



Drug Trafficking Offenses

2023 National Seminar

August 29, 2023

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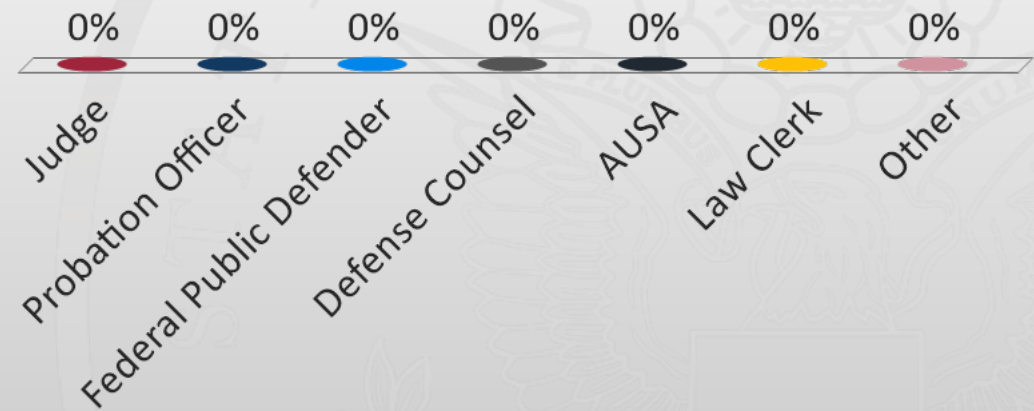
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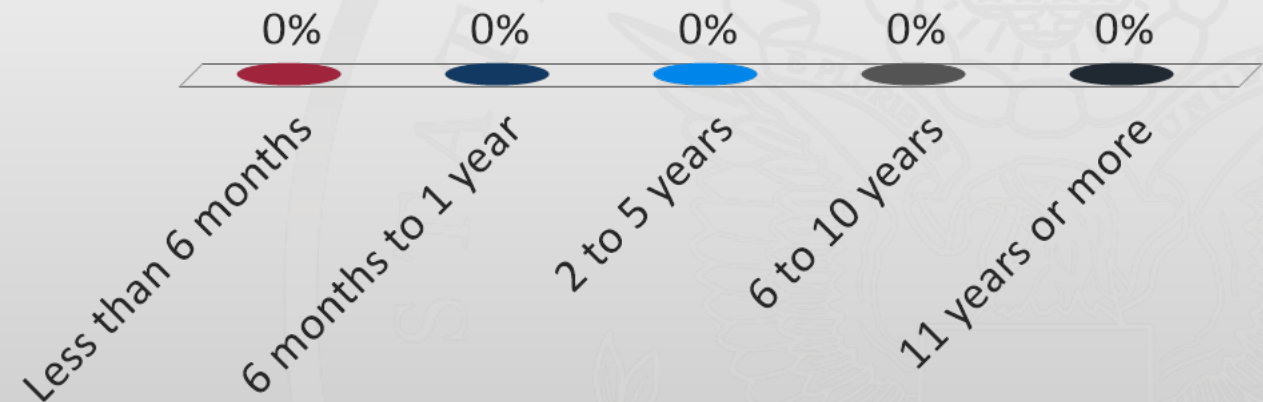
What is your current position?

- A. Judge
- B. Probation Officer
- C. Federal Public Defender
- D. Defense Counsel
- E. AUSA
- F. Law Clerk
- G. Other



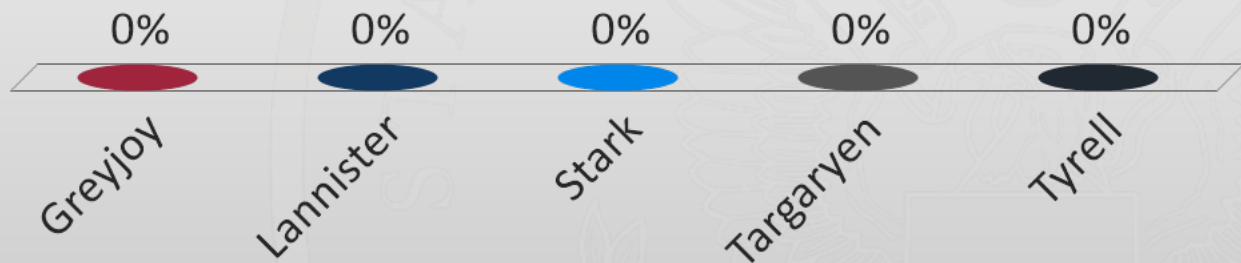
How long have you been working in the field of federal sentencing?

- A. Less than 6 months
- B. 6 months to 1 year
- C. 2 to 5 years
- D. 6 to 10 years
- E. 11 years or more



Which of the following is your favorite house on Game of Thrones?

- A. Greyjoy
- B. Lannister
- C. Stark
- D. Targaryen
- E. Tyrell



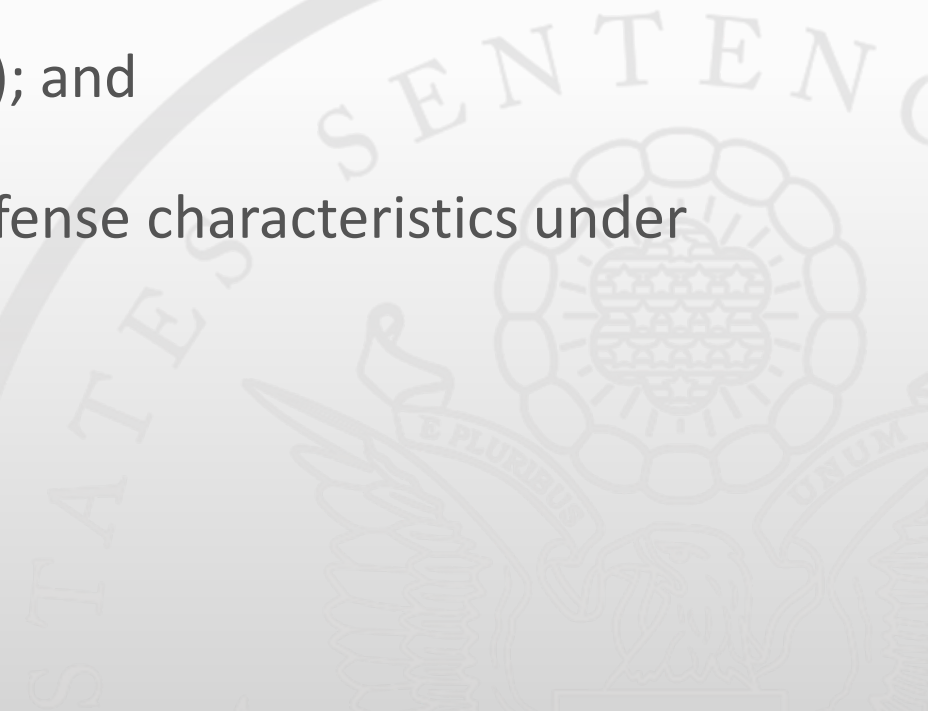
Learning Objectives

Your active engagement in this session will empower you to:

Apply relevant conduct principles to drug trafficking offenses;

Determine the base offense level under §2D1.1(a); and

Resolve common application issues for specific offense characteristics under §2D1.1(b).



