Controlled Substances Offenses

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 or mandatory minimum penalties under 21 U.S.C. § 841(b), use one or both 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.

The penalties applicable to violations of § 841(a) (1) and (2) are set forth in 21 U.S.C. §841(b). These penalties vary depending on the identity and the weight of the controlled substance, whether death or serious bodily injury results from the use of the drugs involved in the offense, or whether the defendant has a prior felony drug conviction. The statutory framework provides for a base maximum sentence of one year in prison, with no mandatory minimum. 21 U.S.C. § 841(b)(3). *See, e.g., United States v. Freeman,* 763 F. 3d 322 (3d Cir. 2014); *United States v. Lacy,* 446 F.3d 448, 454 (3d Cir.2006); *United States v. Barbosa*, 271 F.3d 438, 457 (3d Cir. 2001); *United States v. Vasquez*, 271 F.3d 93, 113 (3d Cir. 2001). In

addition, there are tiers with enhanced statutory maximum sentences and mandatory minimum sentences depending on the identity and weight of the controlled substance, whether death or serious bodily injury occurred and whether the defendant has a prior felony record. 21 U.S.C. § 841(b). This framework raises various issues with respect to instructing on identity, quantity and other factors which would increase the statutory maximum or impose a mandatory minimum sentence beyond the base sentence.

The Supreme Court's opinions in *United States v. Apprendi,* 530 U.S. 466 (2000) and *United States v. Alleyne*, 570 U.S. 99 (2013) establish a framework that requires the jury to find that the government has proven beyond a reasonable doubt any fact that increases the statutory maximum or mandatory minimum beyond the statutory base sentence. Indeed, the Court has referred to these facts as "elements" of the offense and that they must be charged in the indictment. *United States v. Cotton*, 535 U.S. 625 (2002). See *United States v. Barbosa*, 271 F.3d 438, 454 (3d Cir. 2001); *United States v. Lewis*, 802 F.3d 449, 454 (3d Cir. 2015). As such, the jury must be instructed that these facts are elements of the offense as part of this instruction and/or must be required to make such findings on a special verdict form or interrogatory as discussed below. *See also* Commentary to Instruction 6.21.841C (Controlled Substance Offenses – Verdict Forms and Special Interrogatories).

Identity of Substance. Ordinarily, the indictment will charge and the government will prove a specific type of controlled substance; this element is covered in the "Fourth" paragraph of the instruction.

Alternatives with Respect to Weight Thresholds. In cases in which an enhanced statutory maximum or mandatory minimum is sought, the indictment will typically charge 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, the 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. Alternatively, a trial judge may wish to do both. This instruction provides for flexibility in handling this issue by providing bracketed alternatives with respect to the weight of the substance as a "Fifth" element or by using a Verdict Form with Special Interrogatories. *See* discussion of *Apprendi* and *Alleyne* below. If special interrogatories are used, *see* Instruction 6.21.841C.

Identity and Weight of Controlled Substance as Elements of the Offenses. In *Apprendi*, the Supreme Court held that, under the Sixth Amendment, "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. See *United States v. Lewis*, 802 F.3d 449, 454 (3d Cir. 2015). The Supreme Court extended the doctrine to mandatory minimum sentence enhancers in *Alleyne v. United States*, 570 U.S. 99, 103, 133 S. Ct. 2151, 2155 (2013), holding 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." *See United States v. Freeman*, 763 F. 3d 322 (3d Cir. 2014); *United States v. Lacy,* 446 F.3d 448 (3d Cir.2006). *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.

The framework, then, is that an *Apprendi* error occurs when a judge, rather than a jury, finds a fact that increases the statutory mandatory maximum, an *Alleyne* error occurs when a judge, rather than a jury, finds a fact that increases the statutory mandatory minimum for a defendant. *United States v. Lewis*, 802 F.3d 449, 454 (3d Cir. 2015). Failure to have the jury determine facts that increase the statutory mandatory or the statutory mandatory minimum sentence to which the defendant is exposed will preclude the court from sentencing the defendant based upon the enhanced maximum or mandatory minimum range. *See United States v. Freeman*, 763 F. 3d 322 (3d Cir. 2014); *United States v. Cooper*, 556 Fed. Appx. 75, 81-82 (3d. Cir. 2014) (non-precedential); *United States v. Lacy,* 446 F.3d 448, 454 (3d Cir.2006).

