name controlled substance*]. [*Name controlled substance*] is a controlled substance. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, the defendant manufactured [*name controlled substance*].

(B) Second, the defendant did so knowingly [or intentionally].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "manufacture" means the [production] [preparation] [propagation] [compounding] [processing] of a [drug] [other substance] either directly or indirectly [by extraction from substances of natural origin] [independently by means of chemical synthesis] [by a combination of extraction and chemical synthesis]. [The term "manufacture" includes any packaging or repackaging of a substance or labeling or relabeling of its container.] [The term "manufacture" does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable law by a practitioner as an incident to the administration or dispensing of such drug or substance in the course of a professional practice.] [The term "production" includes the planting, cultivating, growing, or harvesting of a controlled substance.]

(B) To prove that the defendant knowingly manufactured the [*name controlled substance*], the defendant did not have to know that the substance was [*name controlled substance*]. It is enough that the defendant knew that it was some kind of controlled substance. Further, the defendant did not have to know how much [*name controlled substance*] he manufactured. It is enough that the defendant knew that he manufactured some quantity of controlled substance.

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge

Use Note

This instruction covers simple manufacturing of a controlled substance. If the charges include increased penalties based on the amount of the controlled substance, see also Inst. 14.07A Unanimity Required: Determining Amount of Controlled Substance (§ 841). If the conduct charged includes manufacturing with death or serious bodily injury resulting, see also Instruction 14.07C Unanimity required: Determining Whether Death or Serious Bodily Injury Resulted and Special Verdict Form.

If the conduct charged is possession with intent to manufacture, Instruction 14.01

Possession with Intent to Distribute may be modified.

Bracketed language indicates options for the court.

Bracketed italics are notes to the court.

Committee Commentary Instruction 14.03A
(current through May 29, 2026)

Title 21 U.S.C. § 841(a)(1) provides that except as authorized by that subchapter, "[I]t shall be unlawful for any person knowingly or intentionally-- (1) to manufacture . . . a controlled substance . . . ."

In paragraph (1), the second sentence recognizes that the court determines whether the substance the defendant is charged with manufacturing falls within the definition of a controlled substance under 21 U.S.C. § 812.

The list of elements in paragraph (1) is based on the statute.

In paragraph (1)(B), the requirement that the defendant knowingly manufactured a controlled substance is based on Sixth Circuit case law. The instruction requires a mens rea of knowingly and then offers in brackets the option of adding an alternative mens rea of intentionally. As noted above, the statute states that the defendant must "knowingly or intentionally" manufacture a controlled substance. However, as noted in the commentary to Instruction 14.01 on possession with intent to distribute, the Sixth Circuit often omits the optional term "intentionally" from the list of elements for that crime. Based on these cases construing the same statute, the instruction for manufacturing uses the term knowingly, and then provides the term "or intentionally" in brackets as an option based on the language in § 841(a) and for cases where the government used that term in the indictment.

In paragraph (2)(A), the definition of manufacture is based on § 802(15). Some options in that definition have been bracketed to minimize unnecessary words. The bracketed statement on production including planting, cultivating, etc. is based on § 802(22) with the redundant term manufacturing deleted.

Paragraph (2)(B), which states that to act "knowingly," the defendant need not know the type or quantity of controlled substance involved, is based on United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003) (*quoting* United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001)). Knowledge that the defendant manufactured "some type of controlled substance" is sufficient. United States v. Stapleton, 297 F. App'x 413, 426 (6th Cir. 2008) (unpublished) (*citing Villarce, supra*). Also, knowledge that the defendant manufactured "some quantity" of the controlled substance is sufficient. *Villarce, supra* at 438 (italics omitted). This authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

Knowledge need not be proved directly. Pattern Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge under § 841(a). *See, e.g., Stapleton, supra* at 428.

The offense of simple manufacturing covered in instruction 14.03A is a lesser included offense of manufacturing when death or serious bodily injury results covered in Inst. 14.07C. *Cf.* Burrage v. United States, 134 S. Ct. 881, 887 & note 3 (2014) (stating that simple distribution is a lesser included offense of distribution when death or serious bodily injury results).

14.03B MANUFACTURE OF A CONTROLLED SUBSTANCE BY A PRACTITIONER (21 U.S.C. § 841(a)(1))

(1) The defendant is charged with the crime of manufacturing [*name controlled substance*]. [*Name controlled substance*] is a controlled substance. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) The defendant manufactured [*name controlled substance*].

(B) The defendant did so knowingly [or intentionally].

(C) The defendant's manufacturing was unauthorized, that is to say the manufacturing was not for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice; and

(D) The defendant knew [or intended] that his manufacturing was unauthorized.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "manufacture" means the [production] [preparation] [propagation] [compounding] [processing] of a [drug] [other substance] either directly or indirectly [by extraction from substances of natural origin] [independently by means of chemical synthesis] [by a combination of extraction and chemical synthesis]. [The term "manufacture" includes any packaging or repackaging of a substance or labeling or relabeling of its container.] [The term "manufacture" does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable law by a practitioner as an incident to the administration or dispensing of such drug or substance in the course of a professional practice.] [The term "production" includes the planting, cultivating, growing, or harvesting of a controlled substance.]

(B) To prove that the defendant knowingly manufactured the [*name controlled substance*], the defendant did not have to know that the substance was [*name controlled substance*]. It is enough that the defendant knew that it was some kind of controlled substance. Further, the defendant did not have to know how much [*name controlled substance*] he manufactured. It is enough that the defendant knew that he manufactured some quantity of controlled substance.

(C) The phrase "a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice" means acting in accordance with generally recognized and accepted professional standards in the field in which the individual practices. In considering whether the defendant acted for a legitimate medical purpose in the usual course of professional practice, you may consider all of the defendant's actions and the circumstances surrounding them.

[(D) The term "practitioner" means a physician [dentist, veterinarian, scientific

investigator, pharmacy, hospital or other person] licensed [registered, or otherwise permitted] by the United States or the jurisdiction in which he practices, to distribute or dispense a controlled substance in the course of professional practice.]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge

Use Note

This instruction covers the conduct of manufacturing a controlled substance by a practitioner; if the defendant is not a practitioner, use Instruction 14.03A.

This instruction covers simple manufacturing of a controlled substance. If the charges include increased penalties based on the amount of the controlled substance, see also Inst. 14.07A Unanimity required – Determining Amount of Controlled Substance (§ 841). If the conduct charged includes manufacturing with death or serious bodily injury resulting, see also Instruction 14.07C Unanimity Required – Determining Whether Death or Serious Bodily Injury Resulted and Special Verdict Form.

This instruction should be given only after the defendant produces evidence that he or she was authorized as a practitioner to manufacture controlled substances; this burden on the defendant to produce evidence is discussed below in the commentary.

In paragraph (2)(C), the instruction refers to an individual practitioner "acting in accordance with generally recognized and accepted professional standards in the field in which the individual practices." Standards for the different kinds of professional practice are set by various organizations. The law applicable to this offense does not define this phrase further.

The definition of "practitioner" in paragraph (2)(D) is based on the statutory definition in § 802(21); if the case involves a type of practitioner not specifically listed, the definition may be modified to cover a qualifying "other person."

Bracketed language indicates options for the court.

Bracketed italics are notes to the court.

Committee Commentary Instruction 14.03B
(current through May 29, 2026)

Title 21 U.S.C. § 841(a)(1) provides, "Except as authorized . . . , it shall be unlawful for any person knowingly or intentionally-- (1) to . . . manufacture . . . a controlled substance . . . ." Practitioners may be prosecuted under this provision if their conduct is unauthorized, i.e., not for a legitimate medical purpose in the usual course of professional practice. 21 C.F.R. §

1306.04(a); United States v. Ruan, 142 S. Ct. 2370, 2374 (2022); United States v. Moore, 96 S. Ct. 335, 337 (1975); *see also* United States v. Godofsky, 943 F.3d 1011, 1017, 1029 (6th Cir. 2019); United States v. Chaney, 921 F.3d 572, 589 (6th Cir. 2019) (*quoting* United States v. Johnson, 71 F.3d 539, 542 (6th Cir. 1995) (cleaned up)); and United States v. Kirk, 584 F.2d 773, 784 (6th Cir. 1978).

In paragraph (1), the elements are based on the statute, regulation and cases cited in the paragraph above. In paragraph (1)(B), the requirement that the defendant "knowingly [or intentionally]" manufactured a controlled substance is based on § 841(a)(1) and Sixth Circuit case law. The instruction requires a mens rea of knowingly, and then offers in brackets the option of adding an alternative mens rea of intentionally. As quoted above, the statute states that the defendant must "knowingly or intentionally" distribute a controlled substance. However, as noted in the commentary to Instruction 14.01 on possession with intent to distribute, the Sixth Circuit often omits the optional term "intentionally" from the list of elements for that crime. Based on these cases construing the same statute, the instruction for manufacturing by a practitioner uses the term knowingly, and then provides the phrase "or intentionally" in brackets as an option for inclusion based on the language in § 841(a) and for cases where the government used that term in the indictment.

In paragraph (1)(C), the requirement that the defendant's manufacturing was unauthorized, that is to say the manufacturing was not for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice, is based on 21 C.F.R. § 1306.04(a), United States v. Ruan, 142 S. Ct. 2370 (2022), and United States v. Moore, 96 S. Ct. 335, 337 (1975); *see also* United States v. Godofsky, 943 F.3d 1011, 1017, 1029 (6th Cir. 2019); United States v. Chaney, 921 F.3d 572, 589 (6th Cir. 2019) (*quoting* United States v. Johnson, 71 F.3d 539, 542 (6th Cir. 1995) (cleaned up)); and United States v. Kirk, 584 F.2d 773, 784 (6th Cir. 1978).

