

Primer



Drug Offenses



Prepared by the
Office of the General Counsel

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UNITED STATES SENTENCING COMMISSION


One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002
T: (202) 502-4500
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I. INTRODUCTION

This primer provides an overview of the statutes, sentencing guidelines, and case law applicable to federal drug offenses. Although the primer identifies some of the key cases and concepts, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

II. THE STATUTORY SCHEME

The most commonly prosecuted federal drug statutes prohibit the manufacture, distribution, importation, and exportation of controlled substances.¹ They also prohibit attempts and conspiracies to do the same.² As discussed below, the statutory penalties for these offenses vary based on (A) the quantity of the drug, (B) the defendant's prior commission of certain felony offenses, and (C) any serious injury or death that resulted from using the drug. These statutes and guidelines are addressed in this Section of the primer and in Sections III and IV.

Other less frequently prosecuted federal drug statutes, including those prohibiting the distribution of listed chemicals, possession and distribution of drug paraphernalia, and possession of controlled substances, are addressed in Section V of the primer along with the guideline applicable to those statutes.

A. PROHIBITED CONDUCT: 21 U.S.C. §§ 841(a), 960(a)

The most commonly prosecuted drug offenses are violations of 21 U.S.C. §§ 841(a) and 960(a). Section 841(a) prohibits the knowing or intentional manufacture, distribution, dispensation, or possession with intent to manufacture, distribute or dispense a controlled substance.³ Section 960(a) prohibits the knowing and intentional importation or exportation of a controlled substance.⁴ The statutory penalties for violating these provisions are set forth in 21 U.S.C. §§ 841(b)(1) and 960(b).

B. STATUTORY PENALTIES: 21 U.S.C. §§ 841(b)(1), 960(b)

1. *Mandatory Minimum Penalties Based on Quantity*

Both 21 U.S.C. §§ 841(b)(1) and 960(b) require mandatory minimum penalties in certain cases, depending on the quantity and type of controlled substance involved in the

¹ 21 U.S.C. §§ 841, 960.

² Inchoate and conspiracy offenses are subject to the same penalties as completed offenses. *See id.* §§ 846, 963.

³ *Id.* § 841(a).

⁴ *Id.* § 960(a).

offense. When certain quantity thresholds are met, a five-year mandatory minimum penalty and a maximum term of 40 years applies,⁵ while larger amounts increase the mandatory minimum to ten years, with a maximum of life imprisonment.⁶ Table 1 outlines the quantity thresholds triggering mandatory minimum penalties under these statutes for common controlled substances.

Table 1. Quantity Thresholds Triggering Mandatory Minimum Penalties for Common Controlled Substances under 21 U.S.C. §§ 841(b)(1) and 960(b)		
Controlled Substance	5 Year Minimum	10 Year Minimum
Heroin	100 g	1 kg
Cocaine	500 g	5 kg
Cocaine base ⁷	28 g	280 g
Methamphetamine (actual)	5 g	50 g
Methamphetamine (mixture)	50 g	500 g
Fentanyl ⁸	40 g	400 g
Fentanyl analogue	10 g	100 g
Marijuana	100 kg	1,000 kg

Quantity, as with any fact (other than a prior conviction) that subjects a defendant to a higher statutory minimum or maximum penalty, must be alleged in the charging instrument (such as an indictment) and proved beyond a reasonable doubt.⁹ Where the defendant is convicted of several substantive counts, the drug amounts may not be added together to reach a mandatory minimum sentence.¹⁰ Importantly, this approach differs

⁵ *Id.* §§ 841(b)(1)(B), 960(b)(2).

⁶ *Id.* §§ 841(b)(1)(A), 960(b)(1).

⁷ See *infra* Section IV.A.4.a for an explanation of how the term “cocaine base” in the statute differs from the definition in the *Guidelines Manual*. See U.S. SENT’G COMM’N, *Guidelines Manual*, §2D1.1(c)(Note D) (Nov. 2021) [hereinafter USSG].

⁸ Congress included fentanyl as a Schedule II controlled substance, along with heroin and other opiates. 21 U.S.C. § 812 (Schedule II at (b)(6)). While the term “fentanyl” does not appear again in title 21 of the United States Code, sections 841 and 960 establish penalties for a substance called “N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propenamide.” 21 USC §§ 841(b)(1)(A)(vi), 960(b)(1)(F). A federal regulation explains that this substance is “commonly known as fentanyl.” 28 C.F.R. § 50.21(d)(4)(vi).

⁹ See, e.g., *Alleyne v. United States*, 570 U.S. 99, 111–16, 111 n.1 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

¹⁰ See, e.g., *United States v. Harrison*, 241 F.3d 289, 292 (2d Cir. 2001) (drug quantities from separate transactions are not aggregated for purposes of calculating a mandatory minimum, but the combined quantities are relevant under §2D1.1 to establish the base offense level).

from the approach mandated by §2D1.1, discussed below, which requires adding drug quantities to determine the applicable guideline range.¹¹

2. Prior Serious Drug Felonies and Serious Violent Felonies

Defendants who otherwise would be subject to a five-year mandatory minimum penalty based on quantity (as discussed above) face an increased ten-year mandatory minimum, with a maximum of life imprisonment, if they have a prior conviction for a “serious drug felony” or “serious violent felony.”¹² Similarly, a qualifying prior conviction increases a ten-year mandatory minimum to a 15-year mandatory minimum (the maximum remains life).¹³ Defendants previously convicted of two or more prior serious drug felonies or serious violent felonies are subject to a 25-year mandatory minimum term of imprisonment under section 841.¹⁴

A “serious drug felony” is defined as an offense (A) involving manufacturing or distribution (or intent to do either) of a federally controlled substance in violation of state or federal law for which the maximum sentence is at least ten years, (B) for which the defendant served more than 12 months of imprisonment, and (C) for which the defendant was released “from any term of imprisonment . . . within 15 years of the commencement of the instant offense.”¹⁵ The term “serious violent felony” is defined as a conviction for any one of a variety of violent offenses “for which the offender served a term of imprisonment of more than 12 months.”¹⁶

For any sentencing enhancement based on a prior conviction, the government must provide notice of the prior convictions on which it intends to rely pursuant to the procedures set forth in 21 U.S.C. § 851.¹⁷ The court may find prior convictions by a preponderance of the evidence for purposes of sentencing.¹⁸

¹¹ See *infra* Section IV.A.2.

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

¹³ *Id.* §§ 841(b)(1)(A), 960(b)(1).

¹⁴ *Id.* § 841(b)(1)(A).

¹⁵ *Id.* § 802(57) (citing 18 U.S.C. § 924(e)(2)).

¹⁶ *Id.* § 802(58) (citing 18 U.S.C. §§ 113, 3559(c)(2)). Determining whether a prior conviction qualifies as a “serious drug felony” and “serious violent felony” requires applying the categorical approach. See generally U.S. SENT’G COMM’N, PRIMER ON CATEGORICAL APPROACH (2022), <https://www.ussc.gov/guidelines/primers/categorical-approach> [hereinafter CATEGORICAL APPROACH PRIMER].

¹⁷ 21 U.S.C. § 851(a)(1). The defendant’s statutory punishment may not be increased “by reason of one or more prior convictions” unless the government first files an information before trial or before entry of a guilty plea stating the prior convictions on which it intends to rely. *Id.* The defendant then may deny the fact of any prior conviction or challenge its validity, and the court must hold a hearing to “determine any issues” in dispute. *Id.* § 851(c)(1).

¹⁸ See *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998). In *Apprendi v. New Jersey*, the Court preserved *Almendarez-Torres*’s holding regarding prior convictions “as a narrow exception to the

3. Death or Serious Bodily Injury

Regardless of the quantity involved, if death or serious bodily injury resulted from a Schedule I or II controlled substance,¹⁹ the mandatory minimum term of imprisonment is 20 years and the maximum is life.²⁰ Additionally, if the defendant was previously convicted of a qualifying offense²¹ and death or serious bodily injury resulted from the use of the substance, the defendant is subject to a mandatory minimum term of life imprisonment.²²

By way of example, Table 2 illustrates the various mandatory minimum penalties that apply under 21 U.S.C. § 841(b)(1) depending on whether the defendant had a qualifying prior felony conviction, whether death or serious bodily injury resulted, or both.

Statutory Provision	Baseline	Qualifying Prior Conviction	Death or Serious Bodily Injury	Both
21 U.S.C. § 841(b)(1)(A)	10 years	15 years (25 if two or more)	20 years	Life
21 U.S.C. § 841(b)(1)(B)	5 years	10 years	20 years	Life
21 U.S.C. § 841(b)(1)(C)	None	None	20 years	Life

C. ATTEMPTS AND CONSPIRACIES: 21 U.S.C. §§ 846, 963

Title 21, sections 846 and 963 of the U.S. Code provide the same penalties for “[a]ny person who attempts or conspires to commit any offense” set forth in the respective subchapters.²³

general rule” that facts that increase a defendant’s statutory sentence must be found beyond a reasonable doubt. 530 U.S. 466, 490 (2000).

¹⁹ Current schedules of controlled substances are published in the Code of Federal Regulations, Title 21, Part 1308. See also DRUG ENF’T ADMIN., U.S. DEP’T OF JUST., CONTROLLED SUBSTANCE SCHEDULES, <https://www.deadiversion.usdoj.gov/schedules/>. Schedules of controlled substances are revised regularly. See 21 U.S.C. § 812.

²⁰ 21 U.S.C. §§ 841(b)(1)(C), 960(b)(3). “Serious bodily injury” is defined as a “bodily injury which involves—(A) a substantial risk of death; (B) protracted and obvious disfigurement; or (C) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” 21 U.S.C. § 802(25). Death or serious bodily injury “results from” the use of the substance if the use was a “but-for cause of the death or injury.” *Burrage v. United States*, 571 U.S. 204, 210–11, 219 (2014).

²¹ Unlike for the increased mandatory minimum penalties under sections 841(b)(1)(A)–(B) and 960(b)(1)–(2), a prior drug felony need not be a “serious” drug felony to trigger an elevated sentence under section 841(b)(1)(C)–(D) and 960(b)(3). As noted above, the government must provide notice of the prior drug felony in compliance with the procedures in 21 U.S.C. § 851.

²² 21 U.S.C. §§ 841(b)(1)(A)–(C), 960(b)(1)–(3).

²³ *Id.* §§ 846 (Control and Enforcement subchapter), 963 (Import and Export subchapter).

To convict a defendant of an attempted drug offense, the government must prove that the defendant intended the criminal conduct and took a “substantial step” toward that purpose.²⁴ Arranging the terms and location for a drug deal and taking physical steps to execute the deal may serve as a substantial step toward a distribution offense;²⁵ purchasing chemicals and equipment for a drug laboratory may serve as a substantial step toward a manufacturing offense.²⁶

To convict a defendant of a drug conspiracy, “the [g]overnment must prove beyond a reasonable doubt that two or more people agreed to commit a crime covered by the [drug] conspiracy statute (that a conspiracy existed) and that the defendant knowingly and willfully participated in the agreement (that he was a member of the conspiracy).”²⁷ A defendant may be convicted of a conspiracy to distribute controlled substances without, for example, ever selling a drug.

The quantities of each of the same type of drug charged and proved beyond a reasonable doubt within the same conspiracy are aggregated to establish the statutory penalties described above.²⁸

Conspiracy liability and sentencing liability under the *Guidelines Manual’s* relevant conduct rules are not the same. In general, as explained below in Sections III.B and IV.A.3.a, the relevant conduct rules hold each defendant responsible for all reasonably foreseeable acts of others that are within the scope of a “jointly undertaken criminal activity” and in furtherance of that activity.²⁹ But because conspiracy counts “may be worded broadly and include the conduct of many participants over a period of time, the scope of the ‘jointly

²⁴ United States v. Amede, 977 F.3d 1086, 1099 (11th Cir. 2020).

²⁵ See, e.g., United States v. Conley, 875 F.3d 391, 398 (7th Cir. 2017) (“[T]o sustain a conviction for attempt, the government had to prove that Conley intended to possess cocaine with the intent to distribute it and knowingly took a substantial step toward that goal.”).

²⁶ See, e.g., United States v. Piesak, 521 F.3d 41, 44–45 (1st Cir. 2008) (sufficient evidence where the defendant ordered and possessed the necessary chemicals to make ecstasy, researched ecstasy manufacturing, acquired laboratory equipment, and admitted her intention to manufacture); United States v. Beltz, 385 F.3d 1158, 1163 (8th Cir. 2004) (“a large number of separated pseudoephedrine tablets, an extensive amount of equipment used in the manufacture of methamphetamine, substances resulting from various stages of production of the drug, and a substantial amount of money and firearms” seized from defendant’s residence supported finding of a substantial step).

²⁷ United States v. Williams, 974 F.3d 320, 367–68 (3d Cir. 2020) (quoting *Smith v. United States*, 568 U.S. 106, 110 (2013)).

²⁸ See, e.g., United States v. Chisholm, 940 F.3d 119, 132 (1st Cir. 2019) (“[B]ecause a conspiracy is a single offense, it constitutes ‘a violation’ for § 841(b) purposes. And in sentencing a narcotics-conspiracy member under § 841(b), the offense involves the aggregate of all drugs attributable to or reasonably foreseeable by him.” (citations and internal alterations omitted)).

²⁹ USSG §1B1.3(a)(1)(B).

undertaken criminal activity’ is not necessarily the same as the scope of the entire conspiracy.”³⁰

III. OVERVIEW OF DRUG GUIDELINES

The guidelines instruct users to determine the applicable Chapter Two offense guideline by referring to Appendix A (Statutory Index) for the offense of conviction (*i.e.*, the offense conduct of which the defendant was convicted). Chapter Two, Part D (Offenses Involving Drugs and Narco-Terrorism) sets forth the applicable guidelines for violations of federal drug laws. There are 17 drug guidelines divided into three subparts: 12 guidelines apply to drug trafficking and manufacturing offenses,³¹ three guidelines apply to unlawful possession offenses,³² and two guidelines apply to regulatory violations.³³

This primer discusses §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) at length³⁴ before addressing the drug trafficking and manufacturing guidelines at §§2D1.2, 2D1.6, 2D1.8, 2D1.11, and 2D1.12 and the unlawful possession guideline at §2D2.1.³⁵ This Section first explains several important concepts that apply across the drug guidelines, such as how to determine the base offense level for most drug offenses and how relevant conduct may factor into the guidelines analysis.

A. DETERMINING THE BASE OFFENSE LEVEL

After identifying the applicable Chapter Two, Part D offense guideline, the next step is to determine the base offense level.³⁶ The Drug Quantity Table in §2D1.1(c) provides the base offense level for the vast majority of offenses to which §2D1.1 applies and also applies via reference from many of the other, less frequently applied Part D offense guidelines.³⁷

The Drug Quantity Table consists of 17 different base offense levels beginning at level six and progressively increasing by two levels to a maximum of level 38. The base offense level under the Drug Quantity Table is determined primarily by (1) the controlled

³⁰ USSG §1B1.3, comment. (n.3(B)).

³¹ See USSG Ch.2, Pt.D, Subpt.1 (Unlawful Manufacturing, Importing, Exporting, Trafficking, or Possession; Continuing Criminal Enterprise).

³² See USSG Ch.2, Pt.D, Subpt.2 (Unlawful Possession).

³³ See USSG Ch.2, Pt.D, Subpt.3 (Regulatory Violations).

³⁴ See *infra* Section IV.

³⁵ See *infra* Section V.

³⁶ USSG §1B1.1(a)(2).

³⁷ See, *e.g.*, USSG §§2D1.2(a)(1)–(2), 2D1.8(a) (setting forth base offense levels that depend on application of §2D1.1).

substance involved in the offense and (2) the quantity involved. An “extraordinary case” involving a quantity above the maximum set forth in the Drug Quantity Table, such as a quantity over ten times that required to trigger base offense level 38, may warrant an upward departure.³⁸

A guideline provision referencing the Drug Quantity Table also may provide for an alternative base offense level or other adjustments, either by default³⁹ or based on other factual circumstances.⁴⁰

B. RELEVANT CONDUCT FOR DRUG OFFENSES

As §1B1.3 (Relevant Conduct) explains, unless otherwise provided, the applicable base offense level, specific offense characteristics, cross references, and adjustments for an offense are determined based upon relevant conduct. Relevant conduct may include conduct that is charged or uncharged, as well as acquitted conduct.⁴¹ In the case of jointly undertaken criminal activity, relevant conduct includes acts and omissions of others that were within the scope of the jointly undertaken criminal activity, in furtherance of that activity, and reasonably foreseeable.⁴² For offenses that would require grouping of multiple counts under §3D1.2(d)—including offenses for which §2D1.1 applies, but excluding §2D2.1 (Unlawful Possession)—relevant conduct includes “all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction,” sometimes referred to as “expanded relevant conduct.”⁴³

Under relevant conduct principles, courts may consider “[t]ypes and quantities of drugs not specified in the count of conviction” in determining the offense level under the

³⁸ USSG §2D1.1, comment. (n.27(B)).

³⁹ *E.g.*, USSG §2D1.10 (directing the application of the greater of “3 plus the offense level from the Drug Quantity Table” or 20).

⁴⁰ *E.g.*, USSG §2D1.8 (directing the application of “[t]he offense level from §2D1.1” subject to a 4-level reduction “[i]f the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises”).

⁴¹ This provision does not require that the defendant be convicted of multiple counts. USSG §1B1.3, comment. (backg’d.) (“Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range.”); *see also* United States v. Watts, 519 U.S. 148, 157 (1997) (sentencing court may consider conduct of which defendant has been acquitted, so long as that conduct has been proved by a preponderance of the evidence).

⁴² USSG §1B1.3(a)(1)(B).

⁴³ USSG §1B1.3(a)(2); *see* USSG §3D1.2(d) (listing §§2D1.1, 2D1.2, 2D1.5, 2D1.11, and 2D1.13 as “[o]ffenses . . . to be grouped under this subsection” and thus subject to the “expanded relevant conduct” rules of §1B1.3(a)(2) but “[s]pecifically exclud[ing]” §2D2.1, such that separate incidents of unlawful possession may not be considered “part of the same course of conduct or common scheme or plan” as the offense of conviction); *see also* U.S. SENT’G COMM’N, PRIMER ON RELEVANT CONDUCT (2022), <https://www.ussc.gov/guidelines/primers/relevant-conduct>.

Drug Quantity Table.⁴⁴ However, several other drug base offense levels and specific offense characteristics require convictions under delineated statutes. For example, the alternative base offense levels in §2D1.1(a)(1)–(4) require a conviction under certain statutes.⁴⁵ The specific offense characteristics in §2D1.1(b)(6), (10), (14)(B), and (14)(C)(i) and the cross reference in §2D1.1(d)(2) also require a conviction under certain statutes.⁴⁶ Thus, for these provisions to apply, it is not enough for a defendant to have committed uncharged or acquitted acts that could have been charged under the referenced statutes—rather, the defendant must be convicted under the specified statute for the base offense level, specific offense characteristic, or cross reference to apply.

Other guideline provisions limit the court’s consideration to the defendant’s actions, not the acts or omissions of others. The defendant’s actions include acts “committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant.”⁴⁷ For example, the 2-level enhancement in §2D1.1(b)(2) applies only where “the *defendant*” used, threatened, or directed the use of violence.⁴⁸

IV. SECTION 2D1.1

Section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applies to violations of 21 U.S.C. §§ 841 and 960, among other drug statutes. This guideline provides five alternative base offense levels, 18 specific offense characteristics, and two cross references. The court must apply the greatest base offense level.⁴⁹

The first four base offense levels, set out in §2D1.1(a), are as follows:

- (1) 43, if the defendant is convicted under 21 U.S.C. §§ 841(b)(1)(A)–(C) or 960(b)(1)–(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after at least one conviction for a similar offense; or
- (2) 38, if the defendant is convicted under 21 U.S.C. §§ 841(b)(1)(A)–(C) or 960(b)(1)–(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

⁴⁴ USSG §2D1.1, comment. (n.5); *United States v. Williamson*, 953 F.3d 264, 269–70 (4th Cir. 2020) (quoting USSG §2D1.1, comment. (n.5)).