Key Relevant Conduct Principles for Drug Trafficking



Key Principles for Relevant Conduct

Section 1B1.3 (pp. 23–32)

Relevant Conduct



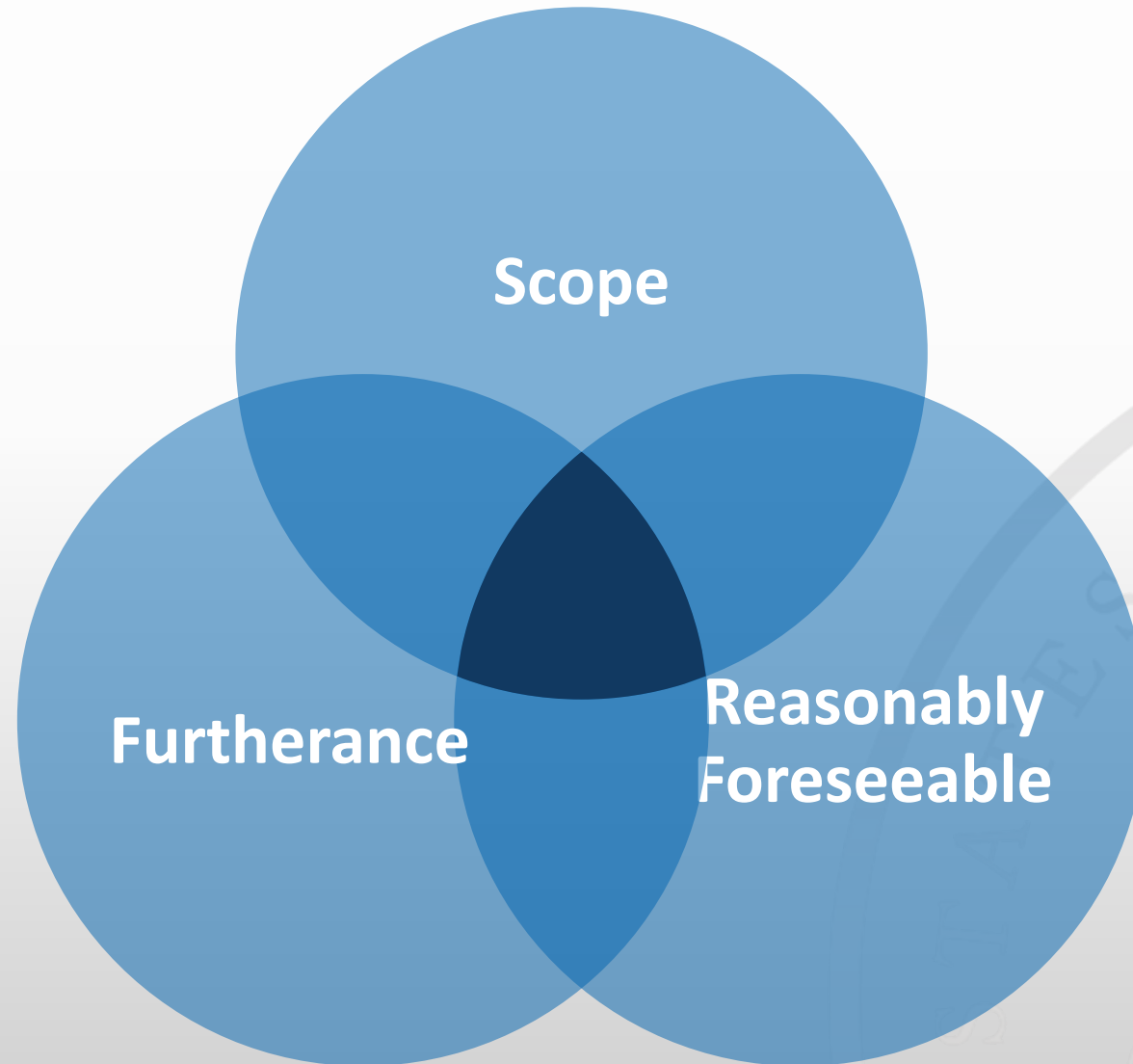
Jointly Undertaken Criminal Activity

Expanded Relevant Conduct

Relevant Conduct Exceptions

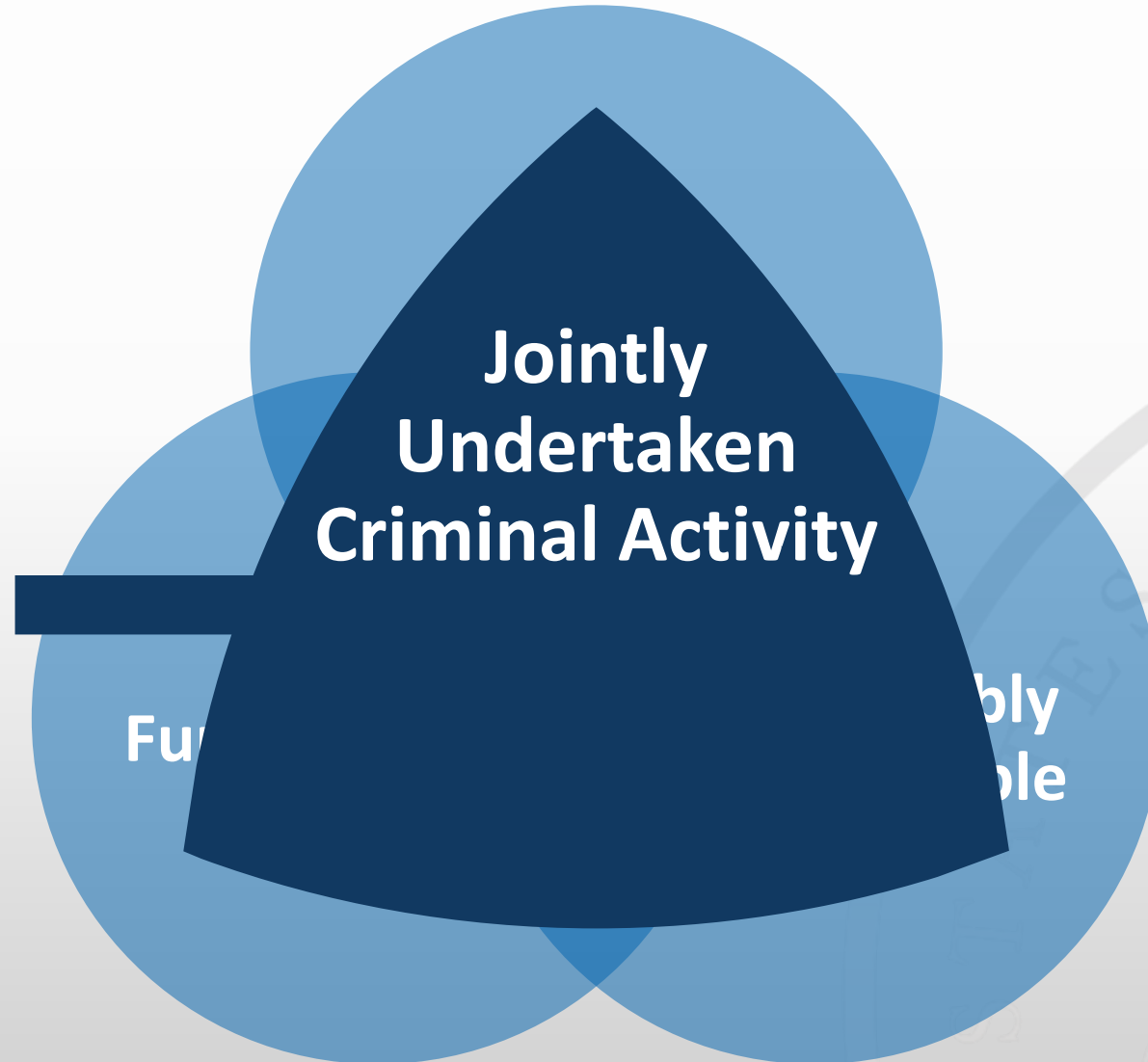
Jointly Undertaken Criminal Activity

Sections 1B1.3(a)(1)(B)(i)–(iii) (p. 23)



Jointly Undertaken Criminal Activity

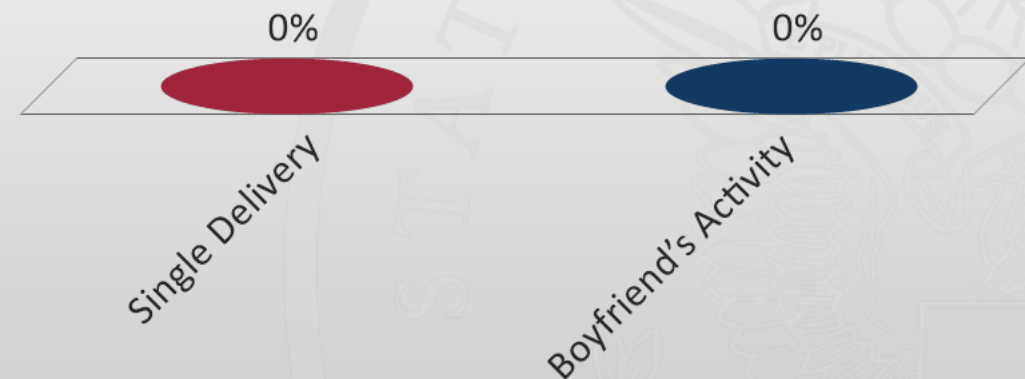
Sections 1B1.3(a)(1)(B)(i)–(iii) (p. 23)



Constance Lee knows of her boyfriend's ongoing drug-trafficking activity, but she agrees to help him out only once by making a delivery for him when he was sick.