In paragraph (1)(D), the requirement that the defendant knew or intended that his manufacturing was unauthorized is based on *Ruan*, 142 S. Ct. 2370, 2382 (2022).

In paragraph (2)(A), the definition of manufacture is based on § 802(15). Some options in that definition have been bracketed to minimize unnecessary words. The bracketed statement on production including planting, cultivating, etc. is based on § 802(22) with the redundant term manufacturing deleted.

Paragraph (2)(B), which states that to act "knowingly," the defendant need not know the type or quantity of controlled substance involved, is based on United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003) (*quoting* United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001)). Knowledge that the defendant manufactured "some type of controlled substance" is sufficient. United States v. Stapleton, 297 F. App'x 413, 426 (6th Cir. 2008) (unpublished) (*citing Villarce, supra*). Also, knowledge that the defendant manufactured "some quantity" of the controlled substance is sufficient. *Villarce, supra* at 438 (italics omitted). This authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

In paragraph (2)(C) the phrase "a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice" is defined to mean "acting in accordance with generally recognized and accepted standards of that individual's professional practice." As stated in the Use Note, standards for the different kinds of professional practice are set by various organizations. The law applicable to this offense does not define this phrase further.

The definition of "practitioner" in paragraph (2)(D) uses the language of § 802(21) but has omitted references to research and teaching and has bracketed the types of practitioners after the term "physician" and the types of licensing to fit the usual case. As noted above, these definitions have been edited; the court should consult the full statutory definitions if the facts warrant.

This instruction is properly given only after the defendant meets the burden of producing evidence that he or she was authorized as a practitioner to manufacture controlled substances. As the *Ruan* Court stated, "[O]nce a defendant meets the burden of producing 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*, 142 S. Ct. 2370, 2376 (2022). The Court did not define the burden on the defendant to produce evidence further; the concurring opinion noted that cert. was not granted on that question and no party briefed it. *Ruan*, *supra* at 2384 (Alito, Thomas, and Barrett, JJ., concurring in the judgment).

The instruction does not include a good faith defense and does not use the term good faith. See United States v. Bauer, 82 F.4th 522, 532 (6th Cir. 2023) (describing the good faith defense as one that "*Ruan* likely makes obsolete").

The minimum mens rea for this crime is knowingly, so the provisions of Inst. 2.09 Deliberate Ignorance are properly given in cases under Inst. 14.03C. See United States v. Bauer, 82 F.4th 522, 530-531 (6th Cir. 2023) (approving a jury instruction that was substantially the same as pattern Inst. 2.09 Deliberate Ignorance); United States v. Anderson, 67 F.4th 755, 766 (6th Cir. 2023) (same).

In United States v. Chaney, 921 F.3d 572 (6th Cir. 2019) the three defendants (a physician, a clinic, and the CEO of the clinic) were convicted of distribution under § 841(a) and § 2. The defendants argued that the evidence they acted without a "legitimate medical purpose" was insufficient because the patients who received the drugs had various serious underlying conditions that justified the prescription of drugs. The trial court rejected this argument, and the Sixth Circuit affirmed, explaining:

> [The defendants'] arguments are incorrect.
> . . . .
> Instead, as the word "purpose" implies, we look at a provider's reason for issuing the prescription when determining whether it was issued for a legitimate medical purpose, rather than the patient's underlying conditions. As the district court made abundantly clear, a doctor prescribing opioid painkillers to anyone walking through the door is not saved if a person happens to have an underlying condition that could justify the prescription; likewise, a doctor who acts in good faith and

with all due care but nevertheless issues a prescription to a patient who was merely faking symptoms is nevertheless acting with a legitimate medical purpose. To say otherwise would be absurdity.

. . . .

Evidence of the circumstances surrounding a prescription allows juries to infer that a physician's purpose was something other than legitimate medical treatment; the underlying conditions a patient may have had are not dispositive.

14.04 POSSESSION OF A CONTROLLED SUBSTANCE (21 U.S.C. § 844)

(1) The defendant is charged with the crime of possessing [*name controlled substance*]. [*Name controlled substance*] is a controlled substance. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, the defendant possessed [*name controlled substance*].

(B) Second, the defendant did so knowingly [or intentionally].

(2) Now I will give you more detailed instructions on some of these terms.

(A) [*Insert applicable definition of possession from Instructions 2.10, 2.10A, and 2.11 here or as a separate instruction*].

(B) To prove that the defendant "knowingly" possessed the [*name controlled substance*], the defendant does not have to know that the substance was [*name controlled substance*]. It is enough that the defendant knew that it was some kind of controlled substance. Further, the defendant did not have to know how much [*name controlled substance*] he possessed. It is enough that the defendant knew that he possessed some quantity of [*name controlled substance*].

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Committee Commentary 14.04
(current through May 29, 2026)

Title 21 U.S.C. § 844 provides that "It shall be unlawful for any person knowingly or intentionally . . . to possess a controlled substance."

In paragraph (1), the second sentence recognizes that the court determines whether the substance the defendant is charged with possessing falls within the definition of a controlled substance under 21 U.S.C. § 812.

The elements in paragraph (1) are adapted from United States v. Colon, 268 F.3d 367, 375 (6th Cir. 2001).

Paragraph (1)(B), which requires that the defendant knowingly possessed a controlled substance, is based on Sixth Circuit case law. The instruction requires a mens rea of knowingly and then offers in brackets the option of adding the alternative mens rea of intentionally. As noted above, the statute states that the defendant must "knowingly or intentionally" possess a controlled substance. However, the Sixth Circuit often omits the optional term "intentionally"

from the list of elements in the context of § 841(a). *See, e.g.,* United States v. Russell, 595 F.3d 633, 645 (6th Cir. 2010) (*quoting* United States v. Coffee, 434 F.3d 887, 897 (6th Cir. 2006)) ("The elements of [possession with intent to distribute] are that the defendant: (1) knowingly, (2) possessed a controlled substance, (3) with intent to distribute it."). *See also* United States v. Jackson, 55 F.3d 1219, 1225 (6th Cir. 1995); United States v. Peters, 15 F.3d 540, 544 (6th Cir. 1994) (*citing* United States v. Clark, 928 F.2d 733, 736 (6th Cir. 1991)). Based on this case law, the instruction for simple possession uses the term knowingly. This approach is consistent with the mens rea for possession generally, see Inst. 2.10A Actual Possession. The term "or intentionally" is provided in brackets as an option based on the language in § 844 and for cases where the government used that term in the indictment.

In paragraph (2)(A), the definition of possessed is a cross-reference to Pattern Instructions 2.10, 2.10A and 2.11.

In paragraph (2)(B), the statement that to act "knowingly" under § 844, the defendant need not know the type of controlled substance involved, is based on United States v. Clay, 346 F.3d 173, 177 (6th Cir. 2003). The statement that the defendant need not know the amount of the controlled substance involved is based on cases construing § 841, including United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003) (*quoting* United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001)) and United States v. Stapleton, 297 F. App'x 413, 426 (6th Cir. 2008) (unpublished). This § 841 authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

14.05 CONSPIRACY TO VIOLATE THE DRUG LAWS (21 U.S.C. § 846)

(1) Count ___ of the indictment charges the defendant(s) with conspiracy to [*insert substantive crime*]. It is a crime for two or more persons to conspire, or agree, to commit a drug crime, even if they never actually achieve their goal.

(2) A conspiracy is a kind of criminal partnership. For you to find the defendant [any one of the defendants] guilty of the conspiracy charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

(A) First, that two or more persons conspired, or agreed, to [*insert substantive crime*].

(B) Second, that the defendant(s) knew of the conspiracy and its [objects] [aims] [goals], and

(C) Third, that the defendant joined the conspiracy with the intent that at least one of the conspirators engage in conduct that satisfies the elements of [*insert substantive crime*].

(3) Now I will give you more detailed instructions on some of these terms.

(A) With regard to the first element – a criminal agreement – the government must prove that two or more persons conspired, or agreed, to cooperate with each other to [*insert substantive crime*].

(1) Proof of conspiracy does not require proof of any formal agreement, written or spoken. Nor does this require proof that everyone involved agreed on all the details. But proof that people simply met together from time to time and talked about common interests, or engaged in similar conduct, is not enough to establish a criminal agreement. Nor is a single transaction between a buyer and a seller sufficient to establish the existence of a conspiracy. These are things that you may consider in deciding whether the government has proved an agreement. But without more they are not enough.

(2) What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people, to cooperate with each other to [*insert substantive crime*]. This is essential.

(3) An agreement can be proved indirectly, by facts and circumstances which lead to a conclusion that an agreement existed. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

[(4) One more point about the agreement. The indictment accuses the defendant(s) of conspiring to commit several drug crimes. The government does not have to prove that the defendant[s] agreed to commit

all these crimes. But the government must prove an agreement to commit at least one of them for you to return a guilty verdict on the conspiracy charge.]

(B) With regard to the second and third element**s** – the defendant's connection to the conspiracy – the government must prove that the defendant(s) knew of the conspiracy and its [objects] [aims] [goals] and joined the conspiracy with the intent that at least one of conspirators engage in conduct that satisfies the elements of [*insert substantive crime*].

(1) [You must consider each defendant separately in this regard.]

