

12.2 Determining Amount of Controlled Substance

If you find the defendant guilty of the charge in [Count _____ of] the indictment, you are then to determine whether the government proved beyond a reasonable doubt that the amount of [specify controlled substance] that defendant intended to distribute equaled or exceeded [certain weights] [insert specific threshold weight]. Your determination of weight must not include the weight of any packaging material. Your decision as to weight must be unanimous.

The government does not have to prove that the defendant knew the quantity of [specify controlled substance].

Comment

When a drug conspiracy is charged, the jury may infer the agreed upon drug amount based on the conduct of the conspirators but may not speculate as to the amount. *See United States v. Narvarrette-Aguilar*, 813 F.3d 785, 794 (9th Cir. 2015) (“Express agreement is not required; rather, agreement may be inferred from conduct.”).

While quantity and drug type are not elements of controlled substance offenses, a jury must determine those facts before a sentencing enhancement based upon drug type or quantity can be applied. The Ninth Circuit has held, however, that the government need not prove that a defendant knew either the controlled substance type or quantity for the enhancement to apply. *United States v. Collazo*, 984 F.3d 1308, 1329 (9th Cir. 2021) (en banc). If the charged controlled substances are not in evidence, the court should only allow the jury to use comparison drugs that are from the defendant’s activity or a conspiracy in which the defendant was involved. *United States v. Lemus*, 847 F.3d 1016, 1022-23 (9th Cir. 2016) (stating that purity of controlled substances not connected to defendant could not be used to estimate purity of defendant’s drugs).

When it is necessary to determine the amount of a controlled substance, use this instruction with Instruction 12.1 (Controlled Substance–Possession with Intent to Distribute). The court may also consider submitting a special verdict form to the jury. For an example of such a form, see the Comment to Instruction 12.5 (Controlled Substance—Conspiracy to Distribute or Manufacture).

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