Will Ms. Lee be responsible for the single delivery only or for all her boyfriend's drug-trafficking activity?

- ✓ A. Single Delivery
- B. Boyfriend's Activity



Key Principles for Relevant Conduct

Section 1B1.3 (pp. 23–32)

Relevant Conduct



Jointly Undertaken Criminal Activity

Expanded Relevant Conduct

Relevant Conduct Exceptions

List of Included Offenses

Section 3D1.2(d) (p. 367)

Child Pornography Trafficking
& Possession | §2G2.2

Firearms | §2K1.1

Fraud | §2B1.1

Migrant Smuggling | §2L1.1

Drugs | §2D1.1

Money Laundering | §2S1.1

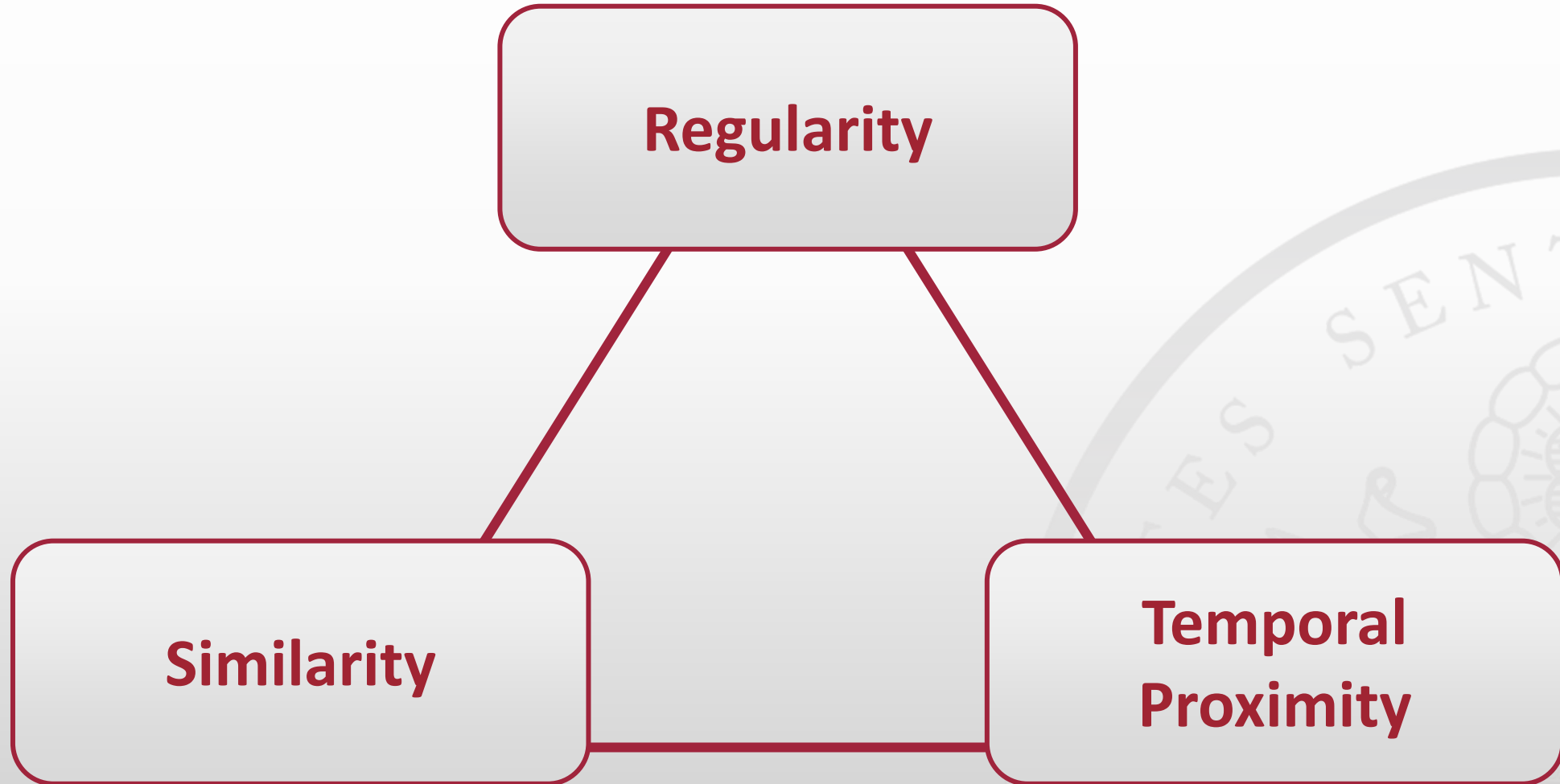
Bribery | §2C1.1

Tax Offenses | §2T1.1

Counterfeiting | §2B5.3

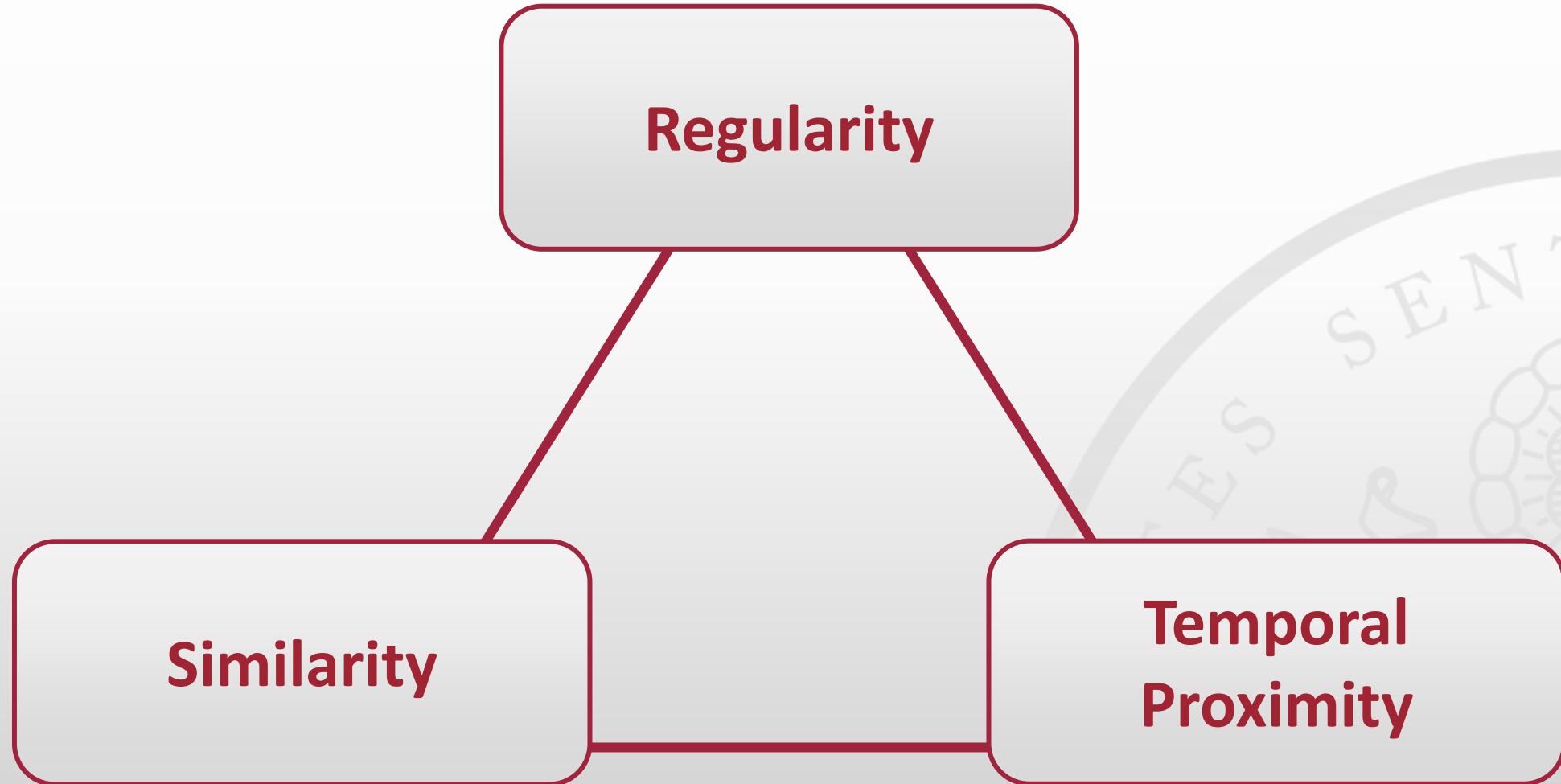
Same Course of Conduct

Section 1B1.3(a)(2), App. Note 5(B)(ii) (p. 30)



