Controlled Substances Offenses

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6.21.841A Controlled Substances – Possession with Intent to *(Manufacture) (Distribute)* **(21 U.S.C. § 841(a) & (b))**

Count *(no.)* **of the indictment charges** *(name of defendant)* **with possessing** *[X grams or more of]* **a mixture or substance containing a controlled substance, specifically** *(identity of controlled substance)***, with the intent to** *(manufacture) (distribute)* **the controlled substance, which is a violation of federal law.**

In order to find *(name)* **guilty of this offense, you must find that the government proved each of the following four** *[five – see Alternative 2 below]* **elements beyond a reasonable doubt:**

First: That *(name)* **possessed a mixture or substance containing a controlled substance;**

Second: That *(name)* **possessed the controlled substance knowingly or intentionally;**

Third: That *(name)* **intended to** *(manufacture) (distribute)* **the controlled substance; and**

Fourth: That the controlled substance was *(identity of controlled substance)***.**

[When the indictment alleges one of the weight thresholds authorizing increased maximum penalties under 21 U.S.C. § 841(b), use one of the following alternatives:

Alternative 1

Use the appropriate Verdict Form with Special Interrogatories With Respect to Substance Identity and Weight, as provided in Instruction 6.21.841C.

Alternative 2

Give the following additional instruction, and also consider giving a lesser included offense instruction on possession with intent to (distribute) (manufacture) a weight meeting a lower maximum penalty threshold:

Fifth: That the weight of the mixture or substance containing the controlled substance was (approximate weight) (X grams or more).]

Comment

See Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 2B *Federal Jury Practice and Instructions* (5th ed. 2000) [hereinafter O'Malley et al] § 64.07; First Circuit § 4.22; Fifth Circuit § 2.87; Eighth Circuit § 6.21.841A & § 6.21.841A1 (*Apprendi*-Affected, Short & Long Forms); Ninth Circuit § 9.13; Eleventh Circuit § 85.

21 U.S.C. § 841(a) provides:

> (a) Unlawful acts. Except as authorized by this subchapter, it 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; or
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

This instruction should be used when the offense charged is possession with intent to manufacture or distribute a controlled substance. Instruction 21.841B should be used when the offense charged is manufacture or distribution of a controlled substance.

Authorized Penalties Depend on Identity and Weight of Controlled Substance. 21 U.S.C. § 841(b) sets forth the authorized penalties for violation of (a)(1) and (2). These penalties vary depending on the identity and, in some cases, the weight of the controlled substance manufactured, distributed or possessed with the intent to manufacture or distribute. *See* the Drug Penalties Chart in the Comment to Instruction 6.21.841C. If the government does not charge in the indictment and prove a specific type of controlled substance, the maximum authorized sentence is, by default, one year in prison. 21 U.S.C. § 841(b)(3). *See, e.g., United States v. Barbosa*, 271 F.3d 438 (3d Cir. 2001); *United States v. Vasquez*, 271 F.3d 93 (3d Cir. 2001).

Ordinarily, the government will charge and prove a specific type of controlled substance; this element is covered in the "Fourth" paragraph of the instruction. If the government charges and proves, and the jury finds that the controlled substance is, for example, heroin, cocaine, cocaine base, or methamphetamine, the maximum penalty is 20 years in prison and $1 million fine regardless of the weight of the substance.

Alternatives With Respect to Weight Thresholds. In cases in which the indictment charges a weight threshold that would authorize higher maximum penalties under 21 U.S.C. § 841(b), different practices are followed in different districts. In some districts, trial judges include, in the section 841(a) instruction, weight of the substance as an element of the offense. In other districts, a weight element is not included in the offense instruction, but instead the jury is asked to make a finding on weight by answering special interrogatories after it has found the defendant guilty of the offense. This instruction provides for flexibility in handling this issue by providing bracketed alternatives with respect to the weight of the substance. *See* discussion of *Apprendi* below. If special interrogatories are used, *see* Instruction 6.21.841C.

Identity and Weight of Controlled Substance as Elements of the Offenses. With respect to the offenses defined by 21 U.S.C. § 841(a), the Third Circuit has held that, if the government seeks a penalty of more than the one year default maximum, the identity of the controlled substance alleged must be treated as an element of the offense that must be found by the jury beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *United States v. Barbosa*, 271 F.3d 438 (3d Cir. 2001). In *Apprendi*, the Supreme Court held that, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Also *see, e.g., United States v. Cotton*, 535 U.S. 625 (2002) (any factor that must be treated as an element under *Apprendi* must be charged in the indictment); *United States v. Figueroa*, 2011 WL 2790465 (E.D. PA 2011) (holding that *Apprendi* and *Cotton* "preclude this court from sentencing defendants pursuant to a higher statutory sentencing range then that authorized by the indictment."). In *United States v. Vasquez*, 271 F.3d 93 (3d Cir. 2001), the Third Circuit also held that weight of the controlled substance must be treated as an element when the weight exceeds the thresholds for the different maximum penalties authorized under 21 U.S.C. § 841(b).

The Third Circuit summarized its decisions on this point in *United States v. Henry*, 282 F.3d 242, 246-47 (3d Cir 2002):

> We recently addressed the quantity and identity issues, respectively, in *United States v. Vazquez*, 271 F.3d 93 (3d Cir.2001) (en banc), and *United States v. Barbosa*, 271 F.3d 438 (3d Cir.2001). In *Vazquez* we held that "an *Apprendi* violation . . . occurs if the drug *quantity* is not found by a jury beyond a reasonable doubt and the defendant's sentence under § 841 exceeds [the statutory maximum]." *Vazquez*, 271 F.3d at 98 (emphasis added). Similarly, in *Barbosa* we held that drug *identity* must be found by a jury beyond a reasonable doubt when the "defendant would be exposed to greater punishment

> depending upon ... the identity of the controlled substance." *Barbosa,* 271 F.3d at 454. Although neither *Vazquez* nor *Barbosa* established a bright line rule that drug quantity and/or identity is *always* an element that must be found beyond a reasonable doubt by a jury, inasmuch as both identity and quantity are relevant to determining what the statutory maximum is when the sentence imposed is greater than the "catch-all" maximum of one year, we conclude that, under *Vazquez* and *Barbosa, Apprendi* has been violated in this case.

In reasoning that refers explicitly to the identity of the controlled substance, but is equally applicable to the weight, the court in *Henry* explained further (282 F.3d at 248):

> Recognizing that prior cases had concluded that drug identity was a sentencing factor, not an element of the crime that had to be submitted to the jury, we did not go so far as to decide that identity is always an element. *Cf. Vazquez,* 271 F.3d at 108 (Becker, C.J., concurring) ("[D]rug type and quantity are *always* elements of an offense under § 841, and therefore must *always* be submitted to the jury for proof beyond a reasonable doubt.") (emphasis in original). Rather, we reaffirmed that "even after *Apprendi*, drug identity will not always be an element of a § 841(a) offense.... So long as the resulting, and possibly enhanced, sentence is below *the statutory maximum authorized by the jury's factual findings*, no *Apprendi* problem exists." *Barbosa*, 271 F.3d at 456-57 (emphasis added). However, what we did conclude in *Barbosa* is that in cases where drug identity is not known or found by the jury, "drug identity would not be an element [only] in those cases where the sentence imposed is below the lowest 'catch-all' maximum of one year found in § 841(b)(3)...." *Id.* at 457. This result was driven by our observation that, without a jury determination on the particular substance, we cannot assume the identity and, thereby, the provision under which the individual should be sentenced. Thus, the rule of *Barbosa* is that when the jury's factual findings do not include a finding as to the identity of the drug beyond a reasonable doubt, *Apprendi* will be violated when the sentence exceeds the lowest "catch-all" statutory maximum of one year. *See* 21 U.S.C. § 841(b)(3).

The weight thresholds also trigger mandatory minimum penalties under 21 U.S.C. § 841(b). The Supreme Court held in *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013), that "[m]andatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury," under the Sixth Amendment as interpreted in *Apprendi*. *Alleyne* overruled *Harris v. United States*, 536 U.S. 545 (2002), which had held that facts which create mandatory minimum penalties need not be found by the jury beyond a reasonable doubt and may be determined by the judge at sentencing although the status of the decision may be questioned after *Booker v. United States*, 543 U.S. 220 (2005). *See, e.g., United States v. Barragan-Sanchez*, 165 Fed. Appx.758, 760 (11th Cir. 2006) (not precedential); *United States v. Ezell*, 417 F. Supp 2d 667, 670 (E.D. Pa.2006). Also *see, e.g., United States v. Stubbs*, __ Fed. Appx. __ (3d Cir. 2014) (non-precedential) (facts that trigger mandatory minimum penalties must also be alleged in the indictment under *United States v. Cotton*, 535 U.S. 625 (2002)).

Lesser Included Offenses. Simple possession, possession with intent to distribute (or manufacture) a weight meeting a lower maximum penalty threshold, and possession with intent to distribute (or manufacture) an unspecified amount of controlled substance are lesser included offenses of possession with intent to distribute (or manufacture) a specific amount of controlled substance. *United States v. Freeman*, __ F. 3d __ (3d Cir. 2014); *United States v. Lacy*, 446 F.3d 448 (3d Cir. 2006); *United States v. Johnson*, 292 Fed. Appx. 178, 180-81 (3d Cir. 2008) (non-precedential) (after citing *Lacy* for the propositions stated above, the Third Circuit noted, although "there is out-of-circuit authority that distribution of powder cocaine is a lesser included offense of distribution of cocaine base," citing *United States v. Lacey*, 511 F.3d 212, 215 (D.C.Cir.2008), "[t]he question of whether possession with intent to distribute cocaine is a lesser included offense of possession with intent to distribute cocaine base" was not clearly answered by Third Circuit precedent and did not need to be resolved on the record in the case before it.). The trial judge should, therefore, consider Instruction No. 3.11 (Lesser Included Offenses). The trial judge should also consider the need to give an instruction on attempt to possess with intent to distribute (or manufacture). *See* Instructions Nos. 7.01 and 6.21.846A; Fed. R. Crim. P. 31(c) (Jury Verdict – Lesser Included Offense or Attempt).