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. Vaquiz*, 810 Fed. Appx. 151, 155 (3d Cir. 2020) (non-precedential); *United States v. Freeman*, 763 F. 3d 322, 332-35 (3d Cir. 2014); *United States v. Lacy*, 446 F.3d 448, 455 (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 (Attempt) and 6.21.846A (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*, 571 U.S. 204, 210 (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." 571 U.S. at 219 - 220. 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. 571 U.S. at 214 - 216. In addition, the Third Circuit has recognized that the government need not prove that the defendant could have reasonably foreseen that death or serious bodily injury would result. *United States v. Jacobs*, 21 F.4th 106 (#d Cir. 2021).

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.

Prior Convictions. Section §841(b) provides for enhanced statutory maximum and mandatory minimum sentences if a defendant has been convicted of certain offenses depending on how much time the defendant spent in jail for the prior conviction and how long after the defendant was released from jail the instant offense occurred.

The issue as to whether a jury must find each of these §841(b) enhancement facts beyond a reasonable doubt has not squarely been decided by the Supreme Court or the Third Circuit. Yet, the available precedent is instructive. While prior decisions address whether the *fact* of a prior conviction must be determined by a jury, they do not expressly address whether facts that go beyond the prior conviction itself and factual elements of the offense must be determined by a jury.

In *Apprendi*, the Supreme Court specifically excluded prior convictions from its holding: "*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 [emphasis added] In *Alleyne*, the Court similarly excluded prior convictions from its holding with respect to statutory mandatory minimums. 570 U.S. at 112 n. 1. Third Circuit in *United States v Blair*, 734 F.3d 218 (3d Cir. 2013), decided after *Alleyne*, noted that:

> [A] as is evident from the language of that holding, *Apprendi* did not change the pre-existing rule from *Almendarez Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), that a judge, rather than a jury, may determine the fact of a prior conviction. *Apprendi,* 530 U.S. at 490, 120 S.Ct. 2348. Recently, in *Alleyne v. United States,* the Supreme Court extended *Apprendi* and held that any facts that increase a mandatory minimum sentence must be submitted to a jury and proved beyond a reasonable doubt. ___ U.S. ___ , 133 S.Ct. 2151, 2158, 186 L.Ed.2d 314 (2013).. the Court expressly declined to alter the *Almendarez Torres* rule. *Id.* at 2160 n. 1. .... *Almendarez Torre*s therefore remains a narrow exception to [*Apprendi's*] general rule for the fact of a prior conviction. Id.

734 F.3d at 226 -227. See also *United States v Hill*, 684 Fed. Appx. 140 (3d. Cir. 2017); *United States v. Johnson*, 639 Fed. Appx. 78 (3d Cir. 2016).

Thus, under current Supreme Court and Third Circuit authority, the "fact of a conviction," ie., that the defendant was convicted of a certain offense, is a fact that need not be submitted to a jury. Other enhancement factors, however, go beyond the mere fact of conviction - namely, the length of time the defendant served and the period of time between being released and committing the instant offense. The Supreme Court and Third Circuit have not expressly addressed whether the decision in *Alleyne* requires those facts to be submitted to the jury. Language in *Blair*, however, suggests that those facts should be viewed differently than the fact of a conviction,

> "When the pertinent documents show, as they do in this case, that the prior convictions are for separate crimes against separate victims at separate times, *Alleyne* does not somehow muddy the record and convert the separateness issue into a jury question. *Alleyne* was written against the backdrop of *Almendarez Torres* and existing ACCA jurisprudence. Had the Supreme Court meant to say that all details related to prior convictions are beyond judicial notice, it would have said so plainly, as that would have been a marked departure from existing law."

734 F.3d at 227-228. The pertinent documents referred to by the Court were Court records.

A determination as to how much time has elapsed between the defendant's release from prison and the instant offense are not facts that can be readily gleaned from the Court's own records. As such, prudence might suggest that any fact about a prior conviction other than the fact of conviction be submitted to the jury using a special verdict form after they have returned a guilty verdict on any charges for which the government seeks an enhancement.

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."). *See also United States v. Petersen*, 622 F.3d 196, 203-04 (3d Cir. 2010). 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, 204 (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, 481-482 (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 12/2021)

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 "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. *United States v. Brown*, 3 F.3d 673, 680 (3d Cir. 1993). *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, 824-825 (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 Rowe*, 919 F.3d 752 (3d Cir. 2019), (holding evidence insufficient to prove constructive possession of the 1000 grams of heroin alleged because amounts distributed over time cannot be combined and evidence did not support a finding that the defendant possessed that amount at least once during the period charged); *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*, 568 Fed. Appx. 135, 140 (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 Rowe,* 919 F.3d 752, 760 (3d Cir. 2019); *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 12/2021)

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 a prohibited drug under federal drug abuse laws.**

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.