(2) Proof of conspiracy does not require proof that a defendant knew everything about the conspiracy, or everyone else involved, or that he was a member of it from the very beginning. Nor does it require proof that a defendant played a major role in the conspiracy, or that his connection to it was substantial. A slight role or connection may be enough.

(3) Further, this does not require proof that the defendant knew the drug involved was [*name controlled substance*]. It is enough that the defendant knew that it was some kind of controlled substance. Nor does this require proof that the defendant knew how much [*name controlled substance*] was involved. It is enough that the defendant knew that some quantity was involved.

(4) But proof that a defendant simply knew about a conspiracy, or was present at times, or associated with members of the group, is not enough, even if he approved of what was happening or did not object to it. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make him a conspirator. These are all things that you may consider in deciding whether the government has proved that a defendant joined a conspiracy. But without more they are not enough.

(5) A defendant's knowledge can be proved indirectly by facts and circumstances which lead to a conclusion that he knew of the conspiracy and its [objects] [aims] [goals]. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

Use Note

This instruction should be followed by Instructions 3.05 through 3.14 as appropriate based on the facts of the case. If the court gives any of these additional instructions, all references to overt acts should be deleted.

If the object drug offense is not charged and defined elsewhere in the instructions, it must be defined at some point in the conspiracy instruction.

This instruction covers simple conspiracy to violate the drug laws. If the prosecution involves conspiracy with increased penalties based on the amount of the controlled substance, see also Inst. 14.07B Unanimity Required – Determining Amount of Controlled Substance (§ 846). If the prosecution involves conspiracy with increased penalties based on death or serious bodily injury, Inst. 14.07C Unanimity Required – Determining Whether Death or Serious Bodily Injury Resulted for Distributing/Dispensing or Manufacturing (§ 841) may be modified to fit the facts.

Bracketed paragraph (3)(A)(4) should be included when the indictment alleges multiple object offenses. It is unclear whether an augmented unanimity instruction specifically requiring unanimous agreement on the same object offense is necessary. See generally Instruction 8.03B and Committee Commentary.

The bracketed sentence in paragraph (3)(B)(1) on considering each defendant separately should be included when multiple defendants are charged with conspiracy.

Specific instructions that an agreement between a defendant and a government agent will not support a conspiracy conviction may be required where important based on the facts of the particular case.

Committee Commentary 14.05

(current through May 29, 2026)

This instruction outlines the basic elements of conspiracy to violate the drug laws under 21 U.S.C. § 846, which imposes penalties on "[a]ny person who . . . conspires to commit any offense defined in [Title 21] . . . ."

The structure of this instruction is based on the conspiracy instructions in Chapter 3 (Insts. 3.01A Conspiracy to Commit an Offense (18 U.S.C. § 371) – Basic Elements, 3.02 Agreement, and 3.03 Defendant's Connection to the Conspiracy), but it is specifically tailored for conspiracies to violate the drug laws. Paragraph (1) is based on paragraph (1) of Inst. 3.01A as revised in 2024.

The list of elements in paragraph (2) is based on Inst. 3.01A(2), which applies to conspiracies charged under § 371. The elements have been modified to delete the overt act requirement because conspiracies charged under § 846 do not require an overt act. United States v. Shabani, 513 U.S. 10 (1994). The elements in Inst. 14.05(2) were revised in 2024 to be

consistent with changes made that year to other conspiracy instructions, Insts. 3.01A, 3.01B, and 3.03. These revisions are described in detail in the commentary to Inst. 3.01A.

In United States v. Potter, 927 F.3d 446, 453 (6th Cir. 2019), the court noted that many Sixth Circuit cases identify three elements for a § 846 conspiracy, including "(1) an agreement to violate drug laws, (2) knowledge and intent to join the conspiracy, and (3) participation in the conspiracy." *See Potter, supra* (*quoting* United States v. Welch, 97 F.3d 142, 148 (6th Cir. 1996) *and citing* United States v. Hines, 398 F.3d 713, 718 (6th Cir. 2005)). The *Potter* court then compared these elements with the elements in the pattern instruction and concluded:

> Conflict? We see it as a semantic difference. The "participation" element [in the case law] cannot mean an "action" furthering the conspiracy because proof of an overt act is not required to establish a violation of § 846. That is not what our cases meant by the term. As best we can tell, this [participation] element . . . [was used] to distinguish joining the conspiracy (which our instructions require) with mere presence at the crime scene (which our instructions find insufficient). In that sense, "participation" is synonymous with "joinder." So whether phrased as two elements or three, a conviction under § 846 requires an agreement to violate the drug laws, the defendant's knowledge of the agreement, and the defendant's decision to voluntarily join (or "participate in") it.

Potter, supra (interior citations and quotation marks omitted).

The paragraphs under (3)(A) defining the first element, a criminal agreement, are drawn from Instruction 3.02 Agreement. In paragraph (3)(A)(1), the language is basically adopted from Instruction 3.02(2), but the Committee added a new sentence to the paragraph, *i.e.*, "Nor is a single transaction between a buyer and a seller sufficient to establish the existence of a conspiracy." This sentence is based on the buyer-seller exception to drug conspiracy liability described in United States v. Wheat, 988 F.3d 299, 307 (6th Cir. 2021) (cleaned up); *see also* United States v. Hamm, 952 F.3d 728, 736 (6th Cir. 2020). This exception is discussed in detail below. In United States v. Watkins, 1994 WL 464193, 1994 U.S. App. LEXIS 23886 (6th Cir. 1994) (unpublished), a panel of the court quoted the third sentence of Inst. 3.02(2) with approval in a § 846 prosecution.

Sixth Circuit cases establish that "[P]roof of a formal agreement is not necessary; a tacit or material understanding among the parties will suffice." United States v. Deitz, 577 F.3d 672, 677 (6th Cir. 2009) (interior quotations omitted) (*quoting* United States v. Martinez, 430 F.3d 317, 330 (6th Cir. 2005) *and citing* United States v. Welch, 97 F.3d 142, 148-49 (6th Cir. 1996)). Nor must the government prove that there was agreement on all the details of how the crime would be carried out. *See, e.g.*, United States v. Schultz, 855 F.2d 1217, 1221 (6th Cir. 1988). However, the government must prove beyond a reasonable doubt that the defendant entered an agreement to violate the drug laws. United States v. Sliwo, 620 F.3d 630 (6th Cir. 2010) (reversing conviction under § 846 for insufficient evidence because all the government proved was that the defendant probably was involved in some illegal enterprise, which failed the requirement to prove an agreement to violate the drug laws).

Paragraph (3)(A)(2) is based on Inst. 3.02(3). The requirement that the agreement involve "two or more persons" reflects the settled law that "proof of an agreement between a defendant and a government agent or informer will not support a conspiracy conviction." United States v. Pennell, 737 F.2d 521, 536 (6th Cir. 1984). Where important given the facts of the particular case, specific instructions on this point may be required. United States v. Nunez, 889 F.2d 1564, 1568-70 (6th Cir. 1989).

The language of paragraph (3)(A)(3) is taken verbatim from Inst. 3.02(4). A § 846 conspiracy may be proved by direct or circumstantial evidence. United States v. Gunter, 551 F.3d 472, 482 (6th Cir. 2008). It is well-established that the government does not have to present direct evidence of an agreement. *See, e.g.*, United States v. Thompson, 533 F.2d 1006, 1009 (6th Cir. 1976). The conspiracy may be inferred from circumstantial evidence that can reasonably be interpreted as participation in the common plan. United States v. Salgado, 250 F.3d 438, 447 (6th Cir. 2001) (*quoting* United States v. Avery, 128 F.3d 966, 971 (6th Cir. 1997)).

Paragraph (3)(A)(4) is based on Inst. 3.02(5).

The paragraphs under (3)(B) defining the second element, the defendant's connection to the conspiracy, are generally based on Instruction 3.03 Defendant's Connection to the Conspiracy as revised in 2024. In paragraph (3)(B), the introductory language (that the government must prove that the defendant(s) knew of the conspiracy and its [objects] [aims] [goals] and joined the conspiracy with the intent that at least one of conspirators engage in conduct that satisfies the elements of [*insert substantive crime*]), is adapted from Instruction 3.01A(2)(B) and (2)(C). In *Gibbs*, the court stated: "To be found guilty of conspiracy [under § 846], the government must prove that [the defendant] was aware of the object of the conspiracy and that he voluntarily associated himself with it to further its objectives." 182 F.3d at 421 (internal quotation marks omitted) (*quoting* United States v. Hodges, 935 F.2d 766, 772 (6th Cir. 1991)). *See also Sliwo, supra* at 633 ("This court has repeatedly held that participation in a scheme whose ultimate purpose a defendant does not know is insufficient to sustain a conspiracy conviction under 21 U.S.C. § 846.")

Occasionally the § 846 conspiracy cases have referred to proof that the defendant was a "willful" member of the conspiracy. *See, e.g., Deitz, supra* at 678 (*quoting* United States v. Gardner, 488 F.3d 700, 711 (6th Cir. 2007)). Because the term "willfully" does not appear in the language of § 846, nor does it appear consistently in case law from the Sixth Circuit, the Committee did not use the term in the instruction. The drawbacks of using the term "willfully" in conspiracy cases are discussed in more detail in the commentary to Inst. 3.01A.