Resulting Death or Serious Bodily Injury. Under 21 U.S.C. § 841(b), the mandatory minimum and maximum penalties available are also increased "if death or serious bodily injury results from the use of such substance." As the Supreme Court noted in *Burrage v. United States*, 134 S. Ct. 881, 887 (2014), "Because the 'death [or serious bodily injury] results' enhancement increased the minimum and maximum sentences to which Burrage was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt. See *Alleyne v. United States, . . .*; *Apprendi v. New Jersey, . . .*." In *Burrage*, where the victim died after ingesting several illegal drugs including heroin purchased from the defendant, the Court held that, "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury." 134 S. Ct. at 892. The Court rejected the government's argument that "results from" can be satisfied by proof that use of the controlled substance was merely a "substantial" or "contributing" factor among a combination of factors that produced death or serious injury. *Id.* at 890-91.

As with the weight issue, the trial judge may ask the jury to consider resulting death or serious bodily injury by way of special interrogatories answered after it finds the defendant guilty of the offense. *See* Instruction 6.21.841C. Alternatively, the trial judge may include in the offense instruction a "death or serious bodily injury" element, as follows:

> *[(Fifth) (Sixth), that death or serious bodily injury resulted from the use of the controlled substance. To find that death or serious bodily injury resulted from the use of the substance, you must find that the Government proved beyond a reasonable doubt that the use of the substance was a but-for cause of the death or injury, meaning the government must prove beyond a reasonable doubt that the death or serious bodily injury would not*

have resulted had the victim not used the controlled substance distributed by (name).]

Under this alternative, the judge should also consider instructing on the lesser included offense of possession with intent not resulting in death or serious injury.

Additional Controlled Substances Offenses. Congress has supplemented the core offenses under 21 U.S.C. § 841 with several additional offenses carrying increased maximum penalties, when the core section 841 crimes are committed under certain specified circumstances. For example, 21 U.S.C. § 860 provides that the penalties for manufacturing, distributing, and possessing with intent to distribute are doubled or tripled when the offense is committed within a specified distance of a school or other facility regularly used by children. Specifically, 21 U.S.C. § 860(a) provides:

> Any person who violates section 841(a)(1) of this title . . . by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private 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, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, is (except as provided in subsection (b) of this section) subject to (1) twice the maximum punishment authorized by section 841(b) of this title; and (2) at least twice any term of supervised release authorized by section 841(b) of this title for a first offense. A fine up to twice that authorized by section 841(b) of this title may be imposed in addition to any term of imprisonment authorized by this subsection. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a person shall be sentenced under this subsection to a term of imprisonment of not less than one year. The mandatory minimum sentencing provisions of this paragraph shall not apply to offenses involving 5 grams or less of marihuana.

Also *see, e.g.*, 21 U.S.C. § 860(c) (Employing children to distribute drugs near schools and playgrounds); 21 U.S.C. § 859 (Distribution to persons under age of twenty-one); 21 U.S.C. § 861 (Employment or use of persons under 18 years of age in drug operations).

The Third Circuit has held that these statutes create separate substantive offenses in addition to the core section 841 offenses, and are not merely sentence enhancement provisions. *See, e.g., United States v. McQuilkin*, 78 F.3d 105, 108 (3d Cir. 1996) ("21 U.S.C. § 860 is a separate substantive offense, not a sentence enhancement provision."). However, the Third Circuit has joined other circuits in holding that the mental state element for the 21 U.S.C. § 860 prohibition of possession with intent to distribute controlled substances within a specified distance of a school or other facility regularly used by children is found in the underlying 841(a)(1) possession with intent to distribute offense (*i.e.*, knowing possession of narcotics with intent to distribute). The government does not have to prove that the defendant either had knowledge that he was possessing narcotics within the specified distance or intended to distribute the narcotics within that area. *United States v. Jackson*, 443 F.3d 293, 299 (3d Cir. 2006).

If the defendant is charged with one of these separate offenses, the trial judge must give a separate instruction on that offense. For example, if the indictment includes a charge of possession with intent to distribute a controlled substance within the prescribed distance of a school or other specified, youth related facility, the trial judge should give the following additional instruction:

> Count *(no.)* of the indictment charges *(name)* with possessing with intent to distribute) a controlled substance in or near a *(school) (playground) (public housing facility) (youth center, or [specify the other type of facility charged])*. This is a separate violation of federal law in addition to the offense of possession with intent to distribute) a controlled substance generally, which is charged in Count *(no.)*.
>
> In order to find *(name)* guilty of this offense, in addition to the elements that I have already explained to you, you must also find that the government proved beyond a reasonable doubt that *(name)* possessed with intent to distribute a controlled substance *[in or on, or within 1000 feet of the property comprising a (public or private elementary, vocational, or secondary school) (public or private college, junior college, or university) (playground) (housing facility owned by a public housing authority)] [within 100 feet of a (public or private youth center) (public swimming pool) (video arcade facility)]*.
>
> The government need not prove that, when (*name*) possessed the controlled substance, he knew that he was *[in or on, or within 1000 feet of the property comprising a (public or private elementary, vocational, or secondary school) (public or private college, junior college, or university) (playground) (housing facility owned by a public housing authority)] [within 100 feet of a (public or private youth center) (public swimming pool) (video arcade facility)]*. Nor does the government have to prove that (*name*) intended to distribute the controlled substance *[in or on, or within 1000 feet of the property comprising a (public or private elementary, vocational, or secondary school) (public or private college, junior college, or university) (playground) (housing facility owned by a public housing authority)] [within 100 feet of a (public or private youth center) (public swimming pool) (video arcade facility)]*.

A similar instruction must be given if the defendant is charged with any of the other separate, increased penalty offenses. With respect to the enhanced penalties for offenses involving firearms and drug trafficking, *see* Instructions 6.18.924A, A-1, B, B-1.

The Third Circuit has also recognized that the underlying section 841 offense is a lesser included offense of the additional offenses. *See, e.g., United States v. Peterson*, 622 F.3d 196 (3d Cir. 2010) (holding that possession with intent to distribute under 21 U.S.C. § 841(a) is a lesser included offense of possession with intent to distribute in a school zone under 21 U.S.C. § 860(a)); *United States v. Jackson*, 443 F.3d 293 (3d Cir.2006) (same); *United States v. Johnson*, 292 Fed. Appx. 178, 180 (3d Cir. 2008) (non-precedential) ("It is self-evident by the very language of § 860 that § 841(a)(1) is a lesser included offense, and every circuit to have

addressed the issue has so held."). The trial judge should, therefore, consider Instruction No. 3.11 (Lesser Included Offenses).

Accomplice Liability: Aiding and Abetting Controlled Substances Offenses. If the defendant is charged (under 18 U.S.C. § 2(a)) with aiding and abetting a controlled substance possession or distribution offense, the government must prove "'that [the defendant] had knowledge of the [drugs], had knowledge that [the principal] intended to distribute or possess [drugs], or purposefully intended to aid others in committing the crime alleged.'" *United States v. Salmon*, 944 F.2d 1106, 1114 (3d Cir.1991) (quoting *United States v. Wexler*, 838 F.2d 88, 92 (3d Cir.1988). Also *see, e.g., United States v. Soto*, 539 F.3d 191, 194-97 (3d Cir. 2008), distinguishing *United States v. Chandler*, 359 F.3d 281 (3d Cir. 2004), in which the Third Circuit continued, "Based on this well-established precedent, the proper question before us with respect to both the conspiracy and the aiding and abetting charges is 'whether there was sufficient evidence that [the alleged accomplice] knew that the subject matter of the transaction was a controlled substance, rather than some other form of contraband, such as stolen jewels or computer chips or currency.' " 359 F.3d at 288 (quoting *United States v. Idowu*, 157 F.3d 265, 266 (3d Cir.1998)). Most recently, in *United States v. Caraballo-Rodriguez*, 726 F.3d 418 (3d Cir. 2013) and *United States v. Boria*, 592 F.3d 476, (3d Cir. 2010), the Third Circuit discussed this point and reviewed its precedent in upholding the sufficiency of the evidence to sustain a conviction for conspiracy to possess controlled substances with the intent to distribute. *See* Comment to Instruction 6.21.846B (Controlled Substances – Conspiracy to (Distribute) (Possess with Intent to Manufacture / Distribute) (Manufacture) (Possess) (21 U.S.C. § 846)).

Therefore, where the evidence warrants, the trial court should include this point in its instruction with respect to accomplice liability for controlled substance offenses. *See* Instruction 7.02 (Accomplice Liability: Aiding and Abetting (18 U.S.C. § 2(a)).

(Revised 11/10; 2/12 & 4/15)

6.21.841-1 Controlled Substances – Possession Defined

To "possess" a controlled substance means to have it within a person's control. The government does not have to prove that *(name)* **physically held the controlled substance, that is, had actual possession of it. As long as the controlled substance was within** *(name)***'s control,** *(he) (she)* **possessed it. If you find that** *(name)* **either had actual possession of the controlled substance or had the power and intention to exercise control over it, even though it was not in** *(name)***'s physical possession - that is, that** *(name)* **had the ability to take actual possession of the substance when** *(name)* **wanted to do so - you may find that the government has proved possession. Possession may be momentary or fleeting. Proof of ownership of the controlled substance is not required.**

[The law also recognizes that possession may be sole or joint. If one person alone possesses a controlled substance, that is sole possession. However, more than one person may have the power and intention to exercise control over a controlled substance. This is called joint possession. If you find that (name) had such power and intention, then (he) (she) possessed the controlled substance even if (he) (she) possessed it jointly with another.]

[Mere proximity to the controlled substance, or mere presence on the property where it is located, or mere association with the person who does control the controlled substance or the property is not enough to support a finding of possession.]

Comment

See Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal* (2003) [hereinafter, Sand et al.] 35-49; 2B O'Malley et al, supra, § 64.08. This instruction is the same as Instruction 6.18.922-5 with respect to possession of a firearm.

Constructive Possession. To convict the defendant of possession or possession with the intent to distribute a controlled substance, the government must establish that the defendant possessed the controlled substance. Possession may be actual or constructive. To establish constructive possession the government must prove that the defendant knew of the object and had control over it. In *United States v. Brown*, 3 F.3d 673 (3d Cir. 1993), the Third Circuit stated:

> Although the government need not show proof of actual possession, to show "constructive" possession of an illegal substance the government must submit sufficient evidence to support an inference that the individual "knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons. Constructive possession necessarily requires both 'dominion and control' over an object and knowledge of that object's existence."