⁴⁵ See USSG §2D1.1(a)(1)–(4).

⁴⁶ See USSG §2D1.1(b)(6), (10), (14)(B), (14)(C)(i), (d)(2).

⁴⁷ USSG §1B1.3(a)(1)(A); see, e.g., USSG §5C1.2, comment. (n.4) (explaining that this use of the term “defendant” is consistent with §1B1.3).

⁴⁸ USSG §2D1.1(b)(2) (emphasis added).

⁴⁹ USSG §2D1.1(a).

- (3) 30, if the defendant is convicted under 21 U.S.C. §§ 841(b)(1)(E) or 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after at least one conviction for a similar offense; or
- (4) 26, if the defendant is convicted under 21 U.S.C. §§ 841(b)(1)(E) or 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance.⁵⁰

These base offense levels are rarely invoked and therefore are rarely the subject of published judicial opinions. In addition, these base offense levels cannot apply based on the relevant conduct rules because they apply only where “the defendant is convicted under” one of 21 U.S.C. § 841(b)(1)(A)–(C), (E) or 21 U.S.C. § 960(b)(1)–(3), (5).

The fifth base offense level, under §2D1.1(a)(5), is “the offense level specified in the Drug Quantity Table,” subject to special provisions that apply when a defendant receives a mitigating role adjustment under §3B1.2.⁵¹

A. DRUG QUANTITY TABLE

The Drug Quantity Table referenced in §2D1.1(a)(5) applies in the overwhelming majority of drug cases.⁵² The offense levels set forth in the Drug Quantity Table depend primarily on drug type and drug quantity.⁵³ These factors are addressed below, followed by common application issues for specific drugs and the special base offense levels in §2D1.1(a)(5) that are triggered by the mitigating role adjustment under §3B1.2.

1. Drug Type

Drug type is the starting point for determining the applicable base offense level in the Drug Quantity Table. The government has the burden of proving drug type by a

⁵⁰ USSG §2D1.1(a)(1)–(4). These base offense levels apply only where “the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance.” *Id.* As the Supreme Court has explained, death or serious bodily injury “results from” the use of the substance if the use was a “but-for cause of the death or injury.” *Burrage v. United States*, 571 U.S. 204, 210–11, 219 (2014).

⁵¹ USSG §2D1.1(a)(5); see discussion *infra* Section IV.A.5.

⁵² See U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: GUIDELINE CALCULATION BASED 55–56 (2022), https://www.uscourts.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2021/Ch2_Guideline_Based.pdf [hereinafter USE OF GUIDELINES] (in FY2021, §2D1.1(a)(5) applied in 99.3% of cases, §2D1.1(a)(1) applied in .1% of cases, §2D1.1(a)(2) applied in .6% of cases, and §2D1.1(a)(3) and (a)(4) each applied in only a single case).

⁵³ Detailed materials on the Commission’s 2014 amendment that reduced sentencing guideline penalties for most federal drug trafficking offenders by two levels are available at U.S. SENT’G COMM’N, MATERIALS ON 2014 DRUG GUIDELINES AMENDMENT, <https://www.uscourts.gov/policymaking/amendments/materials-2014-drug-guidelines-amendment>.

preponderance of the evidence.⁵⁴ It may do so by offering the defendant’s admission, for example, as part of a stipulation, proffer, or plea agreement.⁵⁵ The government also may test a sample of the substance, when such sample is available.⁵⁶ When a sample of the substance is unavailable, the government must rely on circumstantial evidence or eyewitness testimony to establish the type of substance at issue.⁵⁷

a. Analogues

Federal law also controls analogues and other substances beyond the more common controlled substances identified on the Drug Quantity Table.⁵⁸ Except where otherwise provided, any reference to a controlled substance in §2D1.1 includes all analogues, salts, isomers, and salts of isomers.⁵⁹ An analogue of ketamine, for example, is treated the same as ketamine for the purposes of the Drug Quantity Table.

Fentanyl serves as one important exception where this rule does not apply because the guideline provides for the separate treatment of “any substance . . . , whether a controlled substance or not, that has a chemical structure that is similar to fentanyl.”⁶⁰ The Drug Quantity Table lists this “fentanyl analogue” separately from fentanyl, with separate threshold quantities. Thus, while a defendant must be responsible for at least 36 kilograms of fentanyl to receive the maximum base offense level of 38, the same base offense level would apply to offenses involving only 9 kilograms of fentanyl analogue.⁶¹

⁵⁴ See, e.g., *United States v. Lugo*, 702 F.3d 1086, 1089 (8th Cir. 2013) (“The government, for sentencing purposes, bears the burden to prove drug type by a preponderance of the evidence.”); *United States v. Padilla*, 520 F.3d 766, 769 (7th Cir. 2008) (same); USSG §6A1.3, comment. (proposing preponderance of the evidence standard for resolving guideline disputes).

⁵⁵ Cf., e.g., *United States v. Etienne*, 772 F.3d 907, 923 (1st Cir. 2014) (affirming application of statutory minimum sentence based upon defendant’s stipulation to drug type and quantity).

⁵⁶ See, e.g., *United States v. Castaneda*, 906 F.3d 691, 694 (7th Cir. 2018) (affirming district court’s finding that defendant distributed “Ice” where, among other things, “the pound of methamphetamine seized from a coconspirator was 100% pure”).

⁵⁷ See, e.g., *Lugo*, 702 F.3d at 1090 (“[T]he identity of a controlled substance can . . . be proved by circumstantial evidence and opinion testimony.” (omission in original, citation omitted)).

⁵⁸ See, e.g., *United States v. Giggey*, 867 F.3d 236, 240 (1st Cir. 2017) (§2D1.1 “do[es] not exhaust the universe of prohibited drugs”); *United States v. Koss*, 812 F.3d 460, 467 (5th Cir. 2016) (“[T]he Drug Quantity Table refers only to the more common controlled substances, *i.e.*, heroin, cocaine, PCP, methamphetamine, LSD, and marijuana, that are mentioned in the penalty provision of the Controlled Substances Act.”); 21 U.S.C. § 813(a) (“A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I.”).

⁵⁹ USSG §2D1.1, comment. (n.6).

⁶⁰ USSG §2D1.1(c)(Note J).

⁶¹ USSG §2D1.1(c)(1).

Further, the general rule for analogues does not apply to an analogue that is subsequently listed as a controlled substance.⁶² Such substances instead must follow the rules applicable to controlled substances not referenced in the Drug Quantity Table.

b. Controlled substances not referenced in the Drug Quantity Table

For controlled substances not specifically referenced in the Drug Quantity Table, courts must identify the “most closely related controlled substance” that is referenced in the guideline.⁶³ To do so, courts must consider whether the substance:

- (A) has a chemical structure that is substantially similar to a referenced substance;
- (B) has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to that of a referenced substance; and
- (C) requires a lesser or greater quantity to produce a substantially similar effect on the central nervous system as a referenced substance.⁶⁴

District courts are accorded significant discretion in addressing these factors to determine which referenced substance is most closely related to the substance at issue.⁶⁵ Expert testimony may assist courts with these factors.⁶⁶ Lay testimony and admissions from the defendant may help establish the latter two factors concerning the effect of the

⁶² See USSG §2D1.1, comment. (n.6) (defining “analogue” by reference to 21 U.S.C. § 802(32), which expressly excludes controlled substances).

⁶³ *Id.*

⁶⁴ *Id.*; see also 21 U.S.C. § 802(32)(A) (similarly defining the term “controlled substance analogue”). At least two circuits have reached opposite conclusions on whether a closely related controlled substance must come from Schedules I and II or instead may include any controlled substance. Compare, e.g., *United States v. Moreno*, 870 F.3d 643, 647–48 (7th Cir. 2017) (“[T]he application note allows defendants to propose a Schedule V controlled substance as the most closely related drug . . . [I]n light of the breadth of designer drugs, there might still be instances when a Schedule V drug ends up being the most closely related substance—but that is likely going to be rare.”), with *United States v. Giggey*, 867 F.3d 236, 241 (1st Cir. 2017) (dictum) (suggesting that “the plain language of both the statute and the application note indicate that the proper comparator for an unreferenced controlled substance analogue must be drawn from Schedule I or II” but explaining that the district judge’s findings “obviate[d] the need for us to make a definitive holding”).

⁶⁵ E.g., *United States v. El Hage*, 741 F. App’x 194, 200 (5th Cir. 2018) (“The identification of the most closely related controlled substance is a fact question we review for clear error.” (citing *United States v. Malone*, 828 F.3d 331, 337 (5th Cir. 2016))); see *Giggey*, 867 F.3d at 242 (agreeing with other circuits that a district court’s selection of the most closely related controlled substance is a factual determination that “engenders review only for clear error”).

⁶⁶ See, e.g., *Giggey*, 867 F.3d at 242–43 (affirming district court’s resolution of “dueling experts”); *United States v. Novak*, 841 F.3d 721, 730 (7th Cir. 2016) (affirming district court’s reliance on expert testimony regarding physiological effects of drug); see also, e.g., *Malone*, 828 F.3d at 337 (affirming district court’s determination that AM-2201 is most closely related to THC and finding it “significant that the district court gave this matter studied attention” at a “day-long evidentiary hearing” during which parties examined and cross-examined expert witnesses).

substance.⁶⁷ Further, “a sentencing court is not obliged ‘to match substances under each of the factors.’”⁶⁸ Different factors may prove more salient depending on the case; for example, “a substance that is not the best fit in terms of chemical structure may still be the most appropriate comparator because of substantially similar pharmacological effect and potency.”⁶⁹

2. Drug Quantity

Once the drug type is established, the next step is to determine the quantity of drugs attributable to the defendant.

a. Weight

For most drugs listed on the Drug Quantity Table, quantity is determined by the drug’s weight. Except where specified,⁷⁰ the weight specified in the Drug Quantity Table “refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance.”⁷¹ The term “mixture or substance” excludes “materials that must be separated from the controlled substance” before it can be used, such as “the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance.”⁷² An offense involving separable additives that would not qualify as part of the “mixture” may nonetheless warrant an upward departure when used “in an unusually sophisticated manner in order to avoid detection.”⁷³

⁶⁷ See, e.g., *Giggey*, 867 F.3d at 242 & n.6 (affirming finding regarding potency of most closely related substance in part due to defendant’s admission that the drug was “a powerful, highly addictive poisonous chemical that left me with a mind riddled with poor judgment”); *Moreno*, 870 F.3d at 649 (affirming “most closely related” finding based on “the live, in-court testimony of three users of Alpha-PVP,” which “established that the powerful stimulant effect of the drug was more like methcathinone instead of the relatively mild pyrovalerone”).

⁶⁸ *Giggey*, 867 F.3d at 243 (quoting *United States v. Chowdhury*, 639 F.3d 583, 586 (2d Cir. 2011)).

⁶⁹ *Id.*; see, e.g., *Novak*, 841 F.3d at 730 (affirming finding that XLR-11 was most closely related to THC despite the government’s concession “that none of the analogues involved in this case had a chemical structure similar to any controlled substance referenced in the [g]uidelines” based on the “evidence on the latter two factors”); *Chowdhury*, 639 F.3d at 586 (affirming “most closely related” finding based on similar effect, despite “the absence of a substance with a substantially similar chemical structure . . . or reliable information regarding the relative potency of the two substances”).

⁷⁰ See, e.g., discussion of LSD *infra* Section IV.A.4.e.

⁷¹ USSG §2D1.1(c)(Note A).

⁷² USSG §2D1.1, comment. (n.1); see, e.g., *United States v. Ramos*, 814 F.3d 910, 920 (8th Cir. 2016) (affirming inclusion of total weight of “synthetic cannabinoids sprayed onto inert plant material” where the “plant material was not removed prior to the drug’s use, nor was it easily separable”).

⁷³ USSG §2D1.1, comment. (n.1).

Except in cases where the government seizes and then measures all drugs attributable to a defendant, the court must “approximate the quantity of the controlled substance.”⁷⁴ Courts exercise significant discretion in selecting and applying a method for estimating drug quantities, and they often must do so “based on imprecise evidence.”⁷⁵

A few examples illustrate the variety of circumstantial evidence that may support a reasonable estimate. In *United States v. Gibson*, for example, the Seventh Circuit affirmed the district court’s use of a formula based on: (1) the total number of calls made to two drug phones, supported by phone records; (2) the average number of calls required to complete each drug transaction, supported by the testimony of a coconspirator and an officer who participated in controlled buys; and (3) a conservative estimate of the quantity of drugs sold per transaction, again supported by testimony from individuals who witnessed or participated in the conspiracy.⁷⁶ In *United States v. Shaw*, the Eighth Circuit affirmed the district court’s drug quantity estimate based in part on the amount of a fentanyl analogue found in a confiscated nasal spray bottle and testimony regarding the number of bottle refills customers purchased.⁷⁷ In *United States v. French*, the First Circuit affirmed the district court’s drug quantity estimate based on business records demonstrating how much fertilizer the defendants purchased and testimony concerning how much fertilizer it took to grow each marijuana plant.⁷⁸ And in many other cases, courts of appeals have affirmed quantity estimates based on the quantity of drugs sold on an average day multiplied by the duration of the drug activity.⁷⁹

The court must ensure that the method used to estimate drug quantity is both reliable and supported by the record. For example, the First Circuit rejected as unreliable

⁷⁴ USSG §2D1.1, comment. (n.5). Several courts advise that a district court should “err on the side of caution” in approximating drug quantity. *United States v. Flores*, 725 F.3d 1028, 1036 (9th Cir. 2013); *see also, e.g., United States v. Mosley*, 53 F.4th 947, 962 (6th Cir. 2022) (same); *United States v. Almedina*, 686 F.3d 1312, 1316 (11th Cir. 2012) (quantity approximations should be “conservative”). The Fourth Circuit has squarely rejected that position. *United States v. Kiulin*, 360 F.3d 456, 461 (4th Cir. 2004) (“This court has not heretofore required that sentencing courts ‘err on the side of caution’ in approximating drug quantity, and we decline to do so today.”).

⁷⁵ *United States v. Shaw*, 965 F.3d 921, 927 (8th Cir. 2020) (citation omitted).

⁷⁶ 996 F.3d 451, 464–66 (7th Cir. 2021).

⁷⁷ *Shaw*, 965 F.3d at 927–28.

⁷⁸ 904 F.3d 111, 122–23 (1st Cir. 2018).

⁷⁹ *See, e.g., United States v. Maldonado-Peña*, 4 F.4th 1, 58 (1st Cir. 2021) (affirming quantity estimate based on cooperating witness testimony of “how the sellers were organized first in one day shift but eventually evolved into a 24-hour operation with a day shift and a night shift” and how much was “sold on each day of the week”), *cert. denied*, 142 S. Ct. 729 (2021), *and cert. denied*, 142 S. Ct. 1184, 142 S. Ct. 1185 (2022); *United States v. Lee*, 966 F.3d 310, 327 (5th Cir. 2020) (affirming drug quantity estimate based on the number of prescriptions issued by pill mill “discounted . . . by 25% to account for prescriptions that may have been legitimate,” a conservative estimate in the absence of “evidence that even 25% of the clinic’s prescriptions were legitimate”); *United States v. Kearby*, 943 F.3d 969, 974–76 (5th Cir. 2019) (affirming drug quantity estimate of 60 ounces where evidence showed that defendant purchased one to three ounces of methamphetamine per day from a coconspirator and did so for 60 days).

the use of 12 controlled buys to estimate and extrapolate the drug quantity covering six months of drug activity.⁸⁰ The Tenth Circuit reversed a drug quantity estimate where the district court, which had been provided with only the packaged weight, determined the weight of the substance itself (*i.e.*, without the packaging) based on photographs of the package.⁸¹ And the Seventh Circuit reversed a drug quantity finding where the presentence report (PSR) charged the defendant with an unsupported drug quantity, the defendant objected, and the government did not produce anything except a verbal representation that it could call a witness substantiating its claims.⁸² Thus, the court must independently ensure that its quantity determination is supported by reliable evidence, even where the defendant lacks countervailing evidence to rebut the government’s proffer of drug quantity.⁸³

i. Estimates based on cash seizure

Courts also may rely on financial records and laboratory capacity to estimate drug quantity.⁸⁴ When cash is seized from a drug defendant, courts may equate the cash with a corresponding drug quantity as long as there is a plausible and reliable basis for connecting the money to a relevant sale.⁸⁵ For example, the court may consider the proximity of the

⁸⁰ See *Maldonado-Peña*, 4 F.4th at 58 (describing the holding of *United States v. Rivera-Maldonado*, 194 F.3d 224, 231 (1st Cir. 1999), that “a dozen controlled buys over a six-month period was not sufficiently reliable for estimating the overall drug quantity”).

⁸¹ *United States v. Aragon*, 922 F.3d 1102, 1112–13 (10th Cir. 2019).

⁸² *United States v. Gibbs*, 26 F.4th 760, 766 (7th Cir. 2022) (“In this case, the PSR and the district court’s use of it did not meet [Federal Rule of Criminal Procedure 32]’s requirements.”).

⁸³ See, *e.g.*, *United States v. Rollerson*, 7 F.4th 565, 570 (7th Cir.) (“A truly bare allegation [of drug quantity] and bare denial would be in equipoise, unable to meet the prosecution’s burden of proof by a preponderance of the evidence. Once the prosecution presents sufficiently reliable evidence, however, it will meet its burden unless the defense can muster evidence in the other direction.”), *cert. denied*, 142 S. Ct. 631 (2021); *United States v. Holding*, 948 F.3d 864, 870–71 (7th Cir. 2020) (reversing where the district court did not require “some modicum of reliability of the CI information [of drug quantity] supplied to the probation officer charged with preparing the PSR”); *cf.* *United States v. Hopper*, 934 F.3d 740, 766–69 (7th Cir. 2019) (district court plainly erred in adopting PSR that double counted drug quantities).

⁸⁴ USSG §2D1.1, comment. (n.5) (“[T]he court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.”); see also *United States v. Lujan*, 25 F.4th 324, 327 & n.5 (5th Cir. 2022) (collecting cases recognizing that “a district court may rely on cash-to-drug conversions when making guideline calculations”).

⁸⁵ See, *e.g.*, *United States v. Lucio*, 985 F.3d 482, 488 (5th Cir. 2021) (affirming conversion of approximately \$18,000 into quantity of methamphetamine using defendant’s stated price where the defendant did not contest that the cash was from drug proceeds, the evidence showed that the defendant “regularly dealt in kilogram quantities in meth,” and nothing suggested that the defendant could have sold enough other substances (cocaine or marijuana) to amass the sized sum); *United States v. Barry*, 978 F.3d 214, 218–19 (5th Cir. 2020) (affirming conversion of \$14,658 into 852.2 grams of methamphetamine where there was “little direct evidence tying the money to sales of meth” but “ample circumstantial evidence”).

cash to drugs,⁸⁶ testimony concerning the defendant's selling habits,⁸⁷ and the defendant's lack of legitimate sources of income.⁸⁸

In determining the appropriate dollars-to-drugs conversion rate, the court may rely on admissions or evidence from the defendant,⁸⁹ testimony from drug purchasers,⁹⁰ or expert testimony.⁹¹ The court then must divide the cash attributed to drug sales by the conversion rate to arrive at the applicable drug quantity. When converting cash to drug quantities, courts generally estimate the quantity of drugs a defendant sold (the "retail" price), not the quantity of drugs a defendant could purchase (the "wholesale" price).⁹² For instance, in *United States v. Lujan*, the Fifth Circuit held that a district court erred where it calculated drug quantity based on the amount of drugs that could be purchased with the defendant's cash from drug sales because it was "inescapable that some of the proceeds of

⁸⁶ See, e.g., *United States v. Salas*, 455 F.3d 637, 643 (6th Cir. 2006) (cash hidden in cooler with seized cocaine supported finding that cash was from cocaine transaction).

