

**6001 FINDING THE AMOUNT OF CONTROLLED SUBSTANCE**

ADD THE FOLLOWING TO INSTRUCTIONS FOR CASES INVOLVING THE MANUFACTURE, DISTRIBUTION, OR DELIVERY OF A CONTROLLED SUBSTANCE OR THE POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO MANUFACTURE, DISTRIBUTE, OR DELIVER, WHERE THE EVIDENCE IS SUFFICIENT TO SUPPORT A FINDING THAT THE AMOUNT POSSESSED EXCEEDED THE REQUIRED AMOUNT<sup>1</sup>:

If you find the defendant guilty, you must answer the following question(s)<sup>2</sup> “yes” or “no”:

Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it,<sup>3</sup> more than (state amount which determines the penalty)?

Before you may answer this question “yes,” you must be satisfied beyond a reasonable doubt that the amount was more than (state amount).

If you are not so satisfied, you must answer the question “no.”

IF THERE IS A REASONABLE BASIS IN THE EVIDENCE FOR FINDING THAT A LARGER AMOUNT WAS NOT ESTABLISHED AND THAT A SMALLER AMOUNT WAS, ADD THE FOLLOWING AND REPEAT IF NECESSARY.

If you answer the first question “no,” you must answer the following question “yes” or “no”:

Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it, more than (state amount which

determines the penalty)?<sup>4</sup>

Before you may answer this question “yes,” you must be satisfied beyond a reasonable doubt that the amount was more than (state amount).

If you are not so satisfied, you must answer the question “no.”

#### COMMENT

Wis JI-Criminal 6001 was originally published in October 1986 and revised in 1989, 1991, 1992, 1996, 2010, and 2018. The 2010 revision adopted a new format and updated the Comment. The 2018 revision added a model for submitting more than one question regarding the amount involved. This revision was approved by the Committee in April 2022; it added to the comment.

Chapter 161 was renumbered Chapter 961 by 1995 Wisconsin Act 448. Effective date: July 9, 1996. Act 448 also extended the coverage of controlled substance offenses to include “controlled substance analogs.” See Wis JI-Criminal 6005 and 6020A.

This instruction provides for a jury finding of the amount of controlled substance involved in offenses under Chapter 961. It is modeled after the instruction for finding value in theft cases. See Wis-JI Criminal 1441A. See Wis JI-Criminal 6001A EXAMPLE for an adaptation of this instruction for methamphetamine cases.

The penalty-depending-upon-weight provision originally applied to cocaine offenses only but was expanded to cover other substances in 1989. (See 1987 Wisconsin Act 339.) The amounts vary depending on the kind of controlled substance. Because many variables are involved, the Committee decided to revise this instruction to provide a general framework into which the proper amounts must be inserted.

The following statutes provided for penalties based on the amount of controlled substance involved: § 961.41(1), subsections (cm) through (im), for manufacture, distribution, or delivery offenses; and § 961.41(1m), subsections (cm) through (im), for offenses involving possession with intent to manufacture, distribute, or deliver. Under each statute, the subsections deal with the same substances: (cm) cocaine and cocaine base; (d) heroin; (dm) fentanyl, a fentanyl analog; (e) phencyclidine, amphetamine, methamphetamine, et al.; (em) synthetic cannabinoids; (f) lysergic acid diethylamide; (g) psilocin or psilocybin; (h) tetrahydrocannabinols; (hm) certain other Schedule 1 controlled substances and ketamine; and, (im) flunitrazepam.

Sections 961.41(1)(h) and (1m)(h) include penalty grades based on the number of plants containing tetrahydrocannabinols possessed. In such cases, the reference in the question would have to be changed to refer to the number of plants rather than the “amount of” substance.

The Committee suggests the following as an addition to the guilty verdict form:

(Answer the following “yes” or “no”):

Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it, more than (state amount which determines the penalty)?

1. The Committee concluded that it was preferable to state the question in terms of whether the required amount is present rather than to ask the jury to agree on a specific amount. Requiring agreement might cause a delay in reaching a verdict that is not related to any essential issue.

The Committee also concluded that it is not necessary to include the upper threshold – e.g., “but not more than 10 grams” – to avoid unnecessary jury debate about whether or not the upper threshold was exceeded.

2. It may be appropriate to submit more than one question if there is a reasonable basis for finding that a larger amount was not established and that a smaller amount was established (as in a lesser included offense situation).

3. With regard to determining the amount of the controlled substance, § 961.41(1r) provides as follows:

961.41(1r) In determining amounts under . . . subs. (1) and (1m), an amount includes the weight of the [controlled substance or controlled substance analog] . . . together with any compound, mixture, diluent, plant material, or other substance mixed or combined with the controlled substance or controlled substance analog.

In Chapman v. United States, 500 U.S. 453 (1991), the United States Supreme Court reviewed federal sentencing provisions that are similar to § 961.41(1r) in including the weight of material mixed or combined with the controlled substance. The Court held that the sentencing provisions were constitutional in the context of a case where the weight of the blotter paper containing LSD, not the weight of the pure LSD alone, was used to determine the amount for sentencing purposes.

“Stems or branches supporting the marijuana leaves or buds . . . are not excluded as ‘mature stalks’” under the definition of “controlled substance” in § 961.01(14). State v. Martinez, 210 Wis.2d 396, 412 13, 563 N.W.2d 922 (Ct. App. 1997).

4. If the case involves possession with intent to manufacture or deliver, the Committee recommends restating this sentence as follows: “Was the amount of (name controlled substance), including the weight of any other substance or material mixed or combined with it, possessed with intent to (manufacture) (deliver) more than \_\_\_\_\_?” The purpose is to avoid any argument that the necessary amount was simply possessed as opposed to being possessed with intent to deliver. Simple possession is not subject to the added penalties addressed by this instruction.