

Drug Conspiracy Scenario Guideline Application Exercise

United States Sentencing Commission Office of Education & Sentencing Practice

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DRUG CONSPIRACY SCENARIO

Application of the guidelines for Defendant Y

Conviction: Count 1

Offense: Conspiracy to distribute 88 kilograms of marijuana from April 1, 2010 to December 31, 2011; 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))

Applicable Chapter Two

Offense Guideline: §2D1.1 (Drug Trafficking)

Facts:

- Pursuant to a plea agreement, Defendant Y pled guilty to Count 1 of a 50 count indictment. Count 1 charges Defendant A and five other individuals with conspiracy to distribute 88 kilograms of marijuana from April 1, 2010 to December 31, 2011. Defendant Y was also indicted for 10 substantive counts, each citing a drug transaction that occurred in the conspiracy; those counts will be dismissed pursuant to the plea agreement. The other five codefendants also had substantive counts citing specific drug transactions that occurred in the conspiracy. Two of the codefendants were also charged with firearms violations under 18 U.S.C. § 924(c) for the use, carry, or possession of firearms in the drug conspiracy.
- On April 1, 2010, five university students, organized by Defendant X, entered into a conspiracy to traffic drugs, and began an operation selling 4 gram (G, gm) baggies of marijuana to fellow students, both on-campus and off
- The organization's weekly sales totaled one kilogram (K, kg, kilo)
- All members of the organization were involved in all activities

- Two members of the organization often carried firearms when they made deliveries
- The conspiracy had been underway for one year (52 weeks) and had already distributed 52 kg (1 kg per week) when on April 1, 2011, Defendant Y entered the conspiracy, fully participating in all the distribution activities of the weekly sales of one kilogram
- While Defendant Y never carried a firearm, he sometimes accompanied one or both of the two co-participants who did carry firearms when they made deliveries
- On December 31, 2011, 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, 2010 and December 31, 2011. (21 U.S.C. §§ 846 and 841(b)(1)(C))
- 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.
- 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
- Defendant Y has no prior record

Relevant Conduct Questions:

1. For what quantity of drugs is Defendant Y accountable in the determination of the base offense level at §2D1.1(a)(5)?
2. Is Defendant Y accountable for the firearms possessed by co-participants in the determination of the specific offense characteristic at §2D1.1(b)(1)?
3. Is Defendant Y precluded from the specific offense characteristic at §2D1.1(b)(16) based upon the requirement regarding firearms in the subdivision criteria at §5C1.2(a)(2)?

4. If Defendant Y is found to be accountable for less than the 88 kilos in the conspiracy, will he necessarily get a mitigating role reduction at §3B1.2?
5. Will Defendant Y get the Chapter Three Adjustment for Acceptance of Responsibility at §3E1.1? The 2-level reduction at §3E1.1(a)? The additional 1-level reduction at §3E1.1(b)?

POINTERS AND ANALYSIS

Pointers

- Note that §2D1.1 is a guideline included under §3D1.2(d), meaning that relevant conduct for this offense includes not only the acts of the defendant (§1B1.3(a)(1)(A)) and certain acts of others (§1B1.3(a)(1)(B)) within a close temporal relationship with the offense of conviction pursuant to §1B1.3(a)(1), but also those acts of the defendant and certain acts of others that are 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” - a term not found in the *Guidelines Manual* but often used in describing the effect of §1B1.3(a)(2)).
- Note, however, in this case, as is often the case in a conviction for a broad conspiracy count where relevant conduct determined under §1B1.3(a)(1) encompasses the breath of the defendant’s conduct and the conduct of those with whom the defendant was in a joint undertaking, “expanded relevant conduct” of §1B1.3(a)(2) does not have an impact.
- Note that Application Note 2 of §1B1.3 states 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 if that conduct was both in furtherance of the defendant’s jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity. Note also that the determination of “reasonably foreseeable” is on an objective person standard: Would a reasonable person have foreseen that the act would be committed in furtherance of the criminal activity that the defendant has jointly undertaken?
- Note that Application Note 2 of §1B1.3 also 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).