3 F.3d at 680 (citing *United States v. Iafelice*, 978 F.2d 92 (3d Cir. 1992)). *See also United States v. Benjamin*, 711 F.3d 371, 376-77 (3d Cir. 2013); *United States v. Iglesias*, 535 F.3d 150, 156 (3d Cir.2008) ("Constructive possession, which can be proved by circumstantial evidence, 'requires an individual to have the power and intent to exercise both dominion and control over the object he or she is charged with possessing.' " citations omitted); *United States v. Smith*, 352 Fed.Appx. 709, 713 (3d Cir. 2009) (non-precedential) (evidence sufficient to establish defendant's constructive possession of the drugs and firearm found atop a cabinet at his residence); *United States v. Brightwell*, 104 Fed.Appx. 823 (3d Cir. 2004) (affirming conviction for possessing a firearm in relation to a drug trafficking crime on basis of constructive possession). *Compare, e.g., United States v. Bates*, 462 Fed. Appx. 244 (3d Cir. 2012) (non-precedential) (holding evidence insufficient to support a finding that the defendant had dominion and control over heroin, citing *United States v. Jenkins*, 90 F.3d 814 (3d Cir.1996), and *United States v. Brown*, 3 F.3d 673 (3d Cir.1993)); *United States v. Garth*, 188 F.3d 99, 112 (3d Cir.1999) (holding that prosecution had failed to establish that defendant had constructive possession). In *United States v. Wiltshire*, __ Fed. Appx. __ (3d Cir. 2014) (a non-precedential firearms case), the trial court gave Model Instruction 6.18.922G–4 (Firearm Offenses - Knowing Possession Defined), which is identical to this "Controlled Substances – Possession Defined" instruction. The Third Circuit concluded that the model instruction conveyed all the required elements necessary for constructive possession and stated, "In general, use of this Court's model jury instructions is favored. *See United States v. Petersen*, 622 F.3d 196, 208 (3d Cir.2010)."

The instruction does not use the terms "constructive possession" or "dominion," which are commonly used by the courts when discussing the legal concept of possession. Jurors cannot be expected to understand these terms. However, if the attorneys have used either or both of these

terms during the trial, the court may choose to modify the instruction accordingly.

Mere Presence. If the government's case rests heavily on the defendant's presence in combination with other circumstances, the court may wish to include the optional language instructing the jury that mere presence or association is not sufficient to establish possession. It is clear that mere presence or association is insufficient to prove possession. *See, e.g., United States v. Benjamin*, 711 F.3d 371, 376-77 (3d Cir. 2013); *United States v. Davis*, 461 F.2d 1026, 1036 (3d Cir. 1972). In *United States v. Stewart*, 131 Fed.Appx. 350, 354 (3d Cir. 2005) (not precedential), however, the Third Circuit held that the defendant was not entitled to a "mere presence" instruction because the jury instructions given adequately conveyed the requirements for constructive possession:

> The instructions concerning actual and constructive possession were legally correct and complete. The District Court made clear that, in order to have actual possession of an object, a person must have direct physical control or authority over the object, such as the control one has when one holds an object in one's hands. And in order to have "constructive" possession over an object, the District Court explained, a person must have the ability to take actual possession of the object when the person wants to do so. Because mere proximity, mere presence, or mere association is not enough for even constructive possession, these instructions adequately conveyed to the jury that constructive possession is not established by mere proximity, mere presence, or mere association is not enough for even constructive possession, these instructions adequately conveyed to the jury that constructive possession is not established by mere proximity, mere presence, or mere association.

(Revised 11/10; 12/12; 1/14; & 4/15)

6.21.841-2 Controlled Substances – Distribute Defined

Distribute *(to distribute)*, as used in the offenses charged, means *(deliver or transfer) (to deliver or to transfer)* possession or control of a controlled substance from one person to another.

Distribute *(to distribute)* includes the sale of a controlled substance by one person to another, but does not require a sale. Distribute also includes a *(delivery) (transfer)* without any financial compensation, such as a gift or trade.

Comment

The Notes to O'Malley § 64.04 state: "This instruction is based, in part, upon 21 U.S.C.A. § 802(8) and § 802(11). Section 802(8) defines 'deliver' or 'delivery' to mean the 'actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship.' Section 802(11) defines 'distribute' to mean 'to deliver *(other than by administering or dispensing)* a controlled substance.' A 'distributor' is one 'who so delivers a controlled substance.' 21 U.S.C.A. § 802(11). Distribution simply involves an unlawful transfer – a sale or exchange of money or other 'commercial' item is not required. See United States v. Coady, 809 F.2d 119, 124 (1st Cir.1987); United States v. Workopich, 479 F.2d 1142, 1147 (5th Cir.1973); United States v. Ramirez, 608 F.2d 1261, 1264 (9th Cir.1979)."

6.21.841-3 Controlled Substances Offenses – Controlled Substance Defined

You are instructed that, as a matter of law, *(identity of controlled substance alleged in the indictment)* **is a controlled substance, that is, some kind of prohibited drug.**

It is solely for you, however, to decide whether the government has proved beyond a reasonable doubt that *(name) (distributed) (possessed with the intent to distribute) (manufactured) (possessed)* **a mixture or substance containing** *(identity of controlled substance alleged)***.**

Comment

O'Malley § 64.13.

6.21.841-4 Controlled Substances Offenses – Knowingly or Intentionally Defined

To act knowingly, as used in the offense*(s)* **charged, means that** *(name)* **was conscious and aware that** *(he) (she)* **was engaged in the act***(s)* **charged and knew of the surrounding facts and circumstances that make out the offense***(s)*. **Knowingly does not require that** *(name)* **knew that the acts charged and surrounding facts amounted to a crime.**

To act intentionally, as used in the offense*(s)* **charged, means to act deliberately and not by accident. Intentionally does not require that** *(name)* **intended to violate the law.**

The phrase "knowingly or intentionally," as used in the offense*(s)* **charged, requires the government to prove beyond a reasonable doubt that** *(name)* **knew that what** *(he) (she) (distributed) (possessed with intent to distribute) (manufactured) (possessed)* **was a controlled substance. In addition, the government must also prove beyond a reasonable doubt that the controlled substance was in fact** *(identity of the specific controlled substance alleged) [and that the weight of the controlled substance was (X grams or more)]*. **However, as long as you find that the government proved beyond a reasonable doubt that** *(name)* **knew that what** *(he) (she) (manufactured) (distributed) (possessed)* **was a controlled substance, you need not find that** *(name)* **knew that the controlled substance was** *(identity of the specific controlled substance alleged) [or that (name) knew that the weight of the controlled substance was (X grams*

or more)].

In deciding whether *(name)* **acted "knowingly or intentionally," you may consider evidence about what** *(name)* **said, what** *(name)* **did and failed to do, how** *(name)* **acted, and all the other facts and circumstances shown by the evidence that may prove what was in** *(name)***'s mind at that time.**

Comment

The language of this instruction is based on the general definitions of knowingly and intentionally, stated in Instructions 5.02 (Knowingly) and 5.03 (Intentionally), modified in accordance with the Third Circuit's opinion in *United States v. Barbosa*, 271 F.3d 438, 457-58 (3d Cir. 2001), about the meaning of these two mental states with respect to controlled substances offenses. Also *see* O'Malley § 6.15 (Knowledge of precise controlled substance need not be proven).

No Need to Prove Awareness of Specific Type of Controlled Substance or Weight. In *Barbosa*, the Third Circuit held that although the identity of the specific controlled substance alleged must usually be treated as an element of the offense, which must be found by a jury beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the mental state requirements knowingly, intentionally, and intent to distribute in 21 U.S.C. § 841(a) do not require the government to prove that the defendant was aware that he possessed, etc, the specific substance alleged. That is, although the government must prove the identity of the controlled substance in order to increase the available maximum sentence beyond the one year in prison default maximum, the government only needs to prove beyond a reasonable doubt that the defendant knew that he or she was possessing, etc., a controlled substance generally. Thus, in *Barbosa* the evidence was sufficient to sustain the defendant's conviction of possession with intent to distribute, even though it was essentially undisputed that the defendant honestly believed that the cocaine he possessed was in fact heroin.

In those cases in which the weight of the controlled substance affects the maximum penalty available under 21 U.S.C. § 841(b), whether the weight exceeds the thresholds for greater maximum penalties must also be treated as an element of the offense under *Apprendi*. *See* the Comment to Instruction 21.841C. *United States v. Vasquez*, 271 F.3d 93 (3d Cir.2001) (en banc). Although the Third Circuit has not addressed whether the mental state requirements for controlled substance offenses applies to this weight element, it is likely the court will also hold that the government need not prove that the defendant was aware of the weight of the mixture or substance containing the controlled substance. With respect to the controlled substance offenses,

the Third Circuit has treated the identity and weight elements similarly under *Apprendi*. *See, e.g., United States v. Lacy*, 446 F.3d 448, 453 (3d Cir. 2006); *United States v. Barbosa*, 271 F.3d 438, 457-58 (3d Cir. 2001); *Vasquez v. United States*, 271 F.3d 93 (3d Cir.2001) (en banc). Identity and weight serve the same function as determinants of the various penalty ranges under 21 U.S.C. § 841(b), and Congress likely intended the same mental state analysis with respect to both.

Alternatives Regarding Weight Thresholds. The bracketed language in the third paragraph should be used when the indictment charges one of the weight thresholds that would authorize the higher maximum penalties and the court follows the alternative of instructing that weight of the controlled substance is an element of the offense, rather than the alternative of asking the jury to make a finding on weight through special interrogatories after it has found the defendant guilty of the offense.

(Revised 2/12)

6.21.841-5 Controlled Substances – Intent to *(Manufacture) (Distribute)* Defined

In order to find *(name)* guilty of possession of a controlled substance with intent to *(manufacture) (distribute)*, as charged in Count *(no.)* of the indictment, you must find that the government proved beyond a reasonable doubt that *(name)* intended to *(manufacture) (distribute)* a mixture or substance containing a controlled substance. To find that *(name)* had the intent to *(manufacture) (distribute)*, you must find that *(name)* had in mind or planned in some way *(to manufacture a controlled substance) (to deliver or transfer possession or control over a controlled substance to someone else)*.

In determining whether *(name)* had the intent to *(manufacture) (distribute)* you may consider all the facts and circumstances shown by the evidence presented, including *(name's)* words and actions. In determining *(name's)* intent to distribute controlled substances, you may also consider, among other things, the quantity and purity of the controlled substance, the manner in which the controlled substance was packaged, and the presence or absence of weapons, large amounts of cash, or equipment used in the processing or sale of controlled substances.