⁸⁷ See, e.g., *United States v. Mills*, 710 F.3d 5, 15–16 (1st Cir. 2013) (confidential informants' accounts of defendant's oxycodone sales practices corroborated other evidence tying currency exchange records to drug sales); *United States v. Russell*, 595 F.3d 633, 647 (6th Cir. 2010) (upholding finding that cash was tied sale of cocaine base where ex-girlfriend testified "that a large majority of [the defendant's] income originated from selling cocaine," that "any sales of marijuana or methadone were 'occasional' or 'once in a while,' " and that the defendant's "proceeds from managing prostitutes were minimal").

⁸⁸ See, e.g., *Barry*, 978 F.3d at 217–19 (methamphetamine sales were "probative of how [the defendant], who was unemployed and previously had only part-time employment, could have accrued such a large sum of cash"; though the defendant maintained that there were "alternative sources for the money, he presented no evidence supporting those possibilities"). Compare, e.g., *United States v. Chavez*, 584 F.3d 1354, 1367 (11th Cir. 2009) (rejecting the defendant's contention that "the district court merely speculated that the [d]efendant's wherewithal in cash was derived from dealing in methamphetamine" where the defendant "had admitted his involvement in the charged conspiracy," "was found to have possessed large sums of currency with no apparent explanation of its origin," and "was one of the sources of the methamphetamine involved in the conspiracy"), with *United States v. Sandridge*, 385 F.3d 1032, 1037–38 (6th Cir. 2004) ("Even assuming, *arguendo*—based on Defendant's lack of gainful employment, his admitted drug dealing, and the sizable amount of cash—that the \$919 was connected to some sort of drug business, . . . the \$919 in cash cannot be used as a proxy for an additional quantity of cocaine base above and beyond the quantity found in Defendant's car unless a preponderance of the evidence shows that the cash was either proceeds from other cocaine base that was just sold or money to purchase additional cocaine base.").

⁸⁹ See, e.g., *United States v. King*, 518 F.3d 571, 575 n.5 (8th Cir. 2008) (conversion rate set per defendant's stipulation).

⁹⁰ See, e.g., *United States v. Jones*, 531 F.3d 163, 177 (2d Cir. 2008) ("[T]he district court reasonably found that the seized \$883 would have purchased 25.75 grams of crack cocaine. It based this calculation on the price the government's confidential informant had paid for crack cocaine recently purchased from the subject premises.").

⁹¹ *United States v. Kiulin*, 360 F.3d 456, 461–62 (4th Cir. 2004) (affirming ecstasy conversion rate estimate in PSR supported by "law enforcement officer who, it is reasonable to presume, possessed specialized knowledge of the price of ecstasy in North Carolina at the time of [the defendant's] arrest").

⁹² *United States v. Lujan*, 25 F.4th 324, 328 (5th Cir. 2022).

[the defendants'] drug business must have been devoted to living expenses such as housing, food, and medical needs."⁹³

ii. Estimates based on laboratory capacity

Courts also may use the size or capability of a drug laboratory to estimate drug quantities.⁹⁴ This approach may involve, for example, evaluating expert testimony to estimate production capacity based on the available equipment⁹⁵ or amount of precursor chemicals seized from the laboratory.⁹⁶ Further, the application notes to §2D1.1 provide drug conversion values for certain precursor chemicals for offenses involving the manufacture of amphetamine or methamphetamine.⁹⁷

b. Purity

For most substances, purity plays no role in determining drug quantity. Except as specified, as long as the substance contains a detectable amount of a controlled substance, the entire weight counts for purposes of the Drug Quantity Table.⁹⁸ An upward departure may be warranted in cases of “unusually high purity” for some controlled substances.⁹⁹

Five controlled substances (PCP, amphetamine, methamphetamine, hydrocodone, and oxycodone) have base offense levels based on the “weight of the controlled substance, itself, contained” in the mixture, substance, pill, or capsule, as applicable.¹⁰⁰ For substances containing PCP, amphetamine, or methamphetamine, the Drug Quantity Table specifies alternative base offense levels for both the “actual” weight of the substance (*i.e.*, accounting for purity) and the substance as part of a mixture; the greatest base offense levels

⁹³ *Id.* at 329.

⁹⁴ USSG §2D1.1, comment. (n.5); *see, e.g.*, *United States v. Bautista*, 532 F.3d 667, 672–73 (7th Cir. 2008) (affirming quantity estimate based in part on evidence that “the members of an experienced meth operation believed they were going to have a lab outfitted with whatever they needed . . . to manufacture twelve pounds of meth,” even though the lab was not yet functional; the application note “is designed to match the penalty to the true scale of the drug operation,” not evaluate “what was seized” (citation omitted)).

⁹⁵ *Cf. United States v. Chase*, 499 F.3d 1061, 1069–70 (9th Cir. 2007) (reversing drug quantity estimate based on expert testimony wholly reliant on theoretical yield of 5,000-mililiter flask where no precursor chemicals were seized, and no evidence suggested that 5,000-mililiter flask had been used).

⁹⁶ *Cf., e.g., United States v. Forrester*, 616 F.3d 929, 950 (9th Cir. 2010) (acknowledging potential usefulness of expert’s conservative estimate of ecstasy yield based on seized precursor chemicals but vacating and remanding sentence because district court failed to make “explicit findings about the amount of ecstasy involved”).

⁹⁷ *See* USSG §2D1.1 comment. (n.8(D)) (Drug Conversion Tables).

⁹⁸ USSG §2D1.1(c)(Note A).

⁹⁹ USSG §2D1.1, comment. (n.27(C)).

¹⁰⁰ USSG §2D1.1(c)(Note B); *see also* USSG §2D1.1, comment. (n.27(C)) (“[T]he guideline itself provides for the consideration of purity” for PCP, amphetamine, methamphetamine, hydrocodone, and oxycodone.).

applies.¹⁰¹ Methamphetamine, discussed in detail below in Section IV.A.4.c, is further subdivided by differentiating the level of purity among mixtures containing methamphetamine, methamphetamine (actual), and “Ice,” defined as “d-methamphetamine hydrochloride of at least 80% purity.”¹⁰² Quantities of LSD are determined consistent with how the substance is ordinarily prepared and used, as discussed in Section IV.A.4.e.

The government may establish the purity of a substance by testing a representative sample.¹⁰³ Courts, in turn, may consider eyewitness testimony (such as from drug sellers or users) or expert testimony concerning factors such as the appearance, price, and quality of the drugs to support a purity finding, though courts differ on whether such evidence can suffice on its own to establish a particular purity level.¹⁰⁴

c. Converted Drug Weight

The Drug Quantity Table also includes “Converted Drug Weight” (previously called “marihuana equivalency”), a measurement used to determine the base offense level in two circumstances.¹⁰⁵ First, it is used when the defendant’s relevant conduct involves two or more controlled substances (and not merely a single mixture of two substances).¹⁰⁶ Second, it is used when the defendant’s relevant conduct involves a controlled substance referenced to the guideline, but not specifically listed on the Drug Quantity Table.¹⁰⁷

In either situation, the weight of the controlled substances is converted into a Converted Drug Weight using the Drug Conversion Tables (previously called “Drug Equivalency Tables”).¹⁰⁸ A Drug Conversion Calculator is available to assist with these calculations.¹⁰⁹ As discussed further below, depending on the substances involved, a minimum base offense level or “capped” Converted Drug Weight may apply.

¹⁰¹ USSG §2D1.1(c)(Note B).

¹⁰² USSG §2D1.1(c)(Note C).

¹⁰³ See, e.g., *United States v. Walker*, 688 F.3d 416, 425 n.4 (8th Cir. 2012) (“Scientific testing of at least part of a quantity of suspected ‘ice’ methamphetamine seized from a conspiracy is one of the strongest means by which the government can meet its burden of proving the methamphetamine attributed to a defendant is ‘ice’ as defined in the [g]uidelines.”); *United States v. Verdin-Garcia*, 516 F.3d 884, 896 (10th Cir. 2008) (“Laboratory test results are perhaps more persuasive evidence of amounts and purities than eyewitness testimony or wiretapped conversations”); cf. *United States v. Carnell*, 972 F.3d 932, 944 (7th Cir. 2020) (“We also leave for another day the question of whether all of the methamphetamine attributable to a defendant must be tested [to establish purity], and if not, what would constitute a reliably representative sample.”).

¹⁰⁴ See *infra* Section IV.A.4.c.i.

¹⁰⁵ USSG §2D1.1(c)(Note K).

¹⁰⁶ See USSG §2D1.1, comment. (nn.7–8).

¹⁰⁷ See *id.*

¹⁰⁸ USSG §2D1.1, comment. (n.8(D)).

¹⁰⁹ U.S. SENT’G COMM’N, *Guidelines Manual*, Drug Conversion Calculator, <https://guidelines.usc.gov/de>.

As an example of a multiple substance case, consider a defendant responsible for 100 grams of heroin and 100 grams of cocaine. The court would perform the following steps:

Step 1. Reference the Drug Conversion Tables to identify the conversion ratio for each controlled substance.

Heroin: 1 gram = 1,000 grams (1 kg) Converted Drug Weight, per the Drug Conversion Table for Schedule I or II Opiates

Cocaine: 1 gram of cocaine = 200 grams Converted Drug Weight, per the Drug Conversion Table for Cocaine and Other Schedule I and II Stimulants

Step 2. Multiply the quantities of heroin and cocaine by their respective conversion ratios and then add them together.

Heroin: 100 grams x 1,000 = 100,000 grams (100 kg) Converted Drug Weight

Cocaine: 100 grams x 200 = 20,000 grams (20 kg) Converted Drug Weight

TOTAL: 100 kg + 20 kg = 120 kg Converted Drug Weight

Step 3. Return to the Drug Quantity Table to identify the applicable base offense level. A total of 120 kg Converted Drug Weight corresponds to base offense level 24.¹¹⁰

The same process applies to any substance referenced to §2D1.1 but not specifically identified in the Drug Quantity Table. This list includes, for example, morphine, oxycodone, opium, and psilocybin, among many others. A court sentencing a defendant for an offense involving such a substance would reference the appropriate Drug Conversion Table, convert the weight of the substance into Converted Drug Weight, and then apply the offense level from the Drug Quantity Table.¹¹¹

Certain Drug Conversion Tables provide a minimum offense level for any listed controlled substance “individually, or in combination with another controlled substance.”¹¹² In the Drug Conversion Tables for heroin and cocaine, as in the above example, the minimum offense level is 12. Thus, in the above example, even had the defendant been responsible for less than 5 kilograms of converted drug weight (and thus theoretically subject to a lower base offense level based solely on the Drug Quantity Table), the defendant still would have been subject to a minimum offense level of 12.

¹¹⁰ See USSG §2D1.1(c)(8).

¹¹¹ The “most closely related controlled substance” analysis discussed in Section IV.A.1.b would not apply.

¹¹² USSG §2D1.1, comment. (n.8(D)).

Other Drug Conversion Tables provide for capped converted drug weights. For example, the Schedule V Substances table explains that “the combined converted weight of Schedule V substances shall not exceed 2.49 kilograms of converted drug weight.”¹¹³ The Schedule IV Substances (Except Flunitrazepam) table explains that “the combined converted weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of converted drug weight.”¹¹⁴ Where a defendant is responsible for substances from more than one schedule, the converted drug weight must be determined separately for each schedule, subject to any cap applicable to that schedule.¹¹⁵ Then, as before, the converted drug weights are added together and referenced to the appropriate base offense level on the Drug Quantity Table.¹¹⁶

3. Issues Involving Both Substance Type and Quantity

a. Relevant conduct issues

As required by the relevant conduct rules in §1B1.3, the court must calculate the drug quantity by including not just the drugs that the defendant was directly involved in for the offense of conviction, but also (i) in a jointly undertaken criminal activity, “all quantities of contraband that were involved in transactions carried out by other participants, if those transactions were within the scope of, and in furtherance of, the jointly undertaken criminal activity and were reasonably foreseeable in connection with that criminal activity”¹¹⁷ and (ii) any additional amounts outside the offense of conviction in which the defendant was directly involved as “part of the same course of conduct or common scheme or plan.”¹¹⁸ Both provisions present fact-based determinations as to whether a particular drug transaction, for example, is within the scope of a jointly undertaken criminal activity or part of a common scheme or plan.

i. Jointly undertaken criminal activity

A defendant who participates in a jointly undertaken criminal activity, defined as any “criminal plan, scheme, endeavor, or enterprise” undertaken “in concert with others,”¹¹⁹ is accountable for any drug activity that is “(i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ USSG §2D1.1, comment. (n.8(B)).

¹¹⁶ The combined converted drug weight is subject to the cap, if any, applicable to the combined amounts. *Id.*

¹¹⁷ USSG §1B1.3, comment. (n.3(D)); *see also* USSG §1B1.3, comment. (n.3(B)) (discussing scope of jointly undertaken criminal activity in cases involving controlled substances).

¹¹⁸ USSG §1B1.3(a)(2).

¹¹⁹ USSG §1B1.3(a)(1)(B).

(iii) reasonably foreseeable in connection with that criminal activity.”¹²⁰ A defendant need not be charged with a conspiracy to be accountable for someone else’s activity.¹²¹

The scope of the agreement may be disputed; “conspiracy-wide drug amounts . . . in many cases will be higher than the defendant’s actual scope of agreement.”¹²² A defendant’s accountability is “limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant’s agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct.”¹²³

Application Note 4 to §1B1.3 provides several illustrations. For example, where a defendant steps in to make a drug delivery on one occasion to cover for an ill boyfriend, the defendant would be accountable only for the one delivery to which she agreed.¹²⁴ Any other drug sales made by the boyfriend would be outside the scope of the jointly undertaken criminal activity and would not be attributable to the defendant.¹²⁵

Similarly, a street-level drug dealer who buys from the same source as other dealers but otherwise operates independently would be accountable only for the drugs involved in his own activity—not those sold by the other street-level drug dealers.¹²⁶ Suppose that the same dealer, rather than operating independently, instead pooled his resources and profits with other street-level drug dealers. Such an arrangement would satisfy all three requirements: the other dealers’ sales would fall within the scope of the jointly undertaken criminal activity, would further that criminal activity, and would be reasonably foreseeable in connection with that criminal activity.¹²⁷ The defendant would be responsible for the drugs sold by the other dealers during the course of his joint undertaking with them.¹²⁸

Likewise, defendants in a methamphetamine conspiracy may all be found accountable for the highest level of drug purity even if not all substances were of the same purity. For example, the Fourth Circuit found that it was foreseeable to each defendant in a conspiracy that “Ice” methamphetamine was involved, based on evidence that the

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *United States v. McReynolds*, 964 F.3d 555, 564 (6th Cir. 2020).

¹²³ USSG §1B1.3, comment. (n.3(B)); *see, e.g.*, *United States v. Flores*, 995 F.3d 214, 220 (D.C. Cir. 2021) (“[The defendant] maintains that he had no agreement relating to the importation of drugs and had no direct role in any of the drug trafficking transactions. Yet courts have often attributed to enforcers the entire drug quantity that passes through a conspiracy while they were participants in the conspiracy.”).

¹²⁴ USSG §1B1.3, comment. (n.4(C)(v)).

¹²⁵ *Id.*

¹²⁶ USSG §1B1.3, comment. (n.4(C)(vi)).

¹²⁷ *Id.*

¹²⁸ *Id.*

conspiracy was centered around “Ice” and lab reports showing that almost all tested samples contained a substance purity of at least 95 percent.¹²⁹

ii. Same course of conduct or common scheme or plan

Drug activity involving uncharged or acquitted drug quantities may be used to determine the base offense level where it falls within either the “same course of conduct” or a “common scheme or plan.” These “closely related concepts” are not applied with rigid tests or rules.¹³⁰ The former includes conduct that is “substantially connected . . . by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*.”¹³¹ The latter includes offenses that are “sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses,” considering, for example, “the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses.”¹³²

As applied to drug activity, the courts of appeals have framed the analysis in different ways. The Seventh Circuit, for example, has stressed the need to strictly apply the relevant conduct factors, concerned that the inclusion of uncharged drug quantities may “permit[] prosecutors to indict defendants on relatively minor offenses and then seek enhanced sentences later by asserting that the defendant has committed other more serious crimes for which, for whatever reason, the defendant was not prosecuted and has not been convicted.”¹³³ On the other hand, the Fifth Circuit has, “[p]articularly in drug cases, . . . broadly defined what constitutes ‘the same course of conduct’ or ‘common scheme or plan.’ ”¹³⁴

The courts of appeals are, however, united in some important principles reflected in the Commentary to §1B1.3. On the one hand, the “mere fact that the defendant has engaged in other drug transactions is not sufficient to justify treating those transactions as ‘relevant conduct’ for sentencing purposes.”¹³⁵ And on the other hand, “conduct is not unrelated . . . simply because it involves trafficking in a different substance, or because the purportedly

¹²⁹ *United States v. Williams*, 19 F.4th 374, 380–81, 384 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 1392 (2022).

¹³⁰ USSG §1B1.3, comment. (n.5(B)).

¹³¹ USSG §1B1.3, comment. (n.5(B)(i)).

¹³² USSG §1B1.3, comment. (n.5(B)(ii)).

¹³³ *United States v. Draheim*, 958 F.3d 651, 660 (7th Cir. 2020) (quoting *United States v. Ortiz*, 431 F.3d 1035, 1040 (7th Cir. 2005)).

¹³⁴ *United States v. Barry*, 978 F.3d 214, 219 (5th Cir. 2020) (citation omitted).

¹³⁵ *Draheim*, 958 F.3d at 659 (citation omitted); *see, e.g.*, *United States v. Horton*, 993 F.3d 370, 377 (5th Cir. 2021) (“At sentencing, [the defendant] referred to a temporal connection between the offenses, which, without more, is insufficient to establish a relevant conduct determination.”), *cert. denied*, 142 S. Ct. 382 (2021).

related activity occurs at different times.”¹³⁶ In all cases, the relevant conduct analysis requires fact-bound consideration of the underlying offense and its relationship to the uncharged or acquitted conduct.

For example, in *United States v. Nava*, the Fifth Circuit affirmed the inclusion of a seizure of methamphetamine as relevant conduct for a defendant who had been convicted of cocaine trafficking.¹³⁷ Though the record lacked evidence to show that the methamphetamine operation was “part of a common scheme or plan with his cocaine-trafficking activities,” the district court did not clearly err in concluding that it was part of the same course of conduct.¹³⁸ The court explained that “both the cocaine and meth loads were picked up in Ciudad Juarez, concealed in vehicles connected to [the defendant], and transported across the border into the United States”; evidence suggested that the defendant “played a supervisory role in both operations”; and “the meth and cocaine seizures occurred in close temporal proximity.”¹³⁹ That said, the court likewise observed that the “district court could reasonably have come out” either way, acknowledging evidence that would have supported a finding that the methamphetamine and cocaine offenses were “distinct crimes.”¹⁴⁰

In contrast, in *United States v. Draheim*, the Seventh Circuit reversed the inclusion of a “bulk order” arranged by the defendant of nearly 50 grams of Ice where the offense conduct involved only “an individual sale of two grams of street meth in a city.”¹⁴¹ Nothing other than cell phone usage and “the defendant’s practice of obtaining methamphetamine and repackaging it for sale” connected the two transactions.¹⁴² This, the Seventh Circuit said, was insufficient: “A one-time order of a large amount of ice from a national distributor does not match up with a small sale of street meth to a local customer.”¹⁴³

In some cases, the defendant may seek to include drug quantities as relevant conduct to receive either a sentence concurrent with an undischarged sentence or a lower criminal history score. First, where a defendant has an undischarged term of imprisonment for an offense that is relevant conduct to the current offense, the guidelines provide that a

¹³⁶ *United States v. Benton*, 957 F.3d 696, 703 (6th Cir. 2020); *see, e.g.*, USSG §2D1.1, comment. (n.5) (“Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level.”).

¹³⁷ 957 F.3d 581, 586–88 (5th Cir. 2020).

¹³⁸ *Id.* at 586.

¹³⁹ *Id.* at 587; *see also, e.g.*, *United States v. Rollerson*, 7 F.4th 565, 573 (7th Cir.) (affirming determination that uncharged drug buys were relevant conduct and discussing applicable factors), *cert. denied*, 142 S. Ct. 631 (2021); *Barry*, 978 F.3d at 219 (affirming determination that drug quantities determined by converting seized cash were relevant conduct and discussing applicable factors).