While the term is not found in the *Guidelines Manual*, this limitation on holding a defendant accountable for conduct prior to him or her joining a conspiracy is often

called the “bright line rule.”

Analysis

Base Offense Level:

- Although Defendant Y is convicted of a conspiracy that involved 88 kilograms, 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, pursuant to §1B1.3(a)(1)(A), (a)(1)(B), and (a)(1). 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 likely have their guideline application 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, pursuant to §1B1.3(a)(1)(B) and (a)(1).

§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).
 - Although Defendant Y received the 2-level increase under §2D1.1(b)(1) 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 based on the acts of *others* under §1B1.3(a)(1)(B)), that firearm 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 term used is “offense” (or the passive voice, which infers “offense”) or the term used is “defendant.” Note the distinction between the “offense”-based determination in “firearm possessed” at §2D1.1(b)(1), and the “defendant”-based determination in “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.” Meanwhile, the term “defendant” limits relevant conduct such that the acts of others in jointly undertaken criminal activity, pursuant to §1B1.3(a)(1)(B), will not be included.
 - Note also the requirement of §5C1.2(a)(5) that no later than the time of the sentencing hearing, the defendant must truthfully provide to the Government all

information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or a common scheme or plan, *i.e.*, the offense of conviction and all relevant conduct, pursuant to §5C1.2(a)(5) and Application Note 3.

- Note also regarding §5C1.2(a)(5), the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude the court from determining that the defendant has met this requirement. So this is distinct from the requirements of Substantial Assistance - §5K1.1.

Chapter Three Adjustments:

§3B1.2 - Mitigating Role: If the defendant's role in the offense is a minimal participant, a minor participant, or in-between, decrease by 4, 2, or 3 levels, respectively

- Note that the Introductory Commentary to Chapter Three, Part B - Role in the Offense states, "The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), i.e., all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction."
- Because Defendant Y's relevant conduct includes only 36 kilos, his role will be based upon his acts within those limitations, and not based upon the 88 kilos in the entire conspiracy. Therefore the argument for a role reduction will not be based on the fact that Defendant Y was only involved in 36 of the 88 kilos in the conspiracy. Defendant Y has already gotten mitigation by only being held accountable for 36 kilos, not the 88. While a role reduction is still possible, it will be based upon Defendant Y's relevant conduct. The facts in this scenario do not support a role reduction for Defendant Y. (Meanwhile in the determination of role for Defendant X (whose relevant conduct includes all 88 kilos), Defendant X would get an aggravating role, pursuant to §3B1.1, for having organized and led the criminal activity within his relevant conduct.)

§3E1.1 - Acceptance of Responsibility: If a defendant clearly demonstrates acceptance of responsibility, pursuant to §3E1.1(a), decrease by 2 levels. And, pursuant to §3E1.1(b), if the defendant gets the 2-level reduction, is at offense level 16 or greater, and upon motion of the government that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his

intention to plead guilty, thereby permitting government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease by an additional 1 level.

- Note that the application notes to §3E1.1 list various considerations as to whether a defendant qualifies for the 2-level reduction. A frequently used basis is the defendant truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).
- Note that the additional 1-level reduction for Acceptance of Responsibility requires that the defendant assist authorities in the investigation or prosecution of *his own* misconduct by timely notifying authorities of his intention to enter a plea of guilty.... This is distinct from the requirement of the “safety valve” subdivision at §5C1.2(a)(5), and from the requirement of Substantial Assistance to Authorities at §5K1.1. The “safety valve” subdivision requirement is discussed above; Substantial Assistance requires that a defendant cooperate with the government in the investigation or prosecution of *another person*.
- Note that while the government must make a motion for the additional 1-level reduction for Acceptance of Responsibility, the fact of the motion does not require the court to find that the additional 1-level reduction is warranted.

