

**Drug Scenario
Guideline Application Exercise**

**United States Sentencing Commission
Office of Education & Sentencing Practice**

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DRUG SCENARIO

Application of the guidelines and sentencing for Defendant Y

Conviction:	Count 1
Offense:	Conspiracy to distribute 88 kilograms of marijuana from April 1, 2009 to December 31, 2010; in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C)
Maximum Statutory Penalties:	Up to 20 years imprisonment (no mandatory minimum) and up to \$1 million fine; supervised release of at least 3 years (up to life) following imprisonment; Class C Felony (18 U.S.C. § 3559(a)(3)): up to 2 years imprisonment upon subsequent revocation (18 U.S.C. § 3583(e)(3))

Facts

1. On April 1, 2009, five university students, organized by Defendant X, entered into a conspiracy to traffic drugs, and began an operation selling 4 gram (gm) baggies of marijuana to fellow students, both on-campus and off
2. The organization's weekly sales totaled one kilogram (kg)
3. All members of the organization were involved in all activities
4. Two members of the organization often carried firearms when they made deliveries
5. The conspiracy had been underway for one year (52 weeks) and had already distributed 52 kg (1 kg per week) when on April 1, 2010, Defendant Y entered the conspiracy, fully participating in all the distribution activities of the weekly sales of one kilogram
6. While Defendant Y never carried a firearm, he sometimes accompanied one or both of the two participants who did carry firearms when they made deliveries

7. On December 31, 2010, 36 weeks after Defendant Y joined the conspiracy, all six participants were arrested and charged with conspiracy to distribute marijuana, specifically the 88 kg distributed between April 1, 2009 and December 31, 2010. (21 U.S.C. §§ 846 and 841(b)(1)(C))
8. Within a few weeks of apprehension Defendant Y provided full information to the government and announced intentions to plead guilty. The government stated that it will make a motion for Defendant Y to receive full Acceptance of Responsibility.
9. Defendant Y was not involved in providing substantial assistance as the government felt it had sufficient evidence on the organization as well as its sources of marijuana.

Prior Record

- None

Guideline Application

Offense Level Calculations

Chapter Two Offense Guideline	§2D1.1 (Drug Trafficking)
• §2D1.1(a)(3) & §2D1.1(c)(7)	18 (base offense level based on 36 kg marijuana)
• §2D1.1(b)(1)	+2 (firearms possessed by co-participants)
• §2D1.1(b)(16)	-2 (defendant meets five criteria at §5C1.2(a)(1)-(5) - “safety valve”)
(Chapter Two Offense Level:	18)

Chapter Three Adjustments

- §3E1.1(a)&(b) -3 (Acceptance of Responsibility)

Offense Level Total 15

Criminal History Calculations

Chapter Four, Part A

Criminal History Category I (based on 0 criminal history points)

“Overrides” of Offense Level and/or Criminal History Category

§3A1.4 and Chapter Four, Part B

No “overrides” are applicable

Applicable Guideline Range

Chapter Five, Part A - Sentencing Table

18-24 months (Based on Offense Level 15 and Criminal History Category I)

Zone D - no imprisonment substitutions provided for under the guidelines, pursuant to §5C1.1(f), because the guideline range of 18-24 months is in Zone D on the Sentencing Table

Supervised Release

Two to three years of supervised release to follow imprisonment, pursuant to §§5D1.1(a) and 5D1.2(a)(2), based on the statutory classification of the offense as a Class C felony. Note that because the defendant meets the criteria of the “safety valve” at 18 U.S.C. § 3553(f) and §5C1.2, the defendant is not subject to the statutory minimum term of at least three years of supervised release for this conviction.

Restitution

While not required by statute or the guidelines, “community restitution” can be ordered up to an amount equal to the fine that the court imposes for a fine in this case, pursuant to 18 U.S.C. § 3663(c) and §5E1.1(d).

Fine

\$4,000 to \$1 million, assuming an ability to pay, pursuant to §5E1.2(c)(3)(A)&(c)(4), based on offense level 15, and a statutory maximum fine of \$1 million.

POINTERS AND ANALYSIS

Pointers

- Note that §2D1.1 is a guideline included under §3D1.2(d), meaning that the relevant conduct for this offense includes not only the acts of the defendant and certain acts of others within a close temporal relationship with the offense of conviction pursuant to §1B1.3(a)(1), but also those acts temporally within the same course of conduct or common scheme or plan as the offense of conviction under §1B1.3(a)(2) (“expanded relevant conduct”).
- Note also that Application Note 2 of §1B1.3 states:

A defendant’s relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g. in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant’s offense level).
- Note that within the scope of the jointly undertaken criminal activity a defendant has with others, §1B1.3(a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.

