Drug Primer

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DRUG PRIMER

The purpose of this Primer is to provide a general overview of sentencing guidelines issues and case law arising from frequently asked questions regarding the application of the drug guidelines and relevant drug statutes.

I. Drug Statutes

A. The Statutory Scheme

Among the most commonly used drug statutes are the following:

21 U.S.C. § 841	Prohibits the manufacture and distribution of, and possession with intent to distribute, controlled substances
21 U.S.C. § 846	Prohibits attempts and conspiracies to manufacture, distribute or possess with intent to distribute controlled substances
21 U.S.C. § 952	Prohibits the importation of controlled substances
21 U.S.C. § 953	Prohibits the exportation of controlled substances
21 U.S.C. § 963	Prohibits attempts and conspiracies to import/export controlled substances

The penalty structures for these and other drug crimes are set out in 21 U.S.C. §§ 841(b) and 960(b). The minimum and maximum statutory penalties are driven by the type and the quantity of the drug involved, but may be increased if the offense involved death or serious bodily injury, or if the offender has a prior conviction for a felony drug offense. For example:

Pursuant to 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1), a statutory range of ten years to life applies to offenses involving at least:

1 kilogram of Heroin
5 kilograms of Cocaine (powder)
50 grams of Cocaine base
1,000 kilograms of Marijuana or 1,000 plants
50 grams of actual Methamphetamine or 500 grams of mixture or substance

Pursuant to 21 U.S.C. §§ 841(b)(1)(B) and 960(b)(1), a statutory range of 5 to 40 years applies to offenses involving at least:

100 grams of Heroin
500 grams of Cocaine (powder)
5 grams of Cocaine base
100 kilograms of Marijuana or 100 plants
5 grams of actual Methamphetamine or 50 grams of mixture or substance

Pursuant to 21 U.S.C. §§ 841(b)(1)(C) and 960(b)(3), a statutory range of zero to 20 years applies to offenses involving lesser quantities of drugs.

A statutory maximum of 5 years is provided for offenses involving less than 50 kilograms of marijuana and for certain other lesser offenses. 21 U.S.C. §§ 841(b)(1)(D) and 960(b)(4).

B. Legal Issues

Aggregating Quantity. Drug amounts should not be aggregated to apply a higher statutory penalty range than any of the individual substantive counts would support. That is, where the defendant is convicted of separate substantive counts, the drug amounts are not added together to reach a mandatory minimum sentence. *See, e.g.*, *United States v. Winston*, 37 F.3d 235 (6th Cir. 1994) (holding that it was error to construe the statutory penalty as applying to aggregate amounts of drugs held on various separate occasions).

In a conspiracy conviction however, the quantities of each single type of drug charged within the conspiracy are aggregated to establish statutory penalties. *See, e.g., United States v. Gori*, 324 F.3d 234, 237 (3d Cir. 2003).

Enhanced Penalties. Sections 841(b) and 960(b) include enhancement provisions based on the defendant's prior record, which are only applicable if the government provides notice pursuant to § 851. A qualifying prior conviction increases a 5- to 40-year range to a range of 10 years to life. A qualifying prior conviction increases a 10-year mandatory minimum to a 20-year mandatory minimum(the maximum remains life); a second qualifying prior conviction increases a 10-year mandatory minimum to mandatory life. *See*, *e.g.*, *United States v. Thomas*, 398 F.3d 1058 (8th Cir. 2005) (imposition of a mandatory life sentence based upon sentencing court's finding that the defendant had two prior drug trafficking convictions did not violate rule of *Apprendi*).

Higher penalty ranges also apply if death or serious bodily injury results from use of the controlled substance. *See* §§ 841(b) and 960(b).

Apprendi v. New Jersey, 530 U.S. 466 (2000), held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Court reaffirmed this holding in the landmark case of *United States v. Booker*, 543 U.S. 220, 224 (2005).[1]

The courts of appeal have uniformly held that *Apprendi* applies to facts (other than prior convictions) that increase the statutory maximum sentence under § 841(b); however, the circuits are split regarding whether this rule also applies to facts that increase the mandatory minimum. *See* discussion at Section VIII, Part A, pp. 39-41.

C. Lesser Offenses

Many other drug offenses have lower statutory penalty ranges and are often used for plea bargaining and/or presenting defenses of lesser included offenses. For example:

Offenses involving listed chemicals have statutory maximums ranging from one year to 20 years. *See* 21 U.S.C. §§ 841(c), 841(f), 960(d). There are no mandatory minimum or enhancement provisions.

Section 843(a)(6) (possession of listed chemical with intent to manufacture a controlled substance) has a four-year maximum sentence. There are additional penalty provisions.

Section 843(b) ("phone count") has a four-year maximum sentence. There is a "doubling" provision. There are additional penalty provisions.

Section 844 (simple possession) of anything other than cocaine base is a misdemeanor. There are enhancement provisions.

Section 856 (establishment of manufacturing operations) has a 20-year maximum sentence. There are no mandatory minimum or enhancement provisions.

II. Chapter Two Offense Guideline Sections

A. Applicable Offense Guideline Section is Driven by Offense of Conviction

The applicable Chapter Two offense guideline section is determined by looking up the **offense of conviction** in the Statutory Index (Appendix A). *See* §1B1.2 (Applicable Guidelines). *For example, if a defendant was charged with distributing drugs near a school in violation of 21 U.S.C. § 860, but was convicted only of possession with intent to distribute drugs in violation*

[1] In *Booker*, the Supreme Court also excised the two parts of the Sentencing Reform Act that rendered the mandatory guidelines system unconstitutional: the part in 18 U.S.C. § 3553(b)(1) making the guidelines result binding on the sentencing court; and the part in § 3742(e) requiring *de novo* review of sentences on appeal. *Id*. at 258.

of 21 U.S.C. § 841(a), (b)(1), apply §2D1.1 (applicable to 21 U.S.C. § 841(a), (b)(1)), not §2D1.2 (applicable to 21 U.S.C. § 860).

The definition of "offense of conviction" has been obscured by *Apprendi*. *Apprendi* is discussed at page 38. For purposes of determining which offense guideline section is applicable where the Statutory Index specifies the use of more than one section for the offense of conviction (*e.g.*, 21 U.S.C. § 841(a) is sentenced under §2D1.1, whereas § 841(b)(4) is sentenced under §2D2.1), use the offense guideline section for the most specific definition of the offense of conviction. *For example, if the defendant was convicted of § 841(a), (b)(4), use §2D2.1, not §2D1.1.*

B. §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)

For the most widely used code sections in drug cases – 21 U.S.C. § 841(a), (b)(1) (and conspiracy under § 846 to violate § 841(a), (b)(1)) – Appendix A specifies offense guideline §2D1.1. Additionally, §2D1.1 is often used as a result of a cross reference from other Chapter Two, Part D sections. (e.g., §2K2.1(c)(1); §2S1.1(a)(1)).

1. **Determining the Base Offense Level.** Under §2D1.1, unless the defendant is convicted of an offense that establishes death or serious bodily injury, the type and amount of drugs for which the defendant is held responsible will be the most important factor in determining his sentence.

   a. **Drug Quantity Table.** If the offense of conviction does not establish that death or serious bodily injury resulted from use of the substance, the base offense level specified in the Drug Quantity Table applies. *See* §2D1.1(a)(3), (c).

   b. **Death or Serious Bodily Injury.** Sections 2D1.1(a)(1) and (a)(2) provide for substantially enhanced base offense levels (**43** and **38**, respectively), if the defendant is convicted under certain statutes and "the offense of conviction establishes that the death or serious bodily injury resulted from the use of the substance."[2]

   The language of these guidelines make clear that the enhanced base offense levels apply only if death or serious bodily injury is proved as an element of the offense of conviction (to the factfinder, by competent evidence, beyond a reasonable doubt). *See United*

[2]The base offenses levels applicable to §2D1.1(a)(1) and (a)(2) also apply to defendants convicted of conspiring to violate the statutes listed in those sections. *See generally* §1B1.3, comment. (n.6).

States v. Rebmann, 321 F.3d 540, 543-44 (6th Cir. 2003) (upholding district court's interpretation that enhanced base offense level could not be triggered by judicial factfinding at sentencing); *United States v. Pressler*, 256 F.3d 144, 157 n.7 (3d Cir. 2001) (*dicta*) (same); *see also Guidelines Manual*, App. C, amendment 123 ("The purpose of this amendment [limiting the application of §§2D1.1(a)(1), (a)(2)] is to provide that subsections (a)(1) and (a)(2) apply only in the case of a conviction under the circumstances specified in the statutes cited."). *But cf. United States v. Rodriguez*, 279 F.3d 947, 950 (11th Cir. 2002) (finding no error where enhanced base offense level was applied after judicial factfinding by a preponderance of sufficiently reliable information and sentence did not exceed statutory maximum for lesser offense); *United States v. Cathey*, 259 F.3d 365, 368 & n.12 (5th Cir. 2001) (same); *United States v. McIntosh*, 236 F.3d 968, 975-76 (8th Cir. 2001) (same).

Note: The increased offense levels under §2D1.1(a)(1) at level 43 and under (a)(2) at level 38 apply, in part, if the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance. The definition of "serious bodily injury" found in §1B1.1, comment. (n.1(L)) differs from the statutory definition under 21 U.S.C. § 802(25). Courts have not addressed whether the "serious bodily injury" enhancement under §2D1.1(a)(1) or (a)(2) is triggered by the guidelines definition or the statutory definition.

There are two cross reference provisions that may apply when violence is involved in the drug crime. *See* discussion of §2D1.1(d)(1) (murder cross reference) and (d)(2) (distribution of controlled substance with intent to commit a crime of violence cross reference) at Section II, Part D, (1) and (2), pp. 22-23.

c. **Mitigating Role Reduction:** If the defendant receives a mitigating role adjustment under §3B1.2, the offense level determined by reference to the Drug Quantity Table is reduced. This section provides a graduated reduction (2-4 levels) for offenders whose quantity level under §2D1.1 results in a base offense level of 32 or greater. *See* §2D1.1(a)(3). The eligible defendant also receives the two- to four-level downward role adjustment, in addition to this reduced base offense level. *See* USSG §3B1.2 (a)-(b) (Mitigating Role) and Application Note 6.

2. **Drug Type.** The type of controlled substance makes a significant difference in the offense level. For example, the question of whether a substance is crack cocaine is often litigated because of its significantly greater penalty.

a. **Methods for Determining Drug Type**

(i) Stipulation as to drug type by the parties in the plea agreement may be sufficient. *See United States v. Roman*, 121 F.3d 136, 141 n.4 (3d Cir. 1997); *but see United States v. Kang*, 143 F.3d 379, 381 (8th Cir. 1998) (provision of plea agreement indicating that the "United States submits" that offense involved more than 50 grams of crack cocaine was not stipulation by the defendant that was binding at sentencing). A district court may also rely upon admissions to the court by a defendant during a guilty plea colloquy. *United States v. James*, 78 F.3d 851, 856 (3d Cir. 1996); *see also United States v. Faulks*, 143 F.3d 133 (3d Cir. 1998); *but see United States v. Garrett*, 189 F.3d 610, 612 (7th Cir. 1999) (stipulation and admission were insufficient).

(ii) Where the controlled substance is available, identity can be determined through chemical analysis. *See United States v. Wilson*, 103 F.3d 1402, 1407 (8th Cir. 1997) (finding that chemist's testimony identifying substance as cocaine base without referring to "crack" was sufficient to support the defendant's sentence); *United States v. Alfeche*, 942 F.2d 697 (9th Cir. 1991) (court relied on unchallenged chemical analysis to determine identity of substance). Usually, a chemist will testify in terms of whether the substance is "cocaine base," and lay witnesses will testify that the substance is "crack cocaine." *United States v. Richardson*, 225 F.3d 46, 50 (1st Cir. 2000); *United States v. Waters*, 313 F.3d 151, 156 (3d Cir. 2002); *United States v. Dukes*, 139 F.3d 469, 474 (5th Cir. 1998).

(iii) All of seized substance need not be analyzed to determined identity. District courts may rely on random sampling for identification purposes. *United States v. Dent*, 149 F.3d 180, 191 (3d Cir. 1998); *United States v. Fitzgerald*, 89 F.3d 218, 223 n.5 (5th Cir. 1996) (random sampling is generally accepted as a method of identifying entire

substance whose quantity has been measured); *United States v. Roach*, 28 F.3d 729, 735 (8th Cir. 1994) (same); *United States v. Madkour*, 930 F.2d 234 (2d Cir. 1991) (in determining identity, court properly relied on lab results of randomly sampled marijuana plants and testimony from experienced agent that all of the plants were marijuana).