Paragraph (3)(B)(2) on a defendant's knowledge and participation is drawn verbatim from Instruction 3.03(1). The Sixth Circuit has characterized the language of this paragraph as the correct legal standard. United States v. Young, 553 F.3d 1035, 1050 (6th Cir. 2009). Other § 846 cases establish that once the government has proved a § 846 conspiracy beyond a reasonable doubt, the defendant's connection to the conspiracy "need only be slight, and the government is only required to prove that the defendant was a party to the conspiratorial agreement." United States v. Salgado, 250 F.3d 438, 447 (6th Cir. 2001). The defendant does not have to be an active participant in each phase of the conspiracy, so long as he is a party to the general

conspiratorial agreement. *Gibbs*, 182 F.3d at 421 (*quoting* United States v. Hodges, 935 F.2d 766, 772 (6th Cir. 1991)).

The language of paragraph (3)(B)(3), which states that the defendant is not required to know the type or quantity of controlled substance involved for a conviction under § 846, is based on United States v. Villarce, 323 F.3d 435, 439 & n.1 (6th Cir. 2003) (*quoting* United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001)). Knowledge that the defendant possessed "some type of controlled substance" is sufficient. United States v. Stapleton, 297 F. App'x 413, 426 (6th Cir. 2008) (unpublished) (*citing Villarce, supra* at 439). Also, knowledge that the defendant possessed "some quantity" of the controlled substance is sufficient. *Villarce, supra* at 438 (italics omitted). This authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

The language of paragraph (3)(B)(4) is taken verbatim from Instruction 3.03(2), which has been endorsed by a panel of the Sixth Circuit. In United States v. Chubb, 1993 WL 131922 (6th Cir. 1993) (unpublished), a defendant asked the trial court to instruct that "mere association" with the conspiracy was not enough to convict under § 846, and the court did not give this proffered instruction. A panel of the Sixth Circuit stated that the proffered instruction was a correct statement of the law and noted that it was similar to Pattern Instruction 3.03(2). *Chubb*, 1993 WL 131922 at 6 n.5. The panel concluded that failure to give the proffered instruction was not reversible error in this case based on the other instructions given and the defendant's theory of defense. *See also* United States v. Christian, 786 F.2d 203, 211 (6th Cir. 1986) ("Although mere presence alone is insufficient to support a guilty verdict, presence is a material and probative factor which the jury may consider in reaching its decision.").

The language of paragraph (3)(B)(5) is drawn verbatim from Instruction 3.03(3). Proving the defendant's knowledge indirectly is also authorized by Instruction 2.08 Inferring Required Mental State.

The Sixth Circuit provides further guidance on the proof of a defendant's participation based on the type of conspiracy. Drug conspiracies can often be described as "chain" conspiracies because an agreement can be inferred from the interdependence of the enterprise. *See* United States v. Henley, 360 F.3d 509, 513 (6th Cir. 2004) (*quoting* United States v. Spearman, 186 F.3d 743, 746 (6th Cir. 1999)). In a chain conspiracy, jurors are permitted to infer that participants understand they are participating in a joint enterprise because success of the enterprise itself is dependent upon the success of those from whom they buy and sell. *Id*.

Practitioners may be convicted of conspiracy to violate the drug laws by dispensing or distributing controlled substances. *See, e.g.*, United States v. Campbell, 135 F.4th 376 (6th Cir. 2025), discussed in detail in the commentary to Inst. 14.02B. After the decision in United States v. Ruan, 142 S. Ct. 2370 (2022), a practitioner "cannot 'knowingly' agree to violate § 841 unless he agrees to commit acts he *knows* are unauthorized. Thus, the government cannot prove a § 846 violation unless it proves that the conspirators in the agreement knew they were acting–or intended to act–without a legitimate medical purpose in the usual course of professional practice." *Campbell* at 386 (cleaned up).

The Sixth Circuit recognizes a buyer-seller exception to drug conspiracy liability. The "buyer-seller rule . . . refuses to equate a buyer-seller agreement with a conspiratorial agreement." United States v. Wheat, 988 F.3d 299, 307 (6th Cir. 2021) (cleaned up); *see also* United States v. Hamm, 952 F.3d 728, 736 (6th Cir. 2020). The rationale is that when the conspiracy statute uses the common-law term "conspire," the word includes its common-law concepts. *Wheat* at 307 (citations omitted). One of those concepts, Wharton's Rule, holds that "two parties cannot conspire to commit a substantive crime when the crime *itself* requires two parties for its completion (such as dueling or prostitution)." *Wheat* at 307 (citations omitted). Courts presume that Wharton's Rule applies to conspiracy statutes unless the text of the statute suggests otherwise, *Wheat* at 308 *citing* Iannelli v. United States, 420 U.S. 770, 786 (1975). The text of § 846 does not suggest otherwise, so Wharton's Rule applies to it. And the buyer-seller exception based on Wharton's Rule "might be better named the transferor-transferee exception" because it does not require a sale but extends to any distribution. *Wheat* at 308 (internal quotation marks and citation omitted). Earlier cases also recognized this exception, *see, e.g.,* United States v. Dietz, 577 F.3d 672, 680 (6th Cir. 2003), *quoting* United States v. Cole, 59 F. App'x 696, 699 (6th Cir. 2003) (unpublished).

However, the court has often upheld conspiracy convictions based on additional evidence beyond a mere purchase or sale from which knowledge of the conspiracy could be inferred. The court has identified factors that provide circumstantial evidence to establish a drug sale as part of a larger conspiracy: "evidence of advanced planning; multiple transactions involving large quantities of drugs; repeat purchases or other enduring arrangements; the length of the relationship; the established method of payment; the extent to which transactions are standardized; and the level of mutual trust between the buyer and the seller." United States v. Hamm, 952 F.3d at 736 (6th Cir. 2020) (cleaned up), *quoting* United States v. Deitz, 577 F.3d 672, 680–81 (6th Cir. 2003). In *Hamm*, the court concluded that the evidence was sufficient to establish a conspiracy agreement to distribute drugs based *inter alia* on large drug quantities, extensive planning, a relationship that was new but meant to be exclusive and ongoing, and evidence that the defendants worked as a unit with others. *Hamm* at 736-737. *See also* United States v. Williams, 998 F.3d 716, 729-730 (6th Cir. 2021) (finding sufficient evidence of conspiracy where the defendant was a purchaser of drugs but was also charged with distribution); United States v. Rosales, 990 F.3d 989, 995-996 (6th Cir. 2021) (finding sufficient evidence of conspiracy based on the factors identified in *Hamm*). Earlier cases reached the same result, *see, e.g.*, United States v. Nesbitt, 90 F.3d 164, 167 (6th Cir. 1996) (finding that evidence of advanced planning and multiple transactions involving large quantities of drugs may show that the defendant was involved in the conspiracy and was not merely engaged in a buyer-seller relationship); United States v. Anderson, 89 F.3d 1306, 1310 (6th Cir. 1996) (holding that repeat purchases, purchases of large quantities, or other enduring arrangements, are sufficient to support a conspiracy conviction). In contrast, in *Wheat*, the court reversed a drug conspiracy conviction based on insufficient evidence under the buyer-seller exception. *Wheat*, 988 F.3d at 304. The evidence in *Wheat* showed the defendant once gave a potential purchaser a .3-gram free sample of heroin that led to no further exchanges between them. *Wheat* at 304. Examining the factors that permit a jury to find more than a buyer-seller transaction, the court concluded the conviction had to be reversed based on insufficient evidence of an agreement. *Wheat* at 308-312.

A district court need not give a separate instruction on the buyer-seller exception. In

United States v. Williams, 998 F.3d 716 (6th Cir. 2021), the court held the district court did not err in declining to give a buyer-seller instruction, stating that when a district court gives complete instructions on the elements of conspiracy, refusing to give a buyer-seller instruction is not reversible error. *See Williams* at 732 (collecting cases). The *Williams* court further noted that in any event, sufficient evidence in that case established that the defendants were not mere customers purchasing drugs for personal use. In *Wheat*, the court explained, "We generally will not reverse a district court for failing to give an instruction on the buyer-seller limitation (and it does not appear that Wheat's counsel requested such an instruction here anyway). . . . But we cannot ignore this buyer-seller rule when we ask whether there was enough evidence for all essential elements of the crime." *Wheat*, 988 F.3d at 311-12 (6th Cir. 2021) (citations omitted).

Indictments charging conspiracies under 21 U.S.C. § 846 may include multiple drugs as objects of the agreement. When an augmented unanimity instruction is given and the jury returns a general verdict of guilty to a charge that the conspiratorial agreement covered multiple drugs, the general verdict is ambiguous if it cannot be determined whether jurors agreed as to "one or another of the multiple drugs allegedly involved in a conspiracy." United States v. Neuhausser, 241 F.3d 460, 470 (6th Cir. 2001) (discussing United States v. Dale, 178 F.3d 429 (6th Cir. 1999)). Under these conditions the defendant must be sentenced as if he conspired only as to the drug with the lower penalty. *Id*. at 432-34. In these circumstances the judge should use a special verdict form. *See Neuhausser*, 241 F.3d at 472 n.8 ("[W]e do not wish to discourage the Government or the trial court from using separate counts, special verdict forms, or more specific instructions in future cases involving multiple-object conspiracies. Plainly, it is appropriate to take any reasonable steps which might ensure that the jury properly understands the task before it, and that its resulting verdict is susceptible of only one interpretation.") On the other hand, if the indictment and the instructions consistently refer to the multiple drugs using the conjunctive "and," the general verdict is not ambiguous and the sentence is not limited to the lesser penalty. *Id*. at 468-70. *See also* United State v. Tosh, 330 F.3d 836 (6th Cir. 2003).