Same Course of Conduct

Section 1B1.3(a)(2), App. Note 5(B)(ii) (p. 30)



Common Scheme or Plan

Section 1B1.3(a)(2), App. Note 5(B)(i) (p. 29)

Other Offense



Conviction

Victims

Accomplices

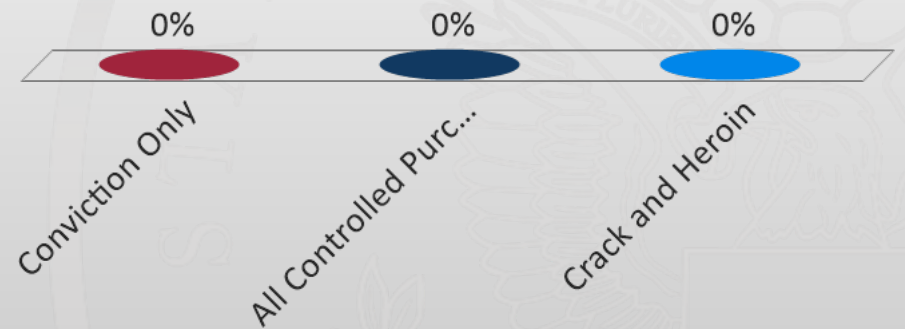
Purpose

Modus Operandi

Randy Hubbert was convicted of one count of distributing cocaine base (crack). The count involves a single controlled purchase from September 2021. Mr. Hubbert engaged in three other controlled purchases of crack in October, November, and December 2021. Two years earlier, Mr. Hubbert was paid \$1,000 to traffic 10 kilograms of heroin across the Mexican border.

Mr. Hubbert's relevant conduct includes . . .

- A. Conviction Only
- ✓ B. All Controlled Purchases (Crack)
- C. Crack and Heroin



Key Principles for Relevant Conduct

Section 1B1.3 (pp. 23–32)

Relevant Conduct



Jointly Undertaken Criminal Activity

Expanded Relevant Conduct

Relevant Conduct Exceptions

Relevant Conduct Exceptions

Introductory Clause to §1B1.3 (p. 23)

Conviction-Based Exception (Requires Specific Conviction)

§§2D1.1(a)(1)–(4)

§2D1.1(b)(6)

§2D1.1(b)(10)

§2D1.1(d)(2)

Defendant-Based Exception (Eliminates Jointly Undertaken Activity)

§2D1.1(b)(2)

§2D1.1(b)(9)

§2D1.1(b)(11)

§2D1.1(b)(12)

Determining the Base Offense Level at §2D1.1



Determining the Base Offense Level

Section 2D1.1(a) (p. 142)

1

Conviction
Involves Death
or SBI

2

If Not, Use Drug
Quantity Table

3

Mitigating Role
Adjustment

Base Offense Levels: Death or SBI

Sections 2D1.1(a)(1)–(a)(2) (p. 142)

43

Conviction Establishes

Element 1

Death or SBI

&

Element 2

Similar Offense

38

Conviction Establishes

Element 1

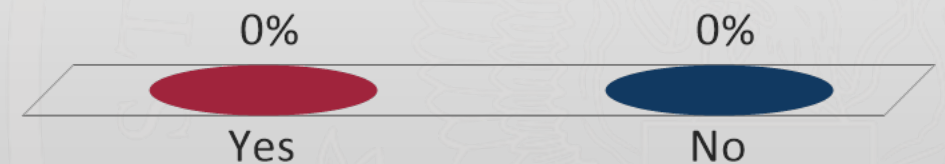
Death or SBI

Brody Comstock pleaded guilty to one count of fentanyl distribution. The conviction does not establish death as an element, but the parties included the following factual stipulation in a plea agreement: "The parties agree that Mr. Comstock sold fentanyl to John Doe, resulting in his fentanyl overdose."

Does the enhanced BOL at §2D1.1(a)(2) apply?

A. Yes

✓ B. No



Base Offense Levels: Death or SBI

Sections 2D1.1(a)(1)–(a)(2) (p. 142)

43

Conviction Establishes

Element 1

Death or SBI

&

Element 2

Similar Offense

38

Conviction Establishes

Element 1

Death or SBI

Base Offense Levels: Death or SBI

Sections 2D1.1(a)(1) (p. 142)

43

Conviction Establishes

Element 1

Death or SBI

&

Element 2

Similar Offense

Recidivist Penalties for Drug Offenders

21 U.S.C. §§ 841(b)(1)(A)–(B), 960(b)(1)–(2)

**First Step Act
(Section 401)**

Narrows and Expands Predicates for Enhanced
Mandatory Minimums

Felony
Drug
Offense

&

Serious
Violent
Felony

Base Offense Levels: Death or SBI

Section 821(a)(1)(A) (1)(A) (1)(A)

A

B

Serious Drug
Felony
or Serious
Violent Felony
Similar
Offense

21 U.S.C. § 841(b)(1)(A)

21 U.S.C. § 841(b)(1)(B)

21 U.S.C. § 841(b)(1)(C)

21 U.S.C. § 960(b)(1)

21 U.S.C. § 960(b)(2)

21 U.S.C. § 960(b)(3)

Felony Drug
Offense

Determining the Base Offense Level

Section 2D1.1(a) (p. 142)

1

Conviction
Involves Death
or SBI

2

If Not, Use Drug
Quantity Table

3

Mitigating Role
Adjustment

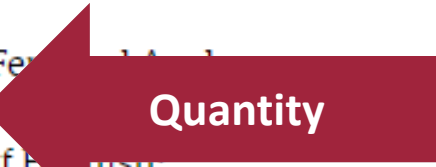
Determining the Base Offense Level

Two Issues for Drug Quantity Table

<p>(7)</p>	<ul style="list-style-type: none"> • At least 400 G but less than 700 G of Heroin; • At least 2 KG but less than 3.5 KG of Cocaine; • At least 112 G but less than 196 G of Cocaine Base, • At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual); • At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of 'Ice'; • At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual); • At least 4 G but less than 7 G of LSD; • At least 160 G but less than 280 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); • At least 40 G but less than 70 G of a Fentanyl Analogue; • At least 400 KG but less than 700 KG of Heroin; • At least 80 KG but less than 140 KG of Hashish; • At least 8 KG but less than 14 KG of Hashish Oil; • At least 400,000 but less than 700,000 units of Ketamine; • At least 400,000 but less than 700,000 units of Schedule I or II Depressants; • At least 25,000 but less than 43,750 units of Flunitrazepam; • At least 400 KG but less than 700 KG of <i>Converted Drug Weight</i>. 	<p>Level 26</p>
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Drug Type



Quantity

Key Issues for Drug Type

Salts, Isomers, & Analogues

Fentanyl Analogues

Drug Conversion Table

Substances Not Listed

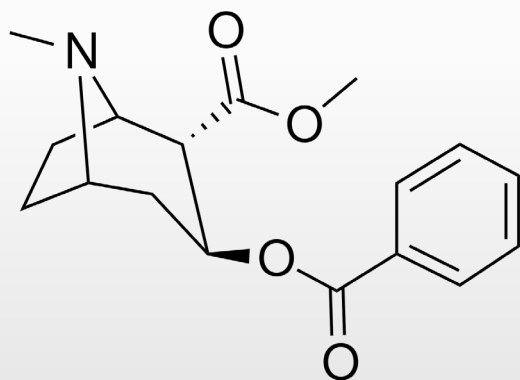
Mixtures



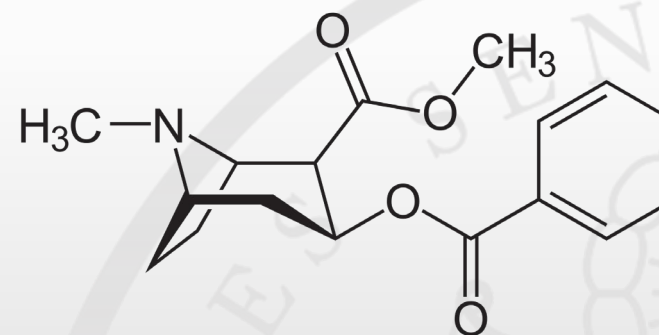
Salts, Isomers, and Analogues

Section 2D1.1, App. Note 6 (p. 156)

Salts, isomers, salts of isomers, and analogues are treated as the similar controlled substance.