Comment

See 2B O'Malley et al, *supra*, § 64.09. This is a clear example of the traditional specific intent element, meaning that the government is required to prove that it was the defendant's purpose or conscious object to commit the unlawful act.

The relevant portions of the second sentence of the second paragraph should be used

when supported by the evidence. *See, e.g.*, *United States v. Lee*, 174 Fed. Appx. 60, 62 (3d Cir. 2006) (not precedential) (evidence sufficient to prove intent to distribute where the defendant was arrested with 30, $10 packets of crack cocaine and stuffed into his waistband, as well as $746 in United States currency, in addition to testimony that he was a seller); *United States v. Johnson*, 302 F.3d 139, 149 (3d Cir. 2002) (evidence sufficient to find intent to distribute where it showed that, when confronted by U. S. Marshals, defendant appeared to stuff fifteen bags of marijuana in a taxi's back seat cushions, his companion said the bags were his not hers; defendant had sixty-two small plastic bags of crack cocaine in his coat pocket; a bag found at his companion's residence contained documents bearing defendant's name and fingerprint, scores of small plastic bags filled with crack cocaine, cocaine, and marijuana, extensive drug paraphernalia, and a loaded gun; she testified the bag belonged to defendant).

Although this instruction provides that the trial court may instruct that the jury can consider, among other things, "what (name) did and failed to do," the court should be careful not to instruct that the jury can consider what the defendant failed to say. *United States v. Waller*, 654 F.3d 430 (3d Cir. 2011), discussed in the Comment to Instruction 5.01 (Proof Of Required State of Mind – Intentionally, Knowingly, Willfully).

(Revised 12/12)

6.21.841B Controlled Substances – ***(Manufacture) (Distribute)*** **a Controlled Substance (21 U.S.C. § 841(a) & (b))**

Count *(no.)* **of the indictment charges the defendant** *(name of defendant)* **with** *(manufacturing) (distributing) [X grams or more]* **of a mixture or substance containing a controlled substance, specifically** *(identity of controlled substance alleged)***, which is a violation of federal law.**

In order to find *(name)* **guilty of this offense, you must find that the government proved each of the following three** *[four – see Alternative 2 below]* **elements beyond a reasonable doubt:**

First: That *(name) (manufactured) (distributed)* **a mixture or substance containing a controlled substance;**

Second: That *(name) (manufactured) (distributed)* **the controlled substance knowingly or intentionally;**

Third: That the controlled substance was *(identity of controlled substance)***.**

[When the indictment charges one of the weight thresholds authorizing increased maximum penalties under 21 U.S.C. § 841(b), use one of the following alternatives:

Alternative 1

Use the appropriate Verdict Form with Special Interrogatories With Respect to Substance Identity and Weight, as provided in Instruction 6.21.841C.

Alternative 2

Give the following additional instruction, and also consider giving a lesser included offense instruction on distribution or manufacture of a weight meeting a lower maximum penalty threshold:

Fourth: That the weight of the mixture or substance containing the controlled substance was (approximate weight) (X grams or more).]

Comment

See 2B O'Malley et al, supra, § 64.03; First Circuit §§ 4.23-4.24; Eighth Circuit § 6.21.841B; Ninth Circuit § 9.15; Tenth Circuit § 2.85.1.

21 U.S.C. § 841(a) provides in pertinent part:

> (a) Unlawful acts. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense . . . a controlled substance. . . .

21 U.S.C. § 841(b) sets forth the authorized penalties for violation of (a)(1). These penalties vary depending on the identity and, in some cases, the weight of the controlled substance manufactured, distributed or possessed with the intent to manufacture or distribute. *See* the Drug Penalties Chart in the Comment to Instruction 6.21.841C.

Identity and Weight of Controlled Substance as Elements; Alternatives. As discussed in the Comment to Instruction 6.21.841A, with respect to the offenses defined by 21 U.S.C. § 841(a), the Third Circuit has held that the identity and quantity of controlled substance involved usually must be treated as elements of the offense charged that must be found by the jury beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

Ordinarily, the government will charge and prove a specific type of controlled substance; this element is covered in the *Third* paragraph of the instruction. If the government proves and the jury finds that the controlled substance is, for example, heroin, cocaine, cocaine base, and methamphetamine, the maximum penalty is 20 years in prison and $1 million fine regardless of the weight of the substance. In cases in which the indictment also charges a weight threshold that would authorize higher maximum penalties under 21 U.S.C. § 841(b), different practices are followed in different districts. Like Instruction 6.21.841A, this instruction provides for

flexibility in handling this issue by providing bracketed alternatives with respect to the weight of the substance. *See* discussion in Comment to Instruction 6.21.841A. If special interrogatories are used, *see* Instruction 6.21.841C.

Death or Serious Bodily Injury. Under 21 U.S.C. § 841(b), the maximum penalties available are also increased "if death or serious bodily injury results from the use of such substance." When the indictment charges resulting death or serious bodily injury, to authorize the increased penalties available under this provision, the jury must find "death or serious bodily injury" beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Also *see Burrage v. United States*, 134 S. Ct. 881, 887 (2014) ("results from the use of such substance" requires proof that the use of the substance was a but-for cause of death or serious injury). The trial judge may ask the jury to consider resulting death or serious bodily injury by way of special interrogatories answered after it finds the defendant guilty of the core offense. *See* Instruction 6.21.841C. Alternatively, the trial judge may include in the offense instruction a "death or serious bodily injury" element, as follows:

> *[(Fourth) (Fifth), that death or serious bodily injury resulted from the use of the controlled substance. To find that death or serious bodily injury resulted from the use of the substance, you must find that the Government proved beyond a reasonable doubt that the use of the substance was a but- for cause of the death or injury, meaning the government must prove beyond a reasonable doubt that the death or serious bodily injury would not have resulted had the victim not used the controlled substance distributed by (name).]*

Under this alternative, the judge should also consider instructing on the lesser included offense of possession with intent not resulting in death or serious injury. *See* Comment to Instruction 6.21.841A.

Additional Controlled Substances Offenses. As discussed in the Comment to Instruction 6.21.841A (Controlled Substances – Possession with Intent to *(Manufacture) (Distribute)*), Congress has supplemented the core offenses under 21 U.S.C. § 841 with several additional offenses carrying increased maximum penalties, when the core section 841 crimes are committed under certain specified circumstances. For example, 21 U.S.C. § 860 provides that the penalties for manufacturing, distributing, and possessing with intent to distribute are doubled or tripled when the offense is committed within a specified distance of a school or other facility regularly used by children. These statutes create separate substantive offenses in addition to the core section 841 offenses, but the Third Circuit has held that the mental state element for the 21 U.S.C. § 860 is found in the underlying 841 offense, and that the government does not have to prove that the defendant knew he was within the specified distance or intended to distribute or manufacture the controlled substance within that area. *United States v. Jackson*, 443 F.3d 293, 299 (3d Cir. 2006).

If the defendant is charged with one of these separate offenses, the trial judge must give a separate instruction on that offense, modifying the instruction suggested in the Instruction

6.21.841A Comment to fit the distribution or manufacture offense charged.

Lesser Included Offenses. Distribution (or manufacture) of a weight meeting a lower maximum penalty threshold, distribution (or manufacture) of an unspecified amount of controlled substance, possession with intent to distribute (or manufacture), and simple possession are lesser included offenses of distribution (or manufacture) of a specific amount of controlled substance. *See United States v. Lacy*, 446 F.3d 448 (3d Cir. 2006). The trial judge should, therefore, consider Instruction No. 3.11 (Lesser Included Offenses). The trial judge should also consider the need to give an instruction on attempt to distribute (or manufacture). *See* Instructions No. 7.01 and 21.846A. *See* Fed. R. Crim. P. 31(c) (Jury Verdict – Lesser Included Offense or Attempt).

(Revised 11/10; 2/12; & 4/15)

6.21.841C Controlled Substances – Verdict Form with Special Interrogatories With Respect to Substance Identity and Weight *[Death or Serious Bodily Injury]*
[The following verdict form and special interrogatories may be used when the indictment charges the weight thresholds (or resulting death or serious bodily injury) which would authorize the higher maximum penalties under 21 U.S.C. § 841(b). See the alternatives set forth in Instructions 6.21.841A and B, and discussed in the Comments to those instructions.]

If you find *(name)* **guilty of the offense charged in Count** *(no.)***, you must answer some questions, called jury interrogatories, to decide whether the offense involved certain weights or quantities of controlled substances. Do not answer these jury interrogatories until after you have reached your verdict. If you find that the government has not proved** *(name)* **guilty of the offense charged in Count** *(no.)***, then you do not need to answer the interrogatories.**

If you find *(name)* **guilty, then in answering these interrogatories, as in deciding your verdict, you must be unanimous, and in order to find that the offense involved a certain weight or quantity of controlled substances, you must all be satisfied that the government proved the weight or quantity beyond a reasonable doubt. Weight or quantity means the total weight of any mixture or substance which contains a detectable amount of the controlled substance charged.**

Jury Interrogatory Number One relates to Count (*no.*) **and first asks whether you unanimously find beyond a reasonable doubt that the weight or quantity of** (*type*

of controlled substance) **which was** (*possessed with intent to distribute*) (*distributed*) (*involved in the conspiracy*) **was** *(X grams or more)***.** *[For conspiracy charge: In making this decision, you should consider all controlled substances that the members of the conspiracy actually (possessed with intent to distribute) (distributed) (intended to distribute).]*

If your answer to this question is "yes," that completes Jury Interrogatory Number One. If your answer is "no," you must then answer the second question, whether you unanimously find beyond a reasonable doubt, that the quantity of (*type of controlled substance*) **which was** (*possessed with intent to distribute*) (*distributed*) (*involved in the conspiracy*) **was** *(next lower threshold)* **or more.**

If you unanimously find that the government did not prove beyond a reasonable doubt that the offense involved (*lowest threshold*) **or more, but rather involved an amount less than** (*lowest threshold*)**, your answer should be "no" to both questions. That completes Jury Interrogatory Number One.**

(*Add instructions regarding all thresholds and all counts.*)

VERDICT FORM with SPECIAL INTERROGATORIES

COUNT NO. __ (Possession With Intent to Manufacture or Distribute)

_____ Guilty

_____ Not Guilty

If you find *(name of defendant)* **not guilty of possession with intent to** *(manufacture)*