¹⁴⁰ *Nava*, 957 F.3d at 587.

¹⁴¹ 958 F.3d 651, 659 (7th Cir. 2020).

¹⁴² *Id.*

¹⁴³ *Id.* at 660.

new sentence should be imposed concurrently with the remainder of any undischarged term of imprisonment.¹⁴⁴ Accordingly, a defendant who demonstrates that the drug activity that led to the undischarged term is relevant conduct may benefit from a concurrent, rather than consecutive sentence, for the instant offense.¹⁴⁵

Second, if drug activity associated with another conviction is considered relevant conduct to the instant offense, it may not be counted as a “prior sentence” in calculating the defendant’s criminal history score under §4A1.2 (Definitions and Instructions for Computing Criminal History).¹⁴⁶ However, conduct underlying a sentence that was imposed prior to the acts constituting the instant offense would be considered as prior criminal history, not as relevant conduct.¹⁴⁷

b. Agreements and attempts to sell

Defendants involved in inchoate offenses, such as attempts and conspiracies, are generally responsible for the agreed-upon quantity.¹⁴⁸ Where the sale is completed, however, the sentencing court instead should use the delivered amount if it more accurately reflects the scale of the offense.¹⁴⁹ Thus, where a defendant agrees to sell 500 grams of cocaine and actually delivers 480 grams with no further delivery to follow, the 480 grams best reflects the scale of the offense.¹⁵⁰

If a defendant both completes a drug transaction and attempts or agrees to an additional transaction, such as where a defendant completes the sale of 5 grams of heroin and attempts to sell an additional 10 grams, the court must aggregate the total amount to determine the scale of the offense.¹⁵¹

In a reverse sting operation, where a government agent sells or negotiates to sell a controlled substance to a defendant, the agreed-upon quantity more accurately reflects the

¹⁴⁴ USSG §5G1.3(b); *see, e.g.*, United States v. Horton, 993 F.3d 370, 375–77 (5th Cir.) (rejecting defendant’s argument that state offense was relevant conduct), *cert. denied*, 142 S. Ct. 382 (2021); United States v. Ochoa, 977 F.3d 354, 357 (5th Cir. 2020) (same); United States v. Clark, 935 F.3d 558, 570–71 (7th Cir. 2019) (rejecting same argument on plain error review).

¹⁴⁵ *See* USSG §5G1.3(b).

¹⁴⁶ *See* USSG §4A1.2, comment. (n.1) (defining “prior sentence” as “a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense”; explaining that “[c]onduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct)”).

¹⁴⁷ USSG §1B1.3, comment. (n.5(C)).

¹⁴⁸ USSG §2D1.1, comment. (n.5).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

scale of the offense, even where the delivery is completed.¹⁵² This is because the actual amount delivered is controlled by the government instead of the defendant.¹⁵³ However, the court may depart downward where the selling government agent sets an artificially low price below the market value for the substance, leading the defendant to purchase a greater quantity than his available resources otherwise would have allowed.¹⁵⁴

c. Personal use quantities

Several courts have concluded that for a defendant in a non-conspiracy distribution case, personal use quantities of drugs are not counted if they were not “part of or connected to the commission of, preparation for, or concealment of” the distribution offense and “not possessed with the intent to distribute.”¹⁵⁵

Where the defendant is involved in a conspiracy or charged with conspiracy to distribute, several courts have held that a defendant may be responsible for personal use quantities. These courts have reasoned that what matters for attributable quantity in the conspiracy context is the “total quantity of drugs involved in the entire enterprise, not what individual co-conspirators choose to do with those drugs.”¹⁵⁶

The Fourth Circuit has applied the same logic in a case involving aiding and abetting the distribution of a controlled substance, holding that drugs set aside for an accomplice’s personal use were within the scope of the criminal activity and therefore were attributable to the defendant.¹⁵⁷

4. Application Issues

Though the above drug quantity principles generally apply throughout §2D1.1, several application issues apply to certain drug types.

a. Cocaine

The Drug Quantity Table sets forth different threshold quantities for each base offense level for “cocaine” (frequently called “powder cocaine”) and “cocaine base.” The guideline defines “cocaine base” as “crack,” a “form of cocaine base, usually prepared by

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ USSG §2D1.1, comment. (n.27(A)).

¹⁵⁵ *United States v. Wilson*, 17 F.4th 994, 1002–03 (10th Cir. 2021) (quoting *United States v. Gill*, 348 F.3d 147, 153 (6th Cir. 2003)) (also noting that the Second, Third, Sixth, Seventh, Eighth, and Ninth Circuits have reached similar conclusions and that the Eleventh Circuit has reached a contrary result).

¹⁵⁶ *United States v. Williamson*, 953 F.3d 264, 270 (4th Cir. 2020) (collecting cases from the First, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits).

¹⁵⁷ *Id.* at 270–72.

processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.”¹⁵⁸ In contrast, the statutory definition of cocaine base “reaches more broadly than just crack cocaine” to include “cocaine in its chemically basic form.”¹⁵⁹ As a result, certain forms of cocaine base may trigger a statutory minimum under 21 U.S.C. § 841(b)(1)(B)(iii), even if those substances would not be treated as “cocaine base” (crack) under §2D1.1 and the Drug Quantity Table.

Courts have described differentiating between crack and powder cocaine, as defined in the guideline, as a “complicated task.”¹⁶⁰ Unlike cocaine base, as defined by the drug statutes, crack does not have a distinct chemical makeup. Rather, crack “is merely one form of cocaine base—a form that arises as the end result of one method of turning the salt form of cocaine, cocaine hydrochloride (powder cocaine), back into a base form.”¹⁶¹ Beyond the “rocklike” physical appearance that often indicates crack cocaine, crack and powder cocaine frequently are consumed differently: “Crack can be smoked, but not snorted or injected; powder cocaine can be snorted, but not smoked.”¹⁶² Because the two cannot be distinguished through chemical tests, the government may rely on eyewitness and expert testimony to establish that a particular offense involves crack rather than powder cocaine.¹⁶³

Consistent with the changes made by the Fair Sentencing Act of 2010,¹⁶⁴ §2D1.1 sets a quantity ratio of just under 18:1 between crack and powder cocaine, such that an offense involving powder cocaine would need to involve 18 times the quantity of crack cocaine to trigger a particular base offense level.¹⁶⁵

¹⁵⁸ USSG §2D1.1(c)(Note D).

¹⁵⁹ *DePierre v. United States*, 564 U.S. 70, 79, 89 (2011).

¹⁶⁰ *United States v. Carnell*, 972 F.3d 932, 940 (7th Cir. 2020) (collecting cases and discussing the difference between distinguishing among types of cocaine and types of methamphetamine).

¹⁶¹ *Id.* (quoting *United States v. Stephenson*, 557 F.3d 449, 452 (7th Cir. 2009)).

¹⁶² *Id.* (quoting *Stephenson*, 557 F.3d at 452–53).

¹⁶³ *See, e.g., id.* (experts in distinguishing crack from powder cocaine are “those who spend their lives and livelihoods enmeshed with the drugs—users, dealers, and law enforcement officers who specialize in narcotics crimes” (quoting *Stephenson*, 557 F.3d at 453)); *United States v. Whitehead*, 487 F.3d 1068, 1071–72 (8th Cir. 2007) (crediting testimony of DEA agent who observed substance).

¹⁶⁴ The Fair Sentencing Act increased the threshold quantities of crack cocaine that trigger five- and ten-year mandatory minimum penalties, resulting in an 18:1 quantity ratio between powder cocaine and crack cocaine. Pub. L. No. 111–220, § 2, 124 Stat. 2372, 2372. Previously, certain statutes required 100 times more powder cocaine than crack cocaine to trigger the same five- and ten-year mandatory minimum penalties (100:1 drug quantity ratio). *See* 21 U.S.C. §§ 841(b)(1)(A)(ii)–(iii), (B)(ii)–(iii), 960(b)(1)(B)–(C), (2)(B)–(C) (2009). The First Step Act of 2018 provides for the retroactive application of the Fair Sentencing Act to eligible offenders who were sentenced before its passage. Pub. L. No. 115–391, § 404, 132 Stat. 5194, 5222.

¹⁶⁵ *See* USSG App. C, amend. 748 (effective Nov. 1, 2010) (amending §2D1.1 to reflect the changes made by the Fair Sentencing Act); *see also* USSG App. C, amend. 782 (effective Nov. 1, 2014) (reducing by two offense levels the base offense levels assigned to quantities that trigger the statutory mandatory minimum penalties,

The Supreme Court has held that district courts may “vary from the crack cocaine [g]uidelines based on *policy* disagreement with” the disparate treatment of crack and powder cocaine offenses, “and not simply based on an individualized determination that they yield an excessive sentence in a particular case.”¹⁶⁶ Courts are not required to vary, however, and may instead exercise their “discretion to stick to the 18:1 ratio in the guidelines.”¹⁶⁷

b. Marijuana

As explained above, ordinarily drug quantity is determined by the entire weight of the mixture or substance. For marijuana, two special rules apply.

First, with respect to marijuana that is unsuitable for consumption without first being dried, such as bales of rain-soaked marijuana or freshly harvested marijuana, such excess moisture content should be excluded when approximating the weight of the marijuana.¹⁶⁸

Second, where an offense involves marijuana plants, the quantity is the greater of either 100 grams of marijuana per plant or the actual weight of the harvested marijuana.¹⁶⁹ The 100 grams-per-plant conversion ratio is based on the average yield from a mature marijuana plant.¹⁷⁰ The ratio applies to all plants, defined as “an organism having leaves and a readily observable root formation,”¹⁷¹ regardless of sex.¹⁷²

Courts diverge in how and whether to apply the plant-to-marijuana ratio for dry plants. The majority of courts of appeals have held that the equivalency may apply to all

resulting in corresponding guideline ranges that include (rather than exceed) the mandatory minimum penalties); USSG App. C, amend. 788 (effective Nov. 1, 2014) (making the changes retroactive).

¹⁶⁶ *Spears v. United States*, 555 U.S. 261, 264 (2009); *see also* *Kimbrough v. United States*, 552 U.S. 85, 110 (2007) (“[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence ‘greater than necessary’ to achieve § 3553(a)’s purposes, even in a mine-run case.”).

¹⁶⁷ *United States v. Maldonado-Peña*, 4 F.4th 1, 62 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 729 (2021), and *cert. denied*, 142 S. Ct. 1184, 142 S. Ct. 1185 (2022).

¹⁶⁸ USSG §2D1.1, comment. (n.1).

¹⁶⁹ USSG §2D1.1(c)(Note E).

¹⁷⁰ USSG §2D1.1, comment. (backg’d.).

¹⁷¹ USSG §2D1.1, comment. (n.2).

¹⁷² USSG §2D1.1(c)(Note E); *see, e.g.,* *United States v. Fletcher*, 74 F.3d 49, 55 & n.6 (4th Cir. 1996) (affirming calculation based on all marijuana plants, male and female, even though “cutting and discarding commercially unproductive male plants[] is part of the marijuana cultivation process” and explaining that “male plants are necessary for seeding” and “constitute an integral part of the initial production process”).

plants, dead or alive.¹⁷³ The Second Circuit has held that the conversion ratio does not apply to dry plants.¹⁷⁴ Rather, the quantity attributed to dry plants must be based solely on the dry weight of the marijuana.¹⁷⁵ The Sixth Circuit has adopted a third approach, holding that the ratio applies to dry plants only in manufacturing offenses, while an estimate of the actual weight of the dry plants must be used in possession and distribution offenses.¹⁷⁶

Section 841 of title 21, U.S. Code, sets a higher ratio of 1 kilogram per plant for the manufacture, distribution, and possession with intent to manufacture or distribute marijuana plants.¹⁷⁷ For example, an offense involving 1,000 marijuana plants would carry the same penalty as an offense involving at least 1,000 kilograms of marijuana.¹⁷⁸

c. Methamphetamine

i. Purity

Though most substances are measured according to the total weight of any mixture or substance in which they are contained,¹⁷⁹ methamphetamine is among the few substances for which the base offense level varies by purity. Specifically, the Drug Quantity Table differentiates among:

- (A) “Ice,” defined as “a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity”;¹⁸⁰
- (B) “Methamphetamine (actual),” referring to the actual weight (purity) of the methamphetamine contained in the mixture;¹⁸¹ and
- (C) Methamphetamine, which includes the entire weight of the mixture or substances.¹⁸²

The guideline reflects a 10:1 quantity ratio between methamphetamine on the one hand and Ice and methamphetamine (actual) on the other, such that it takes ten times more

¹⁷³ See, e.g., *United States v. Swanson*, 210 F.3d 788, 791–92 (7th Cir. 2000) (citing examples from the Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits).

¹⁷⁴ *United States v. Blume*, 967 F.2d 45, 49 (2d Cir. 1992).

¹⁷⁵ *Id.*

¹⁷⁶ *United States v. Olsen*, 537 F.3d 660, 664–66 (6th Cir. 2008).

¹⁷⁷ 21 U.S.C. § 841(b)(1)(A)(vii), (B)(vii), (D).

¹⁷⁸ *Id.* § 841(b)(1)(A)(vii).

¹⁷⁹ USSG §2D1.1(c)(Note A).

¹⁸⁰ USSG §2D1.1(c)(Note C).

¹⁸¹ USSG §2D1.1(c)(Note B).

¹⁸² *Id.*

methamphetamine mixture than Ice or methamphetamine (actual) to trigger the same base offense level. Under this ratio, Ice is treated the same as pure methamphetamine. Thus, if a substance contains methamphetamine of at least 80 percent purity, the entire substance is treated as Ice.

If the substance is not Ice, the applicable quantity is either the actual weight or the mixture, whichever results in the greater offense level. For example, a 5-kilogram (5,000 g) mixture of 60 percent purity would be equivalent to 3 kilograms of methamphetamine (actual) (5,000 g x 60% = 3,000 g). Three kilograms of methamphetamine (actual) results in the greater base offense level (36) than the 5 kilograms of methamphetamine mixture (34) and therefore will set the base offense level for the substance.

Courts differ in whether purity, and specifically purity of Ice, may be proven by circumstantial evidence. Most appellate courts have acknowledged the issue without squarely holding one way or the other, where the ultimate classification would not impact the defendant's sentence.¹⁸³

The Eighth Circuit squarely addressed the issue and held that laboratory testing is not required.¹⁸⁴ Rather, as with identification of crack cocaine, eyewitness testimony concerning the appearance (clarity), quality, price, or name (calling a substance "Ice") may establish that a substance is Ice—even where there is an actual seizure of methamphetamine that could have been (but was not) tested.¹⁸⁵ The Tenth Circuit similarly has suggested that, while "[l]aboratory test results are perhaps more persuasive evidence of amounts and purities than eyewitness testimony or wiretapped conversations," the latter "are not unreliable as a matter of law."¹⁸⁶

On the other hand, the Seventh Circuit has expressly rejected the Eighth Circuit's approach, holding that it "defies common sense that even the most experienced dealer, user, or police officer could somehow detect the difference between 79% pure methamphetamine and 80% pure methamphetamine."¹⁸⁷ The court left open the possibility that a lab report may not be required in all instances,¹⁸⁸ suggesting, for example, that "evidence connecting the visual description of the methamphetamine to the purity" could, demonstrate that a substance is Ice.¹⁸⁹ The court distinguished Ice from crack,

¹⁸³ See, e.g., *United States v. Carnell*, 972 F.3d 932, 945 (7th Cir. 2020) (collecting cases from the Fifth, Tenth, and Eleventh Circuits).

¹⁸⁴ *United States v. Lugo*, 702 F.3d 1086, 1089–91 (8th Cir. 2013) (citing *United States v. Walker*, 688 F.3d 416, 423, 425 (8th Cir. 2012)).

¹⁸⁵ *Id.*

¹⁸⁶ *United States v. Verdin-Garcia*, 516 F.3d 884, 896 (10th Cir. 2008). However, in light of the quantities involved, the Tenth Circuit ultimately did not need to decide the issue. *Id.* at 897.

¹⁸⁷ *Carnell*, 972 F.3d at 941.

¹⁸⁸ *Id.* at 943–44.

¹⁸⁹ *Id.* at 944.

explaining that while the latter is not rigidly defined or susceptible to laboratory confirmation, the former is defined by its purity.¹⁹⁰ The Fourth Circuit agreed with the Seventh Circuit that the language in the guidelines requiring 80% purity for Ice must have meaning, but it did not conclude that lab results were necessary in every case.¹⁹¹ Instead, the Fourth Circuit held that the district court must have latitude to consider available reliable evidence, including the drug's source, price, and appearance, as well as statements from people involved in the offense.¹⁹²

As with the crack-to-powder cocaine quantity ratio, courts have the discretion—but no obligation—to deviate from the 10:1 methamphetamine ratio based on policy disagreements.¹⁹³

ii. Wastewater and other mixture substances

As explained above, the term “mixture or substance” excludes “materials that must be separated from the controlled substance before the controlled substance can be used.”¹⁹⁴ The weight of any wastewater generated in the manufacturing process must be excluded.¹⁹⁵ However, there is a split among the circuits as to whether waste products may be included for purposes of determining whether a statutory minimum applies.¹⁹⁶

d. Pills

Where the number of doses, pills, or capsules but not the weight of the controlled substance is known, quantity is determined by multiplying the number of doses, pills, or capsules by the typical weight per dose as set forth in the Typical Weight Per Unit Table

¹⁹⁰ *Id.* at 939–40.

¹⁹¹ *United States v. Williams*, 19 F.4th 374, 380 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 1392 (2022).

¹⁹² *Id.*

¹⁹³ *See, e.g., United States v. Wickman*, 988 F.3d 1065, 1068 (8th Cir. 2021) (“[I]t is not our ‘proper appellate role’ to compel a district court to diverge from the [g]uidelines in accordance with a defendant’s proffered policy reasons.” (citation omitted)); *United States v. Heim*, 941 F.3d 338, 340 (8th Cir. 2019) (rejecting argument that decision of one judge to follow 10:1 ratio resulted in an unwarranted sentencing disparity despite apparent agreement among other judges of the same district court to vary from the ratio); *United States v. Bostock*, 910 F.3d 348, 350 (7th Cir. 2018) (the 10:1 ratio mirrors the quantities that trigger statutory ranges in 21 U.S.C. § 841(b)(1); “a district judge is not required even to articulate a reason for sticking with the [g]uidelines and may give the silent treatment to stock arguments asking the court to disregard the Commission’s recommendations”).

¹⁹⁴ USSG §2D1.1, comment. (n.1).

¹⁹⁵ *Id.*

¹⁹⁶ *Compare, e.g., Griffith v. United States*, 871 F.3d 1321, 1336 (11th Cir. 2017) (defining “mixture or substance” in both 21 U.S.C. § 841(b) and §2D1.1 to exclude wastewater), *and United States v. Stewart*, 361 F.3d 373, 379–80 (7th Cir. 2004) (collecting cases and concluding that wastewater weight does not count toward statutory minima), *with, e.g., United States v. Treft*, 447 F.3d 421, 424–25 (5th Cir. 2006) (reaching opposite conclusion).

found in the Commentary to §2D1.1.¹⁹⁷ For example, in a case involving 1,000 pills of MDMA, the court would consult the Table to determine a typical weight per pill of 250 mg.¹⁹⁸ Then, the court would multiply the 1,000 pills by 250 mg to arrive at an estimated weight of 250 g (250,000 mg).