Pseudococaine

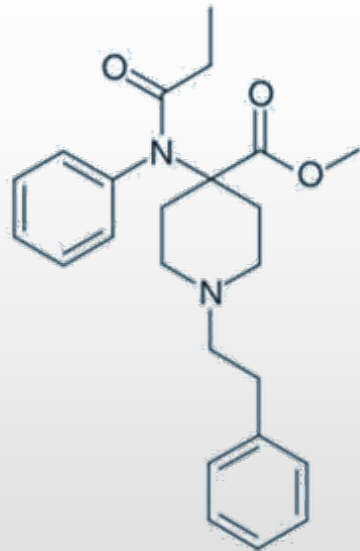


Cocaine

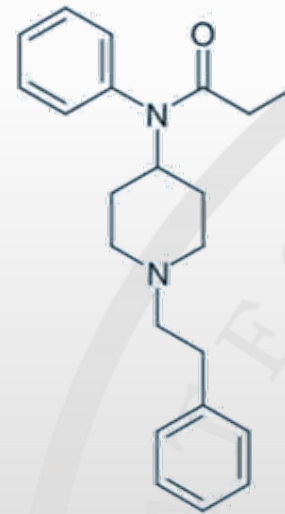
Fentanyl Analogues

Note (J) to Drug Quantity Table (p. 154)

Fentanyl Analogue has its own definition and is found on the Drug Quantity Table.



Carfentanil (45)



Fentanyl (6)

Determining the Base Offense Level

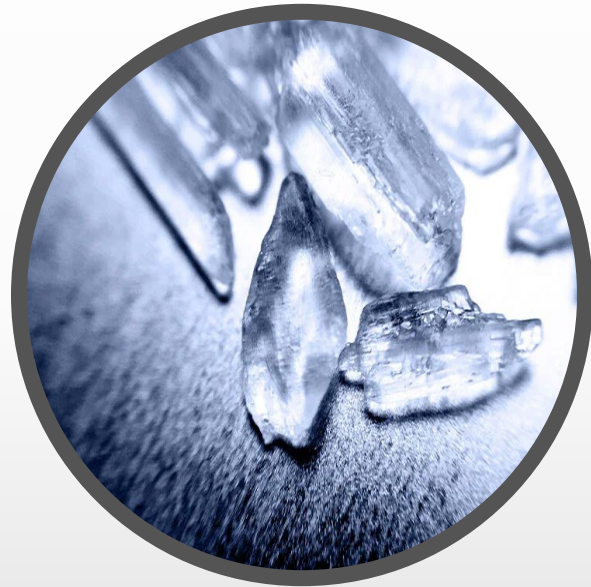
Fentanyl Analogues:

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Other Special Definitions

Notes to the Drug Quantity Table (pp. 153–54)



Ice

Note (C)



Crack

Note (D)



Hashish Oil

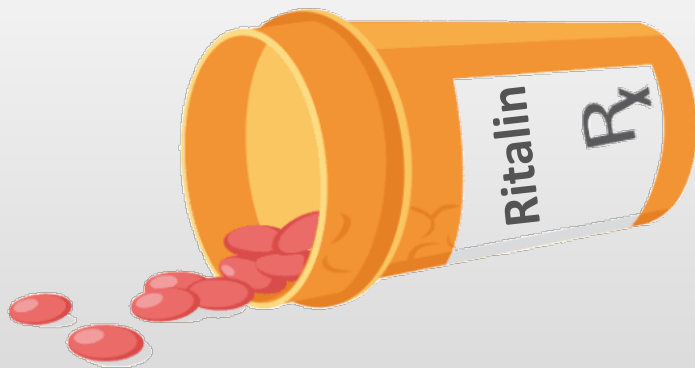
Note (I)

Use of Drug Conversion Tables

Section 2D1.1, App. Note 8 (pp. 157–161)

Drug Conversion Table

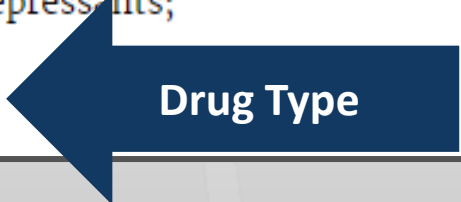
Not on Drug Quantity Table?
Use Drug Conversion Table



Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*	CONVERTED DRUG WEIGHT
1 gm of Cocaine =	200 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of Fenethylamine =	40 gm
1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (Actual) =	20 kg
1 gm of Methamphetamine =	2 kg
1 gm of Methamphetamine (Actual) =	20 kg
1 gm of 'Ice' =	20 kg
1 gm of Khat =	.01 gm
1 gm of 4-Methylaminorex ('Euphoria') =	100 gm
1 gm of Methylphenidate (Ritalin) =	100 gm
1 gm of Phenmetrazine =	80 gm
1 gm Phenylacetone/P2P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm
1 gm Phenylacetone/P2P (in any other case) =	75 gm
1 gm Cocaine Base ('Crack') =	3,571 gm
1 gm of Aminorex =	100 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of N-Benzylpiperazine =	100 gm

Quantity: Converted Drug Weight

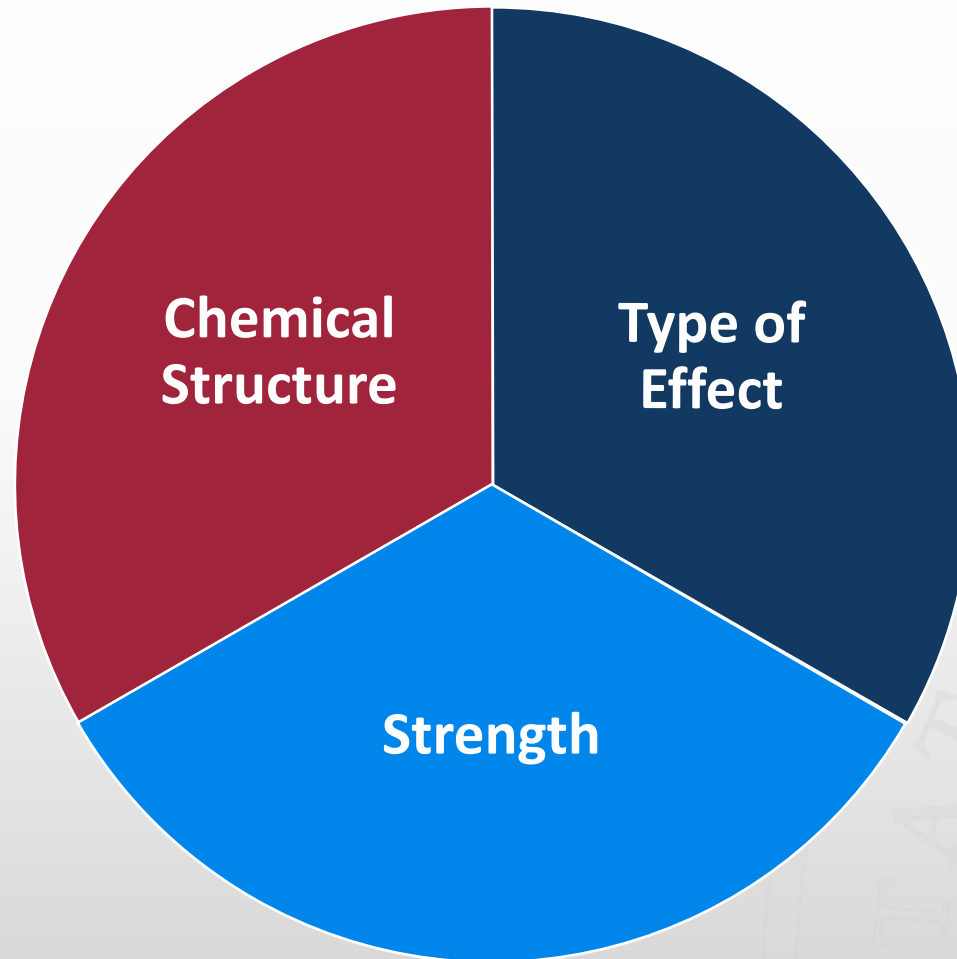
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Drug Type

Substances Not Referenced

Section 2D1.1, App. Note 6 (p. 156)



Mixtures

Note (A) to Drug Quantity table (p. 153)

If a mixture contains more than one controlled substance, use controlled substance that results in the greater offense level.