Drug Scenario - Analysis

Analysis

Base Offense Level:

- Although Defendant Y was convicted of a conspiracy that involved 88 kilograms (kg, kilos), in determining relevant conduct for the application of the guidelines, the court must make an individualized finding for each defendant.
- Because Defendant Y joined the conspiracy after the first year, for guideline application he is not accountable for conduct prior to him joining the conspiracy.
- Because Defendant Y was fully involved in all the activities of the conspiracy for 36 weeks, *he is responsible for 36 kg*. According to §2D1.1(c) – the Drug

Quantity Table – 36 kg of marijuana (between 20 and 40 kg) results in a base offense level (BOL) of 18 (The other defendants whose undertakings included the entire conspiracy will have their sentences likely based on 88 kg, which results in a BOL of 24).

Specific Offense Characteristics:

§2D1.1(b)(1): If a dangerous weapon (including firearm) was possessed, increase by 2 levels.

- Although Defendant Y never carried a firearm, under relevant conduct, he is held accountable for certain activities of his co-participants.
- Because two co-participants within the scope of Defendant Y’s undertaking carried firearms while delivering marijuana in furtherance of the Defendant Y’s jointly undertaken activity, and it was reasonably foreseeable, this characteristic will apply.

§2D1.1(b)(16): If the defendant meets the criteria set forth in subdivisions (1) - (5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases - “the safety valve”), decrease by 2 levels.

The five subdivision criteria are:

- 1) defendant does not have more than 1 criminal history point
 - 2) *defendant* did not use violence or possess a firearm
 - 3) offense did not result in death or serious bodily injury to any person
 - 4) defendant was not an organizer, leader, manager or supervisor
 - 5) *at the time of the sentencing hearing*, the defendant has truthfully provided the government all information concerning the offense.
- Application Note 21 at §2D1.1(b)(16) states that the applicability of subsection (b)(16) shall be determined without regard to the whether the defendant was facing a mandatory minimum. Here, even though Defendant Y is not facing a mandatory minimum and therefore could not qualify for relief under §5C1.2 itself (as to imprisonment, although it does relieve him of the statutory minimum term of supervised release), if he meets the five subdivision criteria at §5C1.2 he qualifies for the 2-level reduction at §2D1.1(b)(16).
 - It is important to remember that because §2D1.1(b)(16) is a reduction, the burden is on the defendant to prove to the court that he has met the five subdivision criteria listed at §5C1.2(a).

- In addition, although Defendant Y received the 2-level increase because a firearm was possessed, Defendant Y can still qualify for the 2-level reduction at §2D1.1(b)(16). This is because the §5C1.2(a)(2) criteria only requires that the defendant *himself* did not possess a weapon. In other words, despite the fact that the firearms are attributed to Defendant Y at §2D1.1(b)(1) (pursuant to relevant conduct under §1B1.3(a)(1)(B)), that possession enhancement does not disqualify Defendant Y from meeting the criteria at §5C1.2(a)(2).
- Note the importance in guideline application as to whether the verb tense is the passive or active, as in “firearm possessed” at §2D1.1(b)(1) and “defendant possess” at §5C1.2(a)(2). Application Note 1(H) at §1B1.1 defines “offense” to mean: “the offense of conviction and all relevant conduct under §1B1.3.”

Impact of Plea Agreement

- Had Defendant Y been charged and convicted of the more serious offense of a violation of 21 U.S.C. § 860(a), distribution in or near a college, the statutory maximum penalties would have been: up to 40 years imprisonment with a mandatory minimum of 1 year; a fine up to \$2 million; supervised release of at least 6 years (up to life) following imprisonment; Class B Felony: up to 3 years imprisonment upon subsequent revocation. By statute, a person convicted under this section of the U.S. Code, is not eligible for the “safety valve”, so the defendant would have to be sentenced to at least the mandatory minimum of 1 year and at least 6 years of supervised release to follow.

The guideline range that would have resulted based on a conviction for 21 U.S.C. § 860(a), distribution in or near a college, applicable guideline §2D1.2, would be: 21-27 months (based on at least 1 offense level greater than the offense level for the distribution of all the drugs (both those in and near a college, and otherwise); or 46-57 months (based on a base offense level (BOL) of 26 *if* it were determined that any of the drug sales was to a person less than age 18 (as would likely be the case in the sale to some college students in their freshman year).