The Typical Weight Per Unit Table should not be used where a “more reliable estimate of the total weight is available from case-specific information.”¹⁹⁹

e. LSD

LSD may be distributed using a carrier medium, such as blotter paper.²⁰⁰ Unlike most other substances, a quantity of LSD on a carrier medium is measured not by its gross weight in a mixture or substance, but by a conversion rate of 0.4 milligrams per dose.²⁰¹ LSD on blotter paper typically is marked by dose; when this is not the case, each ¼ inch-by-¼ inch section is presumed to equal one dose.²⁰² Where LSD is not on a carrier medium, the weight of the LSD itself, contained within a liquid solution, should be used to determine the quantity.²⁰³

However, the weight of the entire substance, including any blotter paper or solution, counts for purposes of determining whether a statutory minimum penalty applies.²⁰⁴

5. Mitigating Role Adjustment

The mitigating role adjustment in §3B1.2 may apply to any offense involving more than one participant.²⁰⁵ It plays a special role in setting the applicable base offense level under §2D1.1(a)(5) and is frequently at issue in drug conspiracy cases given the different roles individuals may play.

¹⁹⁷ USSG §2D1.1, comment. (n.9).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ USSG §2D1.1(c)(Note G).

²⁰¹ *Id.*

²⁰² USSG §2D1.1, comment. (n.10).

²⁰³ *Id.*; *see, e.g.*, *United States v. Morgan*, 292 F.3d 460, 463–64 (5th Cir. 2002); *United States v. Camacho*, 261 F.3d 1071, 1074 (11th Cir. 2001).

²⁰⁴ *Neal v. United States*, 516 U.S. 284, 296 (1996); *Chapman v. United States*, 500 U.S. 453, 455 (1991).

²⁰⁵ USSG §3B1.2, comment. (n.2). “A ‘participant’ is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (*e.g.*, an undercover law enforcement officer) is not a participant.” USSG §3B1.1, comment. (n.1); *see also* USSG §3B1.2, comment. (n.1) (using this definition for purposes of §3B1.2).

Section 3B1.2 provides for a 4-level reduction if the defendant was “a minimal participant in any criminal activity”²⁰⁶ and a 2-level reduction if the defendant was “a minor participant in any criminal activity.”²⁰⁷ A 3-level reduction applies in cases falling between the 4- and 2-level reductions.²⁰⁸

Section 2D1.1(a)(5), in turn, provides that a defendant who receives any mitigating role adjustment (2-, 3-, or 4-level) may receive one of the following reductions:

- (i) A defendant whose base offense level under the Drug Quantity Table is 32 receives a 2-level decrease;
- (ii) A defendant whose base offense level under the Drug Quantity Table is 34 or 36 receives a 3-level decrease; and
- (iii) A defendant whose base offense level under the Drug Quantity Table is 38 receives a 4-level decrease.²⁰⁹

Finally, if the resulting offense level is greater than level 32, and the defendant receives the 4-level minimal participant reduction, then the offense level is decreased to level 32.²¹⁰ A defendant whose base offense level “was reduced by operation of the maximum base offense level in §2D1.1(a)(5)” also receives the applicable reduction under §3B1.2.²¹¹

In general, the §3B1.2 adjustments apply to a “defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.”²¹² A “minimal participant” is one who “plays a minimal role in the criminal activity” and is “plainly among the least culpable of those involved in the conduct of group.”²¹³ A “minor participant” is one whose role could not be described as “minimal,” but “who is less culpable than most other participants in the criminal activity.”²¹⁴

²⁰⁶ USSG §3B1.2(a).

²⁰⁷ USSG §3B1.2(b).

²⁰⁸ USSG §3B1.2.

²⁰⁹ USSG §2D1.1(a)(5).

²¹⁰ *Id.*

²¹¹ USSG §3B1.2, comment. (n.6).

²¹² USSG §3B1.2, comment. (n.3(A)).

²¹³ USSG §3B1.2, comment. (n.4).

²¹⁴ USSG §3B1.2, comment. (n.5); *see, e.g.*, United States v. Bandstra, 999 F.3d 1099, 1102 (8th Cir. 2021) (not enough for a defendant to show “that he or she is a minor participant by comparison with other participants” or that there was “a larger-scale upstream distributor”; no clear error in refusing to grant a minor-role reduction to a defendant who was “deeply involved in the offense” by distributing drugs, interacting with members of the conspiracy, collecting payments via his girlfriend, and tracking debts); United States v. Sanchez, 989 F.3d 523, 544 (7th Cir. 2021) (“[T]he relevant comparison is ‘the defendant’s role to that of an average member of the conspiracy, not to that of the leaders.’” (citation omitted)).

Some courts have rejected the argument that a defendant's role as a drug courier "automatically entitle[s] him to a minor role reduction," explaining that "[n]ot every courier is a minor participant, and not every minor participant is a courier Section 3B1.2(b)'s application instead turns on culpability."²¹⁵ In fact, it is possible for none of the defendants in a group of coconspirators to be minor participants, particularly where they all play important roles in the offense.²¹⁶

B. SECTION 2D1.1(b): SPECIFIC OFFENSE CHARACTERISTICS

Section 2D1.1(b) sets forth 18 specific offense characteristics; however, most of these are applied very infrequently.²¹⁷ Below, five notable specific offense characteristics are discussed, with the remainder briefly outlined thereafter.

1. Section 2D1.1(b)(1): Dangerous Weapons

Section 2D1.1(b)(1) provides for a 2-level increase if "a dangerous weapon (including a firearm) was possessed."²¹⁸ Reflecting the "increased danger of violence when drug traffickers possess weapons," the enhancement applies whenever "the weapon is present, unless it is clearly improbable that the weapon was connected with the offense."²¹⁹

²¹⁵ *Sanchez*, 989 F.3d at 544–45 (citations omitted) (affirming denial of minor role reduction where defendant was responsible for 170 kg of cocaine and 10 kg of heroin and, "[b]esides couriering drugs, . . . recruited members into the conspiracy, unloaded narcotics at stash houses, and even blocked law enforcement from apprehending" a coconspirator); *see, e.g.*, *United States v. Mendoza-Maisonet*, 962 F.3d 1, 25 (1st Cir. 2020) (affirming denial of reduction where evidence showed that defendant "was not substantially less culpable than" his codefendant); *United States v. Bello-Sanchez*, 872 F.3d 260, 264 (5th Cir. 2017) ("[T]he mere fact that [the defendant] was but a courier is not dispositive.").

²¹⁶ *See, e.g.*, *United States v. Cabezas-Montano*, 949 F.3d 567, 605–08 (11th Cir. 2020) (affirming denial of three codefendants' requests for minor role reductions where all three "knowingly participated in the illegal transportation of a large quantity of high-purity and high-value cocaine, that they and their transportation roles were important to that scheme, and that they were held accountable for that conduct only"). For a more detailed explanation regarding the mitigating and aggravating role adjustments and relevant caselaw, *see generally* U.S. SENT'G COMM'N, PRIMER ON AGGRAVATING AND MITIGATING ROLE ADJUSTMENTS (2022), <https://www.ussc.gov/guidelines/primers/aggravating-and-mitigating-role-adjustments>.

²¹⁷ *See* USE OF GUIDELINES, *supra* note 52, at 56–58.

²¹⁸ USSG §2D1.1(b)(1). "Dangerous weapon" and "firearm" are defined by reference to USSG §1B1.1, comment. (n.1(E), (H)). USSG §2D1.1, comment. (n.11(A)). " 'Dangerous weapon' means: (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (*e.g.* a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun)." USSG §1B1.1, comment. (n.1(E)); *see, e.g.*, *United States v. Leyva*, 916 F.3d 14, 27 (D.C. Cir. 2019) (citing this definition to conclude that an "inoperable collector's" pistol was a dangerous weapon "within the meaning of §2D1.1 regardless whether it is capable of being fired"). " 'Firearm' means: (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device." USSG §1B1.1, comment. (n.1(H)).

²¹⁹ USSG §2D1.1, comment. (n.11(A)).

The government must prove, by a preponderance of the evidence, that the weapon was “present.” If the government meets this burden, the defendant must show that it was “clearly improbable that the weapon was connected with the offense.”²²⁰ To ensure that the enhancement does not apply, for example, where a defendant “had an unloaded hunting rifle in the closet,”²²¹ courts look for a “temporal and spatial relation . . . between the weapon, the drug trafficking activity, and the defendant.”²²² The Third Circuit, for example, examines factors such as: “(1) the type of gun involved, with handguns more likely to be connected with drug trafficking than hunting rifles; (2) whether the gun was loaded; (3) whether the gun was stored (or, we add, possessed) near the drugs or drug-related items; and (4) whether the gun was accessible.”²²³ The weapon may be “present” at any point in the offense or during relevant conduct for which the defendant is responsible.²²⁴

Further, courts may apply the dangerous weapon enhancement to constructive possession.²²⁵ To prove constructive possession, the government must show that “the defendant knew of, and was in a position to exercise dominion and control over,” the weapon.²²⁶ In *United States v. Baldon*, for example, the Ninth Circuit found that the

²²⁰ See, e.g., *United States v. Denmark*, 13 F.4th 315, 318–20 (3d Cir. 2021) (articulating this two-step inquiry); *United States v. Montenegro*, 1 F.4th 940, 945–46 (11th Cir. 2021) (same); *United States v. Lee*, 966 F.3d 310, 328 (5th Cir. 2020) (same).

²²¹ USSG §2D1.1, comment. (n.11(A)).

²²² *Lee*, 966 F.3d at 328; *United States v. Bandstra*, 999 F.3d 1099, 1101 (8th Cir. 2021) (articulating same test); see, e.g., *Montenegro*, 1 F.4th at 946 (explaining that “the government is not required to prove that the firearm was used to facilitate the distribution of drugs for the firearms enhancement to apply; its mere presence during the drug offense is sufficient” and that the “potential use” is key); cf., e.g., *Denmark*, 13 F.4th at 319 (“We reject only the narrow position that §2D1.1(b)(1) can never apply unless the guns are physically near drugs or paraphernalia. And this case illustrates why: Although [the defendant] may never have possessed meth at his residence, police watched him agree to sell the meth via FaceTime in the same home where the guns were found a month later. That alone makes it difficult for him to show that the guns were not connected with his drug offense.”).

²²³ *United States v. Perez*, 5 F.4th 390, 401 (3d Cir. 2021) (citing *United States v. Napolitan*, 762 F.3d 297, 308 (3d Cir. 2014)). Cf. *United States v. Mosley*, 53 F.4th 947, 966 (6th Cir. 2022) (listing as factors “(1) the type of gun . . . , (2) its accessibility, (3) the presence of ammunition, (5) the gun’s proximity to illegal drugs, cash, or drug paraphernalia, (5) evidence that [the defendant] used the weapon, and (6) whether [the defendant] was engaged in drug trafficking, rather than manufacturing or possession”).

²²⁴ See USSG §1B1.3 (applicable relevant conduct principles); see, e.g., *Denmark*, 13 F.4th at 321 (affirming application of enhancement where “strong evidence” showed that the defendant “had access to weapons during his drug-trafficking activities” and the defendant failed to “produce[] any evidence to the contrary”); *United States v. Gomez*, 6 F.4th 992, 1008 (9th Cir. 2021) (“Even when defendants were arrested miles away from the firearms stored at their homes or places of business, we held that the defendants possessed weapons during the commission of the drug-trafficking offenses for purposes of this sentencing enhancement.”), cert. denied, 143 S. Ct. 493 (2022); *United States v. West*, 962 F.3d 183, 187 (6th Cir. 2020) (“[A]ll that the government need show is that the dangerous weapon be possessed during ‘relevant conduct.’” (citation omitted)).

²²⁵ See, e.g., *Gomez*, 6 F.4th at 1008 (“We have held that possession of the firearm may be actual or constructive . . .”).

²²⁶ *United States v. Bagcho*, 923 F.3d 1131, 1138 (D.C. Cir. 2019) (citation omitted).

defendant had constructive possession over a gun found in a storage unit where he “used the storage unit and . . . stored his drugs in the backpack where the gun was found, in the unit he paid for.”²²⁷ The court contrasted the defendant’s situation from “a mere passenger in a car, a roommate in a house where guns are found, or a roommate dealing drugs from a cohort’s bedroom.”²²⁸ In *United States v. Bagcho*, the D.C. Circuit held that the government failed to prove the defendant’s constructive ownership of a firearm found at a compound where the defendant operated a drug enterprise.²²⁹ The court observed that “no evidence link[ed] the weapon to [the defendant] beyond the fact that it was found at the compound he owned,” and that the defendant shared the compound with “many people” who lived and worked there.²³⁰

Courts also may apply the dangerous weapon enhancement to a defendant based on another person’s possession, so long as that possession was within the scope of a jointly undertaken criminal activity, in furtherance of that activity, and reasonably foreseeable.²³¹ The defendant need not be aware of the other person’s possession of the weapon for the enhancement to apply.²³² Acknowledging that firearms are common tools of the drug trade, some courts have, “absent evidence of exceptional circumstances,” found it “fairly inferable that a codefendant’s possession of a dangerous weapon is foreseeable to a defendant with reason to believe that their collaborative criminal venture includes an exchange of controlled substances for a large amount of cash.”²³³

On the other hand, at least one court, the Sixth Circuit, has “explicitly rejected the fiction that a firearm’s presence always will be foreseeable to persons participating in illegal drug transactions” and has required “at a minimum, . . . that there be objective evidence that the defendant knew the weapon was present, or at least knew it was reasonably probable that his coconspirator would be armed.”²³⁴ The court nonetheless recognized “that the *quantity* of drugs and cash involved in a conspiracy may make the possession of a firearm reasonably foreseeable,” such as in one case where “narcotics worth at least \$60,000 [were] located near the firearm.”²³⁵ Similarly, the Seventh Circuit has held that §2D1.1(b)(1) “requires more specific evidence tied to the case” than “that parties to any drug transaction might be armed because . . . drug dealing is dangerous.”²³⁶

²²⁷ 956 F.3d 1115, 1128 (9th Cir. 2020) (emphasis omitted).

²²⁸ *Id.*

²²⁹ *Bagcho*, 923 F.3d at 1138–40.

²³⁰ *Id.* at 1139.

²³¹ USSG §1B1.3(a)(1)(B).

²³² *See, e.g., United States v. Hernández*, 964 F.3d 95, 105 (1st Cir. 2020).

²³³ *Id.* (citation omitted).

²³⁴ *United States v. Barron*, 940 F.3d 903, 912 (6th Cir. 2019) (citations omitted).

²³⁵ *Id.* (citation omitted).

²³⁶ *United States v. Jones*, 56 F.4th 455, 502 (7th Cir. 2022).

To avoid double counting for the role of the weapon, the §2D1.1(b)(1) enhancement does not apply to a defendant convicted under 18 U.S.C. § 924(c) (for use or possession of a firearm in connection with an underlying crime of violence or drug trafficking crime), or where §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) otherwise applies, for the same underlying drug offense.²³⁷

Finally, application of the §2D1.1(b)(1) enhancement does not necessarily preclude application of the guideline “safety valve” at §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), which requires (among other things) that the “defendant did not . . . possess a firearm or other dangerous weapon.”²³⁸ That is because §2D1.1(b)(1) and §5C1.2 have different parameters (the latter requires the defendant, and not another person, to have possessed the weapon)²³⁹ and different burdens of proof (the former requires the defendant to show that it was “clearly improbable” that the weapon was connected with the offense while the latter must be proved by a preponderance of the evidence).²⁴⁰ The guideline and statutory safety valves are discussed below in Section VII.B.

2. Section 2D1.1(b)(2): Use of Violence or Threat of Violence

Section 2D1.1(b)(2) provides for a 2-level increase if the defendant “used violence, made a credible threat to use violence, or directed the use of violence.”²⁴¹ At least one court

²³⁷ USSG §2K2.4, comment. (n.4) (“A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).”).

²³⁸ USSG §5C1.2(a)(2).

²³⁹ See, e.g., USSG §5C1.2, comment. (n.4) (“[T]he term ‘defendant’ . . . limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.”); *United States v. Carrasquillo*, 4 F.4th 1265, 1273 n.1 (11th Cir. 2021) (“The daylight between §2D1.1(b)(1) and §5C1.2(a)(2) is most likely to exist in cases where §2D1.1(b)(1) applies ‘based on a co-conspirator’s reasonably foreseeable possession of a firearm in furtherance of jointly undertaken criminal activity.’ In such circumstances, ‘the circuits are unanimous in holding that possession of a weapon by a defendant’s co-conspirator does not render the defendant ineligible for safety-valve relief unless the government shows that the defendant induced the co-conspirator’s possession.’” (citations omitted)); *United States v. Hargrove*, 911 F.3d 1306, 1329 (10th Cir. 2019) (“[I]n evaluating the safety-valve provision, unlike §2D1.1(b)(1), we focus on the defendant’s ‘own conduct’ and ‘recognize a distinction between constructive and actual possession.’ Thus, while a co-conspirator’s possession of a firearm might satisfy §2D1.1(b)(1), the [g]uidelines commentary to the safety-valve provision limits a defendant’s accountability to his ‘own conduct.’” (citations omitted)).

²⁴⁰ See, e.g., *Carrasquillo*, 4 F.4th at 1272–73 (“Where ‘a firearm was possessed’ by the defendant personally, and yet the defendant also seeks the protection of the safety valve, the district court must determine whether the facts of the case show that a ‘connection’ between the firearm and the offense, though possible, is not probable.”).

²⁴¹ USSG §2D1.1(b)(2); see also, e.g., *United States v. Griffith*, 928 F.3d 855, 873 (10th Cir. 2019) (affirming sentencing enhancement where the district court found that the defendant “was protecting not only his family, but also his property, and his property included marijuana” and rejecting the defendant’s argument that his threats to shoot people on his property were made only “in response to an attack on his home”).

has defined “violence” to “encompass[] acts where one uses physical force with the intent to injure, regardless whether an injury actually occurs.”²⁴² Courts also apply the enhancement where the defendant “credibly threatens a violent act, but where that act has not yet come to fruition,”²⁴³ or directs others to use violence.²⁴⁴

The dangerous weapon and use of violence enhancements may be applied cumulatively, as is generally the case with specific offense characteristics.²⁴⁵ As with §2D1.1(b)(1), however, §2D1.1(b)(2) does not apply where a defendant is sentenced pursuant to §2K2.4.²⁴⁶

3. Section 2D1.1(b)(3): Importation Involving Aircraft and Boats

Section 2D1.1(b)(3) provides for a 2-level increase and minimum offense level of 26 for import/export offenses in which:

- (A) An aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance;
- (B) A submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used; or
- (C) The defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance.²⁴⁷

Disputes occasionally arise over a defendant’s role as an “pilot” or “navigator” on a boat used to import a controlled substance. The courts that have considered the issue have concluded that a defendant does not need to have a particular technical skill or position of authority to qualify.²⁴⁸ Rather, the enhancement covers any defendant who fills one of the

²⁴² United States v. Pineda-Duarte, 933 F.3d 519, 523–25 (6th Cir. 2019) (vacating and remanding for the district court to determine whether the defendant “used violence” against police by swinging a shovel in their direction).

²⁴³ *Id.* at 522, 526 (collecting cases); *see also* United States v. Dennis, 41 F.4th 732, 744 (5th Cir. 2022) (affirming enhancement where “[an] agent entering [the defendant’s] home saw the barrel of an assault rifle protrude around a corner, withdraw, and emerge again”), *petition for cert. filed*, No. 22-6473 (U.S. Jan. 6, 2023).

²⁴⁴ *See, e.g.*, United States v. McDonald, 43 F.4th 1090, 1098 (10th Cir. 2022) (district court did not clearly err in determining a defendant directed violence by instructing a co-conspirator “to tell her nephew to ‘handle’ [a confidential informant’s] cooperation with police”); United States v. Perez, 962 F.3d 420, 451 (9th Cir. 2020) (affirming enhancement based in part on defendant’s direction of the use of violence where “he took young [gang] members to the neighboring Rockwood community to ‘put in work,’ during which time they killed a Rockwood gang member”).

²⁴⁵ USSG §2D1.1, comment. (n.11(B)).

²⁴⁶ USSG §2K2.4, comment. (n.4).

²⁴⁷ USSG §2D1.1(b)(3).