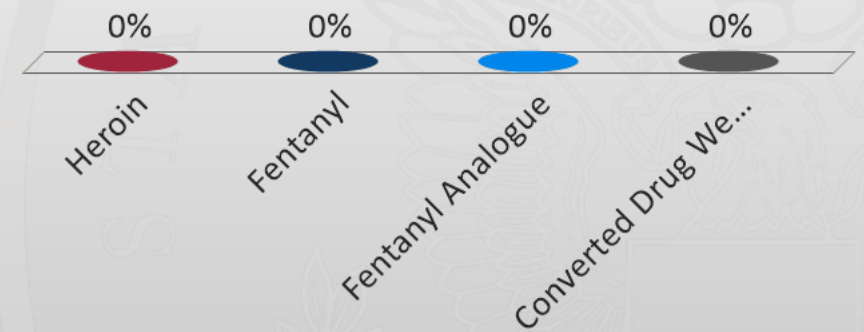


**Use More
Serious
Drug**

Grey Hadson is convicted of one count of distribution of heroin. His relevant conduct is limited to the delivery of a mixture of powder containing heroin, fentanyl, and carfentanil.

Which controlled substance should you use on the Drug Quantity Table?

- A. Heroin
- B. Fentanyl
- ✓ C. Fentanyl Analogue
- D. Converted Drug Weight



Key Issues for Drug Type



Salts, Isomers, & Analogues



Fentanyl Analogues



Drug Conversion Table



Substances Not Listed



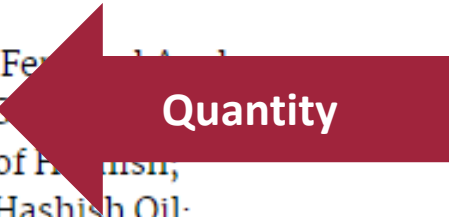
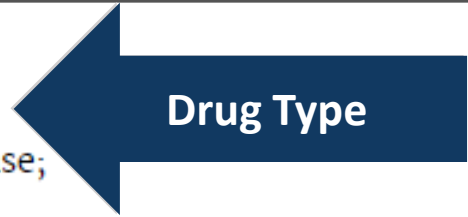
Mixtures



Determining the Base Offense Level

Two Issues for Drug Quantity Table

<p>(7)</p> <ul style="list-style-type: none"> • At least 400 G but less than 700 G of Heroin; • At least 2 KG but less than 3.5 KG of Cocaine; • At least 112 G but less than 196 G of Cocaine Base; • At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual); • At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of 'Ice'; • At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual); • At least 4 G but less than 7 G of LSD; • At least 160 G but less than 280 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); • At least 40 G but less than 70 G of a Fentanyl Analogue; • At least 400 KG but less than 700 KG of Heroin; • At least 80 KG but less than 140 KG of Hashish; • At least 8 KG but less than 14 KG of Hashish Oil; • At least 400,000 but less than 700,000 units of Ketamine; • At least 400,000 but less than 700,000 units of Schedule I or II Depressants; • At least 25,000 but less than 43,750 units of Flunitrazepam; • At least 400 KG but less than 700 KG of <i>Converted Drug Weight</i>. 	<p>Level 26</p>
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Key Issues for Drug Quantity

Weight of Mixtures

Actual Weight

Multiple Drug Types

Min BOL + Max CDW



Weight of Mixtures

Section 2D1.1(c), Note (A) to Drug Quantity Table (p. 153)

Use Mixture Weight,
Not Actual Weight.



Weight of Mixtures

Section 2D1.1, App. Note 1 (p. 155)

Exclude materials that must be separated before use.



Baggie Not Counted



Actual Weight (Purity)

Notes (B), (C) to the Drug Quantity Table (pp. 153–54)

Hydrocodone

Oxycodone

Use Actual Weight

PCP

Amphetamine

Actual or Mixture

Methamphetamine

Ice, Actual, or Mixture

Calculating Offense Levels for Meth Cases

Notes (B), (C) to the Drug Quantity Table (pp. 153–54)

If substance is...	Classify as...	Calculate BOL by...
“d-meth hydrochloride of at least 80% purity”	Ice	Mixture Weight
Not Ice (but 10% or greater purity)	Methamphetamine (Actual)	Mixture Weight x Purity
Less than 10% or unknown purity	Methamphetamine	Mixture Weight

Multiple Drug Types

Section 2D1.1, App. Note 7 (p. 156)

Where there are multiple drug types, the quantities of drugs are to be added using the Drug Conversion Table.



**Converted
Drug
Weight**

Minimum and Maximums for CDW

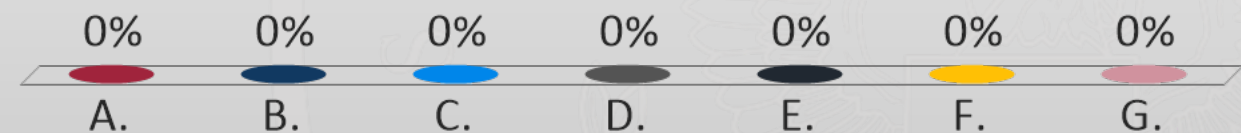
Section 2D1.1, App. Notes 8(B), 8(D) (p. 157–161)

Drug Schedules	BOL Minimum	CDW Maximum
Schedule I	12	None
Schedule II	12	None
Combined Schedules III, IV, and V	6	79.99 kg
Combined Schedules IV and V	6	9.99 kg
Schedule V	6	2.49 kg

Salem Jacobs is convicted of distribution of 50 grams of methamphetamine mixture. His offense involves the delivery of a 110-gram package containing 100 grams of d-methamphetamine hydrochloride of 77% purity.

What is the correct drug type and quantity?

- A. 100 grams of Ice
- B. 77 grams of Ice
- C. 110 grams of Meth (Actual)
- D. 100 grams Meth (Actual)
- ✓ E. 77 grams Meth (Actual)
- F. 84.7 grams of Meth
- G. 50 grams of Meth



Drug Conversion Calculator

Use the Drug Conversion Calculator to convert the quantity of up to three controlled substances at the same time to its converted drug weight. Results will also display the offense level that corresponds to this converted drug weight in the Drug Quantity Table at §2D1.1(c). For certain controlled substances, the Drug Conversion Tables at §2D1.1 set minimum base offense levels in the Drug Quantity Table. Similarly, the converted drug weights assigned in the Drug Conversion Tables for certain controlled substances are “capped” at specified amounts. The resulting calculations in the Drug Conversion Calculator already consider such minimum base offense levels and “caps.”

SUBSTANCE 1

Select Substance



Enter Weight

SUBSTANCE 2

Select Substance



Enter Weight

SUBSTANCE 3

Select Substance



Enter Weight

Submit

Key Issues for Drug Quantity



Weight of Mixtures



Actual Weight



Multiple Drug Types



Min BOL + Max CDW



Evidentiary Issues

Estimating Drug Type and Quantity

Monetary Seizures

Agreements to Sell



Determining Drug Types and Quantities

Section 2D1.1, App. Note 5 (p. 156)



Lab report is generally not required.



Court may estimate drug type and quantity based on any reliable evidence.

Evidentiary Issues: Currency

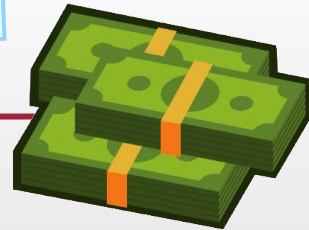
Section 2D1.1(a)(5) (p. 142)

The court may convert cash to drugs.



Evidentiary Issues: Currency

Section 2D1.1(a)(5) (p. 142)



All Cash Is **NOT** Drug Proceeds.



Don't Assume Drug Proceeds Will Buy More Drugs

Agreements to Sell

Section 2D1.1, App. Note 5 (p. 156)

In the case of an agreement to sell,
use the amount of the agreement. . .



unless the sale is completed.

Agreements to Sell

Section 2D1.1, App. Note 5 (p. 156)



Use Agreement, Not
Completed Sale



Don't Use Agreement,
Use Amount Defendant
Capable of Providing

Michael DeOreo was convicted of possession with intent to distribute cocaine. His offense involves an agreement to purchase 1kg of cocaine from a confidential informant. The informant, however, delivered 2kg of cocaine, and Mr. DeOreo was arrested immediately thereafter.