The previous version of this instruction began "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."** The phrase in bold has been modified in response to the Supreme Court's decision in *McFadden v. United States*, 135 S. Ct 2298 (2015) which held that it is not enough that the government prove that defendant believed he was dealing with an illegal regulated substance "under some law." Rather, the government must show "that a defendant knew he was dealing with 'a controlled substance.'" 135 S. Ct. at 2306. That term includes only those drugs listed on the federal drug schedules or treated as such by operation of the Controlled Substance Analogue Enforcement Act of 1986. 21 U.S.C. §§ 802(6), 813. 135 S. Ct. at 2306. **Controlled Substance Analogues.** The Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act) defines a category of substances substantially similar to those listed in on the controlled substances schedules, 21 U.S.C. §802(32)(A) and treats them as controlled substances under §841(a)(1). 21 U.S.C. §813. In cases involving analogues, the following should be added to the instruction:

A controlled substance includes what are called "analogues." An analogue is a substance that has a chemical structure substantially similar to the chemical structure of a controlled substance and is intended for human consumption and either,

(1) has a stimulant, depressant, or hallucinogenic effect on a person's central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of the controlled substance or

(2) the defendant represented or intended it to have such effect.

Additional refinements of the definition of "controlled substance analogue" that may be implicated in particular cases can be found in §§802(32)(B)-(C). In addition, whether an analogue is intended for human consumption is determined as set forth in §813(b)-(c). The instruction should be supplemented if this aspect of the definition is at issue in a particular case.

Controlled substance analogues are further addressed in the commentary to Instruction 6.21.841-4.

(Revised 12/2021)

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 constitute 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 *(count no.)*, requires the government to prove beyond a reasonable doubt either that

(1) ***(name)*** **knew that what** ***(he) (she) (distributed) (possessed with intent to distribute) (manufactured) (possessed)*** **was a controlled substance under federal drug abuse laws, even if** ***(he) (she)*** **did not know which particular controlled substance it was, OR**

(2) ***(name)*** **knew what** ***(he) (she) (distributed) (possessed with intent to distribute) (manufactured) (possessed)*** **was in fact** ***(identity of the specific controlled substance alleged) [and that the weight of the controlled substance was (X grams or more)],*** **even if** ***(he) (she)*** **did not know that it was a controlled substance.**

In addition, the government must prove beyond a reasonable doubt that what *(name) (distributed) (possessed with intent to distribute) (manufactured) (possessed)* **was in fact** *(identity of the specific controlled substance alleged) [and 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 Supreme Court's opinion in *McFadden v. United States*, 135 S. Ct 2298 (2015) and the Third Circuit's opinion in *United States v. Barbosa*, 271 F.3d 438, 457-58 (3d Cir. 2001).

No Need to Prove Awareness of Specific Type of Controlled Substance or Weight. In *McFadden v. United States*, 135 S. Ct 2298 (2015), the Supreme Court held that the knowledge requirement under § 841(a)(1) can be met by proving either (1) that "defendant knew he possessed a substance listed on the schedules, even if he did not know which substance it was," or (2) "that the defendant knew the identity of the substance he possessed." With respect to the first method, the Court explained "the defendant may know that the white powder is listed on the schedules even if he does not know precisely what substance it is. And if so, he would be guilty of knowingly distributing "a controlled substance." 135 S. Ct. at 2304. With respect to the second method, the Court posited, "a defendant who knows he is distributing heroin but does not know that heroin is listed on the schedules …. Because ignorance of the law is typically no defense to criminal prosecution, *Bryan v. United States,* 524 U.S. 184, 196, 118 S. Ct. 1939, 141 L.Ed.2d 197 (1998), this defendant would also be guilty of knowingly distributing 'a controlled substance.'" 135 S. Ct. at 2304. In either case, the proof may be through direct or circumstantial evidence. Circumstantial evidence might include "a defendant's concealment of his activities, evasive behavior with respect to law enforcement, knowledge that a particular substance produces a "high" similar to that produced by controlled substances, and knowledge

that a particular substance is subject to seizure at customs." 135 S. Ct. at 2304 citing *United States v. Ali,* 735 F.3d 176, 188–189 (C.A.4 2013). In *United States v. Barbosa*, 271 F.3d 438, 457-58 (3d Cir. 2001), the Third Circuit held that although the identity and quantity 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 and quantity of the controlled substance in order to increase the statutory maximum sentence, as to the defendant's mental state, 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. Similarly, the Third Circuit has held that the government need not prove that the defendant was aware of the weight of the mixture or substance containing the controlled substance. *United States v. Williams*, 974 F.3d 320, 363 (3d Cir. 2020) ("It is enough that that the knowing or intentional distribution or possession occurred; the quantity is a factual finding that goes to the sentence to be imposed… In the context of §841(a) and (b), the defendant need not consciously cognize the amount he is distributing in order to violate the law.")