²⁴⁸ *See, e.g.*, United States v. Solis, 18 F.4th 395, 404 (2d Cir. 2021) (collecting cases), *cert. denied*, 142 S. Ct. 1185 (2022); United States v. Trinidad, 839 F.3d 112, 115–16 (1st Cir. 2016) (“[W]e reject [the defendant’s]

listed roles.²⁴⁹ Further, the enhancement applies even where the defendant is stopped before actually completing the importation into the United States.²⁵⁰

4. *Section 2D1.1(b)(12): Maintaining a Premises for Manufacturing or Distributing Controlled Substances*

Section 2D1.1(b)(12) provides for a 2-level increase if “the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance,”²⁵¹ sometimes called the “stash-house enhancement.”²⁵² To evaluate whether the defendant “maintained” a premises, courts consider factors such as “(A) whether the defendant held a possessory interest in (*e.g.*, owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.”²⁵³ Some circuits have suggested that a defendant may “maintain” a premises as a stash house even where other individuals also retain control over the premises.²⁵⁴ On the other hand, a defendant does

contention that a person can only qualify as a navigator if he or she knows how to program or adjust a GPS—or other navigational device—and not if he merely relies on it to keep the boat on course.”).

²⁴⁹ See, *e.g.*, *Solis*, 18 F.4th at 403–04 (“Here, defendants’ conduct is consistent with the ordinary meaning of ‘pilot’ and ‘navigator’ as they were both employed to steer or navigate a boat”; additionally one defendant was observed piloting the boat and identified himself as the captain while another “piloted and navigated the boat for at least part of the trip and, as he concedes, steered the boat.”); *United States v. Cruz-Mendez*, 811 F.3d 1172, 1176 (9th Cir. 2016) (“By [the defendant’s] own account, he was a lifelong fisherman hired to transport marijuana bales, and in so doing he operated a boat laden with substantial cargo in open water by controlling both its speed and direction. Such conduct fully justifies the imposition of the two-point enhancement.” (footnote omitted)).

²⁵⁰ See, *e.g.*, *United States v. Rojas*, 812 F.3d 382, 415 (5th Cir. 2016) (no plain error in applying enhancement to defendant even though his plane “was stopped before the actual importation was completed” (quoting *United States v. Rendon*, 354 F.3d 1320, 1330 (11th Cir. 2003))).

²⁵¹ USSG §2D1.1(b)(12).

²⁵² See, *e.g.*, *United States v. Melendez-Rosado*, 57 F.4th 32, 35 (1st Cir. 2023).

²⁵³ USSG §2D1.1, comment. (n.17).

²⁵⁴ See, *e.g.*, *United States v. Barnett*, 48 F.4th 216, 220–21 (4th Cir. 2022) (although a co-conspirator “owned and occupied the house” and “there was no evidence [the defendant] lived there,” enhancement was appropriate because the defendant “claimed ownership of the bulk drugs stored inside the house alongside the accoutrements of drug trafficking,” “frequented” the house to “access[] the drugs he stored there in order to portion and sell them” both on the property and nearby “multiple times per day,” invited an informant to purchase drugs at the house, and fled from law enforcement into the house), *petition for cert. filed*, No. 22-6414 (U.S. Dec. 29, 2022); *United States v. Ford*, 22 F.4th 687, 694 (7th Cir. 2022) (affirming the enhancement because the defendant exercised sufficient control over a room rented by a tenant, based on evidence that the defendant was the main user and occupant of the room and stored and sold drugs in the room); *United States v. McArthur*, 11 F.4th 655, 662 (8th Cir. 2021) (rejecting the defendant’s argument that his coconspirator alone maintained the stash house where the defendant “encouraged members of [his gang] to use his residence to prepare drugs for distribution”).

not maintain a stash house simply by owning drug processing equipment that is stored at a premises over which the defendant lacks control.²⁵⁵

Drug manufacture or distribution “need not be the sole purpose for which the premises was maintained,” but must be a primary or principal—not incidental or collateral—use, as evaluated by the frequency with which the premises is used by the defendant for drug activity and for lawful purposes.²⁵⁶ The Tenth Circuit has characterized this approach as a “reciprocal sliding scale,” such that “[a] substantial drug distribution that regularly and quickly passes through the home (two or three days) on a bi-monthly or tri-monthly basis may qualify as a primary use of the premises for drug-related purposes much the same as an exquisitely frequent, but relatively paltry, operation.”²⁵⁷ The court explained that, “[i]n the same way that a residence is considered to be a home 100% of the time even when not occupied 100% of the time, a home may be used for the primary purpose of unlawful drug activity even when such activity is not constant.”²⁵⁸ Thus, the enhancement still can apply to premises used as family homes as long as they also were used for the purpose of substantial drug trafficking activity.²⁵⁹

5. Section 2D1.1(b)(18): Safety Valve

Section 2D1.1(b)(18) provides a 2-level reduction where a defendant satisfies the five criteria set forth in §5C1.2(a), the guideline “safety valve.”²⁶⁰ This guideline provision

²⁵⁵ See, e.g., *United States v. Lord*, 915 F.3d 1009, 1022 (5th Cir. 2019) (“[The defendant’s] control appears to be demonstrated more so through his possessory interest in the pill press than the premises itself. Consequently, the enhancement is improper.”).

²⁵⁶ USSG §2D1.1, comment. (n.17); see, e.g., *United States v. Mier-Garces*, 967 F.3d 1003, 1033–34 (10th Cir. 2020) (district court did not clearly err in finding that the defendant did not actually live at stash house and explaining that even if the defendant “had stayed there regularly, the regular and repeated use of the home for drug trafficking would still have provided the district court with ample basis to find that a primary or principal use of the home was for drug distribution”); *United States v. Johnson*, 737 F.3d 444, 447–48 (6th Cir. 2013) (upholding enhancement where defendant “maintained at least one room in his home for purpose of storing marijuana for later distribution”).

²⁵⁷ *United States v. Lozano*, 921 F.3d 942, 946 (10th Cir. 2019) (citation omitted) (relevant factors include: “(1) the frequency and number of drugs sales occurring at the home; (2) the quantities of drugs bought, sold, manufactured, or stored in the home; (3) whether drug proceeds, employees, customers, and tools of the drug trade (firearms, digital scales, laboratory equipment, and packaging materials) are present in the home, and (4) the significance of the premises to the drug venture”).

²⁵⁸ *Id.* (citation omitted).

²⁵⁹ *United States v. Melendez-Rosado*, 57 F.4th 32, 38–41 (1st Cir. 2023) (“a premises that serves both as a family’s place of residence and as the hub of a drug-distribution enterprise has two principal uses[, and the] fact that one principal use is for drug distribution permits a sentencing court to impose the stash-house enhancement”; collecting cases in support); *United States v. Hernandez Lopez*, 24 F.4th 1205, 1208 (8th Cir. 2022) (enhancement was appropriate where the defendant stored drugs in his family home’s basement and the basement was not otherwise used by anyone else), *as redacted* 52 F.4th 1035 (8th Cir. 2022).

²⁶⁰ USSG §2D1.1(b)(18).

and its relationship with the statutory safety valve are addressed in Section VII.B.2 below.²⁶¹

6. Other Specific Offense Characteristics

Other infrequently applied specific offense characteristics include the following:

- Section 2D1.1(b)(4) provides for a 2-level increase if “the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility.”²⁶²
- Section 2D1.1(b)(5) provides for a 2-level increase for certain amphetamine and methamphetamine importation and manufacturing offenses, but it does not apply if the defendant receives the §2D1.1(b)(3) enhancement for importation using aircraft or boats.²⁶³
- Section 2D1.1(b)(6) provides for a 2-level increase for defendants “convicted under 21 U.S.C. § 865,” a statutory sentencing provision that applies to certain methamphetamine-related offenses.²⁶⁴
- Section 2D1.1(b)(7) provides for a 2-level increase for “distribut[ing] a controlled substance through mass-marketing by means of an interactive computer service.”²⁶⁵ The enhancement would apply, for example, to a defendant who operated a website to promote the sale of a controlled

²⁶¹ As explained further in Section VII.B.1, the First Step Act of 2018 made changes to the statutory safety valve, including modifying the criminal history requirements for safety valve relief. Pub. L. No. 115–391, § 402, 132 Stat. 5194, 5221.

²⁶² USSG §2D1.1(b)(4); *see, e.g.*, *United States v. Vanderpool*, 566 F.3d 754, 757–58 (8th Cir. 2009) (applying enhancement where “the object of [the defendant’s] offense was to distribute a controlled substance to her cellmate in the Lincoln County jail”); *United States v. Smith*, 824 F. App’x 508, 511–12 (9th Cir. 2020) (applying enhancement).

²⁶³ USSG §2D1.1(b)(5); USSG §2D1.1, comment. (n.12); *see, e.g.*, *United States v. Brune*, 991 F.3d 652, 667 (5th Cir. 2021) (upholding enhancement where the quantity of methamphetamine sold by the defendant and the fact that his “supplier was a member of the Michoacán Cartel based in Dallas,” which “borrow[ed] its name from a Mexican state,” supported the inference that at least some of the drugs were imported), *cert. denied*, 142 S. Ct. 755 (2022).

In *United States v. Serfass*, the Fifth Circuit held that the plain language of §2D1.1(b)(5) supported the conclusion that the enhancement applied to “a defendant who possesses methamphetamine that had itself been unlawfully imported” regardless of whether he or she had actual knowledge of the importation. 684 F.3d 548, 553 (5th Cir. 2012). However, the Ninth Circuit in *United States v. Job*, rejected the Fifth’s Circuit’s conclusion and instead held that actual knowledge is required. 871 F.3d 852, 871–72 (9th Cir. 2017).

²⁶⁴ USSG §2D1.1(b)(6).

²⁶⁵ USSG §2D1.1(b)(7).

substance, but it would not apply to coconspirators who used the internet to communicate with one another.²⁶⁶

- Section 2D1.1(b)(8) provides for a 2-level increase if “the offense involved the distribution of an anabolic steroid and a masking agent.”²⁶⁷
- Section 2D1.1(b)(9) provides for a 2-level increase if the defendant “distributed an anabolic steroid to an athlete.”²⁶⁸
- Section 2D1.1(b)(10) provides for a 2-level increase if the defendant “was convicted under 21 U.S.C. § 841(g)(1)(A),”²⁶⁹ which prohibits the distribution of “date rape” drugs over the internet while “knowing or [having] reasonable cause to believe that [] the drug would be used in the commission of criminal sexual conduct.”²⁷⁰
- Section 2D1.1(b)(11) provides for a 2-level increase if the defendant “bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense.”²⁷¹
- Section 2D1.1(b)(13) provides for a 4-level increase if the defendant “knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue.”²⁷²
- Section 2D1.1(b)(14) provides for a variety of enhancements and minimum offense levels for drug offenses that result in environmental harm²⁷³ and for

²⁶⁶ USSG §2D1.1, comment. (n.13). “Interactive computer service” is defined by reference to 47 U.S.C. § 230(f)(2). *Id.*

²⁶⁷ USSG §2D1.1(b)(8). A “masking agent” is a substance that “prevents the detection of the anabolic steroid in an individual’s body.” USSG §2D1.1, comment. (n.14).

²⁶⁸ USSG §2D1.1(b)(9); *see* USSG §2D1.1, comment. (n.15) (defining “athlete”).

²⁶⁹ USSG §2D1.1(b)(10).

²⁷⁰ 21 U.S.C. § 841(g)(1)(A).

²⁷¹ USSG §2D1.1(b)(11). The enhancement “does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant.” USSG §2D1.1, comment. (n.16). “Such conduct [instead] is covered by §3C1.1 (Obstructing or Impeding the Administration of Justice) and, if applicable, §2D1.1(b)(16)(D).” *Id.*

²⁷² USSG §2D1.1(b)(13); *see also* USSG App. C, amend. 807 (effective Nov. 1, 2018) (adding this provision). The term “fentanyl analogue” is defined as “any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).” USSG §2D1.1(c)(Note J).

²⁷³ *See* USSG §2D1.1(b)(14)(A) (“If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.”).

methamphetamine offenses that endanger minors, the environment, and other persons.²⁷⁴

- Section 2D1.1(b)(15) provides for a 2-level enhancement if the offense involved the cultivation of marijuana on government land or while trespassing on tribal or private land, and the defendant receives an aggravating role adjustment under §3B1.1.²⁷⁵
- Section 2D1.1(b)(16) provides for a 2-level “super-aggravating” role enhancement for defendants who, having received an aggravating role adjustment under §3B1.1, satisfy at least one of five criteria: exploitation of others in a distribution offense; distribution to minors, the elderly, or vulnerable persons; direct involvement in importation; obstruction of justice; or criminal conduct as a livelihood.²⁷⁶
- Section 2D1.1(b)(17) provides for a 2-level reduction for defendants who, having received the 4-level minimal participant reduction in §3B1.2(a), satisfy additional enumerated criteria.²⁷⁷

C. SECTION 2D1.1(d): CROSS REFERENCES

1. Section 2D1.1(d)(1): Murder

Section 2D1.1(d)(1) provides a cross reference to §2A1.1 (First Degree Murder) and §2A1.2 (Second Degree Murder) if a victim was killed under circumstances that would constitute murder.²⁷⁸ Murder is defined in 18 U.S.C. § 1111 as “the unlawful killing of a human being with malice aforethought.”²⁷⁹ Ordinary relevant conduct principles apply to

²⁷⁴ See USSG §2D1.1(b)(14)(B)–(D); *see, e.g.*, United States v. Owen, 940 F.3d 308, 313–17 (6th Cir. 2019) (defendant’s transportation of dangerous items used in the manufacture of methamphetamine in a vehicle presented a risk of harm to a minor riding in the vehicle); United States v. Loesel, 728 F.3d 749, 752 (8th Cir. 2013) (enhancement applied to increased risk of harm to coconspirators).

²⁷⁵ USSG §2D1.1(b)(15).

²⁷⁶ USSG §2D1.1(b)(16); *see, e.g.*, United States v. Jones, 56 F.4th 455, 503–05 (7th Cir. 2022) (applying criminal livelihood super-aggravator enhancement in §2D1.1(b)(16)(E)); United States v. Denson, 967 F.3d 699, 706–08 (8th Cir. 2020) (same). *But see* United States v. Aguilar-Alonzo, 944 F.3d 544, 547 n.1, 552 (5th Cir. 2019) (concluding that the enhancement now in §2D1.1(b)(16)(A) did not apply to the defendant’s involvement of his girlfriend in a distribution offense where the only evidence in support was “the existence of the relationship and [his girlfriend’s] subjective fear of a breakup” if she refused to help).

²⁷⁷ USSG §2D1.1(b)(17) (requiring that “(A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense; (B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and (C) the defendant had minimal knowledge of the scope and structure of the enterprise”).

²⁷⁸ USSG §2D1.1(d)(1).

²⁷⁹ 18 U.S.C. § 1111(a).

determine whether the murder cross reference applies.²⁸⁰ This cross reference applies when the offense level for the applicable murder guideline is higher than the offense level determined under §2D1.1.²⁸¹

2. Section 2D1.1(d)(2): Crime of Violence

Section 2D1.1(d)(2) provides a cross reference to §2X1.1 (Attempt, Solicitation, or Conspiracy) where a defendant is convicted under 21 U.S.C. § 841(b)(7).²⁸²

To be convicted under section 841(b)(7), a defendant must, “with intent to commit a crime of violence . . . against an individual,” distribute a controlled substance or analogue “to that individual without that individual’s knowledge.”²⁸³ “Crime of violence” is defined in 18 U.S.C. § 16 as “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.”²⁸⁴ The term “without that individual’s knowledge” means “the individual is unaware that a substance with the ability to alter that individual’s ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.”²⁸⁵

The cross reference applies when the applicable offense level under §2X1.1 is higher than the offense level determined under §2D1.1.²⁸⁶

V. OTHER OFFENSE GUIDELINES

In addition to §2D1.1, Chapter 2, Part D (Offenses Involving Drugs and Narcoterrorism) sets forth other, less frequently used drug offense guidelines, several of which are addressed below.

²⁸⁰ USSG §1B1.3(a) (unless otherwise specified, cross references shall be determined based on relevant conduct); *see, e.g.*, United States v. Shavers, 955 F.3d 685, 699 (8th Cir. 2020) (rejecting the defendant’s argument that murder was not relevant conduct to drug offense and explaining that “there was ample evidence presented at trial supporting the district court’s finding, by the preponderance of the evidence, that [the defendant] was the one who killed [the victim] during the course of, and in furtherance of, a drug deal, even if the jury acquitted [the defendant] on the firearm charge”).

²⁸¹ For more information on the murder guidelines at §§2A1.1 and §2A1.2, including the operation of cross references to these guidelines, *see generally* U.S. SENT’G COMM’N, PRIMER ON SELECTED OFFENSES AGAINST THE PERSON AND VICAR 1–5 (2022), <https://www.uscc.gov/guidelines/primers/selected-offenses-against-person-and-vicar>.

²⁸² USSG §2D1.1(d)(2).

²⁸³ 21 U.S.C. § 841(b)(7)(A).

²⁸⁴ 18 U.S.C. § 16(a); 21 U.S.C. § 841(b)(7)(A). For more information regarding the term “crime of violence,” *see generally* CATEGORICAL APPROACH PRIMER, *supra* note 16.

²⁸⁵ 21 U.S.C. § 841(b)(7)(B).

²⁸⁶ USSG §2D1.1(d)(2).

A. SECTION 2D1.2 (DRUG OFFENSES OCCURRING NEAR PROTECTED LOCATIONS OR INVOLVING UNDERAGE OR PREGNANT INDIVIDUALS; ATTEMPT OR CONSPIRACY)

Violations of 21 U.S.C. §§ 859 (Distribution to persons under age twenty-one), 860 (Distribution or manufacturing in or near schools and colleges), and 861 (Employment or use of persons under 18 years of age in drug operations) are among the offenses most commonly specified to the offense guideline at §2D1.2.²⁸⁷ Section 2D1.2 applies “only in a case in which the defendant is convicted of a statutory violation of drug trafficking in a protected location or involving an underage or pregnant individual (including an attempt or conspiracy to commit such a violation) or in a case in which the defendant stipulated to such a statutory violation.”²⁸⁸

Section 2D1.2(a) sets forth four alternative base offense levels, the greatest of which applies:

- (1) 2 plus the offense level from §2D1.1²⁸⁹ applicable to the quantity of controlled substances directly involving a protected location or an underage or pregnant individual; or
- (2) 1 plus the offense level from §2D1.1 applicable to the total quantity of controlled substances involved in the offense; or
- (3) 26, if the offense involved a person less than eighteen years of age; or
- (4) 13, otherwise.²⁹⁰

Where only part of the relevant conduct directly involves a protected location, underage person, or pregnant individual, the offense levels in paragraphs (1) and (2) may differ.²⁹¹ For example, if a defendant (as part of the same course of conduct):

sold 5 grams of heroin near a protected location and 10 grams of heroin elsewhere, the offense level from subsection (a)(1) would be level 14 (two plus the offense level for the sale of 5 grams of heroin near the protected location); the offense level from subsection (a)(2) would be level 15 (one plus the offense level for the sale of 15 grams of heroin, the total amount of heroin involved in the offense).²⁹²

²⁸⁷ USSG §2D1.2, statutory provisions; *see also* USSG App. A (Statutory Index).

²⁸⁸ USSG §2D1.2, comment. (n.1) (citing USSG §1B1.2(a)).

²⁸⁹ Application of the offense level from §2D1.1 refers to the entire offense guideline, including any applicable specific offense characteristics. *See* USSG §1B1.5, comment. (n.1).

²⁹⁰ USSG §2D1.2(a).

²⁹¹ USSG §2D1.2, comment. (n.1).

²⁹² *Id.*

Provided that the offense did not also involve any person under 18, the applicable base offense level would be 15 pursuant to §2D1.1(a)(2) as the greatest possible base offense level.

