

**6002 DELIVERING A CONTROLLED SUBSTANCE TO A MINOR — §
961.46**

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY
AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information alleges not only that the defendant delivered¹ (name controlled substance)² but also that the defendant was 17 years of age or over and delivered³ (name controlled substance) to a person who was 17 years of age or under and who was three years younger than the defendant.

If you find the defendant guilty, you must answer the following three questions:⁴

"Was the defendant 17 years of age or over at the time of the delivery?"

"Did the defendant deliver (name controlled substance) to a person who was 17 years of age or under?"

"Was that person at least three years⁵ younger than the defendant?"

Before you may answer a question "yes," you must be satisfied beyond a reasonable doubt that the answer to that question is "yes."

If you are not so satisfied as to any question, you must answer that question "no."

COMMENT

Wis JI-Criminal 6002 was originally published in 1991 and revised in 1996. This revision was approved by the Committee in February 2003 and involved adding reference to 2001 Wisconsin Act 109 to the comment.

Section 961.46 was revised by 2001 Wisconsin Act 109, effective date: February 1, 2003. The penalty-increasing provision was simplified to provide for an increase in the applicable maximum term of imprisonment of not more than 5 years.

1. Section 961.46 provides increased penalties for "violations of § 961.41(1)" which involve delivering or distributing a controlled substance to a child. Section 961.41(1) prohibits delivering, distributing or manufacturing a controlled substance. The instruction is drafted for cases involving delivery. "Distributing" means "delivery", see note 3, below. "Manufacturing" alone is not enough; the penalty increase applies only where there is delivery or distribution.

2. The Committee suggests naming the controlled substance throughout the instruction. The jury will only be considering this special question if they have found the defendant guilty of an offense involving the named substance. It is the nature of the substance that determines the applicable penalty, and it is that penalty which is increased by the facts addressed by this instruction. Section 961.46 also applies to delivery of a "controlled substance analog." For cases involving "analogs," see Wis JI-Criminal 6005.

3. Section 961.46 refers to "distributing or delivering" a controlled substance to a child. The instruction uses "deliver" instead because the Committee concluded that most cases were likely to involve a delivery. Further, § 961.01(9) defines "distribute" as follows: "to deliver other than by administering or dispensing a controlled substance." "Administer" and "dispense" are defined in §§ 961.01(1) and (7), respectively, to refer to activities of "practitioners," further defined in § 961.01(19) as doctors, pharmacists, etc. Thus, "distribute" means "deliver."

4. The Committee recommends that facts which increase the range of penalties be submitted to the jury in the form of three questions. The following form is suggested for the guilty verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the information.

If you find the defendant guilty, answer the following questions "yes" or "no":

"Was the defendant 17 years of age or over at the time of the delivery?"

"Did the defendant deliver (name controlled substance) to a person who was 17 years of age or under?"

"Was that person at least three years younger than the defendant?"

5. The Committee concluded that "three years" refers to a period of 36 months.