Controlled Substance Analogues. In *McFadden*, the Supreme Court addressed the issue as to the knowledge necessary for conviction under § 841(a) (1) when the controlled substance at issue is in fact an analogue drug covered by the Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act), which sets forth a category of substances substantially similar to those listed on the federal controlled substances schedules, 21 U.S.C. §802(32)(A), and, pursuant to § 813, treats those analogues as controlled substances under § 841(a)(1). The Court held:

> That knowledge requirement can be established in two ways. First, it can be established by evidence that a defendant knew that the substance with which he was dealing is some controlled substance—that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue Act—regardless of whether he knew the particular identity of the substance. Second, it can be established by evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue. The Analogue Act defines a controlled substance analogue by its features, as a substance "the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II"; "which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than" the effect of a controlled substance in schedule I or II; or which is represented or intended to have that effect with

> respect to a particular person. §802(32)(A). A defendant who possesses a substance with knowledge of those features knows all of the facts that make his conduct illegal, just as a defendant who knows he possesses heroin knows all of the facts that make his conduct illegal. A defendant need not know of the existence of the Analogue Act to know that he was dealing with "a controlled substance."

135 S. Ct at 2302.

McFadden makes clear that it is not enough that the government prove that defendant believed he was dealing with an illegal regulated substance "under some law." 135 S. Ct. at 2306. Rather, the government must show "that a defendant knew he was dealing with 'a controlled substance.' That term includes only those drugs listed on the federal drug schedules or treated as such by operation of the Analogue Act. §§ 802(6), 813. Thus, in cases involving controlled substance analogues, it might be appropriate to insert the following language for the third paragraph of the model instruction:

The phrase "knowingly or intentionally," as used in (count no.), requires the government to prove beyond a reasonable doubt either that

(1) *(name)* ***knew that what*** *(he) (she) (distributed) (possessed with intent to distribute) (manufactured) (possessed)* ***was a controlled substance analogue under federal drug abuse laws, even if*** *(he) (she)* ***did not know which controlled substance it was an analogue of, or***

(2) *(name),* ***knew the substance*** *(he) (she) (distributed) (possessed with intent to distribute) (manufactured) (distributed) (possessed)*

(a) had a chemical structure of substantially similar to the chemical structure of *[identity of controlled substance]* ***and***

> ***(3) (b) had a stimulant, depressant, or hallucinogenic effect on a person's central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of*** *[identity of controlled substance* ***or the defendant represented or intended it to have such effect.]***

In addition, the government must prove beyond a reasonable doubt that (name) knew that what (he)(she) *(distributed) (possessed with intent to distribute) (manufactured) (possessed)* ***was intended for human consumption. and that the controlled substance was in fact*** *(identity of the specific controlled substance analogue alleged) [and that the weight of the controlled substance analogue was (X grams or more)]****.***

Alternatives When Government Seeks Enhanced Sentence Thresholds. Consistent with *United States v. Apprendi,* 530 U.S. 466 (2000) and *United States v. Alleyne*, 570 U.S. 99 (2013), when the government seeks an enhanced statutory mandatory or the statutory mandatory

minimum sentence, the bracketed language in the third paragraph can 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, and/or the jury can be asked to make a finding on weight through special interrogatories after it has found the defendant guilty of the offense. See Comment to Instruction 6.21.841A.

Fifth Amendment Concerns. Although this instruction provides that the trial court may instruct that the jury can consider, among other things, "what *(name)* said, what (name) did and failed to do," the court should be careful not to instruct in a way that suggests that the jury can consider what the defendant failed to say in a context that implicates a defendant's Fifth Amendment right to remain silent. An instruction that invites the jury to infer intent from a defendant's silence in that context may be a violation of the Fifth Amendment. *United States v. Waller*, 654 F.3d 430 (3d Cir. 2011). See discussion in Comment to Instruction 5.01(Proof Of Required State of Mind – Intentionally, Knowingly, Willfully).