B. SECTION 2D1.6 (USE OF COMMUNICATION FACILITY IN COMMITTING DRUG OFFENSE; ATTEMPT OR CONSPIRACY)

Section 2D1.6 applies to violations of 21 U.S.C. § 843(b).²⁹³ Section 843(b), known as the “telephone count” provision,²⁹⁴ makes it unlawful “for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under” the federal drug laws.²⁹⁵ The statute defines “communication facility” as “any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.”²⁹⁶ “Each separate use of a communication facility” constitutes a separate offense.²⁹⁷ Absent a prior felony conviction under the federal drug laws, which increase the maximum to eight years, violations of section 843(b) carry a maximum term of imprisonment of four years.²⁹⁸

The base offense level under §2D1.6 is the level applicable to the underlying offense.²⁹⁹

C. SECTION 2D1.8 (RENTING OR MANAGING A DRUG ESTABLISHMENT; ATTEMPT OR CONSPIRACY)

Section 2D1.8 applies to violations of 21 U.S.C. § 856 and attempts and conspiracies to violate that statute.³⁰⁰ Section 2D1.8(a) provides two alternative base offense levels. If the defendant participated in the underlying controlled substance offense, §2D1.1 sets the applicable base offense level.³⁰¹ But if “the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises,” the offense level is 4 less than that provided by §2D1.1 for the underlying offense, with a maximum of 26.³⁰²

²⁹³ USSG App. A (Statutory Index). It also applies to attempts and conspiracies under 21 U.S.C. §§ 846, 963. *Id.*

²⁹⁴ See, e.g., *United States v. Hughes*, 726 F.3d 656, 658 (5th Cir. 2013) (using term); *United States v. Green*, 599 F.3d 360, 363 (4th Cir. 2010) (same).

²⁹⁵ 21 U.S.C. § 843(b).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ 21 U.S.C. § 843(d)(1).

²⁹⁹ USSG §2D1.6(a).

³⁰⁰ USSG App. A (Statutory Index).

³⁰¹ USSG §2D1.8(a)(1).

³⁰² USSG §2D1.8(a)(2).

Participation is viewed broadly. For example, a defendant “participates” in the underlying offense (and is ineligible for the §2D1.8(a)(2) offense level cap) where he possesses a dangerous weapon in connection with the offense, guards a cache of controlled substances, arranges for the use of the premises for drug activity, allows the use of more than one premises, makes calls to facilitate the underlying offense, or otherwise assists in its commission.³⁰³ Further, §2D1.8(a)(2) does not apply to defendants who “had previously allowed any premises to be used as a drug establishment without regard to whether such prior misconduct resulted in a conviction.”³⁰⁴ To benefit from §2D1.8(a)(2), the defendant must have “initially leased, rented, purchased, or otherwise acquired a possessory interest in the premises for a legitimate purpose.”³⁰⁵

The circuits have diverged as to who bears the burden of proving the defendant’s participation in the underlying drug offense. The Ninth and D.C. Circuits have held that the government bears the burden of showing the defendant’s participation, while the Tenth Circuit has held that the defendant bears the burden of showing that he did not participate in the underlying offense.³⁰⁶ Other courts have acknowledged but not resolved the issue.³⁰⁷

A defendant who receives a base offense level under §2D1.8(a)(2) is ineligible for a mitigating role adjustment under §3B1.2.³⁰⁸

³⁰³ USSG §2D1.8, comment. (n.1). *Compare, e.g.,* United States v. Dengler, 695 F.3d 736, 739 (8th Cir. 2012) (affirming application of §2D1.8(a)(1) instead of §2D1.8(a)(2) where the defendant “helped coconspirators distribute drugs, purchased drugs from coconspirators, and distributed drugs to his own customers”), *with* United States v. Patch, 9 F.4th 43, 46–48 (1st Cir. 2021) (reversing application of §2D1.8(a)(1) over §2D1.8(a)(2) where the government’s evidence showed only that, other than allowing the use of her apartment, the defendant rode with her boyfriend while he was picking up drugs—defendant “was merely along for the ride as a passenger”—and was “aware” of what was going on).

³⁰⁴ USSG §2D1.8, comment. (n.1).

³⁰⁵ *Id.*

³⁰⁶ *Compare In re Sealed Case*, 552 F.3d 841, 846–47 (D.C. Cir. 2009) (“It makes no difference whatsoever whether the defendant invokes §2D1.8(a)(2)—the [g]overnment cannot seek a sentence based on §2D1.8(a)(1) unless it first proves participation.”), *and* United States v. Leasure, 319 F.3d 1092, 1098 (9th Cir. 2003) (“[B]ecause the purpose of §2D1.8 is to establish a defendant’s base offense level, the government must prove the fact of participation to avoid requiring a defendant to prove ‘the negative of a proposition.’”), *with* United States v. Dickerson, 195 F.3d 1183, 1189–90 (10th Cir. 1999) (suggesting that “subsection (a)(1) effectively presumes that a defendant personally participated in the underlying controlled substance offense,” so “the burden falls on a criminal defendant to prove he did not personally participate in order to obtain the benefits of subsection (a)(2)”).

³⁰⁷ *See, e.g., Patch*, 9 F.4th at 46 (declining to resolve issue where government conceded that it bore the burden); *Dengler*, 695 F.3d at 739 (declining to resolve issue where evidence compelled result regardless of burden).

³⁰⁸ USSG §2D1.8(b)(1).

D. SECTION 2D1.11 (UNLAWFULLY DISTRIBUTING, IMPORTING, EXPORTING OR POSSESSING A LISTED CHEMICAL; ATTEMPT OR CONSPIRACY)

Though structured similarly to §2D1.1, §2D1.11 applies only to violations of statutes pertaining to listed chemicals, which serve as common precursors for the manufacture of controlled substances. Such statutes include 21 U.S.C. §§ 841(c)(1)–(2), (f)(1), 865, and 960(d)(1)–(4).³⁰⁹ As set forth in 2D1.11(a), the base offense level is primarily determined using at least one of the two Chemical Quantity Tables in §2D1.11(d) and (e).³¹⁰ Subsection (d) provides the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table for methamphetamine and amphetamine precursors.³¹¹ Subsection (e) provides the Chemical Quantity Table for all other precursors.³¹² The tables work similarly to the Drug Quantity Table, with base offense levels corresponding to the quantity of the listed chemicals.

Where a defendant receives a mitigating role adjustment under §3B1.2 and the base offense level per the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table (not the general Chemical Quantity Table) is (i) 32, (ii) 34 or 36, or (iii) 38, the offense level is decreased by 2, 3, or 4 levels, respectively.³¹³

Where the offense involves two or more chemicals from the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, the base offense level is determined by the aggregate quantity of the chemicals.³¹⁴ For any other offense involving two or more chemicals, regardless of whether the chemicals are from different tables or categories, the quantity of the single chemical that produces the greatest offense level is used to determine the base offense level.³¹⁵ For cases involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, the weight of the chemicals contained within the tablets is used to calculate the base offense level.³¹⁶

³⁰⁹ USSG App. A (Statutory Index); *cf.*, *e.g.*, United States v. Chan, 729 F. App'x 765, 770–71 (11th Cir. 2018) (explaining application of §2D1.11 to violation of 21 U.S.C. § 841(f)(1)).

³¹⁰ USSG §2D1.11(a).

³¹¹ USSG §2D1.11(d).

³¹² USSG §2D1.11(e).

³¹³ USSG §2D1.11(a).

³¹⁴ USSG §2D1.11(d)–(e)(Note B).

³¹⁵ USSG §2D1.11(d)–(e)(Note A).

³¹⁶ USSG §2D1.11(d)–(e)(Note C); *see, e.g.*, United States v. Jumah, 599 F.3d 799, 813 (7th Cir. 2010) (plain error “to use the gross weight of the pseudoephedrine tablets”).

Section 2D1.11(b) provides six specific offense characteristics:

- (1) A 2-level increase applies if a dangerous weapon or firearm was possessed.³¹⁷
- (2) A 3-level decrease applies if the defendant was convicted of 21 U.S.C. § 841(c)(2) or (f)(1), or § 960(d)(2)–(4), “unless the defendant knew or believed that the listed chemical was to be used to manufacture a controlled substance unlawfully.”³¹⁸
- (3) A 2-level increase applies if the offense involves unlawful releases into the environment or unlawful transportation, storage, or disposal of hazardous waste.³¹⁹
- (4) A 2-level increase applies if the defendant or a person for whom the defendant is accountable under the relevant conduct rules “distributed a listed chemical through mass-marketing by means of an interactive computer service.”³²⁰
- (5) A 2-level increase applies for defendants convicted under 21 U.S.C. § 865, which provides for enhanced penalties for anyone who smuggles methamphetamine precursors into the United States while using a “facilitated entry program.”³²¹
- (6) A 2-level decrease applies for defendants who satisfy the requirements of the guideline safety valve at §5C1.2.³²²

Where the offense involves unlawfully manufacturing or attempting to manufacture a controlled substance, §2D1.1 applies if the resulting offense level would be greater than that determined under §2D1.11.³²³ For this cross reference to apply, the defendant or a

³¹⁷ USSG §2D1.11(b)(1); *see also* USSG §2D1.11, comment. (n.2); *see also supra* Section IV.B.1 (discussing similar enhancement in §2D1.1(b)(1)).

³¹⁸ USSG §2D1.11(b)(2); *see also* USSG §2D1.11, comment. (n.3) (such convictions do not require “that the defendant have knowledge or an actual belief that the listed chemical was to be used to manufacture a controlled substance unlawfully”). *Compare, e.g.,* 21 U.S.C. § 841(c)(2) (criminalizing the knowing or intentional possession or distribution of “a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance”), *with id.* § 841(c)(1) (criminalizing the knowing or intentional possession of “a listed chemical with intent to manufacture a controlled substance”).

³¹⁹ USSG §2D1.11(b)(3); *see also* USSG §2D1.11, comment. (n.4).

³²⁰ USSG §2D1.11(b)(4); *see also* USSG §2D1.11, comment. (n.5); *see also supra* Section IV.B.6 (noting similar enhancement in §2D1.1(b)(7)).

³²¹ USSG §2D1.11(b)(5); *see also* USSG §2D1.11, comment. (n.6) (setting forth instructions on how to divide up the sentence to satisfy the consecutive term of imprisonment mandated by 21 U.S.C. § 865).

³²² USSG §2D1.11(b)(6); *see also* USSG §2D1.11, comment. (n.7) (explaining that the applicability of subsection (b)(6) “shall be determined without regard to the offense of conviction” and that “[i]f subsection (b)(6) applies, §5C1.2(b) does not apply”).

³²³ USSG §2D1.11(c)(1).

person for whom the defendant is accountable under the relevant conduct rules must have “completed the actions sufficient to constitute the offense of unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully.”³²⁴

A defendant may be convicted of both a listed chemical offense and a related offense involving substances covered by §2D1.1.³²⁵ In such circumstances, the offense levels are determined separately under each guideline.³²⁶ The final offense level then is determined after applying the multiple count grouping rules under §3D1.2(b).³²⁷

E. SECTION 2D1.12 (UNLAWFUL POSSESSION, MANUFACTURE, DISTRIBUTION, TRANSPORTATION, EXPORTATION, OR IMPORTATION OF PROHIBITED FLASK, EQUIPMENT, CHEMICAL, PRODUCT, OR MATERIAL; ATTEMPT OR CONSPIRACY)

For violations of 21 U.S.C. §§ 843(a)(6)–(7) and 864, including attempts and conspiracies,³²⁸ Appendix A specifies the offense guideline at §2D1.12.³²⁹ Section 2D1.12(a) sets forth two alternative base offense levels: 12, which applies where the defendant intended to, or knew or believed that a prohibited flask, equipment, or chemical was to be used to, manufacture a controlled substance; or 9, which applies when the defendant only had “reasonable cause to believe” that the material would be so used.³³⁰

Section 2D1.12(b) provides four specific offense characteristics:

- (1) A 2-level increase applies if the defendant intended to manufacture methamphetamine, or “knew, believed, or had reasonable cause to believe that the prohibited flask, equipment, chemical, product, or material was to be used to manufacture methamphetamine.”³³¹

³²⁴ USSG §2D1.11, comment. (n.8); *see, e.g.*, *United States v. Swafford*, 639 F.3d 265, 267–68 (6th Cir. 2011) (upholding application of cross reference where the defendant “had a ‘criminal plan, scheme, endeavor, or enterprise’ with several of the methamphetamine cooks, it was ‘reasonably foreseeable’ that those customers would manufacture methamphetamine[,] and [the defendant’s] sale of iodine was ‘in furtherance of the jointly undertaken criminal activity’”).

³²⁵ USSG §2D1.11, comment. (n.9).

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ 21 U.S.C. § 843(a)(6) and (7) criminalize the knowing or intentional possession, manufacture, distribution, or import/export of equipment or chemicals “knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance or listed chemical.” Section 864 criminalizes stealing or transporting stolen anhydrous ammonia “knowing, intending, or having reasonable cause to believe” that it “will be used to manufacture a controlled substance.” 21 U.S.C. § 864.

³²⁹ USSG App. A (Statutory Index).

³³⁰ USSG §2D1.12(a).

³³¹ USSG §2D1.12(b)(1).

- (2) A 2-level increase applies if the offense involved unlawful releases into the environment or unlawful transportation, treatment, storage, or disposal of hazardous waste.³³²
- (3) A 2-level increase applies if the defendant or a person for whom the defendant is accountable under the relevant conduct rules “distributed any prohibited flask, equipment, chemical, product, or material through mass-marketing by means of an interactive computer service.”³³³
- (4) A 6-level increase applies if the offense involved stealing or transporting stolen anhydrous ammonia.³³⁴

As with §2D1.11(c)(1), §2D1.1 applies where the offense involves unlawfully manufacturing or attempting to manufacture a controlled substance and the resulting offense level would be greater than that determined under §2D1.12.³³⁵

F. SECTION 2D2.1 (UNLAWFUL POSSESSION; ATTEMPT OR CONSPIRACY)

Section 2D2.1 primarily applies to simple possession of a controlled substance in violation of 21 U.S.C. § 844(a)³³⁶ and provides three alternative base offense levels: 8 for heroin, Schedule I and II opiates (including analogues), and cocaine base; 6 for cocaine, flunitrazepam, LSD, and PCP; and 4 for any other controlled substance or list I chemical.³³⁷ Distribution of “a small amount of marijuana for no remuneration” in violation of 21 U.S.C. § 841(b)(4) is treated as simple possession and sentenced under §2D2.1.³³⁸

Section 2D2.1(b)(1) instructs the court to apply a cross reference to §2P1.2 (Providing or Possessing Contraband in Prison) for offenses involving possession of a controlled substance in a prison, correctional facility, or detention facility.³³⁹ Section 2P1.2

³³² USSG §2D1.12(b)(2); *see also* USSG §2D1.12, comment. (n.3) (enhancement applies to conduct that would violate federal environmental laws; describing circumstances in which an upward departure may be warranted); *see, e.g.*, *United States v. Landmesser*, 378 F.3d 308, 312–13 & n.8 (3d Cir. 2004) (discussing and applying Application Note 3).

³³³ USSG §2D1.12(b)(3); *see also* USSG §2D1.12, comment. (n.4); *see also supra* Section IV.B.6 (noting similar enhancement in §2D1.1(b)(7)).

³³⁴ USSG §2D1.12(b)(4).

³³⁵ USSG §2D1.12(c)(1); *see* USSG §2D1.12, comment. (n.2) (explaining how to apply the cross reference).

³³⁶ USSG App. A (Statutory Index).

³³⁷ USSG §2D2.1(a).

³³⁸ USSG §2D1.1, comment. (n.26).

³³⁹ USSG §2D2.1(b)(1).

also provides a cross reference to §2D1.1 if the object of the offense was the distribution of a controlled substance.³⁴⁰

VI. CAREER OFFENDER PROVISIONS

Because some federal drug offenses are “controlled substance offense[s]” as that term is defined in the guidelines,³⁴¹ a defendant convicted of such an offense may qualify as a career offender under §4B1.1 if “the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.”³⁴² The career offender guideline overrides several of the guideline calculation rules discussed above. Specifically, the defendant’s total offense level may increase, and the defendant is automatically placed in Criminal History Category VI.³⁴³ The career offender designation has several important requirements and courts have used the categorical approach in applying this designation.³⁴⁴

VII. SUBSTANTIAL ASSISTANCE, SAFETY VALVES, AND USE OF INFORMATION PROVIDED TO THE GOVERNMENT

Two statutory provisions allow the court to sentence a defendant below a statutory minimum: the substantial assistance provision in 18 U.S.C. § 3553(e) and the safety valve provision in 18 U.S.C. § 3553(f). Defendants may receive other, more limited relief under the related guideline provisions in §§5K1.1 and 5C1.2, respectively.

A. SUBSTANTIAL ASSISTANCE

1. *Substantial Assistance Statute: 18 U.S.C. § 3553(e)*

Section 3553(e) provides:

Upon motion of the [g]overnment, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as

³⁴⁰ USSG §2P1.2(c)(1); *see* United States v. Anguiano, 27 F.4th 1070, 1074 (5th Cir. 2022) (affirming the district court’s application of the cross reference, despite the lack of explicit evidence regarding what the defendant intended to do with the drugs, where the defendant planned to receive 54 grams of methamphetamine and told another inmate that he could “hook him up”).

³⁴¹ USSG §4B1.2(b).

³⁴² USSG §4B1.1(a).

³⁴³ USSG §4B1.1(b)–(c).

³⁴⁴ For a discussion of the career offender requirements, *see* generally U.S. SENT’G COMM’N, PRIMER ON CRIMINAL HISTORY 12–19 (2022), <https://www.ussc.gov/guidelines/primers/criminal-history>. For a discussion of the categorical approach, *see* generally CATEGORICAL APPROACH PRIMER, *supra* note 16.

to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.³⁴⁵

Section 3553(e) may provide relief from any mandatory minimum sentence, unlike the criminal history safety valve in section 3553(f) (discussed below) which applies only to drug statutes.

For a defendant to benefit from section 3553(e), the government must exercise its discretion to file a motion "requesting or authorizing a departure below the statutory minimum."³⁴⁶ Absent a commitment set forth in a plea agreement, which may allow the court to undertake a more "searching" review for compliance with the terms of the agreement,³⁴⁷ the government's decision to withhold a section 3553(e) motion is subject only to extremely limited review for an "unconstitutional motive," such as a defendant's race or religion, or where "the prosecutor's refusal to move [for relief is] not rationally related to any legitimate [g]overnment end."³⁴⁸ Where a plea agreement provides the government with discretion to evaluate the defendant's assistance and decide whether to file such a motion, certain courts evaluate the exercise of that discretion for "good faith," which "demands only that the government have honest dissatisfaction with the defendant's efforts."³⁴⁹ As a general matter, however, section 3553(e) gives "the [g]overnment a power, not a duty, to file a motion when a defendant has substantially assisted."³⁵⁰

Any sentence below the statutory minimum should reflect factors pertaining to the defendant's substantial assistance.³⁵¹

³⁴⁵ 18 U.S.C. § 3553(e).

³⁴⁶ *Melendez v. United States*, 518 U.S. 120, 130 (1996).

³⁴⁷ *United States v. Trimm*, 999 F.3d 119, 129 (2d Cir. 2021).

³⁴⁸ *Wade v. United States*, 504 U.S. 181, 185–86 (1992).

³⁴⁹ *United States v. Tarbell*, 728 F.3d 122, 128 (2d Cir. 2013) (citation omitted); *see, e.g., Trimm*, 999 F.3d at 129 ("[T]he fact that [the defendant] upheld her end of the bargain by testifying is not enough to suggest bad faith in the context of an agreement that expressly lays out that such cooperation might—but might not—warrant a § 3553(e) motion."). *But cf.* *United States v. Moore*, 225 F.3d 637, 641 (6th Cir. 2000) ("While some circuits have ruled that courts may conduct a bad faith review of the government's refusal to file a substantial assistance motion, this Circuit has expressly ruled that when a plea agreement allocates complete discretion to the government to consider whether a substantial assistance motion should be filed, we may only review the government's decision for unconstitutional motives. On the other hand, when the government bargains away its discretion and agrees to a plea agreement in which it promises to file a substantial assistance motion, we may ascertain whether the government complied with the terms of the agreement." (citations omitted)).

³⁵⁰ *Wade*, 504 U.S. at 185; *see, e.g., United States v. Billings*, 546 F.3d 472, 476–77 (7th Cir. 2008) ("[U]nder section 3553(e), the government gets to decide whether a defendant's cooperation merits a substantial assistance motion.").