Is Mr. DeOreo responsible for 1kg or 2kg of cocaine?

- ✓ A. 1 kilogram
- B. 2 kilograms



Evidentiary Issues



Estimating Drug Type and Quantity



Monetary Seizures



Agreements to Sell



Determining the Base Offense Level

Section 2D1.1(a) (p. 142)

1

Conviction
Involves Death
or SBI

2

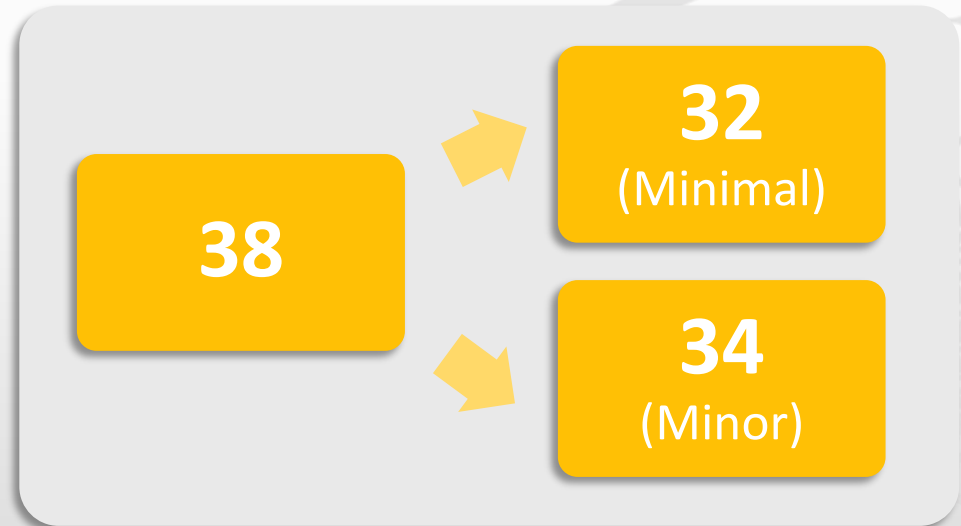
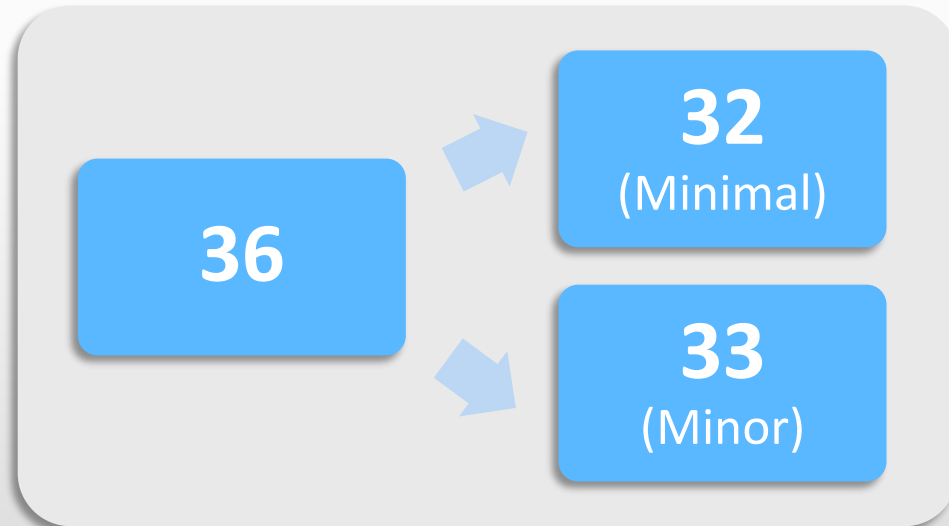
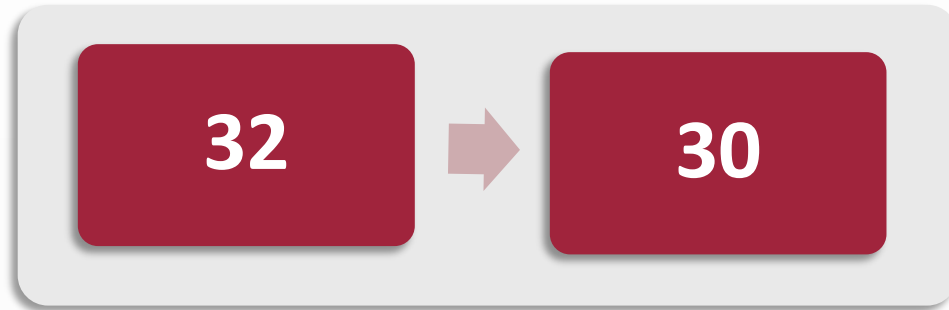
If Not, Use Drug
Quantity Table

3

Mitigating Role
Adjustment

Adjusting the BOL for Mitigating Role

Section 2D1.1(a)(5) (p. 142)



Apply Both BOL Reduction and Mitigating Role

Team Scores

Points	Team



Commonly Applied SOCs

Sections 2D1.1(b)(1), (b)(12), (b)(13), (b)(18)

Weapon Enhancement

Premises Enhancement

Fentanyl Enhancement

Safety Valve Reduction



Weapon Enhancement

Section 2D1.1(b)(1) & App. Note 11(A) (pp. 143, 162)

If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

1

Government proves that
the **weapon** and **drugs**
are present

2

SOC applies unless
defendant can prove
“**clearly improbable.**”

John Farmer pleaded guilty to drug trafficking, related to a series of controlled purchases conducted at a Walmart. While executing an arrest and search warrant, officers found a firearm in Mr. Farmer's home. No drugs were discovered during the search.

Does the 2-level weapons enhancement under §2D1.1(b)(1) apply?

A. Yes

✓ B. No



Impact of § 924(c) Conviction

Section 2K2.4, App. Note 4 (p. 259–60)

Do not apply firearm and certain other SOCs in guideline for the underlying offense, for example:

§2D1.1(b)(1)

If a dangerous weapon
(including a firearm)
was possessed...

§2D1.1(b)(2)

If the defendant used violence,
made a credible threat to use
violence, or caused the use of
violence...

Premises Enhancement

Section 2D1.1(b)(12) (p. 144)

If the **defendant** **maintained** a premises for the **purpose** of manufacturing or distributing a controlled substance, increase by 2 levels.

defendant

maintained

purpose



Premises Enhancement

Section 2D1.1(b)(12), App. Note 17 (p. 163)



Maintained

- Possessory interest; or
- Control of the premises



The Purpose

- Need not be sole purpose
- Compare frequency of drug trafficking v. lawful purpose

Soren Spears was arrested and charged with possession with intent to distribute cocaine base. Phone calls, text messages, and surveillance showed that Mr. Spears repeatedly used his personal residence to receive, weigh, distribute, and cook cocaine.

Will the enhancement for maintaining a drug premises under §2D1.1(b)(12) apply?

- ✓ A. Yes
- B. No



Fentanyl and Fentanyl Analogue Enhancements

§ 2D1.1(b)(3)(A)(i) (13)

+4

The defendant...

- knowingly misrepresented / knowingly marketed as another substance

+2

The defendant...

- represented or marketed as a legitimately manufactured drug; AND
- acted with willful blindness / conscious avoidance of knowledge

Guidelines Safety Valve

Section 2D1.1(b)(18) (p. 146)

If the defendant meets the criteria in **§5C1.2(a)(1)–(5)**.



2

Levels

decrease by 2 levels



Safety Valve

Sections 5C1.2(a)(1)–(5) (pp. 421–22)

1

No more than 1 criminal history point

2

The defendant did not use violence or weapon

3

The offense did not result in death or SBI

4

The defendant was not leader or organizer

5

Safety Valve Proffer

Statutory Safety Valve

18 U.S.C. § 3553(f)

First Step Act
(Section 402)

Expanded Criminal History Eligibility

Defendant does not have:

+4

Criminal
History
Points*

+3

Point
Offense

&

+2

Point
Violent
Offense

*excluding any criminal history points resulting from a 1-point offense

Circuit Split: Statutory Safety Valve

Disjunctive (And = Or)

United States v. Palomares, 52 F.4th 640 (5th Cir. 2022)

United States v. Haynes, 55 F.4th 1075 (6th Cir. 2022)

United States v. Pace, 48 F.4th 741 (7th Cir. 2022)

United States v. Pulsifer, 39 F.4th 1018 (8th Cir. 2022)

Conjunctive (And = And)

United States v. Jones, 60 F.4th 230 (4th Cir. 2023)

United States v. Lopez, 998 F.3d 431 (9th Cir. 2021)

United States v. Garcon, 54 F.4th 1274 (11th Cir. 2022)

→ Supreme Court granted certiorari in this case.