(distribute) **a controlled substance as charged in Count No. __, please proceed to the next count; do not answer the jury interrogatories. If you find** *(name)* **guilty of possession with intent to** *(manufacture) (distribute)* **a controlled substance as charged in Count No. __, please answer the following jury interrogatories before proceeding to the next count.**

JURY INTERROGATORY COUNT NO. __ (Possession With Intent to Manufacture or Distribute):

Do you unanimously find that the government proved beyond a reasonable doubt that the weight of the mixture or substance containing *(identity of controlled substance)* **that** *(name)* **possessed with intent to** *(manufacture) (distribute)* **was** *(X grams or more)***?**

_____ Yes

_____ No

If your answer to this question is "yes," that concludes this Jury Interrogatory. Do not go on to the next question. If your answer to this question is "no," please answer the following question:

Do you unanimously find that the government proved beyond a reasonable doubt that the weight of the mixture or substance containing *(identity of controlled substance)* **that** *(name)* **possessed with intent to** *(manufacture) (distribute)* **was** *(X grams or more – one of the lower thresholds; if necessary a*

*separate interrogatory should be given for each lower threshold that applies)***?**

_____ Yes

_____ No

COUNT NO. __ (Manufacture or Distribute)

_____ Guilty

_____ Not Guilty

If you find *(name of defendant)* **not guilty of** *(manufacture) (distribution)* **of a controlled substance as charged in Count No. __, please proceed to the next count; do not answer the jury interrogatories. If you find** *(name)* **guilty of** *(manufacture) (distribution)* **of a controlled substance as charged in Count No. __, please answer the following jury interrogatories before proceeding to the next count.**

JURY INTERROGATORY COUNT NO. __ (Manufacture or Distribution): Do you unanimously find that the government proved beyond a reasonable doubt that the weight of the mixture or substance containing *(identity of controlled substance)* **that** *(name) (manufactured) (distributed)* **was** *(X grams or more)***?**

_____ Yes

_____ No

If your answer to this question is "yes," that concludes this Jury Interrogatory. Do not go on to the next question. If your answer to this question is "no," please answer

the following question:

Do you unanimously find that the government proved beyond a reasonable doubt that the weight of the mixture or substance containing *(identity of controlled substance)* **that** *(name) (manufactured) (distributed)* **was** *(X grams or more – one of the lower thresholds; if necessary a separate interrogatory should be given for each lower threshold that applies)***?**

_____ Yes

_____ No

COUNT NO. __ (Conspiracy)

_____ Guilty

_____ Not Guilty

If you find *(name of defendant)* **not guilty of the conspiracy as charged in Count No. __, please proceed to the next count; do not answer the jury interrogatories. If you find** *(name)* **guilty of the conspiracy as charged in Count No. __, please answer the following jury interrogatories before proceeding to the next count.**

JURY INTERROGATORY COUNT NO. __ (Conspiracy):

Do you unanimously find that the government proved beyond a reasonable doubt that the weight of the mixture or substance containing *(identity of controlled substance)* **involved in the conspiracy to** *(possess with intent to distribute or manufacture) (manufacture) (distribute)* **which you have found was** *(X grams or more)***?**

_____ Yes

_____ No

If your answer to this question is "yes," that concludes this Jury Interrogatory. Do not go on to the next question. If your answer to this question is "no," please answer the following question:

Do you unanimously find that the government proved beyond a reasonable doubt that the weight of the mixture or substance containing *(identity of*

controlled substance) **that** *(name)* **involved in the conspiracy to** *(possess with intent to manufacture or distribute) (manufacture) (distribute)* **which you have found was** *(X grams or more – one of the lower thresholds; if necessary a separate interrogatory should be given for each lower threshold that applies)***?**

_____ Yes

_____ No

[When the indictment charges that death or serious bodily injury resulted from the use of the controlled substance involved in the offense, under 21 U.S.C. § 841(b), the following special interrogatory may be used:

If you find (name of defendant) not guilty of the offense charged in Count No. __, please proceed to the next count; do not answer the jury interrogatory. If you find (name) guilty of the offense charged in Count No. __, please answer the following jury interrogatory before proceeding to the next count.

JURY INTERROGATORY COUNT NO. __:

Do you unanimously find that the government proved beyond a reasonable doubt that death or serious bodily injury resulted from the use of the controlled substance?

_____ *Yes*

_____ *No]*

Comment

See 2B O'Malley et al, supra, § 64.14 (should not be followed in *Apprendi*-affected cases); Eighth Circuit § 6.21.841A.1 (Verdict Form; with Lesser Included Offense). The interrogatories and verdict forms provided in this instruction are based on those "prepared by the Office of the United States Attorney for the Eastern District of Pennsylvania and used without incident or problem by the judges of the district court ...." *United States v. Vasquez*, 271 F.3d 93, 114 (3d Cir. 2001 (Becker, C.J., concurring).

Special Interrogatories as Alternatives. The special interrogatories may be used, as one of the alternatives in Instructions 6.21.841A and B, in cases in which the indictment charges the weight thresholds that would authorize the higher maximum penalties under 21 U.S.C. § 841(b). *See* Comments to Instructions 6.21.841A and B. *Also see* discussion of special interrogatories in the Comment to Instruction No. 3.18 (Special Verdict Form; Special Interrogatories). When the indictment charges that "death or serious bodily injury result[ed] from the use of such substance," under 21 U.S.C. § 841(b), the trial judge may use the bracketed special interrogatory at the end of this instruction.

Determining Weight of Controlled Substance for Conspiracy Charge. Where the defendant is charged with conspiracy to violate the controlled substances provisions under 21 U.S.C. § 846, the weight or quantity thresholds for the maximum authorized penalties are determined based on the weight or quantity involved in the entire conspiracy, not merely the weight or quantity that the particular defendant conspired to possess, distribute, or manufacture. *See* Comment to Instruction 6.21.846B (Controlled Substances – Conspiracy to *(Distribute) (Possess with Intent to Manufacture / Distribute) (Manufacture) (Possess)*(21 U.S.C. § 846)). However, where multiple conspiracies are alleged and the defendant was not involved in a single overall conspiracy or in all of the multiple conspiracies, the special interrogatory with respect to conspiracy may need to be modified.

Drug Penalties Chart. The weight thresholds and maximum sentences for the most commonly charged controlled substances (with or without "death or serious bodily injury"), provided by 21 U.S.C. § 841(b), are set forth in the following chart (provided by the office of the United States Attorney for the Eastern District of Pennsylvania).

(Revised 2/12)

12/2011

DRUG PENALTIES FOR INDIVIDUALS

		PRIOR CONVICTIONS		
		NONE	***ONE***	***TWO+***
HIGH QUANTITY - § 841(b)(1)(A) - no death or serious bodily injury				
≥ 5 kilograms cocaine ≥ 1 kilogram heroin ≥ 280 grams crack cocaine ≥ 50 grams meth ≥ 500 grams meth mixture ≥ 1000 kg or plants marijuana	minimum imprisonment	10 years	20 years	life
	maximum imprisonment	life	life	life
	maximum fine	$10 million	$20 million	$20 million
	minimum supervised release	5 years	10 years	n/a
	special assessment	$100	$100	$100
HIGH QUANTITY - § 841(b)(1)(A) - death or serious bodily injury				
≥ 5 kilograms cocaine ≥ 1 kilogram heroin ≥ 280 grams crack cocaine ≥ 50 grams meth ≥ 500 grams meth mixture ≥ 1000 kg or plants marijuana	minimum imprisonment	20 years	life	life
	maximum imprisonment	life	life	life
	maximum fine	$10 million	$20 million	$20 million
	minimum supervised release	5 years	n/a	n/a
	special assessment	$100	$100	$100
MEDIUM QUANTITY - § 841(b)(1)(B) - no death or serious bodily injury				
≥ 500 grams cocaine ≥ 100 grams heroin ≥ 28 grams crack cocaine ≥ 5 grams meth ≥ 50 grams meth mixture ≥ 100 kg or plants marijuana	minimum imprisonment	5 years	10 years	10 years
	maximum imprisonment	40 years	life	life
	maximum fine	$5 million	$8 million	$8 million
	minimum supervised release	4 years	8 years	8 years
	special assessment	$100	$100	$100
MEDIUM QUANTITY - § 841(b)(1)(B) - death or serious bodily injury				
≥ 500 grams cocaine ≥ 100 grams heroin ≥ 28 grams crack cocaine ≥ 5 grams meth ≥ 50 grams meth mixture ≥ 100 kg or plants marijuana	minimum imprisonment	20 years	life	life
	maximum imprisonment	life	life	life
	maximum fine	$5 million	$8 million	$8 million
	minimum supervised release	4 years	n/a	n/a
	special assessment	$100	$100	$100
LOW QUANTITY - § 841(b)(1)(C) - no death or serious bodily injury				
≤ 500 grams cocaine ≤ 100 grams heroin ≤ 28 grams crack cocaine ≤ 5 grams meth ≤ 50 grams meth mixture ≤ 50 kg or plants marijuana*	minimum imprisonment	none	none	none
	maximum imprisonment	20 years	30 years	30 years
	maximum fine	$1 million	$2 million	$2 million
	minimum supervised release	3 years	6 years	6 years
	special assessment	$100	$100	$100
LOW QUANTITY - § 841(b)(1)(C) - death or serious bodily injury				
≤ 500 grams cocaine ≤ 100 grams heroin ≤ 28 grams crack cocaine ≤ 5 grams meth ≤ 50 grams meth mixture ≤ 50 kg or plants marijuana*	minimum imprisonment	20 years	life	life
	maximum imprisonment	life		
	maximum fine	$1 million	$2 million	$2 million
	minimum supervised release	3 years	n/a	n/a
	special assessment	$100	$100	$100

*** for ≤50 kg or plants marijuana, see § 841(b)(1)(D)**

6.21.844 Controlled Substance – Possession (21 U.S.C. § 844)

Count *(no.)* **of the indictment charges the defendant** *(name of defendant)* **with possessing a controlled substance, specifically** *(identity of controlled substance)***, which is a violation of federal law.**

In order to find *(name)* **guilty of this offense, you must find that the government proved each of the following two elements beyond a reasonable doubt:**

First: That *(name)* **possessed a controlled substance; and**

Second: That *(name)* **possessed the controlled substance knowingly or intentionally.**

Comment

2B O'Malley et al, supra, § 64.12.

21 U.S.C. § 844(a) provides in part:

> (a) Unlawful acts; penalties. It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter.