In United States v. Schultz, *supra*, 855 F.2d at 1221, the Sixth Circuit approvingly cited United States v. Anello, 765 F.2d 253, 262-263 (1st Cir. 1985), for the proposition that a conditional agreement to purchase controlled substances, if the quality is adequate, is sufficient to support a conspiracy conviction. The Sixth Circuit then went on to hold that a failure to complete the substantive object offense as a result of disagreements among the conspirators over the details of performance did not preclude the existence of a conspiratorial agreement.

14.06 DISTRIBUTION OF A CONTROLLED SUBSTANCE IN OR NEAR SCHOOLS OR COLLEGES (21 U.S.C. § 860(a))

(1) The defendant is charged with the crime of distributing [*name controlled substance*] in or near [*name prohibited place*]. [*Name controlled substance*] is a controlled substance. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant knowingly [or intentionally] distributed [*name controlled substance*] and

(B) Second, that he did so within [*insert one option from below*]

– [1000 feet of an [*insert prohibited place from this list:* elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority]]

– [100 feet of a [*insert prohibited place from this list:* public or private youth center, public swimming pool, or video arcade facility]].

(2) Now I will give you more detailed instructions on some of these terms.

(A) *[Insert definition of relevant prohibited place(s) from list below]*

– [The term "playground" means any outdoor facility [including any parking lot appurtenant thereto] intended for recreation, open to the public, and with any portion thereof containing three or more separate apparatus intended for the recreation of children including, but not limited to, sliding boards, swingsets, and teeterboards.]

– [The term "youth center" means any recreational facility and/or gymnasium [including any parking lot appurtenant thereto], intended primarily for use by persons under 18 years of age, which regularly provides athletic, civic, or cultural activities.]

– [The term "swimming pool" includes any parking lot appurtenant thereto.]

– [The term "video arcade facility" means any facility, legally accessible to persons under 18 years of age, intended primarily for the use of pinball and video machines for amusement containing a minimum of ten pinball and/or video machines.]

(B) The term "distribute" means the defendant delivered or transferred a controlled substance. [The term distribute includes the actual, constructive, or attempted transfer of a controlled substance.] [The term distribute includes the sale of a controlled substance.]

(C) To prove that the defendant knowingly distributed the [*name controlled substance*],

the defendant did not have to know that the substance was [*name controlled substance*]; it is enough that the defendant knew that it was some kind of controlled substance. Further, the defendant did not have to know how much [*name controlled substance*] he distributed. It is enough that the defendant knew that he distributed some quantity of [*name controlled substance*]. And, the defendant did not have to know that his distribution of the [*name controlled substance*] occurred within [*insert one option from below*]

– [1000 feet of [*name prohibited place from paragraph (1)(B)*]]
– [100 feet of [*name prohibited place from paragraph (1)(B)*]].

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

This instruction covers only the crime of distributing a controlled substance near a prohibited place; if the offense charged is not distributing but rather possessing with intent to distribute or manufacturing near a prohibited place, the instruction should be modified. If the underlying violation is based on § 856 rather than § 841, the instruction should be modified. If the charged conduct is based not on § 860(a) but on §§ 860(b) regarding second offenders or 860(c) regarding employing children, the instruction should be modified.

If the first bracketed sentence in paragraph (2)(B) is given, the court should further define the terms actual, constructive, or attempted transfer. The terms actual and constructive are defined in the context of possession in Instructions 2.10 and 2.10A. The term attempt is defined in Instruction 5.01.

Committee Commentary Instruction 14.06
(current through May 29, 2026)

Title 21 U.S.C. § 860(a) provides, "Any person who violates [§§ 841(a)(1) or 856] by distributing, possessing with intent to distribute, or manufacturing a controlled substance . . . within one thousand feet of [a school, playground or public housing facility], or within 100 feet of a [youth center, public swimming pool or video arcade facility] is . . . subject to . . . [increased] maximum punishment . . . ." The Committee drafted Instruction 14.06 Distribution in or near Schools or Colleges to cover the basic offense of distributing a controlled substance in or near a prohibited place.

The offense defined in § 860(a) is a distinct offense and not a sentencing enhancement. United States v. Osborne, 673 F.3d 508, 511 (6th Cir. 2012). It is separate from but based on the offenses described in § 841 or § 856. *Id*. Proof of a violation of § 860(a) depends upon proof of an underlying violation of §§ 841(a)(1) or 856 as an element of the offense. The instruction satisfies this by requiring the jury to find the defendant distributed a controlled substance, an

offense under § 841(a)(1) (see Instruction 14.02).

This instruction assumes that the defendant is charged in the same indictment with both the underlying § 841 drug offense and the schoolyard enhancement offense, and that the evidence of both is sufficient. The Committee used this approach because the underlying drug offense and the schoolyard enhancement offense will usually be charged in the same indictment. *See, e.g.,* United States v. Cross, 900 F.2d 66 (6th Cir. 1990). No authority from the Supreme Court or Sixth Circuit addresses whether these specific crimes must be charged in the same indictment, but based on cases construing the analogous firearms crime of using or carrying a firearm during and in relation to a crime of violence or drug trafficking crime, the crimes need not be charged in the same indictment. In the context of that § 924(c) firearms crime, the law does not require the two offenses to be charged together; indeed, the predicate crime need not be charged at all. *See* U.S. v. Kuehne, 547 F.3d 667, 680 (6th Cir. 2008); United States v. Smith, 182 F.3d 452, 457 (6th Cir. 1999). So if the underlying drug offense and the schoolyard enhancement offense are not charged in the same indictment, this instruction should be modified. Moreover, if the underlying drug offense is not charged in the same indictment, the court must instruct the jury on its duty to find the elements of that underlying offense beyond a reasonable doubt. *Kuehne*, 547 F.3d at 680-81 (finding that in § 924(c) case, failure to separately instruct jury regarding elements of underlying drug trafficking offense was error but harmless).

In paragraph (1), the second sentence recognizes that the court determines whether the substance the defendant is charged with possessing falls within the definition of a controlled substance under 21 U.S.C. § 812.

The list of elements in paragraph (1) is based on the statute, § 860(a).

As provided in paragraph (1)(B), the defendant's proximity to a prohibited place is an element of the offense for the jury to decide as opposed to a sentencing factor for the judge to decide. United States v. Osborne, *supra*.

The statute includes no mens rea term. The Committee inserted the mens rea of knowingly in paragraph (1)(A) based on cases defining the mens rea required for the underlying § 841 drug offense. As explained in the commentaries for the § 841 crimes (Instructions 14.01, 14.02 and 14.03), that statute includes a mens rea of "knowingly or intentionally" but the Sixth Circuit often omits the optional term intentionally from the list of elements for § 841 offenses. Based on these cases using the mens rea of knowingly in the context of § 841, in this situation where the statute by its terms includes no mens rea, the Committee used the term "knowingly."

The definitions in paragraph (2)(A) are provided in § 860(e). Some phrases in the definitions were bracketed to help minimize unnecessary words.

The definition of "distribute" in paragraph (2)(B) is based on several sources. The term "distribute" in § 841(a)(1) is defined as "to deliver . . . a controlled substance." § 802(11). The terms "deliver" and "delivery" are defined as "the actual, constructive, or attempted transfer of a controlled substance . . . ." § 802(8). In United States v. Vincent, 20 F.3d 229, 233 (6th Cir. 1994), the court used the term deliver and cited § 802(11). The first bracketed sentence is drawn

from § 802(8), quoted *supra*. The second bracketed sentence, stating that distribution includes the sale of a controlled substance, is based on United States v. Robbs, 75 F. App'x 425, 431 (6th Cir. 2003) (unpublished).

In paragraph (2)(C), the definition of "knowingly" which states that the defendant need not know the type or quantity of controlled substance involved is based on cases construing § 841, including United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003); United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001); and United States v. Stapleton, 297 F. App'x 413, 425-26 (6th Cir. 2008) (unpublished). Under these cases, knowledge that the defendant possessed "some type of controlled substance" is sufficient. *Stapleton, supra* at 426 (*citing Villarce, supra*). Also, knowledge that the defendant possessed "some quantity" of the controlled substance is sufficient. *Villarce, supra* at 438 (italics omitted). This § 841 authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

The final sentence in paragraph (2)(C) (stating that the defendant need not know that the distribution was near a prohibited place) is based on Sixth Circuit cases holding that § 860(a) does not incorporate any *mens rea* requirement on the proximity of the prohibited place. *See* United States v. Lloyd, 10 F.3d 1197, 1218 (6th Cir. 1993); United States v. Cross, 900 F.2d 66, 69 (6th Cir. 1990).

The Sixth Circuit has determined that § 860(a) convictions withstand commerce clause challenges because congressional power derives from the interstate nature of the illegal drug trade. The jurisdictional element need not be proved in the individual case because the offense necessarily affects interstate commerce. United States v. Tucker, 90 F.3d 1135 (6th Cir. 1996).

The title for the instruction is based on the title of the statute establishing the offense, § 860.

14.07A UNANIMITY REQUIRED – DETERMINING AMOUNT OF CONTROLLED SUBSTANCE (§ 841)

(1) The defendant is charged in Count ____ of the indictment with [*insert name of § 841 offense*]. If you find the defendant guilty of this charge, you will then be asked to determine the quantity of the controlled substance involved in the offense. You will be provided with a special verdict form for this purpose.

(2) If you find by unanimous agreement that the government has proved beyond a reasonable doubt that the offense involved a quantity of at least _____ of a mixture or substance containing a detectable amount of [*name controlled substance*], then please indicate this finding by checking that line on the special verdict form.