(iv) Government need not perform chemical analysis, but may rely on lay testimony and circumstantial evidence to establish identity. *United States v. Gibbs*, 190 F.3d 188, 220 (3d Cir. 1999); *see also United States v. Bryce*, 208 F.3d 346, 353 (2d Cir. 1999) (circumstantial evidence sufficient to establish identity of substance involved in alleged narcotics transaction may include evidence of physical appearance of substance, evidence that substance produced expected effects when sampled by someone familiar with illicit drug, evidence that substance was used in same manner as illicit drug, testimony that high price was paid in cash for substance, evidence that transactions involving substance were carried on with secrecy or deviousness, and evidence that substance was called by name of illegal narcotic by defendant or others in his presence); *United States v. Dominguez*, 992 F.2d 678, 681 (7th Cir. 1993) (circumstantial evidence establishing identity of controlled substance may include sales price consistent with that of controlled substance; covert nature of sale; on-the-scene remarks by conspirator identifying substance as a drug; lay experience based on familiarity through prior use, trading, or law enforcement; and behavior characteristic of drug sales); *United States v. Brown*, 332 F.3d 363, 376 (6th Cir. 2003) (challenged sentence affirmed where sentencing court relied on trial testimony that cocaine purchased from defendant was cooked into crack cocaine, and that drugs seized from co-conspirators were crack cocaine); *United States v. Taylor*, 116 F.3d 269, 273-274 (7th Cir. 1997) (drug supplier, purchasers, and assistants testified that substance was crack); *United States v. Cantley*, 130 F.3d 1371, 1378-1379 (10th Cir. 1997) (multiple police officers and lay witnesses who purchased substance from, or sold substance to, defendant testified that substance was crack); *but see United States v. Roman*, 121 F.3d 136, 140-142 (3d Cir. 1997) (reviewing court affirmed sentence–barely–where the

district court relied on task force officer's testimony that the substance seized from the defendant was crack cocaine based upon his years of experience as a police officer); *United States v. Dent*, 149 F.3d 180, 190 (3d Cir. 1998) (same).

(v) It is not essential that crack cocaine contain sodium bicarbonate, even though the guidelines define "crack" cocaine as a form of cocaine base usually prepared by processing cocaine hydrochloride and sodium bicarbonate. *See* USSG §2D1.1(c), Note (D) (definition of "crack" cocaine); *see also United States v. Diaz*, 176 F.3d 52, 119 (2d Cir. 1999); *United States v. Waters*, 313 F.3d 151, 155 (3d Cir. 2002); *United States v. Jones*, 159 F.3d 969, 983 (6th Cir. 1998); *United States v. Abdul*, 122 F.3d 477, 479 (7th Cir. 1997); *United States v. Stewart*, 122 F.3d 625, 628 (8th Cir. 1997); *United States v. Brooks*, 161 F.3d 1240, 1248 (10th Cir. 1998).

b. **"Mixture or Substance."** The specific drug types listed in the Drug Quantity Table correspond generally to those specifically listed in 21 U.S.C. § 841(b)(1), although the Drug Quantity Table lists more specific drug types.

In most circumstances, "mixture or substance" as used in the Drug Quantity Table has the same meaning as in section 841(b)(1). *See* §2D1.1, comment. (n.1). That is, a mixture need only contain a detectable amount of a controlled substance for the entire mixture to be considered that controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level. *See* Note (A) to Drug Quantity Table.

c. **Using the Drug Equivalency Table.** "Equivalent" is a guidelines term of art. Conversion ratios are not pharmacological equivalents. *See* §2D1.1, comment. (n.10). References to "equivalents" within the Drug Quantity Table itself do not provide the correct base offense levels. For drugs not specifically listed in the Drug Quantity Table, you must convert to marijuana by referring to the Drug Equivalency Tables. Apply the base offense level for the resulting amount of marijuana, subject to the minimum base offense levels and maximum marijuana equivalencies provided in

the tables. *See* §2D1.1, comment. (n.10). *For example*, *if a case involves opium (a Schedule II opiate)*[3], ***do not*** *apply the base offense level for heroin. Instead, convert the opium to marijuana by use of the Drug Equivalency Table.* Compare *1 gram of opium = 50 gm of marijuana,* with *1 gram of heroin = 1 kg of marijuana.*

Analogues: If a drug is listed in neither the Drug Quantity Table or Drug Equivalency Table, apply the offense level for the most analogous drug. *Cf.* §2X5.1. In November 2004, the Commission added to Application Note 5, §2D1.1, a reference to controlled substance analogues. *See* USSG, App. C, amend. 667. The note now allows courts to take potency into account in determining the appropriate sentence in an analogue case. The amendment also provides an application note regarding controlled substances not currently referenced in §2D1.1 to direct the use of the marijuana equivalency of the most analogous controlled substance.

The court properly determines the most analogous drug based on expert testimony. *See United States v. Marsh*, 894 F.2d 1035, 1041 (9th Cir. 1989).

d. **List I Chemicals.** The List I Chemical Equivalency Table applies only in the limited circumstances where the defendant, or someone for whose conduct the defendant is accountable under the relevant conduct rules of §1B1.3(a), manufactured or attempted to manufacture a controlled substance. *Cf.* §2D1.11, comment. (n.2) (limiting the §2D1.11(c) cross reference).

e. **Drug Equivalencies–More Than One Drug.** In addition to providing equivalencies for drugs that are not listed in the Drug Quantity Table, the Drug Equivalency Table also provides a means for combining different drugs. *See* §2D1.1, comment. (nn. 6, 10). Where an offense involves more than one drug and does not include crack cocaine, convert each drug to marijuana, add the marijuana weights, and look up the total marijuana weight in the Drug Quantity Table. *See* §2D1.1, comment. (n. 10(B)). There is a different rule for determining the base offense level in offense involving cocaine base and other controlled substances. *See* §2D1.1, comment. (n. 10(D)).

[3] Schedules of controlled substances are revised regularly. *See* 21 U.S.C. § 812. Current schedules are published in the Code of Federal Regulations, Part 1308 of Title 21, Food and Drugs. *See also* http://www.deadiversion.usdoj.gov/schedules/schedules.htm.

3. **Drug Quantity.** For most drug-related sentences, quantity is the most important consideration. Drug quantity determinations does not necessarily correspond to the amounts charged in the offense of conviction. A defendant should be held responsible for drug quantities involved in his "relevant conduct," which may include a defendant's own acts or the acts of others. *See* §1B1.3. The sentencing guidelines hold the defendant accountable for the reasonably foreseeable acts of others in furtherance of "jointly undertaken criminal activity," which includes any "criminal plan, scheme, endeavor or enterprise undertaken by defendant in concert with others." §1B1.3(a)(1)(B).

   A defendant should be held responsible for all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. *Id*. In the case of controlled substances, the defendant is responsible for "all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook." §1B1.3, comment. (n.2). *See United States v. Laboy*, 351 F.3d 578, 582 (1st Cir. 2003).

   a. **Methods for Determining Quantity.** Issues of quantity may often be wholly dependent on co-conspirator testimony, the credibility of which is left to the district court. *United States v. Candie*, 974 F.2d 61, 64 (8th Cir. 1992) (noting that determination of drug quantity based on witness credibility is "virtually unreviewable on appeal," including, as in this case, a co-conspirator); *United States v. Angel*, 355 F.3d 462, 474 (6th Cir. 2004) (same); *United States v. Milan*, 398 F.3d 445, 457 (6th Cir. 2005) (district court's reliance on proffer statements of codefendants in calculating drug quantity attributable to defendant was not unreasonable when it was not obvious that statements were untruthful); *United States v. Sampson*, 140 F.3d 585, 592 (4th Cir. 1998) (direct or hearsay testimony of lay witnesses as to the amounts attributable to the defendant can provide sufficiently reliable evidence of quantity); *United States v. Fudge*, 325 F.3d 910, 922-923 (7th Cir. 2003) (court relied on co-conspirators' testimony to determine quantity); *United States v. Mathews*, 168 F.3d 1234, 1247-1248 (11th Cir. 1999) (same); *United States v. Rodriguez*, 398 F.3d 1291, 1297 (11th Cir. 2005) (calculation of drug amount which included co-conspirator's estimates of amount of times defendant transported methylenedioxyamphetamine and average amount of tablets transported each time was supported by a preponderance of the

evidence). Where witnesses' estimates of drug amounts are uncertain, however, a district court is well advised to sentence at the low end of the range to which the witness testified. *See Sampson*, 140 F.3d at 592.

(i) Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court should approximate the quantity to be used for sentencing. §2D1.1, comment. (n.12). *See also United States v. Betancourt,* 422 F.3d 240 (5th Cir. 2005); *United States v. Lopes-Montes*, 165 F.3d 730 (9th Cir. 1999); *United States v. Jarrett*, 133 F.3d 519, 529 (7th Cir. 1998); *United States v. Newton*, 31 F.3d 611, 614 (8th Cir. 1994).

(ii) District courts have used a variety of methods to approximate quantity including: (a) determining the production capacity of a laboratory based on the amount of precursor drug found in a defendant's possession; (b) determining the production capacity of a laboratory based on the size and capability of the laboratory; (c) converting seized cash or drug notations into drug amounts; (d) extrapolating the volume of a defendant's drug trafficking from evidence of actual trafficking, etc. *See United States v. Mahaffey*, 53 F.3d 128, 132 (6th Cir. 1995) (court may approximate amount that laboratory could have produced based upon yields of similarly-situated defendants); *United States v. Shaffer*, 993 F.2d 625, 629 (7th Cir. 1993) (court may approximate amount that laboratory could have produced based upon DEA chemist's testimony regarding chemical operations and materials found at drug lab and production capacity of defendant's 12-liter flask when taking into account "sloppy" laboratory procedures); *United States v. Beshore*, 961 F.2d 1380, 1383 (8th Cir. 1992) (court may approximate amount that laboratory could have produced based upon quantity of precursor chemicals, size of laboratory, and recipes to "cook" methamphetamine seized); *United States v. Lopes-Montes*, 165 F.3d 730, 731-732 (9th Cir. 1999) (court reasonably calculated the amount of pure methamphetamine that would have been delivered by defendant based on the purity of the delivered amount and the assumption that the negotiated remaining amount to be delivered would have the same purity); *United States v.*

Short, 947 F.2d 1445, 1456-57 (10th Cir. 1991) (court may approximate amount that laboratory could have produced based upon testimony of DEA chemist and characteristics of laboratory equipment seized); *United States v. Carroll,* 6 F.3d 735 (11th Cir. 1993) (court properly used expert testimony about the chemicals acquired for use in the lab to approximate the conspiracy's capacity for production fo methamphetamine).

(iii) The record should disclose evidence sufficient for a court to make a reasonable approximation of quantity. *United States v. Marrero-Ortiz*, 160 F.3d 768, 780 (1st Cir. 1998) ("[Without] particularized findings to support the assigned base offense level, we have no principled choice but to vacate the sentence and remand for further findings and resentencing."); *United States v. Carreon*, 11 F.3d 1225, 1231 (5th Cir. 1994) (remanding for findings where appellate court is "left to second-guess the basis for the district court's calculation"); *United States v. Mahaffey*, 53 F.3d 128, 133 (6th Cir. 1995) ("[w]e have never approved a finding on the quantity of drugs attributable to a defendant when the record contains no evidence concerning the manner in which a precursor was converted to a controlled substance or the details of the laboratories involved"); *United States v. Hewitt*, 942 F.2d 1270, 1274 (8th Cir. 1991) (condemning use of "far reaching" averaging assumptions in estimating drug quantity); *United States v. Garcia*, 994 F.2d 1499, 1509 (10th Cir. 1993) (vacating sentence where the court based it on the average size shipment of all marijuana traffickers rather than the size of particular shipments of marijuana made by the defendants); *United States v. Butler*, 41 F.3d 1435, 1447-1448 (11th Cir. 1995) (remanding because sentencing court failed to articulate "a reliable method of quantifying the amount of drugs attributable to each appellant").

(iv) A district court may rely on reasonable estimates and averages in arriving at its drug-quantity determinations, as long as the probable accuracy is founded on adequate indicia of reliability. *See also United States v. Krasinski*, 545 F.3d 546 (7th Cir. 2008) (no clear error to rely on estimation of drug quantity based on ranges admitted by defendant, despite the fact that a more conservative

estimate would have resulted in a lower guideline range); *United States v. Dalton,* 409 F.3d 1247 (10th Cir. 2005) (upholding district court's drug quantity estimation based on the co-defendant's testimony and corroborating evidence); *United States v. Laboy*, 351 F.3d 578, 582 (1st Cir. 2003) ("[R]ote multiplication of quantities from a *single* exchange is, taken alone, an improper method for determining overall drug quantities. . . especially . . . where an estimate of quantity is multiplied by an estimate of frequency."); *United States v. Rivera-Maldonado*, 194 F.3d 224 (1st Cir. 1999) (sentence vacated where district court relied on testimony of agent regarding the number of sales in a two hour period and 12 controlled buys to extrapolate the total amounts of three drugs attributable to the defendant for a 6-month indictment period); *United States v. Sepulveda*, 15 F.3d 1161, 1198 (1st Cir. 1993) (sentence vacated where trial testimony of co-conspirator on number of trips and quantities was "averaged" and multiplied); *United States v. Rosacker*, 314 F.3d 422, 426 (9th Cir. 2002) (PSR and forensic lab report contained no evidentiary support for the drug quantities based on the capability of the laboratory); *United States v. Shonubi*, 998 F.2d 84, 89-90 (2d Cir. 1993) (vacating, in the absence of other evidentiary support, district court's drug quantity finding arrived at by rote multiplication of number of trips times quantity carried on one such trip); *United States v. Garcia*, 994 F.2d 1499, 1509 (10th Cir. 1993) (vacating defendant's sentence and holding that averages, when used to arrive at drug quantity findings, must be "more than a guess").

Note: The Second Circuit requires evidence that points specifically to a drug quantity for which the defendant is responsible, *e.g.*, drug records, admissions or live testimony, to prove a relevant conduct quantity of drugs for sentencing purposes. *United States v. Shonubi*, 103 F.3d 1085, 1087 (2d Cir. 1996).