³⁵¹ *See Koons v. United States*, 138 S. Ct. 1783, 1789–90 & n.3 (2018) (the district court "permissibly considered only factors related to petitioners' substantial assistance" in setting a sentence under section 3553(e) and observing (while expressing "no view" on the issue) that "[m]any courts have held that § 3553(e) prohibits consideration of the advisory [g]uidelines ranges in determining how far to depart downward").

2. Substantial Assistance Guideline: Section 5K1.1

Separate from the mandatory minimum departure authority set forth in section 3553(e), §5K1.1 (Substantial Assistance to Authorities (Policy Statement)) also independently permits the government to move the court to depart from the guidelines based upon the defendant's substantial assistance in the investigation or prosecution of another offender.³⁵² Section 5K1.1 sets forth factors for the court to consider in evaluating a defendant's substantial assistance. These factors include, but are not limited to:

- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; and
- (5) the timeliness of the defendant's assistance.³⁵³

Though driven by similar considerations as discussed above, section 3553(e) and §5K1.1 are separate mechanisms with distinct consequences for the defendant's sentence.³⁵⁴ Section 3553(e) allows courts to impose a sentence below a statutory minimum penalty. By contrast, §5K1.1 only allows a court to depart from the applicable guidelines range; it does not permit a court to go below a statutory minimum sentence. Therefore, the government may elect to file a motion under §5K1.1 while simultaneously withholding a motion under section 3553(e), leaving the defendant subject to any applicable mandatory minimums.³⁵⁵

³⁵² USSG §5K1.1.

³⁵³ USSG §5K1.1(a).

³⁵⁴ See, e.g., *Trimm*, 999 F.3d at 129 (explaining that *Melendez v. United States*, 518 U.S. 120, 125 (1996), “interpreted § 3553(e) and §5K1.1 to establish a binary motion system, ‘which permits the [g]overnment to authorize a departure from the [g]uidelines range while withholding from the court the authority to depart below a lower statutory minimum’ ”).

³⁵⁵ See, e.g., *id.* (reversing district court's finding of bad faith and decision to treat the government's §5K1.1 motion as a section 3553(e) motion because “the [g]overnment may in its discretion conclude in good faith that a defendant is entitled to a §5K1.1 motion on the basis of cooperation, but that the value of this cooperation was not so great as to merit a § 3553(e) motion” (emphasis omitted)).

3. Use of Information Provided to the Government

Defendants regularly are offered “assurances that [the prosecutor] will not use what the defendant reveals” while cooperating with the government.³⁵⁶ Section 1B1.8 limits the use of such information where a defendant enters into cooperation agreements relating to the “provision of information concerning the unlawful activities of others,” such as part of an offer of substantial assistance under 18 U.S.C. § 3553(e) or §5K1.1.³⁵⁷ To apply, the agreement must provide that self-incriminating information will not be used against the defendant.³⁵⁸ Where §1B1.8 applies, any information the defendant provides “shall not be used in determining the applicable guideline range”³⁵⁹ or to support an upward departure.³⁶⁰

This restriction does not apply, however, “to the extent provided in the agreement”³⁶¹ or to: (1) information known to the government prior to entering into the cooperation agreement; (2) the existence of prior convictions and sentences required to determine a defendant’s criminal history category or career offender status; (3) in a prosecution for perjury or giving a false statement; (4) where the defendant breaches the agreement; or (5) to determine whether or to what extent a downward departure is warranted pursuant to a government motion under §5K1.1.³⁶² Where a defendant attempts to cooperate but fails to reach an agreement, the use of the information is restricted by Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410.³⁶³

4. Timing of Motion

As provided in Federal Rule of Criminal Procedure 35(b)(1), the government may move for a substantial assistance reduction, including a reduction below a mandatory

³⁵⁶ United States v. Melvin, 730 F.3d 29, 32 (1st Cir. 2013).

³⁵⁷ USSG §1B1.8, comment. (n.6).

³⁵⁸ USSG §1B1.8(a).

³⁵⁹ *Id.*

³⁶⁰ USSG §1B1.8, comment. (n.1).

³⁶¹ USSG §1B1.8(a); *cf., e.g.*, United States v. Jackson, 635 F.3d 205, 209 (6th Cir. 2011) (“Here, the plain language of USSG §1B1.8 specifically and unequivocally protects proffer statements from use ‘in determining the applicable guideline range.’ But the text also appears to be similarly unequivocal in its lack of any further protection for proffer statements.”). Courts generally interpret cooperation agreements as “contracts between defendants and the [g]overnment ‘according to general contractual principles.’” United States v. Perry, 640 F.3d 805, 811 (8th Cir. 2011) (also finding “no basis in the text or the commentary of §1B1.8 that either requires or permits us to depart from those settled principles of interpretation in the present instance”); United States v. Lopez, 219 F.3d 343, 346–47 (4th Cir. 2000) (reaching similar result).

³⁶² USSG §1B1.8(b).

³⁶³ USSG §1B1.8, comment. (n.3). These rules provide, with limited exceptions, that a statement made during plea discussions is not admissible “if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.” FED. R. EVID. 410(a)(4); *see also* FED. R. CRIM. P. 11(f).

minimum, within one year of sentencing.³⁶⁴ Rule 35(b)(2) allows the government to file such a motion beyond one year under limited circumstances.³⁶⁵

B. SAFETY VALVE

1. Statutory Safety Valve: 18 U.S.C. § 3553(f)

The statutory “safety valve” allows courts to sentence certain drug defendants with minimal criminal histories “without regard to any statutory minimum sentence.”³⁶⁶ The First Step Act of 2018 expanded the safety valve in two ways.³⁶⁷ First, it added maritime drug offenses (46 U.S.C. §§ 70503 and 70506) to the prior list of offenses (21 U.S.C. §§ 841, 844, 846, 960, and 963) to which section 3553(f) applies.³⁶⁸

Second, the First Step Act modified the criminal history requirements for safety valve relief.³⁶⁹ As amended, to qualify for a sentence below the statutory minimum under section 3553(f), a defendant must satisfy criteria set forth in five paragraphs by a preponderance of the evidence:³⁷⁰

Paragraph (1) requires that the defendant does not have—

- (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
- (B) a prior 3-point offense, as determined under the sentencing guidelines; and
- (C) a prior 2-point violent offense, as determined under the sentencing guidelines.³⁷¹

The circuits are split over whether the recently amended criminal history requirements set forth in paragraph (1) are disjunctive (such that meeting any one of the

³⁶⁴ FED. R. CRIM. P. 35(b)(1), (4).

³⁶⁵ Specifically, the government may file a motion beyond the one-year period where the substantial assistance involves information not previously known to the defendant, information that had not previously been useful to the government, or information that was promptly provided to the government once its usefulness became reasonably apparent to the defendant. FED. R. CRIM. P. 35(b)(2).

³⁶⁶ 18 U.S.C. § 3553(f).

³⁶⁷ Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221.

³⁶⁸ *Id.* § 402(a)(1)(A).

³⁶⁹ *Id.* § 402(a)(1)(B).

³⁷⁰ *United States v. Lopez*, 998 F.3d 431, 432–33, 433 n.1 (9th Cir. 2021) (setting forth preponderance standard); *United States v. Barron*, 940 F.3d 903, 914 (6th Cir. 2019) (same).

³⁷¹ 18 U.S.C. § 3553(f)(1).

three criminal history criteria would render a defendant ineligible) or conjunctive (such that a defendant is ineligible only if all three criteria are met). The Fifth, Sixth, Seventh, and Eighth Circuits have held that the statutory context dictates a disjunctive reading.³⁷² The Eleventh and Ninth Circuit reached the opposite conclusion based on the plain text of the statute, holding that a defendant who does not meet all three criminal history criteria still may be eligible for relief.³⁷³ The Supreme Court has granted a writ of certiorari to resolve this circuit split.³⁷⁴

Paragraph (2) requires that the “defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense.”³⁷⁵ The focus of this provision is on the “defendant’s own conduct”;³⁷⁶ “possession of a firearm by a co-conspirator does not render a defendant ineligible for relief under the safety valve.”³⁷⁷ Further, because the preponderance burden of proof under section 3553(f) differs from the defendant’s burden in §2D1.1(b)(1) to show that it is clearly improbable that any weapon was connected with the offense, a defendant may receive both the 2-level weapon enhancement and the benefit of the safety valve.³⁷⁸

Paragraph (3) requires that the offense not result in death or serious bodily injury to any person.³⁷⁹ Death or serious bodily injury “results from” the use of the substance if the use was a “but-for cause of the death or injury.”³⁸⁰

³⁷² United States v. Haynes, 55 F.4th 1075, 1080 (6th Cir. 2022); United States v. Palomares, 52 F.4th 640, 642 (5th Cir. 2022), *petition for cert. filed*, No. 22-6391 (U.S. Dec. 23, 2022); United States v. Pace, 48 F.4th 741, 751–56 (7th Cir. 2022); United States v. Pulsifer, 39 F.4th 1018, 1021–23 (8th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023).

³⁷³ United States v. Garcon, 54 F.4th 1274, 1276 (11th Cir. 2022) (en banc), *petition for cert. filed*, No. 22-851 (U.S. Mar. 6, 2023); *Lopez*, 998 F.3d at 435–44.

³⁷⁴ *Pulsifer*, 143 S. Ct. at 978.

³⁷⁵ 18 U.S.C. § 3553(f)(2). The Eighth Circuit held that the term “offense” in paragraphs (2)–(4) refers only to “the offense of conviction” without, as provided in Application Note 3 to §5C1.2, including relevant conduct. *United States v. Hodgkiss*, 960 F.3d 1110, 1112 (8th Cir. 2020).

³⁷⁶ *United States v. Hargrove*, 911 F.3d 1306, 1330 (10th Cir. 2019) (emphasis omitted).

³⁷⁷ *United States v. Barron*, 940 F.3d 903, 914 & n.2 (6th Cir. 2019) (collecting cases).

³⁷⁸ *See, e.g.*, *United States v. Stamps*, 983 F.3d 945, 949–50 (7th Cir. 2020) (remanding where district court found that §2D1.1(b)(1) applied but did not determine whether the defendant established by a preponderance of the evidence that he did not possess a firearm); *United States v. Bolton*, 858 F.3d 905, 914 (4th Cir. 2017) (collecting cases) (“Whereas a defendant may be unable to show that any connection between a firearm and an offense is ‘clearly improbable,’ the same defendant might be able to prove ‘by a preponderance of the evidence’ that the firearm was not connected with the offense to satisfy §5C1.2(a)(2).”).

³⁷⁹ 18 U.S.C. § 3553(f)(3).

³⁸⁰ *Burrage v. United States*, 571 U.S. 204, 210–11, 219 (2014).

Paragraph (4) requires that the defendant not receive the aggravating role adjustment (for being “an organizer, leader, manager, or supervisor”) set forth in §3B1.1 or have engaged in a continuing criminal enterprise.³⁸¹

Paragraph (5) requires the defendant to “truthfully provide[] to the [g]overnment” everything the defendant knows about the “offenses that were part of the same course of conduct” or “common scheme or plan.”³⁸² Importantly, however, a defendant remains eligible even if he has no useful information to provide or the government already is aware of any information he had to offer.³⁸³

The defendant must provide a “truthful” and “complete” disclosure; courts have “had little difficulty affirming the denial of safety-valve relief when the opposite is true—*i.e.*, when a defendant provided only limited information to the [g]overnment or lied about or even denied his involvement in the offense.”³⁸⁴ Some courts have characterized “completeness” as requiring “an affirmative act” of disclosure by the defendant, who “may have to do more than ‘merely answer all questions posed by the government.’”³⁸⁵ Some circuits have concluded that prior false statements or obstructive conduct do not preclude a defendant from satisfying paragraph (5) as long as the defendant subsequently provides a truthful and complete disclosure.³⁸⁶ Ultimately, the court must determine whether the

³⁸¹ 18 U.S.C. § 3553(f)(4); *see* USSG §3B1.1; 21 U.S.C. § 848(c).

³⁸² 18 U.S.C. § 3553(f)(5). The First Circuit has held that, to satisfy paragraph (5), a defendant must provide all information concerning “the offense of conviction and all relevant conduct,” consistent with the “expansive” statutory text. *United States v. Martinez*, 9 F.4th 24, 38 (1st Cir. 2021) (citing USSG §5C1.2, comment. (n.3)).

³⁸³ 18 U.S.C. § 3553(f)(5).

³⁸⁴ *United States v. Collins*, 924 F.3d 436, 444 n.14 (7th Cir. 2019) (collecting cases where the denial of relief was affirmed, such as where the “defendant gave limited information” about his offense, “kept altering his version of events,” and “continued to cling to a false version of events and dispute their own culpability”); *see, e.g.*, *United States v. Gardner*, 32 F.4th 504, 526–28 (6th Cir.) (defendant failed to satisfy this criteria where she failed to disclose her culpable mental state, but instead “asserted her innocence as to any knowledge of the [drug] conspiracy”), *cert. denied*, 143 S. Ct. 251 (2022); *United States v. Valquier*, 934 F.3d 780, 783 (8th Cir. 2019) (“Here, the government’s evidence suggests that [the defendant] had a larger role in the drug conspiracy than he admitted to, and [the defendant] failed to establish that he did in fact provide complete information.” (footnote omitted)); *United States v. Aidoo*, 670 F.3d 600, 610 (4th Cir. 2012) (“The district court is obligated to determine for itself whether the defendant has truthfully provided the government with all the relevant information that he knows, and the court is free to consider any lies the defendant may have told when evaluating the defendant’s truthfulness.”).

³⁸⁵ *United States v. Barron*, 940 F.3d 903, 917 (6th Cir. 2019) (citation and alterations omitted); *cf., e.g.*, *United States v. Rios*, 995 F.3d 654, 658 (8th Cir. 2021) (per curiam) (“A defendant must prove through affirmative conduct, that he or she gave the [g]overnment truthful information and evidence about the relevant crimes before sentencing.” (citation omitted)).

³⁸⁶ *See, e.g.*, *United States v. Acevedo-Fitz*, 739 F.3d 967, 971 (7th Cir. 2014) (stating that other circuits have accepted the notion that “a defendant seeking relief under the safety valve may lie with impunity right up to the moment of sentencing” but concluding that “a defendant who intentionally lies while seeking to benefit from the safety valve is not acting in good faith and is not within the class of offenders whom Congress intended to protect from potentially harsh statutory minimum penalties”).

defendant has met his burden of demonstrating a true and complete disclosure, without deference to the government’s view.³⁸⁷

The defendant’s disclosure often comes in the form of a “safety valve proffer,” but no specific format is required as long as the complete disclosure occurs before the “time of the sentencing hearing.”³⁸⁸ The circuits are divided over whether this means “before sentencing proceedings begin,” as the Seventh Circuit has held,³⁸⁹ or before sentence is imposed such that a defendant may make a disclosure during a continuance of the sentencing hearing, as the Eighth Circuit has held.³⁹⁰

2. Guideline Safety Valve: Section 5C1.2

The guideline safety valve in §5C1.2 has not been amended since the First Step Act amended section 3553(f). Therefore, though paragraphs (2) through (5) of §5C1.2(a) mirror those in 18 U.S.C. § 3553(f), the criminal history requirement in §5C1.2(a)(1) remains far more stringent: a defendant with more than 1 criminal history point is ineligible.³⁹¹ In 2023, the Commission published an amendment to revise §5C1.2(a)(1) to track the statutory requirements of section 3553(f)(1) exactly, by incorporating the expanded statutory criminal history criteria.³⁹² The published amendment also tracks the

³⁸⁷ See, e.g., *United States v. Lima-Rivero*, 971 F.3d 518, 521 (5th Cir. 2020) (the government’s view of the defendant’s truthfulness does not bind the court and the court’s assessment may not rest solely on “a case agent’s mere speculation” as to the same).

³⁸⁸ 18 U.S.C. § 3553(f)(5); see, e.g., *United States v. Cota-Luna*, 891 F.3d 639, 649 (6th Cir. 2018) (“[T]he Safety Valve guideline does not explicitly require an in-person meeting, this Court has never suggested that such a requirement is implicit, and other Circuits have held that the Safety Valve guideline does not specify any particular form that a defendant’s communication must take.” (citations omitted)).

³⁸⁹ See, e.g., *United States v. Alvarado*, 326 F.3d 857, 862 (7th Cir. 2003) (collecting cases).

³⁹⁰ *United States v. Madrigal*, 327 F.3d 738, 744–48 (8th Cir. 2003); see also *United States v. Garcia*, 405 F.3d 1260, 1275 (11th Cir. 2005) (per curiam) (“[T]his temporal requirement does not preclude the district court from exercising its discretion to continue a sentence . . . to give the defendant more time to fully debrief and give a formal safety-valve statement.”).

³⁹¹ USSG §5C1.2(a)(1). However, courts may choose to vary below the guidelines where a defendant meets the amended statutory safety valve criteria. See, e.g., *United States v. Noiega*, 35 F.4th 643, 651 (8th Cir.) (explaining that a district court “varied downward as if [§5C1.2] were applicable”), *cert. denied*, 143 S. Ct. 413 (2022). Relatedly, in unpublished opinions applying plain error review, two courts of appeals have suggested that defendants may not borrow from the amended criminal history requirements in section 3553(f)(1) to satisfy the unchanged requirements in §5C1.2(a)(1). See, e.g., *United States v. Leri*, 849 F. App’x 898, 900 (11th Cir. 2021) (per curiam) (“[A]s [the defendant] does not satisfy the criteria in §5C1.2 and it is not plain that the amended criteria in § 3553(f) are incorporated into §5C1.2, the district court did not plainly err by not concluding that [the defendant] satisfied the safety-valve criteria.”), *cert. denied*, 142 S. Ct. 1146 (2022); *cf.*, e.g., *United States v. Goudy*, 837 F. App’x 566, 567 (9th Cir. 2021) (rejecting the defendant’s argument that the district court plainly erred in calculating the applicable range for his revocation sentence because “[t]he [g]uidelines have not been amended to reflect the changes adopted in the First Step Act”).

³⁹² Sentencing Guidelines for United States Courts, 88 FR 28254, 28264 (May 3, 2023). The amendment will go into effect on November 1, 2023, absent congressional action to the contrary.

First Step Act’s changes to section 3553(f) by adding maritime offenses to the list of enumerated offense types at §5C1.2(a).³⁹³

Separately, where a defendant satisfies the five criteria enumerated in §5C1.2(a), the defendant may benefit from a 2-level reduction under the specific offense characteristics at §§2D1.1(b)(18) or 2D1.11(b)(6). No particular offense of conviction is required for these specific offense characteristics to apply.³⁹⁴

3. Use of Information Provided to the Government

As amended by the First Step Act, section 3553(f) protects “[i]nformation disclosed by a defendant under” the statutory safety valve provision.³⁹⁵ Specifically, such information “may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.”³⁹⁶ The Ninth Circuit has held, however, that “enhance” in this context does not include the denial of a reduction; accordingly, a district court did not err by considering information disclosed during the safety valve proffer in choosing to not vary as far downward as the defendant requested.³⁹⁷

The guidelines do not provide any similar protection for information provided under the guideline safety valve.³⁹⁸ For example, the restrictions on using information disclosed by the defendant to enhance his sentence would not apply to a defendant who is convicted for an offense not enumerated in section 3553(f) and who seeks a 2-level under §2D1.1(b)(18) reduction for complying with §5C1.2, such as where §2D1.1 applies via a cross reference from another guideline.

³⁹³ *Id.*

³⁹⁴ USSG §§2D1.1(b)(18), 2D1.11(b)(6).

³⁹⁵ 18 U.S.C. § 3553(f).

³⁹⁶ *Id.*

³⁹⁷ *United States v. Brown*, 42 F.4th 1142, 1146–47 (9th Cir.), *cert. denied*, 143 S. Ct. 506 (2022).

³⁹⁸ *Cf.* USSG §1B1.8, comment. (n.6) (§1B1.8 does not apply to “an agreement by the defendant simply to detail the extent of his own unlawful activities”).