(Revised 12/2021)

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., U.S. v. Styles*, 587 Fed.Appx. 26 (3d Cir. 2014) (non-precedential) (evidence sufficient to prove intent to distribute where defendant knew codefendant sold narcotics, exchanged small bills for large bills to help codefendant transport cash more easily, drove codefendant to Los Angeles twice to in order to buy narcotics there, and brought over $15,000 to airport knowing codefendant would use it to buy drugs); *U.S. v. Jackson,* 575 Fed. Appx. 59 (3d Cir. 2014) (non-precedential) (evidence sufficient to prove intent to distribute where defendant possessed 42 individually bagged packets of crack cocaine, an expensive firearm and possessed no paraphernalia for personal use when arrested); *U.S. v. Dees*, 574 Fed. Appx. 179 (3d. Cir. 2014) (non-precedential) (evidence sufficient to prove intent to distribute where defendant possessed 213 grams of cocaine and had recently given cocaine to others); *U.S. v. Morris*, 561 Fed. Appx. 180 (3d Cir. 2014) (non-precedential) (evidence sufficient to prove intent to distribute where defendant sold cocaine, others sold cocaine for the defendant, and sandwich baggies, ammonia, razors, and $6,000 cash found in defendant's residence); *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 11/2018)

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 or mandatory minimum 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 or mandatory minimum 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. . .

As discussed in the Comment to Instruction 6.21.841A, the penalties applicable to violations of § 841(a) (1) are set forth in 21 U.S.C. § 841(b). 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, whether death or serious bodily injury results from the use of the drugs involved in the offense, or whether the defendant has a prior felony drug conviction. The statutory framework provides for a base maximum sentence of one year in prison with no mandatory minimum. 21 U.S.C. §841(b)(3). *See United States v Freeman*, 763 F.3d 322 (3d Cir. 2014). In addition, there are tiers with enhanced statutory maximum sentences and mandatory minimum sentences depending on the identity and weight of the controlled substance, whether death or serious bodily injury occurred and whether the defendant has a prior felony record. 21 U.S.C. § 841(b). This framework raises various issues with respect to instructing on identity, quantity and other factors which would increase the statutory maximum or impose a mandatory minimum sentence beyond the base sentence.

The Supreme Court's opinions in *United States v. Apprendi,* 530 U.S. 466 (2000) and *United States v. Alleyne*, 570 U.S. 99 (2013) establish a framework that requires the jury to find that the government has proven beyond a reasonable doubt any fact that increases the statutory maximum or mandatory minimum beyond the statutory base sentence. Indeed, the Court has

referred to these facts as "elements" of the offense and that they must be charged in the indictment. *United States v. Cotton*, 535 U.S. 625 (2002). See *United States v. Barbosa*, 271 F.3d 438, 454 (3d Cir. 2001); *United States v. Lewis*, 802 F.3d 449, 454 (3d Cir. 2015). As such, the jury must be instructed that these facts are elements of the offense as part of this instruction and/or must be required to make such findings on a special verdict form or interrogatory as discussed below. See also Commentary to Instruction 6.21.841C – Controlled Substance Offenses – Verdict Forms and Special Interrogatories.

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 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); *United States v. Alleyne*, 570 U.S. 99 (2013).

Ordinarily, the government will charge and prove a specific type of controlled substance; this element is covered in the *Third* paragraph of the instruction. In cases in which the indictment also charges a weight threshold that would authorize higher maximum or a mandatory minimum penalty under 21 U.S.C. § 841(b), different practices are followed in different districts. As with 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 as a "Fourth" element or by using a Verdict Form with Special Interrogatories. *See* discussion in Comment to Instruction 6.21.841A. If special interrogatories are used, *see* Instruction 6.21.841C.

Death or Serious Bodily Injury. As discussed in more detail in the Comment to Instruction 6.21.841A, 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). In addition, the Third Circuit has recognized that the government need not prove that the defendant could have reasonably foreseen that death or serious bodily injury would result. *United States v. Jacobs*, 21 F.4th 106 (#d Cir. 2021).

As with other facts that increase the statutory maximum or mandatory minimum penalty, the trial judge may add this as an element of the offense in this Instruction and/or use A Verdict Form with Special Interrogatories to be answered after the jury finds the defendant guilty of the core offense. *See* Instruction 6.21.841C. To add it as an element to this instruction, the trial judge may include the following:

[(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.

Prior Convictions. A discussed more fully in the Comment to Instruction 6.21.841A, if the government will seek an enhanced statutory sentence based upon facts relating to a defendant's prior conviction, such as how much time the defendant spent in jail for the prior conviction and how long after the defendant was released from jail the instant offense occurred, the trial judge should carefully consider whether the factual issue must be determined by the jury. While prior decisions address whether the *fact* of a prior conviction must be determined by a jury, they do not expressly address whether facts that go beyond the prior conviction itself and factual elements of the offense must be determined by a jury.