[(3) If you do not so find, you will then be asked to determine whether the government has proved a lesser quantity. If you unanimously find that the government has proved beyond a reasonable doubt that the offense involved a quantity of at least _____ of a mixture or substance containing a detectable amount of [*name controlled substance*], then please indicate this finding by checking that line on the special verdict form.]

(4) In determining the quantity of the controlled substance involved in the offense, you need not find that the defendant knew the quantity involved in the offense.

Use Note

This instruction explains the requirements of Apprendi v. New Jersey, 530 U.S. 466 (2000) and Alleyne v. United States, 133 S.Ct. 2151 (2013) for a § 841 prosecution when the penalties are increased based on the amount of the controlled substance. In these cases, the committee recommends that the court give this instruction and use a special verdict form. Special verdict forms are provided below following the commentary.

Depending upon the nature and quantity of the controlled substance alleged in the indictment and the special verdict form used, bracketed paragraph (3) may not be necessary to determine the quantity.

Committee Commentary 14.07A

(current through May 29, 2026)

Aside from the requirement that the jury unanimously agree on all facts that are elements of the offense, *see* Richardson v. United States, 526 U.S. 813, 817 (1999), the jury must also unanimously agree beyond a reasonable doubt on any fact (other than a prior conviction) that increases the statutory maximum or triggers a mandatory minimum penalty. Alleyne v. United States, 133 S.Ct. 2151 (2013); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); *see also* Jones v. United States, 526 U.S. 227 (1999). Under subsections 841(b)(1)(A) and (B), the quantity of a controlled substance can trigger a mandatory minimum penalty and can increase the statutory maximum of 20 years provided in subsection 841(b)(1)(C). In those cases, the jury must agree

unanimously on a minimum quantity involved in the § 841 offense. Instruction 14.07A Unanimity Required – Determining Amount of Controlled Substance (§ 841) is designed for these cases where jury unanimity is required. The instruction explains the background to the jury, and special verdict forms follow to allow the jury to work through the questions and record its decisions on the quantity.

As an example, if the indictment alleges a quantity of 280 grams or more of cocaine base, this instruction and the special verdict forms are intended to elicit, first, whether the government has proved an amount of 280 grams or more. Such a finding would invoke a statutory maximum sentence of life imprisonment and a mandatory minimum sentence of 10 years imprisonment under § 841(b)(1)(A)(iii) (assuming that the defendant has no prior felony drug convictions, which would further enhance his sentence). If the jury does not find that the government proved this quantity, it must then determine whether the government proved a quantity that met or exceeded a lesser threshold, in this case 28 grams of cocaine base. Such a finding would invoke a statutory maximum sentence of 40 years imprisonment and a mandatory minimum sentence of 5 years imprisonment under § 841(b)(1)(B)(iii). If the jury finds that the government has proved neither of these threshold quantities, then the base statutory maximum sentence of 20 years imprisonment would apply under § 841(b)(1)(C). These threshold amounts for cocaine base became effective on August 3, 2010, as part of the Fair Sentencing Act of 2010, and they apply to all defendants who are sentenced on that date or later. Defendants sentenced before August 3, 2010 are subject to the greater threshold amounts that were in effect on the date of sentencing. See 18 U.S.C. § 3553(a)(4)(A)(ii); Dorsey v. United States, 132 S.Ct. 2321 (2012).

The government need not prove that the defendant knew the quantity of drugs involved in the offense. The Sixth Circuit explained:

> It is settled, even after Apprendi, that the "government need not prove mens rea as to the type and quantity of the drugs" in order to establish a violation of § 841(b). United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003); United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001). As the *Garcia* Court explained, drug type and quantity are irrelevant to the mens rea element of § 841(a), which requires nothing more specific than an intent to distribute a controlled substance. 252 F.3d at 844. Likewise, intent is irrelevant to the penalty provisions of § 841(b), which require only that the specified drug types and quantities be "involved" in an offense. *Id*.

United States v. Gunter, 551 F.3d 472, 484-85 (6th Cir. 2009). This authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014).

Provided below are two special verdict forms designed for § 841 prosecutions, Forms 14.07A-1 and 14.07A-2. The Committee decided to provide two versions of a special verdict form so district judges may choose the form they prefer. Form A-1 asks the jury to identify the amount of drugs proved by asking one question and giving the jury several choices for the answer, from which it must choose just one. Form A-2 asks the jury to identify the amount of drugs by asking two sequential questions, first whether the greater amount was proved, and if not, whether the lesser amount was proved.

Special Verdict Form § 841
Form 14.07A-1

We, the jury, unanimously find the following:

COUNT ____

Question 1. With respect to the charge in count ____ of the indictment for [*insert name of § 841 offense*], we find the defendant [*insert name*]:

Guilty _____ Not Guilty _____

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Question 1(a) and proceed to [*next count or signature line*].

Question 1(a). With respect to Count ____ , the amount of the mixture or substance containing a detectable amount of [*name controlled substance*] was (indicate answer by checking one line below):

_____ [*identify amount from § 841(b)(1)(A)*] or more.

_____ less than [*identify amount from § 841(b)(1)(A)*] but more than [*identify amount from § 841(b)(1)(B)*].

_____ less than [*identify amount from § 841(b)(1)(B)*].

Proceed to [*next count or signature line*].

Special Verdict Form § 841
Form 14.07A-2

We, the jury, unanimously find the following:

COUNT ____

Question 1. With respect to the charge in count ____ of the indictment for [*insert name of § 841 offense*], we find the defendant [*insert name*]:

Guilty _____ Not Guilty _____

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Questions 1(a) and 1(b) and proceed to [*next count or signature line*].

Question 1(a). With respect to Count ____ , the amount of the mixture or substance containing a detectable amount of [*name controlled substance*] was:

_____ [*identify amount from § 841(b)(1)(A)*] or more.
_____ less than [*identify amount from § 841(b)(1)(A)*].

If you chose the first option of [*identify amount from § 841(b)(1)(A)*] or more, skip
Question 1(b) and proceed to [*next count or signature line*].

If you chose the second option of less than [*identify amount from § 841(b)(1)(A)*], proceed to Question 1(b).

Question 1(b). With respect to Count ____ , the amount of the mixture or substance containing a detectable amount of [*name controlled substance*] was:

_____ [*identify amount from § 841(b)(1)(B)*] or more.
_____ less than [*identify amount from § 841(b)(1)(B)*].

Proceed to [*next count or signature line*].

14.07B UNANIMITY REQUIRED – DETERMINING AMOUNT OF CONTROLLED SUBSTANCE (§ 846)

(1) The defendant is charged in Count _____ of the indictment with conspiracy to [*insert object(s) of conspiracy*]. If you find the defendant guilty of this charge, you will then be asked to determine the quantity of the controlled substance involved in the conspiracy that was attributable to him as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him. You will be provided with a special verdict form for this purpose.

(2) If you find by unanimous agreement that the government has proved beyond a reasonable doubt that a quantity of at least _____ of a mixture or substance containing a detectable amount of [*name controlled substance*] was attributable to defendant as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him, then please indicate this finding on the special verdict form.

[(3) If you do not so find, you will then be asked to determine whether the government has proved a lesser quantity. If you unanimously find that the government has proved beyond a reasonable doubt that a quantity of at least _____ of a mixture or substance containing a detectable amount of [*name controlled substance*] was attributable to defendant as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him, then please indicate that finding on the special verdict form.]

(4) In determining the quantity of the controlled substance, you need not find that the defendant knew that his offense involved this quantity of drugs.

Use Note

This instruction explains the requirements of Apprendi v. New Jersey, 530 U.S. 466 (2000) and Alleyne v. United States, 133 S. Ct. 2151 (2013) in a controlled substances conspiracy case. In these cases, the committee recommends that the court give this instruction and use a special verdict form. Special verdict forms are provided below following the commentary.

Depending upon the nature and quantity of the controlled substance alleged in the indictment and the special verdict form used, bracketed paragraph (3) may not be necessary to determine the quantity for sentencing purposes.

Committee Commentary 14.07B

(current through May 29, 2026)

As described in the Commentary to Instruction 14.07A, under *Apprendi* and *Alleyne*, the jury must unanimously agree on any fact (other than a prior conviction) that increases the statutory maximum penalty or triggers a mandatory minimum penalty. In § 846 conspiracy prosecutions, the quantity of a controlled substance can increase the statutory maximum penalty and/or trigger a statutory mandatory minimum penalty and therefore requires the jury to agree

unanimously on a minimum quantity involved. Instruction 14.07B Unanimity Required – Determining Amount of Controlled Substance (§ 846) and the accompanying special verdict forms are designed for these cases where jury unanimity is required. The instruction explains the background to the jury, and the special verdict forms provided below allow the jury to work through the questions and record its decisions on the amount.

The Sixth Circuit recently stated that to determine the quantity of drugs attributable to a defendant in a § 846 drug conspiracy, the jury must identify the quantity of drugs attributable to defendant as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him. United States v. Rosales, 990 F.3d 989, 997-998 (6th Cir. 2021) (*citing* United States v. Swiney, 203 F.3d 397, 402 (6th Cir. 2000) and United States v. Hamm, 952 F.3d 728, 745-746 (6th Cir. 2020)). The court characterized this approach for determining quantity as "defendant-specific" rather than "conspiracy-wide." *Rosales* at 997. The court further concluded that the conspiracy-wide instruction the trial court gave was error but it was harmless in that case. *Id.* at 998. Based on *Rosales* and the other cases cited above, paragraphs (1), (2), and (3) of the instruction and the accompanying two special verdict forms tell the jury to identify the quantity of drugs that was "attributable to the defendant as the result of his own conduct and the conduct of other co-conspirators that was reasonably foreseeable to him."