(v) A district court cannot quantify yield figures without regard for a particular defendant's capabilities when viewed in light of the drug laboratory. *United States v. Eschman*, 227 F.3d 886, 890-891 (7th Cir. 2000) (court should not rely on a theoretical yield analysis of 100 percent to extrapolate

clandestine laboratory yield); *United States v. Rosacker*, 314 F.3d 422, 427 (9th Cir. 2002) (sentencing court should consider the defendant's ability to manufacture). *See also United States v. Cole*, 125 F.3d 654, 655 (8th Cir. 1997) (relevant inquiry is on what defendant, not "an average cook," is capable of yielding); *United States v. Hamilton*, 81 F.3d 652, 653-54 (6th Cir. 1996) (rejecting standardized drug conversion formulas in favor of individualized assessment of defendant's capabilities); *United States v. Mahaffey*, 53 F.3d 128, 132-33 (6th Cir. 1995) (same); *United States v. Anderson*, 236 F.3d 427, 430 (8th Cir. 2001) (evidence must be based not on theoretical yield but on what the particular defendant could produce); *United States v. Rosacker*, 314 F.3d 422, 428 (9th Cir. 2002) (same); *United States v. Havens*, 910 F.2d 703, 706 (10th Cir. 1990) ("The factual question is what each specific defendant could have actually produced, not the theoretical maximum amount produceable from the chemicals involved."); *United States v. Higgins*, 282 F.3d 1261 (10th Cir. 2002) (an estimate by an agent of the quantity of seized controlled substances destroyed before trial is not sufficiently reliable for extrapolating clandestine laboratory yield).

(vi) The production capacity of a laboratory may be based on the amount of precursor drug found in a defendant's possession. Some courts permit quantity to be approximated by calculating the amount of controlled substance that could be produced from the amount of precursor chemicals seized. *United States v. Basinger*, 60 F.3d 1400, 1409 (9th Cir. 1995). Some courts have also permitted a district court to rely on expert testimony that estimates production capability, even when the expert had to assume the availability of precursor chemicals that were not seized or were found in short supply. *United States v. Evans*, 891 F.2d 686, 687-88 (8th Cir. 1989) (same); *United States v. Becker*, 230 F.3d 1224, 1234-36 (10th Cir. 2000) (same); *United States v. Smith*, 240 F.3d 927, 930-31 (11th Cir. 2001) (same).

(vii) The production capacity of a laboratory may be determined by the size and capability of the laboratory. *United States v. Shaffer*, 993 F.2d 625, 629 (7th Cir. 1993) (court may

approximate amount that laboratory could have produced based upon DEA chemist's testimony regarding chemical operations and materials found at drug lab and production capacity of defendant's 12-liter flask when taking into account "sloppy" laboratory procedures); *United States v. Beshore*, 961 F.2d 1380, 1383 (8th Cir. 1992) (court may approximate amount that laboratory could have produced based upon quantity of precursor chemicals, size of laboratory, and recipes to "cook" methamphetamine seized); *United States v. Short*, 947 F.2d 1445, 1456-57 (10th Cir. 1991) (court may approximate amount that laboratory could have produced based upon testimony of DEA chemist and characteristics of laboratory equipment seized); *United States v. Williams*, 989 F.2d 1061, 1072-1074 (9th Cir. 1993) (court permitted to rely on expert testimony that estimated production capability, even though expert had to assume availability of precursor chemicals that were not seized or were found in short supply); *United States v. Kessler*, 321 F.3d 699, 703-704 (8th Cir. 2003) (court relied on chemist's testimony regarding analyzed samples from defendant's residence and from the lab to approximate quantity).

(viii) Courts may convert money into quantities of drugs. Where cash is seized and where either no drug is seized or the amount seized does not reflect the scale of offense, a sentencing court may estimate the quantity of drugs by converting cash into its drug equivalent, provided it finds by a preponderance that the cash was attributable to drug sales which are relevant conduct under §1B1.3. *See United States v. Jackson*, 3 F.3d 506, 511 (1st Cir. 1993) (when drug traffickers possess large amounts of cash in ready proximity to their drug supply, a reasonable inference may be drawn that the money represents drug profits); *United States v. Hicks*, 948 F.2d 877, 882 (4th Cir. 1991); *United States v. Henderson*, 254 F.3d 543, 544 (5th Cir. 2001); *United States v. Jackson*, 990 F.2d 251, 253 (6th Cir. 1993); *United States v. Rivera*, 6 F.3d 431, 446 (7th Cir. 1993); *United States v. Stephenson*, 924 F.2d 753, 764 (8th Cir. 1991); *United States v. Rios*, 22 F.3d 1024, 1027 (10th Cir. 1994).

(ix) Courts should be careful in their calculations to avoid double counting of both the proceeds and the narcotics themselves. *See United States v. Sampson*, 140 F.3d 585, 592 (4th Cir. 1998).

(x) Courts have extrapolated money in other situations to arrive at a drug quantity. *See United States v. Eke*, 117 F.3d 19, 22-24 (1st Cir. 1997) (court affirmed extrapolation of fees paid to couriers to reach a quantity); *United States v. Bashara*, 27 F.3d 1174, 1181-82 (6th Cir.1994) (amount of a wire transfer was converted into an equivalent amount of heroin).

(xi) Courts may extrapolate the volume of a defendant's drug trafficking from evidence of actual trafficking. *United States v. Lopes-Montes*, 165 F.3d 730, 731-732 (9th Cir. 1998) (court reasonably calculated the amount of pure methamphetamine that would have been delivered by defendant based on the purity of the delivered amount and the assumption that the negotiated remaining amount to be delivered would have the same purity). Courts have also used evidence such as drug ledgers or defendant's admissions to determine the quantity attributable to a defendant. *E.g.*, *United States v. Spiller*, 261 F.3d 683, 691 (7th Cir. 2001) (defendant held responsible for dealing 28,000 grams of crack cocaine as evidence by handwritten ledgers belonging to the defendant in which he recorded drug sales); *United States v. Lincoln,* 413 F.3d 716 (8th Cir. 2005) (district court properly made drug quantity estimate based on defendant's post-arrest admissions to the police).

b. **No Evidence to Refute Quantity.** Generally, where a defendant offers no evidence to refute the factual assertions in the presentence report as to the quantity of drugs attributable to him, whether because of his own acts or because such quantity falls within the scope of his jointly undertaken activity and was reasonably foreseeable, the district court may adopt those facts without further inquiry as long as the assertions are supported by sufficient indicia of reliability. *See United States v. Cyr*, 337 F.3d 96, 100 (1st Cir. 2003); *United States v. Solis*, 299 F.3d 420, 461 (5th Cir. 2002); *United States v. Barnett*, 989 F.2d 546, n.6 (1st Cir. 1993); *United States v. Holmes*, 961 F.2d 599, 603 (6th Cir. 1992); *United States v. Shelton*, 400 F.3d 1325 (11th Cir. 2005).

c. **Entire Weight.** For most drugs, weight includes the entire weight of any mixture or substance containing a detectable amount of the controlled substance. *See* Note (A) to Drug Quantity Table. Therefore, in most cases, the base offense level will be set by this entire weight.

d. **Actual Weight.** The purity of a controlled substance is relevant for guideline calculations in a limited number of circumstances; *e.g.*, for offenses involving PCP, amphetamine, methamphetamine, and oxycodone. For offenses involving these controlled substances, the actual weight of the controlled substance is used to determine the base offense level. *See* Note (B) of the Drug Quantity Table.

Also, when applying the Drug Quantity Table, drug weight does not include materials that must be separated from the controlled substance before the controlled substance can be used. *See* §2D1.1, comment. (n.1). *See also* Section II, Part E for discussion of marijuana, p. 23; methamphetamine, p. 24; and LSD, p. 26.

e. **Methods for Determining Purity.** Generally, purity is determined by laboratory testing. *United States v. Contreras*, No. 01CR57, 2002 WL 31049842, *3 (N.D. Ill. Sept. 12, 2002) (mem.) (district court relied on widely accepted scientific methods to determine purity).

(i) When no drugs have been recovered, the government may prove the purity attributable to a defendant by circumstantial evidence. *See* §2D1.1, Note 12. For example, a conspirator's reliable testimony that purchased methamphetamine was "undiluted, unadulterated . . . not cut . . . pure," was held to be sufficiently reliable evidence. *United States v. Cockerill*, 217 F.3d 841 (4th Cir. 2000) (unpublished). Absent evidence to the contrary, a court may assume purity of unrecovered drugs from purity of recovered substances. *United States v. Newton*, 31 F.3d 611, 614 (8th Cir. 1994); *United States v. Lopes-Montes*, 165 F.3d 730, 731-732 (9th Cir. 1999); *see also United States v. Mosby*, 177 F.3d 1067, 1071 (8th Cir. 1999) (court relied on expert testimony from government witness that purity of methamphetamine produced in a lab is usually between 85 and 95 percent to extrapolate quantity of

unrecovered drugs in conjunction with 88 percent purity of seized substance).

(ii) Purity can also be relevant for departure purposes. Particularly when heroin is involved, courts may depart because an unusually high purity is indicative of a defendant's position or role in a drug distribution chain. USSG §2D1.1, comment. (n.9); *see United States v. Doe*, 149 F.3d 634, 640 (7th Cir. 1998); *United States v. Legarda*, 17 F.3d 496, 502 (1st Cir. 1994) (high purity of cocaine justified an upward departure); *United States v. Asseff*, 917 F.2d 502, 504-505 (11th Cir. 1990) (same); *United States v. Martinez-Duran*, 927 F.2d 453, 456 (9th Cir. 1991) (to justify upward departure for high purity of heroin, the government should adduce evidence as to what level of purity is unusually high). Several courts have held, however, that Application Note 9 does not authorize a court to depart based on the low purity of drugs. *See United States v. Beltran*, 122 F.3d 1156, 1159-60 (8th Cir. 1997) (rejecting departure based on purity of methamphetamine); *United States v. Upthegrove*, 974 F.2d 55, 56 (7th Cir. 1992) (rejecting departure based on purity of marijuana); *United States v. Benish*, 5 F.3d 20, 27-28 (3d Cir. 1993) (court did not have discretion to depart downward from sentencing guidelines based on age and sex of marijuana plants; guidelines focus exclusively on number of plants, indicating that Sentencing Commission considered and rejected all other factors); *but see United States v. Mikaelian*, 168 F.3d 380, 390 (9th Cir. 1999) (stating that "the low purity of heroin involved in a crime cannot be categorically excluded as a basis for a downward departure").

C. Selected Specific Offense Characteristics

1. §2D1.1(b)(1) provides for a two-level enhancement if a dangerous weapon (including a firearm) was possessed.

a. **Constructive Possession.** Circuit courts have upheld the weapons enhancement for possession of a weapon in connection with a drug offense if the possession was constructive. Actual possession is not required as long as the person exercised control over the object. *Compare United States v. Hough*, 276 F.3d 884, 894-895 (6th Cir.

2002) (gun upstairs); *United States v. Morales*, 880 F.2d 827 (5th Cir. 1989) (gun in adjoining room); *United States v. Corral*, 324 F.3d 866, 872-783 (7th Cir. 2003) (gun hidden in bathroom); *United States v. Trujillo*, 146 F.3d 838, 847 (11th Cir. 1998) (gun in separate office from cocaine); *with United States v. Garrido*, 995 F.2d 808 (8th Cir. 1993) (rifle in same closet as Ziploc bags of marijuana residue); *United States v. Flores*, 149 F.3d 1272, 1280 (10th Cir. 1998) (shotgun found in headboard of bed found to be connected to drug dealer).

b. **Relationship to Drug Offense.** Application of §2D1.1(b)(1) requires a showing of a temporal and spatial relationship between the weapon, the drug trafficking activity, and the defendant. The enhancement applies if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. *See* §2D1.1, comment. (n.3). The enhancement applies if the weapon was present at any point in the offense or during relevant conduct for which the defendant is responsible. *See* §1B1.3(a)(1).

c. **Co-Conspirator's Possession of a Firearm.** Pursuant to §1B1.3(a)(1)(B), it is also permissible to enhance a defendant's sentence based on a co-conspirator's possession of a weapon in connection with the drug trafficking offense. It is not necessary to prove that defendant knew of co-conspirator's possession of the weapon, as long as co-conspirator's possession was reasonably foreseeable. *See, e.g.*, §1B1.3(a)(1)(B); *United States v. Harris*, 230 F.3d 1054 (7th Cir. 2000) (defendant was subject to firearm enhancement based on co-conspirator's possession of firearms).