Although in *Apprendi* it appears the Supreme Court specifically excluded prior convictions from its holding ("*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." 530 U.S. at 490 (emphasis added)), neither the Supreme Court nor the Third Circuit have addressed whether enhancement factors that go beyond the mere fact of conviction - namely, the length of time the defendant served and the period of time between being released and committing the instant offense must be determined by the jury. As such, prudence might suggest that any fact about a prior conviction other than the fact of conviction be submitted to the jury using a special verdict form after they have returned a guilty verdict on any charges for which the government seeks an enhancement. 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. Freeman,* 763 F.3d 322, 332 (3d Cir. 2014**);** *United States v. Lacy*, 446 F.3d 448 (3d Cir. 2006). *See also United States v. Johnson*, 292 Fed. Appx. 178 (3d Cir. 2008) (non-precedential). 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 12/2021)

6.21.841C Controlled Substances – Verdict Form with Special Interrogatories with Respect to Substance Identity and Factors that Enhance Statutory Maximum or Mandatory Minimum Sentence

[The following verdict form and special interrogatories may be used when the indictment charges the weight thresholds (or other factors, such as resulting death or serious bodily injury) which would authorize the higher statutory maximum or mandatory minimum 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** *[or other factor]***. 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** *[or other factor]***, you must all be satisfied that the government proved the weight or quantity** *[or other factor]* **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** *[or define other factor]***.**

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*) (*within the scope of the conspiracy*) **was** *(X grams or more)***.** *[For conspiracy charge: Alternative 1 [increased statutory maximum penalty]: In making this decision, you may attribute to (name) the quantity (possessed with intent to distribute) (distributed) (intended to distribute) which was within the scope of the conspiracy. Alternative 2 [increased mandatory minimum penalty]: In making this decision, you may attribute to (name) only the quantity (possessed with intent to distribute) (distributed) (intended to distribute) which was within the scope of the conspiracy and reasonably foreseeable to (him) (her).]*

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*) (*was within the scope of the conspiracy*) **was** *(next lower threshold)* **or more.** *[For conspiracy charge: Alternative 1 [increased statutory maximum penalty]: In making this decision, you may attribute to (name) the quantity (possessed with intent to distribute) (distributed) (intended to distribute) which was within the scope of the conspiracy. Alternative 2 [increased mandatory minimum penalty]: In making this decision, you may*

attribute to (name) only the quantity (possessed with intent to distribute) (distributed) (intended to distribute) which was within the scope of the conspiracy and reasonably foreseeable to (him) (her).]

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):

When the indictment alleges one of the weight thresholds authorizing increased maximum or mandatory penalties under 21 U.S.C 841(b), include the relevant question(s) below:

Alternative 1 *[increased statutory maximum penalty]*

When the indictment alleges one of the weight thresholds authorizing increased statutory maximum penalty under 21 U.S.C 841(b), include the following: **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)* **which was within the scope of 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)* **which was within the scope of 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

Alternative 2 *[increased statutory mandatory minimum penalty]*

When the indictment alleges one of the weight thresholds authorizing increased statutory mandatory minimum penalty under 21 U.S.C 841(b), use the following:

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)* **which was within the scope of the conspiracy to** *(possess with intent to distribute or manufacture) (manufacture) (distribute)* **which you have found and was reasonably foreseeable to *[name]* 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)* **which was within the scope of the conspiracy to** *(possess with intent to manufacture or distribute) (manufacture) (distribute)* **which you have found and was reasonably foreseeable to** *(name}***w** *(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, that is, death or serious bodily injury would not have resulted had the victim not used the controlled substance distributed by (name)?

_____ *Yes*

_____ *No]*

Comment

See 2B O'Malley et al, supra, § 64.03, §64.07, and §64.12 ; 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. As discussed in the Comment to Instruction 21.841A, any fact, other than the fact of a prior conviction, which increases the statutory maximum or statutory mandatory minimum sentence for the offense, such as identity, weight, and causing the death of the user, 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). 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. The weight or quantity thresholds for the maximum or mandatory minimum authorized penalties are not merely the weight or quantity that the particular defendant possessed, distributed, or manufactured, but include quantities within the scope of the conspiracy. *United States v Williams*, 974 F.3d 320, 364-67 93d Cir. 2020). Current Third Circuit precedent establishes the following framework as to the government's burden in proving beyond a reasonable doubt the appropriate amount attributable to a defendant as a member of a conspiracy under §846. The statutory maximum sentence a defendant is exposed to is based upon the quantity attributable to "the conspiracy as a whole," *United States v. Phillips*, 349 F.3d 138, 143 (3d Cir. 2003), *vacated on other grounds sub nom. Barbour v. United States*, 543 U.S. 1102, 125 S. Ct. 992, 160 L.Ed.2d 1012 (2005). In contrast, the statutory minimum sentence to which the defendant is exposed is determined by the quantity which was within the scope of the agreement and reasonably foreseeable to the defendant as a natural result of participating in the conspiracy. *United States v Williams*, 974 F.3d 320, 366-7 (3d Cir. 2020). As such, when weight is a fact that will either increase the statutory maximum sentence or the statutory minimum sentence, a special interrogatory should be included using the alternatives provided in the Verdict Form. *See* discussion in 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.