State Safety Valve

Promulgated 5/31/13 (1)

Guidelines

Expanded Criminal History Eligibility

Defendant does not have:

+4

Criminal
History
Points*

+3

Point
Offense

&

+2

Point
Violent
Offense

*excluding any criminal history points resulting from a 1-point offense

Guidelines Safety Valve

Sections 5C1.2(a)(1)–(5) (pp. 421–22)

1

No more than 1 criminal history point

2

The defendant did not use violence or weapon

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Safety Valve Proffer

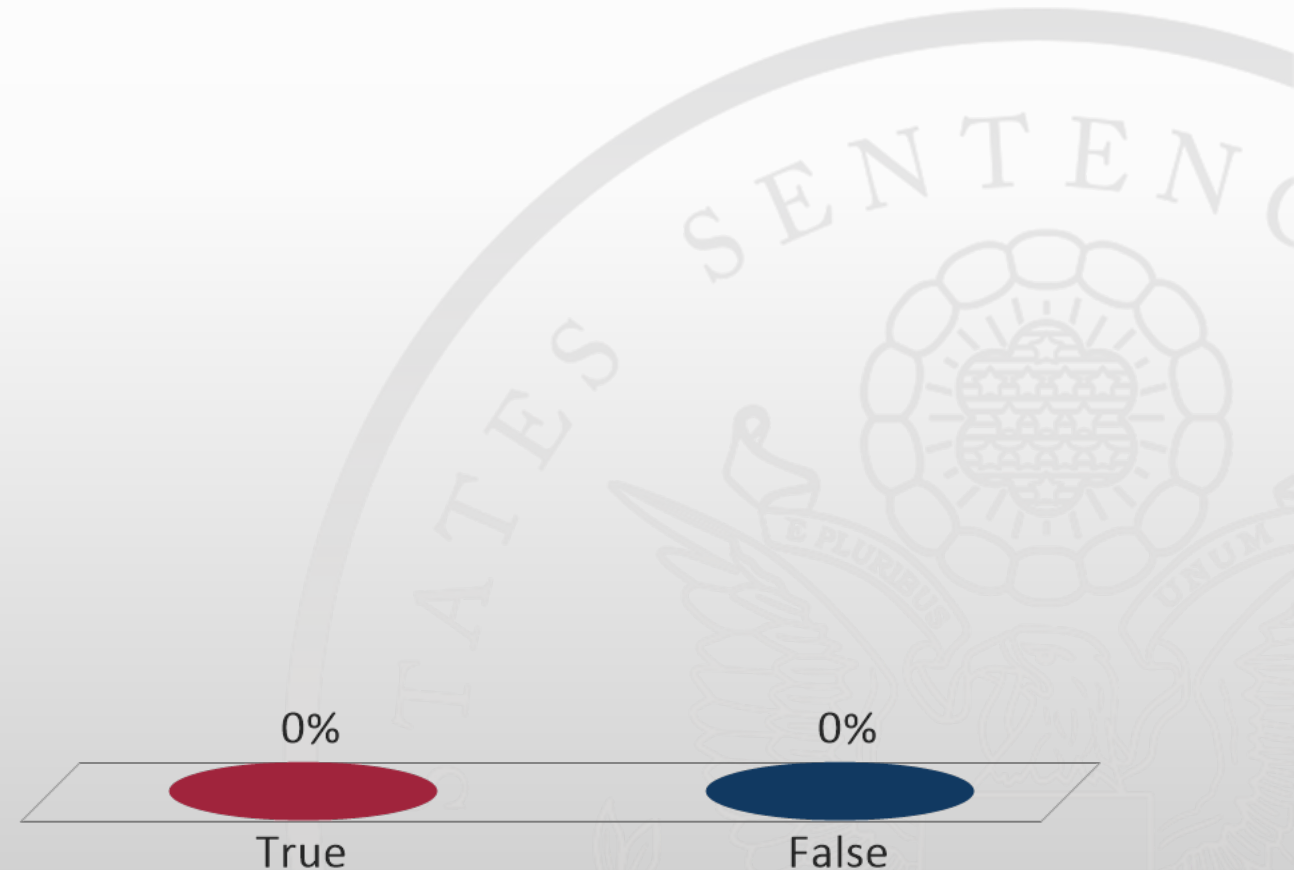
The defendant

True or False

A defendant who receives a firearm enhancement at §2D1.1(a)(1) is automatically precluded from a 2-level reduction for guidelines safety valve at §2D1.1(b)(18).

A. True

✓ B. False



Interaction between §2D1.1(b)(1) & §5C1.2(a)(2)

§2D1.1(b)(1)

- Offense Based
- Lower Standard



§5C1.2(a)(2)

- Defendant Based
- Higher Standard

Commonly Applied SOCs

Sections 2D1.1(b)(1), (b)(12), (b)(13), (b)(18)



Weapon Enhancement



Premises Enhancement



Fentanyl Enhancement



Safety Valve Reduction



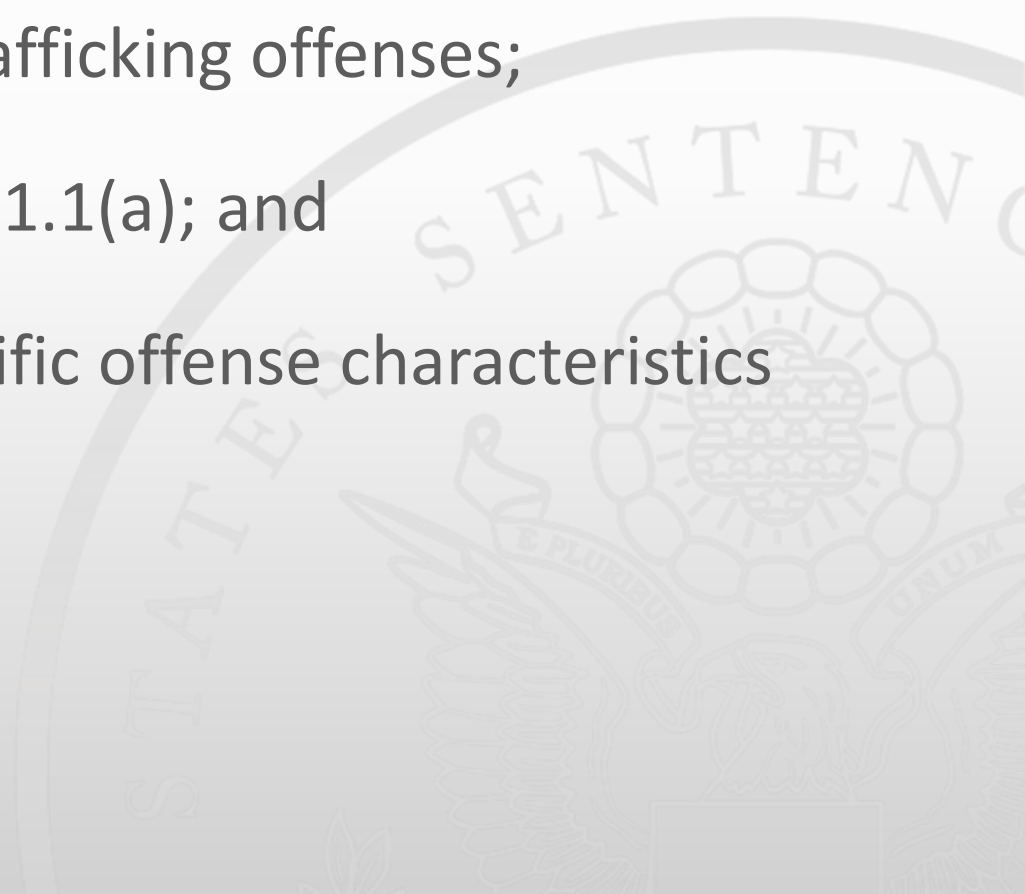
Learning Outcomes

You should now be able to:

Apply relevant conduct principles to drug trafficking offenses;

Determine the base offense level under §2D1.1(a); and

Resolve common application issues for specific offense characteristics under §2D1.1(b).



Questions?



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