Several circuits have found that since firearms are tools of the trade in drug trafficking offenses, a co-conspirator's possession of such is always reasonably foreseeable. *United States v. Bianco*, 922 F.2d 910, 912 (1st Cir. 1991) ("[F]irearms are common tools of the drug trade. Absent evidence of exceptional circumstances we think 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"); *United States v. Topete-Plascencia*, 351 F.3d 454, 458 (10th Cir. 2003) ("[P]ossession of the gun for use in connection with the on-going drug trafficking activities was reasonably foreseeable to [the defendant] in light of the fact all co-conspirators were in Casper solely to distribute drugs."); *United States v. Kimberlin*, 18 F.3d

1156, 1160 (4th Cir. 1994) (the government offered ample evidence to support a finding that the defendant could foresee the codefendant carrying a weapon).

d. **Application of Safety Valve and Firearm Possession.** A defendant who receives the two-level firearm enhancement (§2D1.1(b)(1)) is *not* automatically ineligible for relief under §5C1.2, *see* discussion at Section VIII, Part B, p. 41. However, when a defendant receives a two-level enhancement under §2D1.1(b)(1) based on his own possession of a firearm, generally, he is ineligible for application of §5C1.2. *See United States v. Flucas*, 99 F.3d 177, 178-179 (5th Cir. 1996); *United States v. DeJesus*, 219 F.3d 117, 122 (2d Cir. 2000); *United States v. Moore*, 184 F.3d 790, 795 (8th Cir. 1999); *United States v. Grimm*, 170 F.3d 760, 768 (7th Cir. 1999); *compare United States v. Nelson*, 222 F.3d 545, 549-551 (9th Cir. 2000) (stating that to avoid an enhancement under §2D1.1(b)(1), the defendant must prove that it was clearly improbable he possessed a weapon in connection with the offense; however, he must only establish by a preponderance of the evidence that a weapon was not involved in order to receive the safety valve).

e. **Co-conspirator's Possession and §2D1.1(b)(11).**[4]. In most circuits, a defendant who receives the two-level enhancement based on a co-defendant's possession of the firearm is not rendered ineligible for relief under §5C1.2, and the two-level reduction under §2D1.1(b)(11). *See United States v. Figueroa-Encarnacion*, 343 F.3d 23, 34-35 (1st Cir. 2003); *United States v. Pena-Sarabia*, 297 F.3d 983, 989 (10th Cir. 2002); *United States v. Clavijo*, 165 F.3d 1341, 1343-44 (11th Cir. 1999); *United States v. Wilson*, 114 F.3d 429, 432 (4th Cir. 1997); *United States v. Wilson*, 105 F.3d 219, 222 (5th Cir. 1997); *In re Sealed Case*, 105 F.3d 1460, 1462 (D.C. Cir. 1997); *but see United States v. Johnson*, 344 F.3d 562 (6th Cir. 2003) (defendant who received a two-level sentence enhancement for possession of a weapon based on co-defendant's possession of the weapon would be ineligible for the safety valve reduction).

f. **Burden of Proof.** Most circuits generally have held that once the government has shown by a preponderance of evidence possession

[4] As a result of the addition of new specific offense characteristics to this guideline, this provision has been renumbered on several occasions.

of a weapon during the offense, the evidentiary standard shifts to the defendant to establish that it was clearly improbable that the weapon was connected to the offense. *See United States v. Marrero-Ortiz*, 160 F.3d 768 (1st Cir. 1998); *United States v. Brown*, 276 F.3d 211 (6th Cir. 2002); *United States v. Johnson*, 42 F.3d 1312 (10th Cir. 1994); *United States v. Hall*, 46 F.3d 62 (11th Cir. 1995); *United States v. Drozdowski*, 313 F.3d 819 (3d Cir. 2002) (defendant did not establish that it was "clearly improbable" that the weapons found at the defendant's father's house were connected to the drug conspiracy).

g. **Enhancement in 18 U.S.C. § 924(c) cases.** Section 2D1.1(b)(1) should not be applied when a defendant is also sentenced for a violation of 18 U.S.C. § 924(c) because the sentence imposed for the firearms conviction accounts for the conduct that would underlie the enhancement. *See* §2K2.4, comment. (n.4); *see also United States v. Aquino*, 242 F.3d 859, 864 (9th Cir. 2001).

2. **§2D1.1(b)(6) provides a two-level enhancement if the defendant, or a person for whose relevant conduct the defendant is accountable, distributed a controlled substance through mass marketing by means of an interactive computer service.** Application Note 23 defines interactive computer service.

3. **§2D1.1(b)(10) provides enhancements if manufacture of amphetamine or methamphetamine created a substantial risk of harm to a minor, human life, or the environment.** Application Note 20 to §2D1.1 outlines factors to consider in determining whether an offense created a substantial risk of harm to human life or the environment. *See United States v. Chamness,* 435 F.3d 724 (7th Cir. 2006) (methamphetamine laboratory in a trailer posed a substantial risk to human life or the environment, warranting imposition of the enhancement). *See also United States v. Florence*, 333 F.3d 1290, 1292-93 (11th Cir. 2003) (court held defendant's activities created a substantial risk of harm to the life of minors who were staying at the hotel; also held that §2D1.1(b)(5)(C)[5] does not require a district court to identify a specific minor at risk).

4. **§2D1.1(b)(11) provides a two-level safety valve reduction.** Section 2D1.1(b)(11) provides for a two-level reduction if a defendant meets the requirements for the "safety valve" reduction set forth at §5C1.2(a)(1)-(5), *see* discussion at Section VIII, Part B, p. 40.

[5] As a result of recent amendments to §2D1.1, this enhancement has been renumbered as (b)(10)(B).

The two-level reduction applies regardless of whether defendant was convicted of a crime carrying a mandatory minimum sentence and irrespective of the minimum offense level provision of §5C1.2(b). *See* §2D1.1, comment. (n.21). A defendant may also qualify for the reduction under §2D1.1(b)(11) even if the defendant is convicted of a statute which is not listed at §5C1.2(a) and excluded from operation of the statutory safety valve reduction.

D. Cross References

1. **Murder.** Section 2D1.1(d)(1) provides a cross reference to §2A1.1 (First Degree Murder) and §2A1.2 (Second Degree Murder) if the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111.

   18 U.S.C. § 1111 defines murder as "the unlawful killing of a human being with malice aforethought" and covers both first and second degree murder.

   Distinguished from §§2D1.1(a)(1) & (a)(2). To achieve a base offense level of **43** or **38** under §§2D1.1(a)(1) or (2), the offense of conviction, not just "circumstances" as in §2D1.1(d)(1), must establish that death or serious bodily injury occurred, *see* discussion above at Section II, Part B, p. 4, but no malice aforethought need be proved.

2. **Crime of Violence.** Section 2D1.1(d)(2) provides for a cross reference to §2X1.1 (Attempt, Solicitation, or Conspiracy) if the defendant was convicted of 21 U.S.C. § 841(b)(7) (distribution of a controlled substance with intent to commit crime of violence). The higher offense level, as determined under §2D1.1 or §2X1.1, applies.

   Crime of violence is defined in 18 U.S.C. § 16 and specifically includes rape.

   To be convicted of § 841(b)(7), the victim must have been unaware that a substance with the ability to impair his or her judgment was administered. Therefore, if the victim of the assault had knowingly taken the drug, the cross reference cannot be applied.[6]

[6]This cross reference is limited to cases involving a conviction under 21 U.S.C. § 841(b)(7). An amendment that became effective on November 1, 2004, provided a special instruction in §2D1.1(e) that requires application of the vulnerable victim adjustment in §3A1.1(b)(1) if the defendant commits a sexual offense by distributing a controlled substance to another individual, with or without that individual's knowledge.

Note: If, in the alternative, the defendant is convicted of distribution of a controlled substance resulting in serious bodily injury, §§2D1.1(a)(1) or (2) applies. *See* discussion Section II, Part B, p. 4.

E. Application Issues for Specific Drugs

1. Cocaine

a. **Powder Cocaine v. Cocaine Base or "Crack."** The statute sets a 100:1 ratio between powder cocaine and cocaine base, or "crack." In other words, it takes 100 times the quantity of powder cocaine to trigger the same statutory punishment as crack cocaine. *See* 21 U.S.C. §§ 841(b)(1)(A)(ii),(iii). Despite frequent charges that it has a racially disparate impact, courts have upheld the constitutionality of the 100:1 ratio. Prior to Nov. 1, 2007, the Drug Quantity Table also set a 100:1 ratio between powder cocaine and cocaine base. As a result of changes made to §2D1.1 by Amendment 706, the guideline ratio between powder cocaine and cocaine base varies throughout the Drug Quantity Table. *See* §2D1.1(c). A court may consider the crack/powder cocaine disparity when imposing sentence. *See, e.g., Spears v. United States*, 129 S. Ct. 840 (2009); *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

b. **Definition of "Cocaine Base."** Section 2D1.1 defines cocaine base as "crack," which is in turn defined as "the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." *See* Note (D) to Drug Quantity Table.

Note: The circuits are split as to whether "cocaine base" for the purpose of setting the statutory penalty range is also limited to crack. *Compare United States v. Barbosa*, 271 F.3d 438 (3d Cir. 2001) (definition only applies to guidelines); *United States v. Palacio*, 4 F.3d 150 (2d Cir. 1993) (same), *with United States v. Munoz-Realpe*, 21 F.3d 375 (11th Cir. 1994) (holding that Congress implicitly ratified definition by allowing guideline definition to take effect).

2. Marijuana

a. **Dry Weight.** As an exception to the general rule that drug weight includes the entire weight of any mixture or substance, *see* discussion Section II, Part B, p. 16, the moisture in marijuana is not

counted. The weight of marijuana is its weight when dry enough to consume. *See* §2D1.1, comment. (n.1).

b. **Marijuana Plants.** A marijuana plant is defined as "an organism having leaves and a readily observable root formation." *See* §2D1.1, comment. (n.17). *See also United States v. Foree*, 43 F.3d 1572, 1581 (11th Cir. 1995) (a cutting or seedling from a marijuana plant is not considered a plant until the cutting or seedling develops roots of its own). Neither the statute nor the Drug Quantity Table differentiates between male and female plants. *See* Note (E) to Drug Quantity Table ("regardless of sex"); *see also United States v. Proyect*, 989 F.2d 84 (2d Cir. 1993) (upholding constitutionality of failure to differentiate).

Under §2D1.1, one marijuana plant is treated as equivalent to 100 grams of marijuana. *See* Note (E) to Drug Quantity Table. The Guidelines make exception to this equivalency if the actual dry weight of harvested marijuana is greater, in which case the court should use the actual dry weight of the harvested marijuana. *See id.* Courts have generally applied the equivalency even if the actual weight of harvested marijuana plants is lower than 100 grams per plant. *See United States v. Olsen*, 537 F.3d 660, 665 n.2 (6th Cir. 2008) (collecting cases). The Sixth Circuit has limited this rule to manufacturing cases and has held that a sentence for possession or distribution should be based on the actual weight of the harvested plants. *Id.* at 665.

Note: One marijuana plant is treated as equivalent to 1 kilogram (not 100 grams) of marijuana for purpose of setting the statutory penalty range. *See* 21 U.S.C. §§ 841(b)(1)(A)(vii), (B)(vii), (D).

3. **Methamphetamine**

a. **Purity.** The Drug Quantity Table treats methamphetamine (actual) separately from a mixture or substance containing a detectable amount of methamphetamine, and directs that whichever method results in the greater offense level applies. *See* Note (B) to Drug Quantity Table.

In addition, the Drug Quantity Table treats "Ice," which is defined there as a mixture or substance that is at least 80 percent pure d-methamphetamine, the same as methamphetamine (actual). *See* §2D1.1(c).

Note: To be subject to enhanced statutory penalties, a defendant must be put on notice of the quantities of actual methamphetamine for which he is responsible. *United States v. Muns*, 192 F. Supp. 2d 1046, 1048 n.2 (D. Haw. 2002). *For example, if an offense involves 5 grams of ice, the 5-year mandatory minimum sentence for 5 grams of methamphetamine (actual) would not apply.*

b. **Waste Water.** As an exception to the general rule that drug weight includes the entire weight of any mixture or substance, *see* discussion Section II, Part B, p. 16, for guideline purposes, methamphetamine weight does not include the weight of "wash" or waste water. *See* §2D1.1, comment. (n.1).

Note: The courts are split as to whether this rule also applies for purpose of setting the statutory penalty range. *Compare United States v. Ochoa-Heredia*, 125 F. Supp. 2d 892 (N.D. Iowa 2001) (collecting and analyzing circuit cases and concluding that weight of waste water not included to apply mandatory minimum), *with United States v. Richards*, 87 F.3d 1152 (10th Cir. 1996) (holding *contra*).

c. **Precursor Chemicals.** Under §2D1.1 (if the defendant was convicted of a drug offense, as opposed to a listed chemical offense), methamphetamine precursors are only considered in determining the base offense level if the defendant, or someone for whose conduct the defendant is responsible under the relevant conduct rules of §1B1.3(a), manufactured or attempted to manufacture methamphetamine.

If the above condition is met, and the precursor is listed in the List I Chemical Equivalency Table, *see* §2D1.1, comment. (n.10), convert the precursor (List I Chemical) to marijuana as discussed at Section II, Part B, p. 8. The equivalency established there presumes a 50 percent yield.

If the above condition is met, and the precursor is not listed in the List I Chemical Equivalency Table, the court may estimate the probable yield. *See* §2D1.1, comment. (n.12). Any such estimate, however, must be based on sufficiently reliable evidence as to probable yield based on the particular defendant's capabilities viewed in light of the drug laboratory involved. *See, e.g.*, *United States v. Rosacker*, 314 F.3d 422 (9th Cir. 2002) (holding that district court erred in relying on a forensic laboratory report that was based on unsupported assumptions); *United States v.*

Eschman, 227 F.3d 886 (7th Cir. 2000) (reversing district court's use of one-to-one conversion from pseudoephedrine to methamphetamine based on theoretical 100 percent yield where expert testimony established lower practical yields).

Note*:* If the defendant was convicted of a listed chemical offense, as opposed to a drug offense, apply §2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical; Attempt or Conspiracy). *See* discussion at Section III, Part C, pp. 27-29.

d. **Grouping Offenses from §§2D1.1 and 2D1.11.** Cases involving convictions for precursor chemicals (sentenced under §2D1.11) and offenses related to convictions for methamphetamine (sentenced under §2D1.1) group under §3D1.2(b). *See* §2D1.11, comment. (n.3). Determine the adjusted offense level for the count of conviction under §2D1.1 (which will include the precursor chemicals as relevant conduct if the defendant is accountable for using them to manufacture the methamphetamine) and the adjusted offense level for the count of conviction under §2D1.11 and apply the higher of the two. *See* §3D1.3(a).