Prior Convictions. As discussed more fully above in the Commentary to Instruction 6.21.841A, §841(b) provides for some enhanced penalties when a defendant has a prior conviction, the length of time served and the time between release and the instant offense. While prior decisions address whether the *fact* of a prior conviction must be determined by a jury, *Apprendi v. New Jersey,* 530 U.S. 466 (2000)***;*** *United States v. Blair*, 734 F.3d 218 (3d Cir. 2013), they do not expressly address whether facts that go beyond the prior conviction itself and factual elements of the offense must be determined by a jury.

In cases in which the enhancements apply, the trial judge may wish to submit the issue to the

jury after they have reached a verdict of guilt using a Verdict Form with Special Interrogatories, such as:

Count [ ]

You have already found the defendant [name], guilty of Count [ ]. Please answer the following questions:

1. *Do you unanimously find, beyond a reasonable doubt, that the defendant was convicted of the offense of [name offense]? YES_____ NO ____*
2. *Do you unanimously find, beyond a reasonable doubt, that he served more than [time] in prison for that offense? YES ____ NO ____*
3. *Do you unanimously find, beyond a reasonable doubt, that he was released from imprisonment for that offense within [time] of the commencement of [offense charged in this count]. YES_____ NO _____*

(Revised 12/2021)

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.

(Revised 12/2021)

6.21.846A 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 6.21.841A, any fact, other than the fact of a prior conviction, which increases the statutory maximum or statutory mandatory minimum sentence for the offense, such as identity, weight, and causing the death of the user 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, facts such as 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.

(Revised 12/2021)

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)***.**

[When the indictment alleges one of the weight thresholds authorizing increased maximum or mandatory penalties under 21 U.S.C 841(b), either use the appropriate Verdict Form with Special Interrogatories With Respect to Substance Identity and Weight, as provided in Instruction 6.21.841C or give the relevant following additional instruction:

Alternative 1 *[increased statutory mandatory minimum penalty]*

When the indictment alleges one of the weight thresholds authorizing increased mandatory minimum penalty under 21 U.S.C 841(b), give the following additional instruction, and when appropriate, also consider giving a lesser included offense instruction as to a weight meeting a lower penalty threshold:

Fourth, that the weight or quantity of *(type of controlled substance)* ***which was within the scope of the conspiracy and reasonably foreseeable to the defendant was*** *(X grams or more)****. In making this decision, you may attribute to a particular defendant who you have found to be a member of the conspiracy only the quantity*** *(distributed) (possessed with intent to distribute) (manufactured)(possessed)* ***which was within the scope of the conspiracy and reasonably foreseeable to that defendant .***

Alternative 2 *[increased statutory maximum penalty]*

When the indictment alleges one of the weight thresholds authorizing increased

statutory maximum penalty under 21 U.S.C 841(b), give the following additional instruction, and, when appropriate, also consider giving a lesser included offense instruction as to a weight meeting a lower penalty threshold:

Fourth, that the weight or quantity of *(type of controlled substance)* ***which was within the scope of the conspiracy was*** *(X grams or more).* ***]***

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. *United States v. Shabani*, 513 U.S. 10, 13-14 (1994). To prove a conspiracy to commit controlled substance offense under 21 U.S.C. § 846, the government must prove "(1) a shared unity of purpose, (2) an intent to achieve a common illegal goal, and (3) an agreement to work toward that goal, which [the defendant] knowingly joined." *United States v. Boria,* 592 F.3d 476, 481 (3d Cir.2010); *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 425-46 (3d Cir. 2013) (*en banc*). See also *United States v. Wheeler*, 742 Fed. Appx. 646, 658-9 (3d Cir. 2018) (non-precedential). 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*, 568 U.S. 106, 110 133 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.

S*ee also United States v. Sanchez,* 704 Fed. Appx. 38, 40 (3d Cir. 2017) (non-precedential); *United States v. Bailey,* 840 F.3d 99, 108-109 (3d Cir. 2016) *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*, 588 Fed. Appx. 167 (3d Cir. 2014) (non-precedential); *United States v. Kemp*, 580 Fed. Appx. 138 (3d. Cir. 2014) (non-precedential).