The penalties prescribed under § 844(a) are "a term of imprisonment of not more than 1 year, and . . . a minimum fine of $1,000, or both. . . . . ," with higher penalties authorized for second and subsequent offenses. Higher maximum penalties and a mandatory minimum sentence were formerly required for possession of a specified quantity of cocaine base, but this provision was removed by the Fair Sentencing Act of 2010.

(Revised 2/12)

21.846A Attempt to *(Distribute) (Possess with Intent to Manufacture / Distribute) (Manufacture) (Possess)* a Controlled Substance (21 U.S.C. § 846)

[For recommended instruction, see Instruction 7.01 (Attempt).]

Comment

Eighth Circuit § 6.21.846B; Ninth Circuit § 9.14 & § 9.16.

21 U.S.C. § 846 provides, "Any person who attempts or conspires to commit any offense defined in this subchapter [dealing with controlled substances] 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." With respect to conspiracy under this provision, the Supreme Court has recognized, according to "the settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States v. Shabani*, 513 U.S. 10, 13-14 (1994). This same principle has also been applied to attempt under various federal statutes. *See, e.g., United States v. Earp*, 84 Fed. Appx. 228, 232-34 (3d Cir 2004) (unpublished opinion); *United States v. Hsu*, 155 F.3d 189, 202-03 (3d Cir. 1998); *United States v. Cicco*, 10 F.3d 980, 984-85 (3d Cir. 1993); *United States v. Cruz-Jiminez*, 977 F.2d 95, 102 (3d Cir. 1992); *United States v. Kikumura*, 918 F.2d 1084, 1108 (3d Cir. 1990); *United States v. Everett*, 700 F. 2d 900, 903-04 (3d Cir. 1983). The law with respect to attempt under federal criminal statutes, including attempts to commit controlled substances offenses, is set forth in Instruction 7.01 (Attempt) and in the Comment to that instruction.

As discussed in the Comment to Instruction 21.841A, identity (usually) and weight (in some cases) are elements of the controlled substance offense that must be found by the jury beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Because the penalties for attempt under 21 U.S.C. § 846 are the same as those prescribed for the controlled substance offense(s) that was (were) the object of the attempt, identity and quantity of the controlled substance involved are elements of attempt in those cases in which they would be elements of the offense attempted. Accordingly, when the trial judge instructs on the elements of the controlled substance offense(s) the defendant is charged with attempting, the judge should instruct on the identity and weight elements, or should adapt the special interrogatories set forth in Instruction 6.21.841C. *See* Instructions 6.21.841A, B, and C, and the Comments to these instructions.

6.21.846B Controlled Substances – Conspiracy to *(Distribute) (Possess with Intent to Manufacture / Distribute) (Manufacture) (Possess)* **(21 U.S.C. § 846)**

Count *(no.)* **of the indictment charges that on or about the___ day of _____, 2__, in the _____ District of _____,** *(name)* **agreed or conspired with one or more other person***(s)* **to** *(distribute) (possess with the intent to distribute) (manufacture) (possess)* **a controlled substance.**

It is a federal crime for two or more persons to agree or conspire to commit any offense against the United States, even if they never actually achieve their objective. A conspiracy is a kind of criminal partnership.

In order for you to find *(name)* **guilty of conspiracy to** *(distribute) (possess with the intent to distribute) (manufacture) (possess)* **a controlled substance, you must find that the government proved beyond a reasonable doubt each of the following three (3) elements:**

First: That two or more persons agreed to *(distribute) (possess with the intent to distribute) (manufacture) (possess)* **a controlled substance.** *(I have explained the elements of this offense already.) (I will explain the elements of this offense to you shortly.)***;**

Second: That *(name)* **was a party to or member of that agreement; and**

Third: That *(name)* **joined the agreement or conspiracy knowing of its objective***(s)* **to** *(distribute) (possess with the intent to distribute) (manufacture) (possess)* **a controlled substance and intending to join together with at least one**

other alleged conspirator to achieve that *(those)* **objective***(s)***; that is, that** *(name)* **and at least one other alleged conspirator shared a unity of purpose and the intent to achieve that** *(those)* **objective***(s)***.**

I will explain these elements in more detail.

[The trial court should also give the applicable, additional conspiracy instructions provided in Instructions 6.18.371C-E and G-L.]

Comment

See Fifth Circuit § 2.89; Eighth Circuit § 6.21.846A & 6.21.846A.1 (*Apprendi* - Affected); Eleventh Circuit § 87; Tenth Circuit § 2.87.

21 U.S.C. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter (dealing controlled substances laws) 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.

Conspiracy to Commit Controlled Substances Offenses Defined. Conspiracy to commit a controlled substances offense under 21 U.S.C. § 846 is generally defined the same as under the general conspiracy statute 18 U.S.C. § 371, except that 21 U.S.C. § 846 does not include an overt act requirement. When the charge is conspiracy under 21 U.S.C. § 846, the trial judge should also give the instructions with respect to conspiracy generally that are applicable in the case. *See* Instructions 6.18.371C - E and G - L. If the defendant is charged in the same case both with conspiracy under 18 U.S.C. § 371 and with conspiracy under 21 U.S.C. § 846, the trial judge must be careful to make clear that an overt act is required with respect to the former but not the latter. If the defendant asserts that he or she withdrew from a controlled substance conspiracy and then the statute of limitations ran before his / her indictment, Instruction 6.18.371J-2 (Withdrawal as a Defense to Conspiracy Based on the Statute of Limitations) should be given. That instruction reflects the Supreme Court's decision in *Smith v. United States*, __ U.S. __, 133 S. Ct. 714 (2013) (holding that the defendant has the burden of proving withdrawal from a controlled substance conspiracy as a statute of limitations defense).

Mere Buyer-Seller Relationship is Not Conspiracy; "Buyer-Seller" Instruction. A relationship of buyer and seller does not alone establish a conspiracy, but all the circumstances must be considered to determine whether a buyer is actually a member of a conspiracy with the seller. Thus, in *United States v. Badini*, 525 Fed. Appx. 190, 192 (3d Cir. 2013) (non-

precedential), the Third Circuit stated, citing and quoting *United States v. Gibbs*, 190 F.3d 188, 197-99 (3d Cir. 1999):

> While Badini is correct that a mere buyer-seller relationship does not amount to a conspiracy, "[t]he government need not prove that each defendant knew all of the conspiracy''s details, goals, or other participants." . . . We have held that when a defendant is a buyer who has limited dealings with a conspiracy, we should examine several factors to determine whether his purchases are circumstantial evidence of an intent to join the conspiracy. . . . Among the factors are the length of affiliation between buyer and seller, whether there is a demonstrated level of mutual trust, whether there is an established method of payment, and the extent to which the transactions are standardized. In *Gibbs*, we also noted that other courts have looked to whether the buyer bought large amounts of drugs and whether the buyer purchased the drugs on credit.

Also, *see, e.g., United States v. Theodoropoulos*, 866 F.2d 587, 593 (3d Cir.1989), overruled on other grounds by *United States v. Price*, 13 F.3d 711, 727 (3d Cir.1994); United States v. Pressler, 256 F. 3d, 144, 151-57 (3d Cir. 2001); *United States v. Garcia*, __ Fed. Appx. __, 2014 WL 5285978 (3d Cir. 2014); *United States v. Kemp*, __ Fed. Appx. __, 2014 WL 5292939 (3d. Cir. 2014).

In *United States v. Lewis*, 447 Fed. Appx. 310 (3d Cir. 2011) (non-precedential), the Third Circuit rejected the defendant's argument that the trial judge erred in not giving a requested "buy-sell" jury instruction, to the effect that, "[T]he mere agreement of one person to buy what another agrees to sell, standing alone, does not support a conspiracy conviction." The court concluded that the evidence did not support this theory of defense and, furthermore, the trial court's instruction adequately covered the point by stating that if the government failed to prove defendant was a member of the conspiracy charged and the jury found defendant only a purchaser of drugs or a member of a separate conspiracy, the jury must find the defendant not guilty of the conspiracy count. Even though the Court in *Lewis* did not require a "buy-sell" instruction, when there is a significant issue about whether there was a mere buyer-seller relationship, the trial judge may want to be more specific about the factors that may provide circumstantial evidence of agreement and membership (as discussed in the quote from *Badini* above), in addition to the circumstances stated in Instructions 6.18.371C (Conspiracy – Existence of an Agreement) and 6.18.371D (Conspiracy – Membership in the Agreement).

No Need for Additional Evidence Imputing Knowledge that Conspiracy Involved Controlled Substances. Before the Third Circuit's 2013 decision in *United States v. Caraballo-Rodriguez*, 726 F.3d 418 (3d Cir. 2013), this Comment cautioned that when the point is contested, the trial court may want to emphasize in its instructions that the government must persuade the jury that the defendant knew the conspiracy involved controlled substances. That caution was based on "a series of cases, [in which the Third Circuit had] been reluctant to uphold drug conspiracy convictions unless the Government introduces evidence from which the jury could infer knowledge of drugs, as opposed to some other contraband. . . . Despite the presence of otherwise suspicious circumstances, we have nevertheless required some additional piece of evidence imputing

knowledge of drugs to the defendant." *United States v. Boria*, 592 F.3d 476, 481-82 (3d Cir. 2010) (citations and footnotes omitted). However, in *United States v. Caraballo-Rodriguez*, the Third Circuit *en banc* rejected "the 'strict approach' established by our precedent" in controlled substance conspiracy cases, and "reestablish[ed] a familiar course with respect to sufficiency of the evidence challenges in other situations, . . . returning to the deferential review standard we normally apply." 726 F.3d at 420. The Court "specifically disavow[ed] the reasoning we previously embraced—that the jury's verdict could not stand when the evidence was as consistent with contraband other than controlled substances, even though a jury could rationally conclude that the defendant knew the subject of the conspiracy was drugs." *Id.* at 431-32. The Third Circuit also reiterated:

> Furthermore, we take this opportunity to clarify that, although the prosecution must prove the defendant's knowledge of the conspiracy's specific objective, that knowledge need not be proven by direct evidence. To the contrary, "[i]t is not unusual that the government will not have direct evidence. Knowledge is often proven by circumstances. A case can be built against the defendant grain-by-grain until the scale finally tips.". . . Again, jurors are routinely instructed that their verdict can be supported by direct or circumstantial evidence, and reasonable inferences can be drawn from both types of evidence.