Paragraph (4), which states that the mens rea of the defendant as to the amount of drugs involved is irrelevant, is supported by United States v. Mahaffey, 983 F.3d 238, 243 (6th Cir. 2020); United States v. Dado, 759 F.3d 550, 571 (6th Cir. 2014); United States v. Gunter, 551 F.3d 472, 484-85 (6th Cir. 2009) (*citing* United States v. Villarce, 323 F.3d 435, 439 (6th Cir. 2003) and United States v. Garcia, 252 F.3d 838, 844 (6th Cir. 2001)). This authority was not overruled by Alleyne v. United States, 133 S. Ct. 2151 (2013). United States v. Dado, *supra*. Nor was this authority abrogated by Rehaif v. United States, 139 S. Ct. 2191 (2019). United States v. Mahaffey, *supra* at 239.

Provided below are two special verdict forms designed for § 846 prosecutions, Forms 14.07B-1 and 14.07B-2. The Committee decided to provide two versions of a special verdict form so district judges may choose the form they prefer. Form B-1 asks the jury to identify the amount of drugs proved by asking one question on the amount and giving the jury several choices for the answer, from which it must choose just one. Form B-2 asks the jury to identify the amount of drugs by asking two sequential questions, first whether the greater amount was proved, and if not, whether the lesser amount was proved.

Special Verdict Form § 846
Form 14.07B-1

We, the jury, unanimously find the following:

COUNT ____

Question 1. With respect to the charge in count ____ of the indictment for conspiracy to [*insert object(s) of conspiracy*], we find the defendant [*insert name*]:

Guilty _____ Not Guilty _____

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Question 1(a) and proceed to [*next count or signature line*].

Question 1(a). With respect to Count ____ , the amount of the mixture or substance containing a detectable amount of [*name controlled substance*] that was attributable to defendant as the result of his own conduct and the conduct of other co-conspirators reasonably foreseeable to him was (indicate answer by checking one line below):

_____ [*identify amount from § 841(b)(1)(A)*] or more.

_____ less than [*identify amount from § 841(b)(1)(A)*] but more than [*identify amount from § 841(b)(1)(B)*].

_____ less than [*identify amount from § 841(b)(1)(B)*].

Proceed to [*next count or signature line*].

Special Verdict Form § 846
Form 14.07B-2

We, the jury, unanimously find the following:

COUNT ____

Question 1. With respect to the charge in count ____ of the indictment for conspiracy to *[insert object(s) of conspiracy]*, we find the defendant [*insert name*]:

Guilty _____ Not Guilty _____

If you answered guilty in response to Question 1, proceed to Question 1(a).

If you answered not guilty in response to Question 1, skip Questions 1(a) and 1(b) and proceed to [*next count or signature line*].

Question 1(a). With respect to Count ____ , the amount of the mixture or substance containing a detectable amount of [*name controlled substance*] that was attributable to defendant as the result of his own conduct and the conduct of other co-conspirators reasonably foreseeable to him was (indicate answer by checking one line below):

_____ [*identify amount from § 841(b)(1)(A)*] or more.

_____ less than [*identify amount from § 841(b)(1)(A)*].

If you chose the first option of [*identify amount from § 841(b)(1)(A)*] or more, skip Question 1(b) and proceed to [*next count or signature line*].

If you chose the second option of less than [*identify amount from § 841(b)(1)(A)*], proceed to Question 1(b).

Question 1(b). With respect to Count ____ , the amount of the mixture or substance containing a detectable amount of [*name controlled substance*] that was attributable to defendant as the result of his own conduct and the conduct of other co-conspirators reasonably foreseeable to him was (indicate answer by checking one line below):

_____ [*identify amount from § 841(b)(1)(B)*] or more.

_____ less than [*identify amount from § 841(b)(1)(B)*].

Proceed to [*next count or signature line*].

14.07C UNANIMITY REQUIRED – DETERMINING WHETHER DEATH OR SERIOUS BODILY INJURY RESULTED FROM DISTRIBUTING/DISPENSING OR MANUFACTURING (§ 841) AND SPECIAL VERDICT FORM

(1) The defendant is charged in Count ____ of the indictment with [distributing/dispensing] [manufacturing] [*name controlled substance*]. If you find the defendant guilty of this charge, you will then be asked to determine whether this [distributing/dispensing] [manufacturing] offense resulted in [death] [serious bodily injury]. You will be provided with a special verdict form to answer this question.

(2) For you to find defendant guilty of [distributing/dispensing] [manufacturing] [*name controlled substance*] resulting in [death] [serious bodily injury], you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

> (A) First, that [*name of person injured/deceased*] would not have [sustained serious bodily injury] [died] but for the use of that same [*name controlled substance*] [distributed/dispensed] [manufactured] by the defendant;
>
> [(B) Second, the defendant was part of the of the distribution chain that placed the [*name controlled substance*] into the hands of [*name of person injured/deceased*].]

(3) Now I will give you more detailed instructions on some of these terms.

> (A) But-for causation means that without using the controlled substance [distributed/dispensed] [manufactured] by the defendant, [*name of person injured/deceased*] would not have [sustained serious bodily injury] [died]. The government need not prove that [serious bodily injury] [death] was foreseeable to the defendant.
>
> [(B) The term "serious bodily injury" means bodily injury which involves [*insert at least one from the options below*]
>
> [a substantial risk of death] or
> [protracted and obvious disfigurement] or
> [protracted loss or impairment of the function of a bodily member, organ, or mental faculty]].

(4) If you find by unanimous agreement that the government has proved beyond a reasonable doubt that the [distributing/dispensing] [manufacturing] resulted in [death] [serious bodily injury], then please indicate this finding by checking that line on the verdict form.

Use Note

This instruction explains the requirements of Apprendi v. New Jersey, 530 U.S. 466 (2000) and Alleyne v. United States, 133 S.Ct. 2151 (2013) in a prosecution for distributing or dispensing,

or manufacturing, a controlled substance under § 841 when death or serious bodily injury results. In these cases, the committee recommends that the court give this instruction and use a special verdict form, provided below following the commentary.

Bracketed paragraph (2)(B) should be used if the defendant's liability for the offense of distributing or dispensing, or manufacturing, a controlled substance is based on being part of a conspiracy under *Pinkerton*, but if the defendant's liability for distributing or dispensing, or manufacturing, is based on his own actions, the court may omit paragraph (2)(B). This is discussed in the commentary below.

Bracketed paragraph (3)(B) defining serious bodily injury may be deleted if the question is not raised by the facts.

Like the instruction, the special verdict form may be edited depending on whether the facts of the case raise the issue of death or serious bodily injury.

Committee Commentary 14.07C
(current through May 29, 2026)

Aside from the requirement that the jury unanimously agree on all facts that are elements of the offense, *see* Richardson v. United States, 526 U.S. 813, 817 (1999), the jury must also unanimously agree beyond a reasonable doubt on any fact (other than a prior conviction) that increases the statutory maximum or triggers a mandatory minimum penalty. Alleyne v. United States, 133 S.Ct. 2151 (2013); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); *see also* Jones v. United States, 526 U.S. 227 (1999).

Title 21 U.S.C. § 841(a)(1) provides that except as authorized by that subchapter, "[I]t shall be unlawful for any person knowingly or intentionally-- (1) to . . . manufacture, distribute, or dispense . . . a controlled substance . . . ." See Instructions 14.02A and 14.03A. Subparagraphs § 841(b)(1)(A) - (C) and (b)(1)(E)(i) & (ii) impose increased maximum sentences and/or mandatory minimum sentences on a defendant who unlawfully distributes or dispenses or manufactures particular controlled substances when "death or serious bodily injury results from the use of such substance." This instruction, 14.07C Unanimity Required – Determining Whether Death or Serious Bodily Injury Resulted for Distributing/Dispensing or Manufacturing (§ 841), is designed for the cases where jury unanimity is required on the resulting death or serious bodily injury. The instruction explains the elements to the jury, and a special verdict form follows to allow the jury to record its decisions on the question.

This distribution/dispensing and manufacturing offense with the death-or-injury sentence enhancement applies only to a limited subset of controlled substances and can also require minimum amounts. See § 841(b)(1)(A)-(C), (b)(1)(E)(i) & (ii).

The list of elements in paragraph (2) is adapted from Burrage v. United States, 134 S. Ct. 881, 887 (2014).

Paragraph (2)(A) covers the injury-or-death-results and the but-for causation element required by the statute and Burrage v. United States, 134 S. Ct. 881, 887-888, 892 (2014). *Burrage* is discussed in detail below. This paragraph refers to "that same" drug distributed by the defendant to require that the drug distributed by the defendant was the same one that caused the victim's death or injury. *See* United States v. Davis, 970 F.3d 650, 656 (6th Cir. 2020) ("[T]he drugs supporting a defendant's § 841(a) conviction must be the same drugs that caused death."); *see also* United States v. Ewing, 749 F. App'x 317, 328-30 (6th Cir. 2018) (unpublished) (vacating distribution conviction with the death-or-injury sentence enhancement due to insufficient evidence that the victim's death resulted from the same drug that defendant distributed to him).