In *United States v. Lewis*, 447 Fed. Appx. 310, 314 (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. With respect to proving the third element, that the defendant joined the conspiracy knowing of its purpose to commit a controlled substance offense, in *United States v. Caraballo-Rodriguez*, 726 F.3d 418 (3d Cir. 2013) (en banc).the Third Circuit rejected it's previous "'strict approach'" 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." 726 F.3d 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.

726 F.3d 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." 726 F.3d at 426 425. *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.

See also United States v. Rodriguez, 726 Fed. Appx. 136 (3d Cir. 2018).

Identity and Weight of Controlled Substance Involved in Conspiracy. As discussed in the Comment to Instruction 21.841A, any fact, other than the fact of a prior conviction, which increases the statutory maximum or statutory mandatory minimum sentence for the offense, such as identity, weight, and causing the death of the user 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). 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, weight or other sentence enhancing facts and/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.

Current Third Circuit precedent establishes the following framework as to the government's burden in proving beyond a reasonable doubt the appropriate amount attributable to a defendant as a member of a conspiracy under §846. The statutory maximum sentence a defendant is exposed to is based upon the quantity attributable to "the conspiracy as a whole," *United States v. Phillips*, 349 F.3d 138, 143 (3d Cir. 2003), *vacated on other grounds sub nom. Barbour v. United States*, 543 U.S. 1102, 125 S. Ct. 992, 160 L.Ed.2d 1012 (2005). In contrast, the statutory minimum sentence to which the defendant is exposed is determined by the quantity which was within the scope of the agreement and reasonably foreseeable to the defendant as a natural result of participating in the conspiracy. *United States v Williams*, 974 F.3d 320, 366-7 (3d Cir. 2020). As such, when weight is a fact that will either increase the statutory maximum sentence or the statutory minimum sentence, the jury should be instructed accordingly using the alternatives provided in the instruction.

(Revised 12/2021)

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)(5)(B) 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:

> ***I would like to alert you that 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 government] alleges is subject to forfeiture by*** *(name)****. 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.**

The Government 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 the crime alleged in Count (no.),** *(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 by the defendant, 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. To "obtain" property means to acquire it. In order to find that property is subject to forfeiture as proceeds of the offense, you must find that the defendant actually acquired the property as a result 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 each of the following items of property that the government alleges is subject to forfeiture:

(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 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*****?**

YES _____

NO _____

This _____ day of _____, 20_____.

_____

Foreperson

Comment

See Eighth Circuit § 6.21.853 (Controlled Substances); Eleventh Circuit T6; 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).

Burden of Proof. Criminal forfeiture is part of a sentence and not an element of the offense, so there is no requirement that the issues relating to forfeiture be proven beyond a reasonable doubt. *United States v. Libretti*, 516 U.S. 29, 41, 49 (1995), *United States v. Sandini*, 816 F,2d 869, 874-76 (3d Cir. 1987), *United States v. Voight*, 89 F.3d 1050 (3d Cir 1996). In *Sandini*, the Third Circuit held that the burden of proof under §853 is a preponderance of the evidence and that there is no constitutional violation as along as the jury considers the forfeiture issues in a bifurcated proceeding after the guilt phase of the trial. 816 F.2d at 875-6. The Third Circuit reaffirmed that holding even in light of the Supreme Court's decision in *Apprendi v New Jerse*y, 530 U.S. 466 (2000) in *United States v. Leahy*, 438 F.3d 328, 331-33 (3d Cir. 2006).

No Joint-and-Several Liability. In *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), the Supreme Court rejected joint-and-several liability among co-conspirators for proceeds that the defendant did not obtain as a result of the offense under 21 U.S.C. §853, abrogating the Third Circuit's decision in *United States v. Pitt*, 193 F.3d 751 (3d Cir. 1999). Thus, only property that the defendant actually acquired as proceeds of the offense may be subject to forfeiture under §853. The Third Circuit has extended *Honeycutt* to preclude joint-and-several forfeiture liability under the RICO statute, 18 U.S.C. 1963. *United States v. Gjeli*, 867 F.3d 418 (3d Cir. 2017). Thus, only proceeds of the offense that the defendant did actually acquire may be forfeited.

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. Pursuant to Fed. R. Crim. P. 32.2(a), 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 …The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks." . A "conclusory forfeiture allegation in the indictment that recognizably tracks the language of the applicable criminal forfeiture statute is sufficient under the rule." *United States v Lacerda*, 958 F.3d 196 (3d Cir. 2020) Rule 32.2 requires that "the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict." In addition, "If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." Fed. R. Crim. P. 32.2(b)(5)(B).

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(b)(1); 21 U.S.C. § 853(n).

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 (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 (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.