4. **LSD**

a. **Carrier Medium.** As an exception to the general rule that drug weight includes the entire weight of any mixture or substance, *see* discussion at Section II, Part B, p. 16, §2D1.1(c) establishes a dosage unit of 0.4 milligrams for the purposes of the Drug Quantity table. *See* Note (H) to Drug Quantity Table.

Note: This rule does not apply for purpose of setting the statutory penalty range; the carrier medium is included in the weight for statutory purposes. *See* §2D1.1, comment. (backg'd); *Neal v. United States*, 516 U.S. 284 (1996) (holding that guidelines treatment does not override statute).

b. **Liquid Solution.** If the LSD is contained in a liquid solution, the weight of the pure LSD alone should be used in determining the base offense level under the guidelines. *United States v. Morgan*, 292 F.3d 460, 463-464 (5th Cir. 2002); *United States v. Camacho*, 261 F.3d 1071, 1074 (11th Cir. 2001); *United States v. Ingram*, 67 F.3d 126, 128 (6th Cir. 1995); *United States v. Turner*, 59 F.3d 481, 485 (4th Cir. 1995). *But see* §2D1.1, comment. (n.15). For

purposes of applicability of mandatory statutory minimums, however, sentencing court must consider total weight of liquid solution containing LSD. *Chapman v. United States*, 500 U.S. 453, 456 (1991) (for determining statutory minimum sentence, weight of carrier medium included in the weight of LSD); *Morgan*, 292 F.3d at 465.

III. Other Offense Guideline Sections

A. §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy)

This guideline 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 stipulates to such a statutory violation. *See* USSG §2D1.2, comment. (n.1).

> **Base Offense Level.** Apply two plus the offense level from §2D1.1[7] for the quantity of controlled substances directly involving a protected location or underage or pregnant individual; or, alternatively, one plus the offense level from §2D1.1 for the quantity of controlled substances involved in the offense. *See* §2D1.2 (a)(1) and (2). Otherwise, the base offense level would be 26, if the offense involved a person less than 18 years; or 13, in all other cases. *See* §2D1.2(a)(3) and (4).

B. §2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy)

This guideline applies the offense levels set forth in §2D1.1 unless "the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises," in which case the defendant receives a 4-level reduction but is ineligible for a role reduction under Chapter 3.

There is a circuit split as to who has the burden of proving participation in the underlying controlled substance offense. The Tenth Circuit held that the defendant had the burden of proving that he did not participate in the underlying trafficking offense. *United States v. Dickerson*, 195 F.3d 1183, 1189–90 (10th Cir. 1999), but other circuits since then have held that the government must affirmatively prove that the defendant participated in the underlying drug trafficking in order to justify the higher sentence. *See, e.g., United States v. Leasure*, 319 F.3d 1092, 1098 (9th Cir. 2003); *In re Sealed Case*, 552 F.3d 841, 846 (D.C. Cir. 2009).

[7] Application of the offense level from §2D1.1 refers to the entire offense guideline (*i.e.*, base offense level and applicable specific offense characteristics. See §1B1.5, comment. (n.1).

C. §2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy)

Where the defendant is convicted of endangering human life while illegally manufacturing a controlled substance, in violation of 21 U.S.C. § 858, Appendix A specifies offense guideline §2D1.10.

1. **Base Offense Level:** Apply three plus the base offense level from the Drug Quantity Table in §2D1.1; or 20 otherwise. *See* §2D1.10 (a)(1) and (2).

2. **Selected Specific Offense Characteristics under §2D1.10.** Section 2D1.10(b)(1) provides a three-level enhancement if the offense involved the manufacture of amphetamine or methamphetamine; and a six-level enhancement if the offense also created a substantial risk of harm to the life of a minor or an incompetent. *See* discussion of a similar enhancement under §2D1.1(b)(10) at Section II, Part C, p. 21.

D. §2D1.11 (Unlawfully Distributing, Importing or Possessing a Listed Chemical; Attempt or Conspiracy)

Where the defendant is convicted of a listed chemical offense, usually 21 U.S.C. §§ 841(c)(1), (2), Appendix A specifies guideline §2D1.11. To be convicted, the defendant must have knowingly committed the offense with reasonable cause to believe that a controlled substance was being manufactured. It is not required, however, that the defendant himself was involved in the manufacturing.

1. **Base Offense Level.** Apply the base offense level specified in the Chemical Quantity Table. *See* §2D1.11(a), (d), (e). In 2004, the Commission amended this section to include a mitigating role reduction like the one contained in §2D1.1(a)(3).

2. **Selected Specific Offense Characteristics under §2D1.11**

   a. Section 2D1.11(b)(1) provides a two-level enhancement if a dangerous weapon (including a firearm) was possessed. *See* discussion of similar enhancement under §2D1.1(b)(1) at Section II, Part C, p. 18; *but compare* §2D1.1(b)(1), comment. (n.3) ("unless it is clearly improbable"), *with* §2D1.11, comment. (n.1) ("unless it is improbable").

   b. Section 2D1.11(b)(2) provides a three-level reduction for certain convictions, unless the defendant "knew or believed" that the listed chemical was to be used to manufacture a controlled substance

unlawfully. To be convicted under 21 U.S.C. § 841(c)(2), the defendant need only have had "reasonable cause to believe" that the listed chemical was to be used to manufacture a controlled substance unlawfully; 21 U.S.C. §§ 841(f)(1) and 960(d)(2) do not require any level of knowledge or belief. This reduction reflects that defendants who possess or distribute listed chemicals without knowing or believing they would be used to manufacture a controlled substance unlawfully are less culpable. *See* § 2D1.11, comment. (n.5).

c. Section 2D1.11(b)(4) provides a two-level enhancement for distribution of a controlled substance, listed chemical, or prohibited equipment, through the use of an interactive computer service. *See* discussion of similar enhancement under §2D1.1(b)(6) at p. 21.

d. In contrast to §2D1.1(b)(11), there is no two-level reduction for meeting the safety valve criteria at 18 U.S.C. § 3553(f)(1)-(5) and §5C1.2(a)(1)-(5).

3. **Cross Reference.** Section 2D1.11(c) provides a cross reference to §2D1.1, but only if the defendant (or a person for whose conduct the defendant is accountable under the relevant conduct rules) completed the actions sufficient to constitute the offense of manufacturing or attempting to manufacture a controlled substance unlawfully. *See* §2D1.11(c).

As the scope of relevant conduct is not as broad as the scope of criminal conspiracy, *see* §1B1.3, comment. (n.2), note carefully whether the manufacture of a controlled substance is both in furtherance of jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity. *For example, if a defendant was arrested selling pseudoephedrine to undercover agents, the cross reference would not apply because the defendant was not involved in the manufacture of a controlled substance or accountable for someone else manufacturing a controlled substance.*

To constitute an attempt, the defendant (or a person for whose conduct the defendant is accountable as relevant conduct) must have intended to manufacture unlawfully and have taken a substantial step toward completing that objective. *See United States v. O'Leary*, 35 F.3d 153, 155 (5th Cir. 1994).

E. §2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy)

1. Base Offense Level: **12** if the defendant either intended to manufacture a controlled substance or knew or believed that the prohibited flask, equipment, chemical product, or material was to be used to manufacture a controlled substance, or **9** otherwise. *See* §2D1.12(a)(1) and (2).

2. Selected Specific Offense Characteristics

   a. §2D1.12(b)(3) adds a two-level enhancement for distribution of a controlled substance, listed chemical, or prohibited equipment, through the use of an interactive computer service; with a corresponding application note providing a definition of interactive computer service.

   b. §2D1.12(b)(4) provides a six-level enhancement if the offense involved stealing anhydrous ammonia or transporting stolen anhydrous ammonia.

F. §2D2.1 (Unlawful Possession; Attempt or Conspiracy)

Simple possession of a controlled substance in violation of 21 U.S.C. § 844 is sentenced under §2D2.1, which (except for possession of more than five grams of cocaine base) provides a flat base offense level that is set based on the type of controlled substance.

Cross Reference. Section 2D2.1(b) provides a cross reference to §2D1.1, but only if the defendant is convicted of possession of more than five grams of a mixture or substance containing cocaine base as if the defendant had been convicted of possession of that mixture or substance with intent to distribute.

IV. Selected Relevant Conduct Issues Specific to Drug Cases

A. Reasonable Foreseeability and Relevant Conduct

In the case of a jointly undertaken criminal activity, a defendant is accountable for "reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook." USSG §1B1.3, comment. (n.2). A "jointly undertaken criminal activity" is a "criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy." *Id.* Proof of "reasonable foreseeability requires more than just subjective awareness." *United States v. Fox*, 548 F.3d 523, 532 (7th Cir. 2008).

In addition, a defendant is responsible for all acts and commissions part of "the same course of conduct or common scheme or plan as the offense of conviction." §1B1.3(a)(2). For offenses to be considered part of a common scheme or plan under the relevant conduct rules, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*. *See* §1B1.3, comment. (n.9(A)). Of course, "the relevant conduct must be unlawful." *United States v. Chube II*, 538 F.3d 693 (7th Cir. 2008) (holding that relevant conduct did not include distribution of prescription medications that was "the result of mistake or inadvertence" and not "necessarily criminal").

Separate incidents of possession with intent to distribute can be included within the scope of relevant conduct for the purpose of determining drug quantity when they qualify as part of a "common scheme or plan" or constitute the "same course of conduct" under §1B1.3. *See Hill*, 79 F.3d at 1481-85 (finding that a discrete incident of possession separated in time by over one year from the offense of conviction could not be part of a common scheme or course of conduct). To find that separate events are related in this fashion, the *Guidelines Manual* requires courts to balance three factors: "the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." *Id.* at 1482 (*quoting* §1B1.3, comment. (n.9(B)). *See United States v. Gill*, 348 F.3d 147, 155 (6th Cir. 2003).

B. Prior Convictions and Relevant Conduct

Section 4A1.2(a)(1) defines "prior sentence" for purposes of criminal history computation and specifically excludes a "sentence for conduct that is part of the instant offense." Application Note 1 explains that this means relevant conduct. Accordingly, if drug amounts attributable to a prior conviction are included as relevant conduct for a defendant's offense level computation in a latter case, that prior conviction should not also be counted in the criminal history calculations required by Chapter Four. *See, e.g.*, *United States v. Weiland*, 284 F.3d 878, 881 (8th Cir. 2002). The district court's determination about whether a prior conviction for drug trafficking was relevant conduct also may impact how the prior conviction would count for purposes of §5G1.3(b), (c). *See, e.g.*, *United States v. Johnson*, 324 F.3d 875 (7th Cir. 2003) (prior state cocaine conspiracy conviction was determined not to be relevant to Johnson's federal cocaine base distribution conviction, resulting in a portion of his federal sentence running consecutive to his state sentence). *See also* §1B1.3. comment. (n.8).

C. Drug Quantity and Base Offense Levels if Death Results

Section 2D1.1(a)(1) and (a)(2) provide base offense levels for offenses that involve death or serious bodily injury from the use of a controlled substance. The evidentiary standard usually applied is preponderance of the evidence. However, in *United States v. Rebmann*, 321 F.3d 540 (6th Cir. 2003), the government, under §2D1.1(a)(2), was required to demonstrate beyond a reasonable doubt, rather than by a preponderance of evidence, that the death of the individual to whom the defendant distributed heroin was the result of the distribution because "if a death results" was an element of the offense rather than relevant conduct. *But see United States v.*

Rodriguez, 279 F.3d 947, 949-951 (11th Cir. 2002) (concluding that there was no *Apprendi* error under 21 U.S.C. § 841(b)(1)(C) when the enhancement for resulting death was found by only a preponderance of the evidence because the 20-year sentence imposed did not exceed the maximum sentence authorized under § 841(b)(1)(C) for a heroin offense without reference to "death or serious bodily injury"); *United States v. McIntosh*, 236 F.3d 968, 976 (8th Cir. 2001) (same); *United States v. Cathey*, 259 F.3d 365, 368 (5th Cir. 2001) (upholding 20-year sentence under § 841(b)(1)(C) upon judge's finding that death resulted from distribution of heroin); *United States v. Swiney*, 203 F.3d 397 (6th Cir. 2000) (where enhancement is attributable to defendant only because of co-conspirator's responsibility for death, then sentencing court must determine whether the death was in furtherance of the jointly undertaken criminal activity and foreseeable to the defendant).

D. Personal Use Quantities and Relevant Conduct

Because simple possession of a controlled substance (except crack cocaine over 5 grams) is an offense using a Chapter Two guideline which is excluded from grouping at §3D1.2(d), the guidelines instruct that the act of simple possession and the corresponding drug amounts should not be included as part of the same course of conduct or common scheme or plan (*see* §1B1.3(a)(2)) in the calculation of the base offense level for drug trafficking offenses. Whether such acts and amounts can be otherwise included in the calculation of a conspiracy or substantive count for drug trafficking has, however, been the subject of case law.

