**Chapter 14.00**

**CONTROLLED SUBSTANCES OFFENSES**

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 Substance (§ 841) and Special Verdict Form 14.07C (distributing/dispensing

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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 1, 2025)

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 1, 2025)

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 ཞྭdispense

ཛྭ 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 ཞྭdispenserཛྭ

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 14.02C**

(current through May 1, 2025)

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. 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 (2022).

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.”

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, some of

these definitions have been edited; the court should consult the full statutory definitions if the

facts warrant.

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.

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”).

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. 14.02C. 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 ཞྭpurpose

ཛྭ 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.

**14.03A 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 1, 2025)

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 requireed – 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 1, 2025)

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 ཞྭpurpose

ཛྭ 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 1, 2025)

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).

**Inst. 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 1, 2025)

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 ཞྭ(1) an agreement to

violate drug laws, (2) knowledge and intent to join the conspiracy, and (3) participation in the

conspiracy.

ཛྭ *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 ཞྭparticipation

ཛྭ element [in the

case law] cannot mean an ཞྭaction

ཛྭ 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, ཞྭparticipation

ཛྭ is synonymous with ཞྭjoinder.

ཛྭ So whether phrased as

two elements or three, a conviction under § 846 requires an agreement to violate

the drug laws, the defendantཚྭs knowledge of the agreement, and the defendantཚྭs

decision to voluntarily join (or ཞྭparticipate inཛྭ) 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*.

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: ཞྭevidence 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.

ཛྭ United States v.

Hamm, 952 F.3d at 736 (6th Cir. 2020) (cleaned up), *quoting* United States v. Deitz, 577 F.3d

672, 680ཤྭ81 (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 1, 2025)

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 1, 2025)

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 1, 2025)

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 1, 2025)

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 ཞྭdeath or serious bodily injury results from

the use of such substance.

ཛྭ 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, 284ཤྭ85 (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 substanceསྭhere, oxycodoneསྭྭཞcombines with other

factorsཛྭྭསhere, *inter alia,* diazepam and alprazolmamསྭto result in death. *Burrage,*

134 S.Ct. at 888. The Government presented sufficient oxycodone-specific

evidence for a rational jury to find that, ཞྭwithout the incremental effect

ཛྭ 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

when Death or Serious Bodily Results

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*].