Id. at 431 (citations omitted). Also *see , e.g., United States v. Jean-Baptiste*, 747 F. 3d 186, 205-206 (3d Cir. 2014); *United States v. Benoit*, 730 F.3d 280, 289-90 (3d Cir. 2013). Finally, the Court in *Caraballo-Rodriguez* acknowledged that "'knowledge' can be demonstrated by actual knowledge or willful blindness." *Id.* at 426. *See* Instruction 5.06 (Willful Blindness).

No Overt Act Requirement. As to the lack of an overt act element under 21 U.S.C. § 846, the Supreme Court explained in *United States v. Shabani*, 513 U.S. 10, 13-14 (1994):

> The language of [21 U.S.C. § 846 does not] require that an overt act be committed to further the conspiracy, and we have not inferred such a requirement from congressional silence in other conspiracy statutes. . . .
>
> *Nash [v. United States*, 229 U.S. 373 (1913)] and *Singer* [*v. United States*, 323 U.S. 338 (1945)] follow the settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms. See *Molzof v. United States*, 502 U.S. 301, 307-308, 112 S.Ct. 711, 715-716, 116 L.Ed.2d 731 (1992). We have consistently held that the common law understanding of conspiracy "does not make the doing of any act other than the act of conspiring a condition of liability." *Nash, supra*, 229 U.S., at 378, 33 S.Ct., at 782; see also *Collins v. Hardyman*, 341 U.S. 651, 659, 71 S.Ct. 937, 941, 95 L.Ed. 1253 (1951); *Bannon v. United States*, 156 U.S. 464, 468, 15 S.Ct. 467, 469, 39 L.Ed. 494 (1895) ("At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy ...").
>
> [W]e find it instructive that the general conspiracy statute, 18 U.S.C. § 371, contains an explicit requirement that a conspirator "do any act to effect the object of the

> conspiracy." In light of this additional element in the general conspiracy statute, Congress' silence in § 846 speaks volumes. After all, the general conspiracy statute preceded and presumably provided the framework for the more specific drug conspiracy statute. "*Nash* and *Singer* give Congress a formulary: by choosing a text modeled on § 371, it gets an overt-act requirement; by choosing a text modeled on the Sherman Act, 15 U.S.C. § 1, it dispenses with such a requirement." *United States v. Sassi*, 966 F.2d 283, 284 (CA7 1992). Congress appears to have made the choice quite deliberately with respect to § 846.

Identity and Weight of Controlled Substance Involved in Conspiracy. As with attempt under 21 U.S.C. § 846, the penalties for conspiracy under 21 U.S.C. § 846 are the same as those prescribed for the controlled substance offense(s) that was (were) the object of the conspiracy. Accordingly, when the trial judge instructs on the elements of the controlled substance offense the defendant is charged with conspiring to commit, the judge should instruct on the identity and weight elements or should use the special interrogatories set forth in Instruction 6.21.841C. *See* Instructions 6.21.841A, B, and C, and the Comments to these instructions.

In *United States v. Phillips*, 349 F.3d 138 (3d Cir. 2003), the Third Circuit held that, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a jury in a multi-defendant drug conspiracy case need only determine the amount of drugs involved in the conspiracy as a whole, not the amount attributable to each defendant. Finding persuasive the analyses of cases from other circuits, the court reasoned (349 F.3d at 142-43):

> In drug conspiracy cases, *Apprendi* requires the jury to find only the drug type and quantity element as to the conspiracy as a whole, and not the drug type and quantity attributable to each co-conspirator. The finding of drug quantity for purposes of determining the statutory maximum is, in other words, to be an offense-specific, not a defendant-specific, determination. The jury must find, beyond a reasonable doubt, the existence of a conspiracy, the defendant's involvement in it, and the requisite drug type and quantity involved in the conspiracy as a whole. Once the jury makes these findings, it is for the sentencing judge to determine by a preponderance of the evidence the drug quantity attributable to each defendant and sentence him or her accordingly, provided that the sentence does not exceed the applicable statutory maximum.

In *Phillips*, the Third Circuit affirmed the trial court's instruction to the jury to decide, beyond a reasonable doubt, only the amount of crack involved in the conspiracy itself, and upheld sentences for the individual defendants that were within the statutory maximum of life imprisonment triggered by the jury's finding that the amount of crack attributable to the conspiracy was 50 or more grams. 349 F.3d at 140.

(Revised 11/10, 12/12, 5/13, 1/14, & 4/15)

6.21.853 Criminal Forfeiture of Property (21 U.S.C. § 853)

[If the indictment contains notice that the government will seek forfeiture of property as part of sentencing in accordance with 21 U.S.C. § 853 and, if a party requests a jury determination under Fed. R. Crim . P. 32.2(b)(4) that the property is subject to forfeiture, the trial court should instruct the jury regarding this matter at three points during the trial proceedings.

First: When the court instructs the jury at the end of trial with respect to its deliberations and the trial verdict, the court should alert the jury that:

> ***Depending on the verdict you reach, there may be a brief additional proceeding after you have returned your verdict.***

Second: If the jury has returned a guilty verdict, at the outset of the forfeiture proceeding before the jury, the trial court should explain preliminarily the nature and purpose of the forfeiture proceeding that is about to take place, as follows:

> ***You have found** (name) **guilty of** (state the offense(s))**, as charged in Count**(s) (no.) **of the indictment. You will now need to consider a further question regarding property that the indictment alleges is subject to forfeiture by** (name) **to the government. Forfeiture means that** (name) **would lose any ownership or interest** (he) (she) **has or claims to have in the specified property, as a part of the penalty for engaging in criminal activity. After the parties have presented any additional evidence on this subject, I will instruct you further on the law with***

respect to forfeiture. In considering whether the property is subject to forfeiture, you should consider the evidence you have already heard and any additional evidence presented by the parties. You should evaluate that evidence and its credibility as I explained to you earlier in my instructions.

Third: At the end of the forfeiture proceeding, the trial court should give the instruction below.]

You have found *(name)* **guilty of** *(state the offense(s))***, as charged in Count**(s) *(No.)* **of the indictment. You now need to consider a special verdict concerning property that the indictment alleges is subject to forfeiture by** *(name)* **to the government. Forfeiture means that** *(name)* **would lose any ownership or interest** *(he) (she)* **has or claims to have in the specified property, as a part of the penalty for engaging in criminal activity. I instruct you that you are bound by your previous finding that** *(name)* **is guilty of** *(state the offense(s))***.**

Under federal law, any person convicted of *(state the offense(s))* **shall forfeit to the government any property that is the proceeds of the offense, any property that was derived from the proceeds of the offense, and any property that was used or was intended to be used to commit or to facilitate the commission of the offense** *[in the case of a person convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848, add: and any property that provided the person with a source of control over or that represents his or her interest in or claim against the continuing criminal*

enterprise].

In deciding whether property is subject to forfeiture, you should not concern yourself with or consider whether any other person may own or have an interest in the property. I will resolve any such claims. Similarly, you are not to consider whether the property is presently available. Your only concern is whether the government has proven the required connection between the property and the offense*(s)* **for which you have found** *(name)* **guilty.**

Count *(no.)* **allege***(s)* **that** *(describe the particular property alleged to be subject to forfeiture)* **should be forfeited because of the connection between this property and** *(name's)* **commission of** *(state offense(s) asserted as the basis for forfeiture)***.** *[Describe as to each count for which there has been a conviction, the specific property alleged to be subject to forfeiture.]* **This property is subject to forfeiture if you find that the government has proved by a preponderance of the evidence either:**

First: That the property is or was derived from any proceeds *(name)* **obtained, directly or indirectly, as a result of the offense***(s)* **for which you have found** *(him) (her)* **guilty; or**

Second: That the property was used, or was intended to be used, in any manner or part, to commit or to facilitate the commission of an offense*(s)* **for which you have found** *(name)* **guilty.**

[In the case of a person convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848: or Third, the property provided (name) with a source of control over, or represented (his) (her) interest in or claims against, the continuing criminal enterprise.]

Property is "proceeds" of a controlled substance offense if the property was obtained directly or indirectly, as a result of the offense. Property "was derived" from the proceeds of a controlled substance offense if the property was obtained, directly or indirectly, using money or any other source of wealth gained as a result of the commission of the offense.

Property that "was used, or was intended to be used, in any manner or part, to commit or to facilitate the commission of an offense" means property that makes the commission of the offense easier or which is used to assist in the commission of the offense. This includes, but is not limited to, property that is used or intended to be used to purchase, manufacture, transport, store, conceal, or protect the controlled substances used in the offense, or the persons committing the offense. Property that was used or was intended to be used to commit or facilitate the offense is subject to forfeiture even if only a portion of it was so used, or if it was also used for other purposes.

You may, but you are not required to, find that the property is subject to forfeiture if you find that the government established by a preponderance of the

evidence: (1) that the property was acquired by *(name)* **during the time period when** *(name)* **was committing the offense***(s)* **for which you have found** *(him) (her)* **guilty, or within a reasonable time after the commission of that** *(those)* **offense***(s)***, and (2) that there was no likely source for the property other than the offense***(s)* **for which you have found** *(name)* **guilty.**

Preponderance of the evidence is a lower standard than proof beyond a reasonable doubt, which is the standard you applied in your previous deliberations. To prove something by a preponderance of the evidence means to prove that it is more likely true than not true. If you put the credible evidence that is favorable to government and the credible evidence that is favorable to *(name)* **on opposite sides of a scale, the scale would have to tip somewhat on the government's side in order for you to find that the property is subject to forfeiture. However, if the scale tips in favor of** *(name)***, or if the credible evidence appears to be equally balanced, or if you cannot say on which side the credible evidence is weightier, then you must find that the property is not subject to forfeiture.**

In making this determination, you should consider all of the evidence presented on the subject during this proceeding and during the trial, regardless of who offered it. All of my previous instructions continue to apply, and you should evaluate the evidence and its credibility according to the instructions I gave you earlier.

A Special Verdict Form has been prepared for your use. With respect to each

item of property, you are asked to decide whether it is subject to forfeiture to the government, based on the reasons I have explained to you. Your decision must be unanimous. Indicate on the verdict form whether you find that the property listed is subject to forfeiture, and then the foreperson should sign and date the form.

SPECIAL VERDICT FORM

We, the Jury, return the following Special Verdict as to the defendant *(name's)* **interest in each item of property alleged in Count**(s) *(insert count number(s))* **to be subject to forfeiture by** *(name)* **to the United States:**

(Insert dollar amount in United States currency and description of real property or other tangible or intangible personal property as alleged in indictment.)