The death-or-injury sentence enhancement does not require the defendant to have a culpable mental state regarding the death or serious bodily injury. United States v. Williams, 998 F.3d 716 (6th Cir. 2021). In *Williams*, the defendant argued that the district court should have told the jury that it could not convict him of the enhancement unless it found that he had some sort of culpable mental state regarding the victim's death and serious bodily injury. *Id.* at 733. On plain error review, the court rejected that argument, stating the government need not demonstrate foreseeability to apply the death-or-injury enhancement, and that at any rate the defendant was not prejudiced by the omission of a mental state because the manufacture of drugs laced with fentanyl, a highly lethal drug, established foreseeability. *Id.* at 734.

Bracketed paragraph (2)(B) covers the "distribution-chain rule" announced in United States v. Hamm, 952 F.3d 728, 747 note 11 (6th Cir. 2020). The *Hamm* court held that while conspiracy liability based on *Pinkerton* could be used to impose liability for the substantive offense of regular distribution, (see Inst. 14.02A Distribution of a Controlled Substance and Inst. 3.10 Pinkerton Liability for Substantive Offenses Committed by Others), *Pinkerton* liability could not be used to impose the death-or-injury sentence enhancement covered by this instruction. *Hamm* at 741 and 744, *citing* United States v. Swiney, 203 F.3d 397, 406 (6th Cir. 2000). Instead, imposing the sentence enhancement was covered by a "narrower rule." *Hamm* at 744. That rule is that the sentence enhancement "applies only to defendants who were part of the distribution chain that placed the drugs into the hands of the overdose victim . . . ." *Id.* Paragraph (2)(B) states this requirement.

On the other hand, if the defendant's liability for distribution is based on his own actions and not on his status as a conspirator under *Pinkerton*, the narrower distribution-chain rule of *Hamm/Swiney* does not apply. United States v. Davis, 970 F.3d 650, 657 (6th Cir. 2020). The *Davis* court affirmed a conviction for the death-or-injury sentence enhancement and stated that the *Hamm/Swiney* rule was "irrelevant" because defendant was not charged with conspiracy nor was his liability for distribution based on a conspiracy theory. The court explained:

> Neither [the *Hamm* or *Swiney*] decision applies here. Davis was not charged with a conspiracy under § 846. Nor was he held liable for his § 841(a) offense on a conspiracy theory. And nothing in *Swiney* or *Hamm* suggests that those decisions apply to a case involving a substantive charge under § 841(a) not predicated on a conspiracy. The decisions are thus irrelevant here because [Davis] "is not being held responsible for someone else's actions based on his status as a co-conspirator, but is being punished for

his own actions."

Davis, id. (quoting United States v. Atkins, 289 F. App'x 872, 877 (6th Cir. 2008); *and citing* United States v. Carbajal, 290 F.3d 277, 284-85 (5th Cir. 2002) and United States v. Soler, 275 F.3d 146, 152 (1st Cir. 2002)). Thus paragraph (2)(B) is bracketed: If the defendant's liability for the offense of distributing a controlled substance is based on being part of a conspiracy under *Pinkerton*, the court should use paragraph (2)(B), but if the defendant's liability for distribution is based on his own actions, the court may omit paragraph (2)(B) based on *Davis*.

A more recent case, United States v. Williams, 998 F.3d 716 (6th Cir. 2021) is difficult to reconcile with *Davis*. In *Williams*, the defendant's conviction for distribution with the death-or-serious-bodily-injury enhancement was not based on conspiracy but was based on aiding and abetting under 18 U.S.C. § 2. *See Williams* at 727 (defendants Bradley, Barrett and Williams were charged with, *inter alia*, "eight counts of distribution of a substance containing a detectible amount of fentanyl, the use of which resulted in serious bodily injury or death, under 21 U.S.C. §§ 841(a)(1), (b)(1)(C) and 18 U.S.C. § 2."). The court affirmed the convictions and stated:

> To prove that Bradley was liable for the death of others, moreover, the government cannot rely on *Pinkerton* liability, and must show that he was in the chain of distribution that caused the victim's death or injury (*citing Hamm* at 741). The government did so here. It presented testimonial evidence from toxicology experts that indicated that the counterfeit pills containing fentanyl were the cause of the overdoses and demonstrated that Bradley was a manufacturer of this highly lethal drug. Because the government properly situated Bradley in the chain of distribution, the § 841(b)(1)(C) enhancement was properly applied to him (*citing Hamm* at 747).

This language in *Williams* suggests that the distribution chain rule applies not just to cases based on conspiracy but to cases based on aiding and abetting as well.

In U.S. v. Sadler, 24 F.4th 515 (6th Cir. 2022), cert. denied, 2022 WL 4653329, defendants Tempo and Sadler were convicted of drug offenses and the death-or-serious-bodily-injury enhancement. Neither defendant objected to the enhancement, so the court applied plain error review. Because defendant Tempo's underlying drug conviction was based on one of three possible theories (he personally committed the crime; he aided and abetted the crime; or Pinkerton liability), the court held that the jury could have found that Tempo was a principal and/or an aider and abettor, so omitting the chain of distribution instruction did not substantially affect the defendant's rights and did not warrant remand. *Sadler*, 24 F.4th at 563. In contrast, defendant Sadler's underlying drug conviction was based only on conspiracy liability under § 846, so omitting the chain of distribution instruction did substantially affect his rights. The court vacated Sadler's sentence and remanded for a new trial on the sole question of whether he was within the chain of distribution. *Sadler*, 24 F.4th at 561-562, 564.

The Sixth Circuit has stated that district courts should consider using special verdict forms or more specific instructions to make clear to juries the distinction between substantive offenses and the death-or-injury enhancement, and the differing applicability of *Pinkerton* to each. See United States v. Hamm, 952 F.3d 728, 747 note 10 (6th Cir. 2020).

Paragraph (3)(A), which defines but-for causation, is based on the instruction approved in United States v. Volkman, 797 F.3d 377 (6th Cir. 2015). The court described the *Volkman* instruction as "properly [given]" and stated that it "clearly informed" the jury of the but-for standard. *Volkman* at 392 & note 2.

Bracketed paragraph (3)(B), which defines "serious bodily injury" is based on § 802(11).

In *Burrage*, the Court discussed two causation standards. *Burrage* at 890. The first is the but-for standard the Court adopted and that appears in paragraph (2)(A) of the instruction. *Burrage* at 887-889. Discussing this but-for standard, the Sixth Circuit explained:

> The Government was not required to prove, however, that oxycodone was [the victim]'s *only* cause of death. On the contrary, but-for causation exists where a particular controlled substance–here, oxycodone–"combines with other factors"–here, *inter alia,* diazepam and alprazolmam–to result in death. *Burrage,* 134 S.Ct. at 888. The Government presented sufficient oxycodone-specific evidence for a rational jury to find that, "without the incremental effect" of the oxycodone, [the victim] would not have died. *Id.*

United States v. Volkman, 797 F.3d at 395 (6th Cir. 2015).

The second causation standard the Court mentioned in *Burrage* is that the victim's use of the drug distributed by the defendant was an independently sufficient cause of the victim's death or injury. *Burrage* at 890 & 892. The Court defined this as a situation "when multiple sufficient causes independently, but concurrently, produce a result." *Id.* at 890. The Court continued:

> To illustrate, if A stabs B, inflicting a fatal wound; while at the same moment X, acting independently, shoots B in the head ... also inflicting [a fatal] wound; and B dies from the combined effects of the two wounds, A will generally be liable for homicide even though his conduct was not a but-for cause of B's death (since B would have died from X's actions in any event).

Burrage at 890 (cleaned up). The Court also described this as a situation "where each of two causes is independently effective." *Burrage* at 890. After identifying this standard, the *Burrage* Court did not accept or reject it because there was no evidence in that case that the victim's heroin use was an independently sufficient cause of his death. *Id.* Panels of the Sixth Circuit have applied this causation standard and found the evidence sufficient in United States v. Allen, 761 Fed. Appx. 447, 450-451 (6th Cir. 2017) (unpublished) and United States v. Ewing, 749 F. App'x 317, 327-28 (6th Cir. 2018) (unpublished). In *Ewing*, the panel concluded that the government presented sufficient evidence to support causation "either as an independent and sufficient cause or as a but-for cause." *Id*.

The government's proof of but-for causation does not require evidence from blood toxicology tests. United States v. Sadler, 24 F.4th 515, 546 (6th Cir. 2022), cert. denied, 2022 WL 4653329.

The offense of simple distribution covered in Inst. 14.02A is a lesser included offense of distribution when death or serious bodily injury results covered in Inst. 14.07C. *See Burrage* at 887 & note 3.

Form 14.07C
Special Verdict Form for § 841 Distributing/Dispensing or Manufacturing
<u>when Death or Serious Bodily Results</u>

We, the jury, unanimously find the following:

COUNT ____

Question 1. With respect to the charge in count ____ of the indictment for [*insert § 841 offense of [distributing/dispensing] [manufacturing]] the controlled substance*], we find the defendant [*insert name*]:

Guilty _____ Not Guilty _____

If you answered guilty in response to Question 1, proceed to Questions 1(a) and 1(b) below.

If you answered not guilty in response to Question 1, skip Questions 1(a) and 1(b) and proceed to [*next count or signature line*].

Question 1(a). With respect to the charge in Count ____ of the indictment, did the defendant's [distributing/dispensing] [manufacturing] of the controlled substance result in death?

Yes _____

No _____

If you answered No in response to Question 1(a), proceed to Question 1(b).

If you answered Yes in response to Question 1(a), skip Question 1(b) and proceed to [*next count or signature line*].

Question 1(b). With respect to the charge in count ____ of the indictment, did the defendant's [distributing/dispensing] [manufacturing] of the controlled substance result in serious bodily injury?

Yes _____

No _____

Proceed to [*next count or signature line*].