Under the relevant case law, the answer to whether a defendant should be held accountable under the relevant conduct rules for drugs possessed for personal use varies depending upon the offense charged. Personal use amounts are not included in drug amounts used to compute the base offense level when the charge is possession with intent to distribute. *See United States v. Gill*, 348 F.3d 147, 151-153 (6th Cir. 2003) (because defendant's possession of drugs for personal use was not an act that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, it could not be considered relevant conduct); *United States v. Kipp*, 10 F.3d 1463 (9th Cir. 1993); *United States v. Wyss*, 147 F.3d 631 (7th Cir. 1998); *United States v. Fraser*, 243 F.3d 473, 476 (8th Cir. 2001); *United States v. Williams*, 247 F.3d 353 (2d Cir. 2001). If the case includes a conspiracy count, personal use amounts are included in the base offense level computation. *See United States v. Antonietti*, 86 F.3d 206 (11th Cir. 1996) (defendant properly held accountable for marijuana cultivated for his own use); *United States v. Asch*, 207 F.3d 1238, 1240 (10th Cir. 2000) (where a member of a conspiracy to distribute drugs handles drugs both for personal consumption and distribution in the course of the conspiracy, the entire quantity of drugs handled is relevant conduct for purposes of calculating the base offense level pursuant to the guidelines). *See United States v. Fregoso*, 60 F.3d 1314, 1328-29 (8th Cir.1995); *United States v. Snook*, 60 F.3d 394, 395-96 (7th Cir. 1995); *United States v. Innamorati*, 996 F.2d 456, 492 (1st Cir. 1993); *cf. United States v. Antonietti*, 86 F.3d 206, 209-11 (11th Cir. 1996) (holding that drugs possessed for personal use were relevant to offenses of manufacturing, possessing with intent to distribute, and conspiring to manufacture and possess

with intent to distribute, and conspiring to manufacture and possess with intent to distribute, without recognizing the distinctions among the offenses).

V. Sentencing Entrapment

Entrapment, a complete defense to a crime, occurs when the government induces a defendant who was not predisposed to engage in criminal conduct to commit a crime. Many courts recognize that analogous "sentencing entrapment"–when the government induces a defendant to commit a crime more serious than he was predisposed to commit–would require sentencing the defendant for the crime he was predisposed to commit rather than the crime he did commit. However, few courts have found that defendants have proved sentencing entrapment.

A. Remedies for Sentencing Manipulation

Notes 12 and 14 to §2D1.1 provide for specific remedies for sentencing manipulation by the government, either by excluding amounts from the base offense level or by departure.

1. Note 12 provides in pertinent part that, where an offense involves an agreement to sell a controlled substance, the base offense level is based on the agreed-upon quantity, *unless* the defendant establishes that he did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity. This note was amended in November 2004, to clarify that it includes not only a seller but also a defendant-buyer in a reverse sting operation.

2. Note 14 states that the court may depart downward if it finds that the government agent in a reverse sting sets a price for the controlled substance that is substantially below the market value, thereby leading the defendant to purchase a significantly greater quantity than he would otherwise have been able to purchase.

   Section §2D1.1, Application Note 14 has been interpreted in different ways by the courts. The courts may look at the government's intention to increase a sentence or the defendant's predisposition to buy drugs. Many factors are taken into consideration in determining whether a defendant participated in a drug buy or is capable of purchasing certain drug quantities. In addition to the price offered by the government in a reverse sting, other factors, such as credit terms, initial down payment and repayment plans have also been examined.

   In the District of Columbia Circuit, the court applied a two-part test to make this determination: (1) whether the government offered overgenerous terms or inducements and; (2) whether the overgenerous terms led the defendant to purchase a greater quantity of drugs than his

resources otherwise would have allowed. *See United States v. Gaviria*, 116 F.3d 1498, 1527 (D.C. Cir. 1997), *cert. denied*, 534 U.S. 1033 (2001) (denying application of Note 14, where defendant presented no evidence that agreed upon price was substantially below the market price). The Eighth Circuit added a third consideration: whether defendant is predisposed to buying drugs. *See United States v. Searcy*, 233 F.3d 1096 (8th Cir. 2000) (court remanded for reconsideration in light of fact defendant never dealt in crack cocaine before government agent coaxed him to do so.). The Ninth Circuit used a different test when looking to the government's intent: whether the government lowered the price with the intention that an increase in the defendant's sentence would be the result. *See United States v. Naranjo*, 52 F.3d 245 (9th Cir. 1995) (finding strong evidence DEA agents were trying to increase the quantity of drugs purchased by offering to buy back unsold quantities.).

Application of Note 14 is primarily factor-driven. *See United States v. Lora*, 129 F. Supp. 2d 77 (D. Mass. 2001) (where drug quantity was used to measure a defendant's culpability, the quantity at issue must be a product of the defendant's proclivity and not the government's effort to ratchet up the sentence); *United States v. Goodwin*, 317 F.3d 293 (D.C. Cir. 2003) (denying defendant's motion for downward departure where it found quantity discounts and minimal down payments for drugs were a common occurrence in the illicit drug trade.); *but* s*ee United States v. Panduro*, 38 Fed. App'x 36 (2d Cir. 2002) (holding Note 14 is applicable where government agents offered drugs on a nearly 50 percent consignment basis). Transaction need not be monetary based. *See United States v. Cambrelen*, 29 F. Supp. 2d 120 (E.D.N.Y. 1998), *cert. denied*, 534 U.S. 855 (2001) (granting the sentence reduction where court found government agent's influence led defendant to steal drugs from a warehouse).

B. Other Sentencing Manipulation/Entrapment

Courts have also recognized other forms of sentencing manipulation and/or entrapment by the government. For example, the Ninth Circuit has held that drugs should be excluded from consideration where the defendant was pressured (or entrapped) to sell more or more serious drugs. *See, e.g.*, *United States v. Staufer*, 38 F.3d 1103 (9th Cir. 1994); *United States v. Searcy*, 233 F.3d 1096 (8th Cir. 2000). Some courts have also held that excluding amounts of drugs based on sentencing manipulation or entrapment may reduce the sentence below the mandatory minimum. *See, e.g.*, *United States v. Castaneda*, 94 F.3d 592 (9th Cir. 1996); *United States v. Montoya*, 62 F.3d 1 (1st Cir. 1995).

C. Limits on Sentencing Manipulation/Entrapment

Some courts have limited sentencing entrapment to those cases where the government has engaged in outrageous conduct. *See, e.g.*, *United States v. Scull*, 321 F.3d 1270 (10th Cir. 2003). The Sixth and Eleventh Circuits have rejected "sentencing entrapment" as a ground for departure. *See United States v. Watkins*, 179 F.3d 489, 503 n.14 (6th Cir. 1999); *United States v. Williams,* 954 F.2d 668, 673 (11th Cir. 1992).

VI. Chapter Three: Adjustments[8]

A. Role Adjustments

Defendants sentenced under §2D1.1 and §2D1.11 who receive a mitigating role adjustment under §3B1.2 receive a graduated reduction in the applicable offense level where the quantity level under §2D1.1 and §2D1.11 results in a base level of 32 or greater. *See* discussion of §2D1.1(a)(3) at Section II, Part B, p. 5 and discussion of §2D1.11 at Section III, Part C, p. 28. This mitigating role reduction sets the *base offense level*; specific offense characteristics, Chapter Three adjustments, and Chapter Five departures follow from this starting point.

B. Abuse of Position of Trust or Use of a Special Skill

Application Note 8 of §2D1.1 provides that an adjustment under §3B1.3 ordinarily would apply in the case of a defendant who used his or her position as a coach to influence an athlete to use an anabolic steroid.

Courts have applied the adjustment for use of a special skill in drug trafficking cases. *See, e.g., United State v. Calderon,* 127 F.3d 1314 (11th Cir. 1997) (upholding adjustment for defendants who captained a vessel on the high seas during a drug smuggling operation); *United States v. Nelson-Rodriguez,* 319 F.3d 12 (1st Cir. 2003) (defendant's skills with communication equipment and ability to determine and locate frequencies necessary to communicate with Colombians significantly facilitated the commission of the offense and was thus a special skill); *United States v. Chastain,* 198 F.3d 1338 (11th Cir. 1999) (defendant who acted as the pilot for a conspiracy to import marijuana into the United States was properly subject to the adjustment for use of a special skill); *United States v. Campbell,* 61 F.3d 976 (1st Cir. 1995)(upholding application of the adjustment for a defendant who had near PhD training as a chemist, who was charged with manufacturing P2P, a precursor chemical for methamphetamine). *But cf.*, *United States v. Montero-Montero,* 370 F.3d 121 (1st Cir. 2004) (reversing application of the adjustment where the evidence failed to show that the defendant navigated the boat used for the smuggling operation); *United States v. Burt,* 134 F.3d 997 (10th Cir. 1998) (adjustment should not applied

[8] For a fuller discussion of Chapter Three adjustments, *see* "Guideline Sentencing: Selected Chapter Three Adjustments," USSC, Office of General Counsel, available at http://www.ussc.gov/training/CH_3_Decisions_03.pdf.

to a suspended deputy sheriff involved in drug dealing based on the knowledge of tricks used to conceal drugs because such skills do not qualify as special skills).

C. Using a Minor to Commit a Crime

1. **§3B1.4 – "Use" of Minor to Commit Crime.** One issue is whether a two-level upward adjustment for using a minor to commit an offense requires evidence that the defendant acted affirmatively to involve the minor in the crime, beyond merely acting as his partner. Two circuits have held that is it not enough if the defendant and the minor are equal participants in a crime. *United States v. Butler*, 207 F.3d 839, 847 (6th Cir. 2000) (no §3B1.4 adjustment because defendant and minor possessed equal authority in their commission of crime and "use" of a minor requires more affirmative action on the part of the defendant); *United States v. Parker,* 241 F.3d 1114, 1120-21 (9th Cir. 2001) (no §3B1.4 adjustment because Note 1 defines "used" as "directly commanding, encouraging, intimidating, counseling, training, procuring, recruiting or soliciting" and defendant merely "participated" in an armed bank robbery with minor). *But see United States v. Ramsey,* 237 F.3d 853, 859-60 (7th Cir.), *cert. denied,* 534 U.S. 831 (2001) (inquiry under §3B1.4 is whether the defendant affirmatively involved a minor in the commission of an offense, regardless of whether the minor is a partner in the offense or is in a subordinate position). Courts have applied the adjustment in instances where the minor was not actively involved in the crime. *See, e.g., United States v. Gaskin,* 364 F.3d 438 (2d Cir. 2004) (adjustment was warranted where the defendant drove son to the parking lot where the defendant took delivery of a RV containing marijuana so that the son could drive the defendant's car); *United States v. Castro-Hernandaz,* 258 F.3d 1057 (9th Cir. 2001) (adjustment was warranted where the defendant was transporting his three year old son as a passenger in his truck at the same time he was smuggling drugs); *United States v. Warner*, 204 F.3d 799 (8th Cir. 2000) (upholding adjustment where the defendant offered to leave his eight year old daughter with drug purchasers as collateral for payment money they entrusted to him).

2. **§3B1.4 – Use of Minor and Defendant's Age.** Another issue is whether a two-level upward adjustment for using a minor to commit an offense applies to defendants of all ages. The Sixth Circuit has held that §3B1.4 violates the Violent Crime Control and Law Enforcement Act of 1994, which directed the Commission to "promulgate guidelines or amend existing guidelines to provide that a *defendant 21 years of age or older* who has been convicted of an offense shall receive an appropriate sentence enhancement if the defendant involved a minor in the commission of the offense." *United States v. Butler,* 207 F.3d 839, 850-51 (6th Cir. 2000) (in a splintered opinion, court rejected arguments that Commission

implemented Congress's directive in a "slightly broader fashion" and that Congressional silence during the waiting period prior to the effective date of the amendment was significant). Two other circuits have held that the Commission did not exceed its authority when it subjected defendants of all ages to §3B1.4. *United States v. Murphy,* 254 F.3d 511, 513 (4th Cir. 2001) (Commission complied with the congressional directive because every defendant over the age of 21 will receive the §3B1.4 adjustment); *United States v. Ramsey,* 237 F.3d 853, 858 & n.7 (7th Cir.), *cert. denied,* 534 U.S. 831 (2001) (Congress implicitly approved of §3B1.4 by failing to disapprove it in 1995 during the waiting period before the amendment went into effect even though Congress disapproved crack cocaine and money laundering amendments also proposed that same year).

VII. Chapter Four: Criminal History and Career Offender

Application of USSG §4B1.1 (Career Offender) and USSG §4B1.4 (Armed Career Criminal) requires, *inter alia*, that a defendant's instant conviction be either a crime of violence or a controlled substance offense and that the defendant's record include the requisite number of predicate offenses. If a defendant has been indicted for a controlled substance offense, whether he fits the criteria for a career offender or an armed career criminal should be considered. The determination of whether a predicate offense is either a crime of violence or a controlled substance offense requires the court to apply the categorical approach enunciated by the Supreme Court in *Taylor v. United States,* 495 U.S. 575 (1990). *See also Shepard v. United States,* 544 U.S. 13 (2005).

The circuit courts vary in their treatment of drug offenses that qualify as a "controlled substance offense" in determining a defendant's status as a career offender or armed career criminal. *See United States v. Stelivan*, 125 F.3d 603, 605-06 (8th Cir. 1997) (conspiracy to distribute cocaine considered a controlled substance offense); *United States v. Browning*, 252 F.3d 1153, 1159 (10th Cir. 2001) (Wyoming conviction for aiding and abetting manufacture of methamphetamine considered a controlled substance); *United States v. Shabazz*, 233 F.3d 730 (3d Cir. 2000) (use of a minor to sell drugs is a controlled substance offense).