Do you unanimously find by a preponderance of the evidence that this property is subject to forfeiture?

YES _____

NO _____

This _____ day of _____, 20_____.

_____

Foreperson

Comment

See Eighth Circuit § 6.21.853 (Controlled Substances); Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal* (2003) [hereinafter, Sand et al.] 52.06 (RICO Forfeiture).

This instruction addresses criminal forfeiture after a conviction for a controlled substance offense, under 21 U.S.C. § 853 (Criminal Forfeiture), which provides in pertinent part:

> (a) Property subject to criminal forfeiture
>
> Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law–
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
> (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.
>
> The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. . . .
>
> (b) Meaning of term "property"
>
> Property subject to criminal forfeiture under this section includes –
>
> (1) real property, including things growing on, affixed to, and found in land; and
> (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities. . . .
>
> (d) Rebuttable presumption
>
> There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that–
>
> (1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and
> (2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter. . . .

21 U.S.C. § 853(a), (b), (d).

Other Criminal Forfeiture Statutes. In 1970, when Congress enacted this controlled substances forfeiture provision, it also enacted a RICO forfeiture provision (18 U.S.C. § 1963).

The RICO provision is broader than the controlled substances provision with respect to the property subject to forfeiture, but the RICO provision does not provide the rebuttable presumption set forth in subsection (d) of the controlled substances provision. With respect to the RICO forfeiture provision, *see* Instruction 6.18.963 (RICO – Criminal Forfeiture of Property (18 U.S.C. § 1963)).

Since 1970, Congress has expanded the availability of criminal forfeiture to other federal criminal offenses. For example, 18 U.S.C. § 982 provides for criminal forfeiture as part of the sentence for persons convicted of a number of federal crimes, including money laundering, and mail, bank and wire fraud. Also, *see, e.g.*, 18 U.S.C. § 1467 (obscene materials); 18 U.S.C. § 2253 (exploitation of children in producing obscene materials); 18 U.S.C. § 924(d)(1) (firearms and ammunition used or involved in a knowing violation of the federal firearms act and other federal criminal statutes); 18 U.S.C. § 3665 (firearms possessed by convicted felons); 18 U.S.C. §§201, 981(a)(1)(C), 3666 (bribery); 18 U.S.C. § 3667 (liquors and related property).

Further, in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. 106-185, § 16, Apr. 25, 2000, 114 Stat. 221, Congress enacted 28 U.S.C. § 2461(c), which provides that a forfeiture judgment may be obtained in any criminal prosecution on the basis of a violation for which a civil forfeiture provision but no corresponding criminal forfeiture provision exists. The Third Circuit confirmed this expansion of the reach of criminal forfeiture proceedings in *United States v. Vampire Nation*, 451 F.3d 189, 198-201 (3d Cir. 2006). In addition, Section 2461(c), as amended by the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-177, Title IV, § 410, Mar. 9, 2006, 120 Stat. 192, 246, directs that the criminal forfeiture procedures in 21 U.S.C. § 853 are the controlling procedures for all criminal forfeiture cases with the exception of § 853(d)'s rebuttable presumption provision, which applies only to forfeiture under the Controlled Substances Act.

Except in RICO forfeiture cases, where a different forfeiture provision is charged, the Controlled Substances forfeiture instructions should be modified to reflect the standard for forfeiture stated in the particular provision. For example, the provision at 18 U.S.C. § 981(a)(1)(C), which is applicable by virtue of 28 U.S.C. § 2461(c) to numerous offenses, allows for forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable" to the offense. These terms are defined in various decisions. *See, e.g., United States v. Stewart*, 185 F.3d 112, 129-30 (3d Cir. 1999) (tainted funds traced into account were forfeitable as "involved in" and "traceable to" money laundering); *United States v. Bornfield*, 145 F.3d 1123, 1134 (10th Cir. 1998) ("property 'traceable to' means property where the acquisition is attributable to the money laundering scheme rather than from money obtained from untainted sources" and "proof that the proceeds of the money laundering transaction enabled the defendant to acquire the property is sufficient to warrant forfeiture as property 'traceable to' the offense"); *United States v. Voigt*, 89 F.3d 1050, 1084-87 (3d Cir. 1996). *See also United States v. Cheeseman*, 600 F.3d 270, 275-81 (3d Cir. 2010) (interpreting "any firearm or ammunition involved in or used in" a knowing violation of 18 U.S.C. § 922(g)(3) which prohibits possession of a firearm by any person "who is an unlawful user of or addicted to any controlled substance").

In RICO forfeiture cases, the trial judge should give Instruction 6.18.1963 (RICO – Criminal Forfeiture of Property (18 U.S.C. § 1963)).

In some cases, where money was the proceeds of an offense but has been dissipated, the government may seek to forfeit that sum of money, and receive a money judgment. "Given that § 853 does not contain any language limiting the amount of money available in a forfeiture order to the value of the assets a defendant possesses at the time the order is issued, we think it clear that an in personam forfeiture judgment may be entered for the full amount of the criminal proceeds." *United States v. Vampire Nation,* 451 F.3d 189, 201-02 (3d Cir. 2006).

Notice and Jury Determination. Where criminal forfeiture is authorized by statute, a judgment of forfeiture can be considered in a particular case only when "the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute." Fed. R. Crim. P. 32.2(a). A jury determination that property is subject to forfeiture is required when a party requests it under Fed. R. Crim. P. 32.2(b)(4), which provides:

> (4) Jury Determination. Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

Rule 32.2 and the relevant statutes also provide that issues with respect to third party claims of ownership of or an interest in the property subject to forfeiture are to be determined by the trial judge on the petition of the third party, in an ancillary proceeding without a jury. *See, e.g.,* Fed. R. Crim. P. 32.2(c); 21 U.S.C. § 853(n).

Burden of Proof. Criminal forfeiture is part of the sentence authorized after conviction; it is not an element of the offense. *See, e.g., United States v. Libretti*, 516 U.S. 29, 41, 49 (1995) (holding, because forfeiture is not an element of the offense, there is no constitutional right to a jury determination of the issues relevant to forfeiture). Because forfeiture is a part of the sentence and does not involve an element of the offense, there is no constitutional requirement that the issues with respect to forfeiture must be proved by the government beyond a reasonable doubt. Thus, in *United States v. Voight*, 89 F.3d 1050, 1082-84 (3d Cir. 1996), the Third Circuit held that the government's burden of proof was a preponderance of evidence under 18 U.S.C. § 982, even though the statute does not itself address the standard of proof. In *United States v. Sandini,* 816 F.2d 869, 874-76 (3d Cir. 1987), the court held that 21 U.S.C. § 853(d) (quoted above), which creates a rebuttable presumption that the property is subject to forfeiture if the government establishes certain facts by a preponderance of the evidence, is constitutional as long as the forfeiture proceeding follows conviction based on proof beyond a reasonable doubt. Even after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Booker*, 543 U.S. 220 (2005), the Third Circuit held in *United States v. Leahy*, 438 F.3d 328, 331-33 (3d Cir. 2006), that, "[a]s to forfeiture, based upon the Supreme Court's decision in *Libretti v. United States*, 516 U.S. 29, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995), we conclude that the amount a defendant must forfeit also need not be admitted or proved to a jury beyond a reasonable doubt."

Nevertheless, the Third Circuit has interpreted the RICO forfeiture statute (18 U.S.C. §1963) as imposing on the government the burden of proof beyond a reasonable doubt. Thus, in *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994), the court distinguished *Sandini*, attaching much significance to the fact that although Congress enacted 21 U.S.C. § 853 and 18 U.S.C. § 1963 at the same time, Congress did not include in the RICO forfeiture section, the rebuttable presumption provision it included in the controlled substances statute. *Id.* at 902-06

Two years later, in *Voight*, however, the Third Circuit concluded that the lack of a rebuttable presumption in 18 U.S.C. § 982 (criminal forfeiture after conviction of, e.g., money laundering, mail, bank, and wire fraud) did not mean that Congress intended the beyond a reasonable doubt standard to apply to forfeiture under that provision. The court distinguished its *Pelullo* decision by noting that the RICO section was the most far reaching federal criminal forfeiture provision and, therefore, the beyond a reasonable doubt standard was appropriate to insure a greater degree of fact finding accuracy in RICO actions. *See United States v. Lebed*, 2005 WL 2495843 (E.D. Pa. 2005) (discussing that a different burden of proof applies depending on the specific statutory forfeiture provision, citing *Voight*, *Pelullo*, and *Sandini*). Further, the *Pelullo* court's holding was based on the court's interpretation of the statute, which is not affected by the Third Circuit's holding in *Leahy* that, even after *Apprendi* and *Booker*, the Constitution does not require proof beyond a reasonable doubt of the issues related to forfeiture.

It appears that the Third Circuit may apply the preponderance of evidence standard to criminal forfeitures authorized by the Civil Asset Forfeiture Reform Act of 2000, since the procedures under 21 U.S.C. § 853 apply to forfeitures under that Act as well. Whether *Pelullo* will be revisited on the basis of subsequent developments is an open question.

Rebuttable Presumption. The rebuttable presumption created by 21 U.S.C. § 853(d) seems to be treated more like a permissive inference than a presumption. Thus, in *United States v. Sandini*, 816 F.2d at 876, responding to the defendant's argument that there was no rational connection between the proven facts and the ultimate facts, the Third Circuit stated:

> In some circumstances the defendant's argument might marshal some force. But as the Court stated in *Ulster County Court v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777 (1979), "[w]hen reviewing this type of device, the Court has required the party challenging it to demonstrate its invalidity as applied to him." Only if "under the facts of the case, there is no rational way the trier could make the connection permitted by the inference" does a permissible inference affect the burden of proof. *See also Barnes v. United States*, 412 U.S. 837, 843-47, 93 S.Ct. 2357, 2361-63, 37 L.Ed.2d 380 (1973).
>
> In this case, the jury was free to reject the inference derived from the statutory presumption, and the burden of proof remained with the government. The huge profits generated by the illegal drug trade are well known, and the jury rationally may give some weight to the statutory inference when other evidence demonstrates sudden and unexpected wealth. On its face, we cannot say the presumption is improper. . . .

The presumption here does not exist in a vacuum and to establish its invalidity the defendant must take the inference in the context of other facts in the record. We conclude at this stage only that the inference is not facially invalid. *Ulster County v. Allen*, 442 U.S. at 163, 99 S.Ct. at 2227.

(Revised 11/10)