

6003 DELIVERING A CONTROLLED SUBSTANCE TO A PRISONER — § 961.465

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

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 delivered³ (name controlled substance) to a prisoner.

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

"Did the defendant deliver (name controlled substance) to a prisoner [within the precincts of a (prison) (jail) (house of correction)]?"⁵

ADD THE FOLLOWING ONLY IF "PRECINCTS" ARE INVOLVED:

["Precinct" means a place where any activity is conducted by a (prison) (jail) (house of correction).]⁶

Before you may answer this question "yes," you must be satisfied beyond a reasonable doubt that the defendant delivered (name controlled substance) to a prisoner⁷ [within the precincts of a (prison) (jail) (house of correction)].

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

COMMENT

Wis JI-Criminal 6003 was originally published in 1990 and revised in 1996. This revision was approved by the Committee in February 2003.

Section 961.465 was repealed by 2001 Wisconsin Act 109, effective February 1, 2003. Wis JI-Criminal 6003 is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by § 961.465 have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(8).

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.

Section 961.465 provides for increased penalties for a "person who violates § 961.41(1) or (1m) by delivering or possessing with intent to deliver or distribute a controlled substance or controlled substance analog to a prisoner within the precincts of any prison, jail, or house of correction." § 961.465(1). Subsection (2) of § 961.465 doubles the "applicable minimum and maximum fines and minimum and maximum periods of imprisonment" for violations of § 961.41(1) or (1m) involving "cocaine, cocaine base, heroin, phencyclidine, lysergic acid diethylamide, psilocin, psilocybin, amphetamine, methamphetamine, methalinone, or any form of tetrahydrocannabinols." Subsection (1) applies the regular fine and doubles the possible maximum term of imprisonment for offenses involving any other controlled substance or analog not specified in subsection (2).

Both subsections apply to violations of § 961.41(1) and (1m). Section 961.41(1) applies to the manufacture, distribution, or delivery of a controlled substance. See Wis JI-Criminal 6020 and 6021. Section 961.41(1m) applies to possession of a controlled substance with intent to manufacture, distribute, or deliver. See Wis JI-Criminal 6035 and 6036. Both subsections of § 961.465 also apply to violations accomplished by delivering or distributing a controlled substance to a prisoner or by possessing a controlled substance with intent to deliver or distribute to a prisoner.

1. The underlying offense can be a violation of either § 961.41(1) – manufacture, distribution, or delivery of a controlled substance – or § 961.41(1m) – possession of a controlled substance with intent to deliver, distribute, or manufacture. This instruction uses "delivery"; it would need to be changed if one of the other alternatives was the basis for the underlying charge.

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.

3. This instruction is drafted for a case where there was an actual delivery of a controlled substance to a prisoner. The statute also applies, however, to possession of a controlled substance with intent to deliver or distribute to a prisoner. See the comment preceding note 1, supra.

4. The Committee recommends that facts which increase the range of penalties be submitted to the jury in the form of a special question. 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) (complaint).

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

"Did the defendant deliver (name controlled substance) to a prisoner [within the precincts of a (prison) (jail) (house of correction)]?"

5. The Committee suggests including the reference to "precincts" only where the case involves an alleged delivery outside the prison or jail proper.

6. This is the definition of "precincts" provided by § 961.465(3). Also see State v. Cummings, 153 Wis.2d 603, 451 N.W.2d 463 (Ct. App. 1989), where the court invoked the precinct rationale in the case of a prisoner who was receiving medical treatment in a hospital outside the prison.

7. If a definition of "prisoner" is needed, the Committee suggests the following which is adapted from the one used in Wis JI-Criminal 1222: "A prisoner is one who is confined to a (prison) (jail) (house of correction) as a result of a violation of law." It is based on the discussion in State v. Brill, 1 Wis.2d 288, 83 N.W.2d 721 (1957), cited with approval in In Interest of C.D.M., 125 Wis.2d 170, 370 N.W.2d 287 (Ct. App. 1985). Also see note 1, Wis JI-Criminal 1222. The term "prisoner" is also defined in § 46.011(2) for purposes of chapters 46 to 51, 55, and 58, and in § 301.01(2) for purposes of chapters 301 to 304.