Enhancement Provisions

	Career Offender	Armed Career Criminal	"Three Strikes"
Sources of Law	USSG §§4B1.1, 4B1.2 28 U.S.C. § 994(h)	USSG §4B1.4 18 U.S.C. § 924(e)	No guideline yet. 18 U.S.C. § 3559(c)
Requirements	(1) Defendant at least 18 at offense. (2) Instant offense is felony conviction for "crime of violence" or "controlled substance offense." (3) 2 prior convictions for "crimes of violence" or "controlled substance offenses" (or 1 of each).	(1) Violation of § 922(g) (possession of a firearm by prohibited person). (2) 3 prior convictions for "violent felonies" or "serious drug offenses" committed on different occasions.	(1) Instant offense must be "serious violent felony" (2) 2 prior convictions for "serious violent offense" or "serious violent felony" +1 prior "serious drug offense"
Offense Definitions for Instant and Predicate Offenses	"Crime of violence" = any felony for burglary of a dwelling, arson, extortion, other conduct involving serious risk of physical injury, or with an element of the use or threatened use of force. "Controlled substance offense" = any state or federal offense involving manufacture, distribution, or intent to distribute.	"Violent felony" = any felony that (I) has an element the use, threat of use, or attempted use of physical force against another person, or (ii) is burglary, arson, extortion, explosives use, or otherwise involves conduct that presents a serious potential risk of physical injury to another. "Serious drug offense" = federal drug offense 10 year + max., or state drug offense involving manufacture/distribution and at least 10 year max.	"Serious violent felony" = murder, sex crimes, kidnaping, extortion, arson, firearms use, attempts/conspiracies thereof, or any other offense punishable over 10 years with a force element or which by its nature involves substantial risk of physical force being used. "Serious drug offense" = anything punishable under 21 U.S.C. § 841(b)(1)(A); (*e.g.*, 1K heroin, 5K cocaine, 50g crack, etc).
Result	Criminal history category becomes VI. Offense level is raised to near statutory max.	Criminal history becomes at least IV. Offense level is raised to 33 or 34. Under § 924(e), 15-year mandatory minimum.	Mandatory life imprisonment. Note that 18 U.S.C. § 3582(c) may provide relief to defendants over 70 who have done at least 30 years.
Notes	5, 10, or 15 year limits on priors which must be separately countable in guidelines calculation. No notice required before trial/plea.	No time limit on priors. No notice required before trial/plea.	No time limit on priors. Priors must occur after previous prior conviction (conduct→conviction→conduct...) Gov't. must give written notice before trial/plea under 21 U.S.C. § 851(a). Robberies do not count as S.V.F.'s if defendant proves that no one was hurt and no dangerous weapon was used/threatened. A similar exception exists for arson.

Courtesy of Federal Defender Training Group

VIII. Chapter Five: Determining the Sentence

A. Statutory Penalty Ranges Revisited: *Apprendi*

1. Statutory Maximum Sentence

a. ***Apprendi v. New Jersey*, 530 U.S. 466 (2000).** In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490. Before *Apprendi*, the usual practice had been for the district court to treat drug quantity and other penalty-enhancing facts as sentencing factors that it determined at sentencing by a preponderance of the evidence. After *Apprendi*, the courts of appeal have uniformly held that the rule announced there applies to facts–such as drug type, drug quantity, death or serious bodily injury–that increase the statutory maximum sentence. *For example, if a defendant is convicted of possession with intent to sell an unspecified amount of cocaine, the statutory maximum sentence is 20 years, pursuant to 21 U.S.C. § 841(b)(1)(C), even if the government proves at sentencing that the amount of cocaine involved would trigger an enhanced penalty.*

b. **Statutory Maximum Trumps Guideline Range.** Under §5G1.1(a), (c)(1), the statutory maximum sentence trumps the otherwise applicable guideline range. Therefore, after *Apprendi*, the absolute maximum sentence is determined by what triggering facts were pled and proved to the guilt phase factfinder, by competent evidence, beyond a reasonable doubt. *For example*, *if a defendant is convicted of possession with intent to sell an unspecified amount of cocaine (20-year statutory maximum), and the otherwise applicable guideline range is 292-365 months, the guideline sentence is 240 months (20 years).*

c. **Stacking of Multiple Convictions.** When a defendant sustains multiple convictions, §5G1.2(d) directs courts to run sentences consecutively to the extent necessary to achieve the guideline range. Most circuits have held that this sort of "stacking" of sentences is mandatory if the imposition of fully concurrent terms would result in a sentence below the guideline range. *See, e.g.*, *United States v. Lafayette*, 337 F.3d 1043, 1050, n.12 (D.C. Cir. 2003) (collecting cases); *but cf. United States v. Velasquez*, 304 F.3d 237, 243-45 (3d Cir. 2002) (holding that it was within district

court's discretion to impose concurrent terms). Therefore, where a defendant's guideline range is within the *combined* total of the statutory maximum sentences for all convictions, by stacking terms, the court may impose a sentence within the guideline range without exceeding the statutory maximum sentence. *For example, if a defendant is convicted of possession with intent to sell an unspecified amount of cocaine (20-year statutory maximum) and conspiracy to possess with intent to sell an unspecified amount of cocaine (20-year statutory maximum), and the applicable guideline range is 292-365 months, the court may stack the maximum terms to set a combined maximum of 40 years; therefore, the guideline range remains 292-365 months.*

2. **Statutory Minimum Sentence**

a. ***Harris v. United States*, 536 U.S. 545 (2002).** In *Harris*, the United States Supreme Court held that the rule announced in *Apprendi* was not violated by judicial fact finding as to a factor that increased the mandatory minimum sentence to which a defendant is subject. *Harris*, 536 U.S. at 556. At issue in *Harris* was 18 U.S.C. § 924(c)(1)(A)(ii), which increases the minimum term for a defendant who carries a firearm in relation to a drug trafficking offense from five years to seven years if the defendant "brandished" the firearm. A judicial finding that the defendant brandished the firearm increases the minimum term but does not alter the maximum term, which is life. Some courts have held, based on *Harris,* that the rule announced in *Apprendi* does not apply to mandatory minimum terms. *See, e.g.*, *United States v. Goodine*, 326 F.3d 26, 31-32 (1st Cir. 2003) ("We therefore find that drug quantity for purposes of § 841 is a sentencing factor that may be determined by a preponderance of the evidence"); *United States v. Copeland*, 321 F.3d 582, 603 (6th Cir. 2003) (where a defendant is made subject to a higher range of punishment under §§ 841(b)(1)(A) and (B) but is nonetheless sentenced within the confines of § 841(b)(1)(C), his rights under *Apprendi* are not violated); *United States v. Solis*, 299 F.3d 420, 454 (5th Cir. 2002) (the contention that *Apprendi* applies to mandatory minimums is meritless in light of the Supreme Court's recent decision in *Harris*); *but see United States v. Gonzales,* 420 F.3d 111 (2d Cir. 2005) (Given that the statutory minimum sentences for aggravated drug offenses operate in tandem with increased maximum sentences to create sentencing ranges that raise the limit of possible sentences, drug quantity must be deemed an element of an aggravated drug offense for all purposes relevant to the application of such

increased ranges, and courts are not required to treat drug quantity as a sentencing factor for purposes of imposing mandatory minimum sentences under the statute); *United States v. Velasco-Heredia*, 319 F.3d 1080 (9th Cir. 2003) (holding that drug quantity that triggers a mandatory minimum sentence must be proved by competent evidence beyond a reasonable doubt where same finding also raised potential maximum sentence); *United States v. Graham*, 317 F.3d 262, 275 (D.C. Cir. 2003) (remanding for resentencing where jury verdict did not support imposition of five-year mandatory minimum term of supervised release pursuant to § 841(b)(1)(A), although same term could have been imposed under § 841(b)(1)(C) in court's discretion); *see also United States v. Martinez*, 277 F.3d 517, 530, 532-34 (4th Cir. 2002) (concluding that court erred in telling a defendant who was pleading guilty that he faced a mandatory minimum sentence of ten years and a maximum of life when he, in fact, faced no mandatory minimum sentence and a maximum of twenty years, although error did not affect substantial rights).

b. **Statutory Minimum Trumps Guideline Range.** Under §5G1.1(b), (c)(2), the statutory minimum sentence trumps the otherwise applicable guideline range.

c. **Drug Quantity Under Guidelines Does not Necessarily Equal Drug Quantity Under the Statute**. In some cases, the drug quantity used for calculating the guidelines will not be the same as the drug quantity used to calculate the statutory minimum. One court has stated: "[S]tatutory minimums do not hinge on the particular defendant's relevant conduct. In a drug conspiracy, the amount of drugs attributable to any one codefendant as 'relevant conduct' for guidelines purposes is limited to the reasonably foreseeable transactions in furtherance of that codefendant's jointly undertaken criminal activity,' USSG §1B1.3(a)(1)(B), but when it comes to the statutory penalties, every coconspirator is liable for the sometimes broader set of transactions that were reasonably foreseeable acts in furtherance of the entire conspiracy." *United States v. Easter*, 553 F.3d 519, 523 (7th Cir. 2009) (citing cases).

3. **Definition of "Offense of Conviction" Obscured.** A defendant's *maximum* sentence is based on the facts pled and proved by competent evidence beyond a reasonable doubt at trial (or plea). In certain jurisdictions, the *minimum* sentence is based on facts found by a preponderance of sufficiently reliable evidence at sentencing, a defendant's statutory penalty range may be drawn from separate penalty

provisions. *For example, if a defendant is convicted of possession with intent to sell an unspecified amount of cocaine, but the court finds at sentencing that more than 5 kilograms of cocaine were involved, the statutory penalty range is 10 years (based on 21 U.S.C. § 841(b)(1)(A)) to 20 years (based on 21 U.S.C. §841(b)(1)(C)).*

B. Relief from Mandatory Minimum Sentences: the "Safety Valve"

18 U.S.C. § 3553(f): For violations of 21 U.S.C. §§ 841, 844, 846, 960, and 963, the "safety valve" provision directs courts to impose sentences "without regard to any statutory minimum sentence" if the five conditions listed at section 3553(f)(1)-(5) are met. This means that if the five statutory conditions are met, there is no mandatory minimum term. The five statutory conditions are listed verbatim at §5C1.2(a)(1)-(5). The defendant bears the burden of proving by a preponderance of evidence that all five conditions are met. *See, e.g.*, *United States v. Ajugwo*, 82 F.3d 925 (9th Cir. 1996). Once the court finds that the conditions are met, the court has no discretion but to apply the guidelines without regard to the mandatory minimum. *See, e.g.*, *United States v. Myers*, 106 F.3d 936 (10th Cir. 1997); *United States v. Real-Hernandez*, 90 F.3d 356, 361-62 (9th Cir. 1996).

1. The Statutory and Guideline Conditions

a. **No more than one criminal history point.** This criterion is met only if the defendant, by a straight application of §4A1.1, has no more than one criminal history point. That is, even if a court departs, pursuant to §4A1.3, down to one criminal history point, the defendant has not met this criterion.

b. **No violence or weapon.** This criterion is met if *the defendant* did not possess a firearm in connection with the offense.

(I) To determine whether this criterion is met, look beyond the offense of conviction to relevant conduct, *see* §5C1.2, comment. (n.3), but only to the defendant's own conduct, *see* §5C1.2, comment. (n.4). Therefore, if a defendant's offense level is increased pursuant to §2D1.1(b)(1) based on a co-conspirator's possession of a weapon, this increase does not preclude defendant from meeting this criterion. *See, e.g.*, *United States v. Figueroa-Encarnacion*, 343 F.3d 23, 34-35 (1st Cir. 2003) (collecting cases); *United States v. Pena-Sarabia*, 297 F.3d 983, 987-989 & n.2 (10th Cir. 2002) (overruling prior circuit authority to the contrary).

(ii) In addition, the defendant might meet this criterion even if his or her offense level is increased pursuant to

§2D1.1(b)(1) based on his or her own possession of a weapon. This result is possible because of the different standards of proof for application of §2D1.1(b)(1) (if weapon was present, defendant bears burden of proving it was "clearly improbable" that the weapon was connected with the offense) and §5C1.2(a)(2) (defendant bears burden of proving by preponderance of evidence that weapon was not connected with offense). *See United States v. Nelson*, 222 F.3d 545 (9th Cir. 2000); *but see United States v. Vasquez*, 161 F.3d 909, 911-12 (5th Cir. 1998) ("despite any difference in semantics between §§2D1.1(b)(1) and 5C1.2(2), the two provisions should be analyzed analogously"); *United States v. Coleman*, 148 F.3d 897 (8th Cir. 1998) (applying same test for weapon possession enhancement and safety valve decrease).

c. **No death or serious bodily injury.** To determine whether this criterion is met, look beyond the offense of conviction to relevant conduct, *see* §5C1.2, comment. (n.3); the inquiry is not limited to the defendant's own conduct. *Compare* §5C1.2, comment. (n.4).

d. **No leadership role adjustment**

(I) This criterion is not met if defendant is subject to an aggravating role adjustment under §3B1.1. *See* §5C1.2, comment. (n.5).

(ii) In addition, this criterion is not met if defendant was engaged in a continuing criminal enterprise. However, as Application Note 6 explains, a defendant engaged in a continuing criminal enterprise will not be eligible for other reasons: (1) safety valve does not apply to convictions under 21 U.S.C. § 848; and (2) by definition, a defendant engaged in a continuing criminal enterprise convicted of a covered offense will receive an aggravating role adjustment, *compare* 21 U.S.C. §848(c)(2)(A) *with* §3B1.1, and thus be ineligible for the reduction.

e. **Full disclosure.** The final criterion is that defendant make full, truthful disclosure to the government no later than sentencing. It is important to note that §5C1.2(a)(5) specifically provides that "the fact that the defendant has no useful information to provide or that the Government is already aware of the information" does not preclude the defendant from meeting this criterion.

(I) Full disclosure. Section 5C1.2(a)(5) requires disclosure of "all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." This includes information about other participants, regardless of whether defendant was convicted of conspiracy. *See, e.g.*, *United States v. Woods*, 210 F.3d 70 (1st Cir. 2000); *United States v. Myers*, 106 F.3d 936 (10th Cir. 1997); *United States v. Thompson*, 81 F.3d 877 (9th Cir. 1996).

(ii) Truthful disclosure. The courts are split as to whether, despite prior lies and omissions to the Government, a defendant can still be eligible for the safety valve so long as the defendant makes a complete and truthful proffer no later than the commencement of the sentencing hearing. *Compare United States v. Schreiber*, 191 F.3d 103, 108-09 (2d Cir. 1999) ("lies and omissions do not disqualify a defendant from safety valve relief so long as the defendant makes a complete and truthful proffer not later than the commencement of the sentencing hearing"); *United States v. Madrigal*, 327 F.3d 738 (8th Cir. 2003); *United States v. Shrestha*, 86 F.3d 935, 940 (9th Cir. 1996); *United States v. Mejia-Pimental*, 477 F.3d 1100 (9th Cir. 2007); *United States v. Gama-Bastidas*, 142 F.3d 1233, 1242-43 (10th Cir. 1998); *United States v. Brownlee*, 204 F.3d 1302, 1304-05 (11th Cir. 2000); *United States v. Johnson*, 231 F.3d 43, 51 (D.C. Cir. 2000); *with United States v. Fletcher*, 74 F.3d 49, 56 (4th Cir. 1996) (holding *contra*); *United States v. Edwards*, 65 F.3d 430, 433 (5th Cir. 1995); *United States v. Marin*, 144 F.3d 1085, 1094 (7th Cir. 1998).

The courts are also split as to whether information provided to the government for purposes of the safety valve must be both objectively and subjectively truthful. *Compare United States v. Thompson*, 76 F.3d 166, 170-71 (7th Cir. 1996) (defendant qualified for safety valve where she was "forthright within the range of her ability," given that she had low level of cognitive functioning, an elevated need for approval from others, and a limited ability to question and analyze her surrounding circumstances); *United States v. Sherpa*, 110 F.3d 656, 659-63 (9th Cir. 1997) (affirming application of safety valve where jury convicted defendant,

but judge held that defendant was being truthful in denying knowledge that he was carrying drugs); *with United States v. Reynoso*, 239 F.3d 143, 150 (2d Cir. 2000) (requirement not satisfied where defendant, who suffers from organic memory impairment, provided information that she subjectively believed to be truthful but was objectively untruthful).

(iii) Disclosure to the Government. Courts have interpreted the "government" to mean the prosecutorial authority, *see United States v. Jimenez-Martinez*, 83 F.3d 488, 495-96 (1st Cir. 1996), or the government's attorney, *see United States v. Contreras*, 136 F.3d 1245, 1246 (9th Cir. 1998). Therefore, disclosure to a probation officer, *see United States v. Rodriguez*, 60 F.3d 193 (5th Cir. 1995), or the court, *see United States v. Marin*, 144 F.3d 1085, 1092 (7th Cir. 1998), does not satisfy the requirement.

Note: However, a defendant is not required to give information to a specific government attorney. *See United States v. Real-Hernandez*, 90 F.3d 356 (9th Cir. 1996).

(iv) Disclosure not later than sentencing. Courts are split as to whether "not later than the time of the sentencing hearing" means before the commencement of the first sentencing hearing or before the hearing at which the defendant is sentenced. *Compare United States v. Madrigal*, 327 F.3d 738 (8th Cir. 2003) (holding that continued sentencing hearing did not deprive district court of jurisdiction to grant safety valve relief), *with United States v. Marin*, 144 F.3d 1085 (7th Cir. 1998) (reversing where district court continued sentencing hearing numerous times to "coax the truth out of" the defendant).

3. **§5C1.2(b).** If a defendant meets the criteria and his statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two and Three cannot be less than 17.

4. **Safety Valve and §2D1.1(b)(11).** If the district court finds that the defendant failed to disclose everything he knows concerning his offense and relevant conduct, it may deny the two-level "safety valve" reduction under §2D1.1(b)(11). *United States v. Virgen-Chavarin*, 350 F.3d 1122, 1130 (10th Cir. 2003). The two-level reduction applies regardless of whether defendant was convicted of a crime carrying a mandatory

minimum sentence and irrespective of the minimum offense level provision of §5C1.2(b). *See* §2D1.1, comment. (n.21). A defendant may also qualify for the reduction under §2D1.1(b)(11) even if the defendant is convicted of a statute which is not listed at §5C1.2(a) and excluded from operation of the statutory safety valve reduction.

5. **Departures or variances below the mandatory minimum sentence are permissible when the safety valve is applied, including a downward departure under §5K1.1 (Substantial Assistance).**

C. Downward Departures for Substantial Assistance to Authorities

1. A district court may depart below a guideline minimum sentence where the government has filed a substantial assistance motion pursuant to USSG §5K1.1 based on the defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

2. A substantial assistance reduction below a statutory mandatory minimum requires a government motion pursuant to 18 U.S.C.§ 3553(e) specifically requesting or authorizing the district court to impose a sentence below a level established by statute as minimum sentence before the court may impose such a sentence. *Melendez v. United States*, 518 U.S. 120, 122 (1996). Otherwise, the court may only depart down from the guideline range to the statutory minimum sentence. *Id*.

3. When the guideline range falls below the statutory mandatory minimum sentence, and the government files a motion pursuant to 18 U.S.C.§ 3553(e), the appropriate starting point for the downward departure is the statutory mandatory minimum sentence. *United States v. Li,* 206 F.3d 78 (1st Cir. 2000); *United States v. Cordero,* 313 F.3d 161 (3rd Cir. 2002); *United States v. Hayes,* 5 F.3d 292 (7th Cir. 1993);*United States v. Schaffer*, 110 F.3d 530 (8th Cir. 1997)*; United States v. Head,* 178 F.3d 1205 (11th Cir. 1999)

IX. Chapter Six: Sentencing Procedures and Plea Agreements

A. Plea Agreement Considerations

Because of the impact of a plea agreement in a drug case, there are several considerations that should be taken into account: (1) the type of plea agreement; (2) whether it is a binding agreement; and (3) whether and how a plea agreement limits the consideration of the defendant's conduct or of certain relevant conduct.

1. **Agreement to Not Pursue Further Charges.** A plea agreement may specify that the prosecutor will not bring, or will move to dismiss, other charges. *See* Fed. R. Crim. P. 11(c)(1)(A). The court may accept, reject or defer a decision regarding such an agreement until after the review of the presentence report. *See* Fed. R. Crim. P. 11(c)(3)(A).

2. **Agreement as to Sentence Recommendation.** A plea agreement may specify that the prosecutor recommends, or agrees not to oppose, a defendant's request that a particular sentence or sentencing range is appropriate, or that a particular sentencing factor or guideline applies or does not apply in the case. *See* Fed. R. Crim. P. 11(c)(1)(B). Such a recommendation is not binding on the court and the defendant should be advised that if the court does not follow the recommendation the defendant has no right to withdraw the plea. *See* Fed. R. Crim. P. 11(c)(3)(B).

3. **Agreement as to Sentence to be Imposed.** A plea agreement may include an agreement between the parties that a specific sentence or range is the appropriate disposition of the case, or that a particular sentencing provision or factor does or does not apply in the case. See Fed. R. Crim. P. 11(c)(1)(C). The court may accept, reject or defer a decision regarding such an agreement until after review of the presentence report. *See* Fed. R. Crim. P. 11(c)(3)(A). Once the court has accepted such an agreement, the sentencing stipulations reflected in the agreement are binding on the court. Fed. R. Crim. P. 11(c)(1)(C).

4. **Withdrawal of Plea.** If the court rejects a plea agreement that contains provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must give the defendant an opportunity to withdraw the plea. *See* Fed. R. Crim. P. 11(c)(5).

B. The Guidelines' Treatment of Plea Agreements

1. **Policy Statements.** Chapter Six of the guidelines sets forth standards for the courts' consideration of plea agreements.

2. **USSG §6B1.1.** This guideline parallels the procedural requirements of Fed. R. Crim. P. 11(c). In the commentary to this section, the Commission recommends that the court defer acceptance of plea agreements of the types specified in Fed. R. Crim. P.11(c)(1)(A) or (C) until the court has reviewed the presentence report.

3. **Guideline standards for accepting plea agreement.** Chapter Six of the guidelines provides standards to guide courts in their decisions about plea

agreements. These standards go beyond the requirements imposed by Rule 11.

a. In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges (Rule 11(c)(1)(A)), the court may accept the agreement, for reasons stated on the record, if the remaining charges adequately reflect the seriousness of the actual offense behavior and accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines. *See* USSG §6B1.2(a). However, conduct underlying dismissed charges or charges not proved may be considered relevant conduct in connection with the count(s) of which the defendant is convicted. *See id*.; *United States v. Grissom*, 525 F.3d 691 (9th Cir. 2008). In addition, the court may consider conduct underlying charges dismissed pursuant to a plea agreement in determining whether to depart from sentencing guidelines. *See* USSG §5K2.21.

b. In the case of a plea agreement that includes a nonbinding recommendation or sentence (Rule 11(c)(1)(B)), or an agreement for a specific sentence (Rule 11(c)(1)(C)), the court may accept the recommendation if the court is satisfied either that: (1) the recommended or agreed upon sentence is within the applicable guideline range; or (2) the recommended or agreed upon sentence departs from the applicable guideline range for justifiable reasons, and those reasons are set forth in writing in the statement of reasons or judgment and commitment order.

C. Section 1B1.8: Use of Certain Information

There are limitations on using information provided in the course of a defendant's cooperation in calculating his guideline range. Section 1B1.8 provides that "where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement," and under other circumstances listed in §1B1.8. *See*, *e.g.*, *United States v. Shorteeth*, 887 F.2d 253 (10th Cir. 1989); *United States v. Jarman*, 144 F.3d 912, 914 (6th Cir. 1998) (§1B1.8 "unquestionably forbids the government to influence the sentencing range by disclosing revelations made by a defendant in the course of cooperation required by a plea agreement").

Thus, a court may not, in calculating the guideline range, use information disclosed by a defendant in the course of cooperating pursuant to §1B1.8. Consequently, information, such as

additional drug transactions in which the defendant has participated, may not be used to determine drug quantity if that information was provided by the defendant under the circumstances set forth in §1B1.8. *See, e.g.*, *United States v. Gonzalez*, 309 F.3d 882 (5th Cir. 2002) (prosecutor improperly used information gained under §1B1.8 to support its argument for a leadership role enhancement); *United States v. Thornton*, 306 F.3d 1355, 1357 (3d Cir. 2002) (although sentence affirmed on other grounds, §1B1.8 violated where defendant's admissions confirming presence of guns in house was basis for firearm enhancement). *But see United States v. Milan*, 398 F.3d 445 (6th Cir. 2005) (sentencing guidelines permit district court to consider proffer statements of codefendant in determining defendant's sentence).

The defendant must be providing information concerning the criminal activities of "others" in order to qualify under §1B1.8. *See* §1B1.8, comment. (n.6).

The government must have agreed that the self-incriminating information provided pursuant to the cooperation agreement will not be used against the defendant. *See* §1B1.8; *see also United States v. Cruz*, 156 F.3d 366, 370-371 (2d Cir. 1998) (§1B1.8 does not cover proffer agreements); *United States v. Baird*, 218 F.3d 221, 228-229 (3d Cir. 2000) (the agreement need not cite to §1B1.8 to fall within its purview); *United States v. Ykema*, 887 F.2d 697, 699 (6th Cir. 1989) (concluding that mere promise that "no additional charges" would be brought did not preclude sentence based on drug quantity higher than that stipulated in plea agreement).

Section 1B1.8 does not prohibit disclosure of information provided in a plea agreement to the sentencing court, but rather, it prohibits this information from being used to determine the applicable guideline range. §1B1.8, comment. (n.1); *United States v. Gonzalez*, 309 F.3d 882, 886-887 (5th Cir. 2002).

Section 1B1.8 does not restrict the use of all information that a defendant may disclose in the course of his cooperation: information (1) known to the government prior to entering into the cooperation agreement, *see United States v. Wilson*, 106 F.3d 1140, 1144, n.5 (3d Cir. 1997); (2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender); (3) in a prosecution for perjury or giving a false statement; (4) in the event there is a breach of the cooperation agreement by the defendant, *United States v. Bradbury*, 189 F.3d 200 (2d Cir. 1999); or (5) relevant in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities), may be used in determining a defendant's sentencing range. *See* §1B1.8.

Because the defendant gets "use" immunity, and not "transactional" immunity, information independently obtained from other sources, such as codefendants, may be considered, *see United States v. Baird*, 218 F.3d 221, 231 (3d Cir. 2000); *United States v. Boyd*, 901 F.2d 842, 845 (10th Cir. 1990), unless the information was elicited solely as a result of, or prompted by, the defendant's cooperation. *See United States v. Gibson*, 48 F.3d 876, 879 (5th Cir. 1995); *United States v. Davis*, 912 F.2d 1210, 1213 (10th Cir. 1990). The government bears

the burden of establishing that the evidence it wants to use was derived from a legitimate source independent of the defendant. *See, e.g.*, *United States v. Taylor*, 277 F.3d 721 (5th Cir. 2001).

The information may be used to determine whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under USSG §5K1.1. *See United States v. Mills*, 329 F.3d 24, 28 (1st Cir. 2003); *United States v. McFarlane,* 309 F.3d 510, 515 (8th Cir. 2002). For example, a court may refuse to depart downward on the basis of such information, but should not use the information to depart upward. §1B1.8, comment. (n.1).