



Drug Offenses

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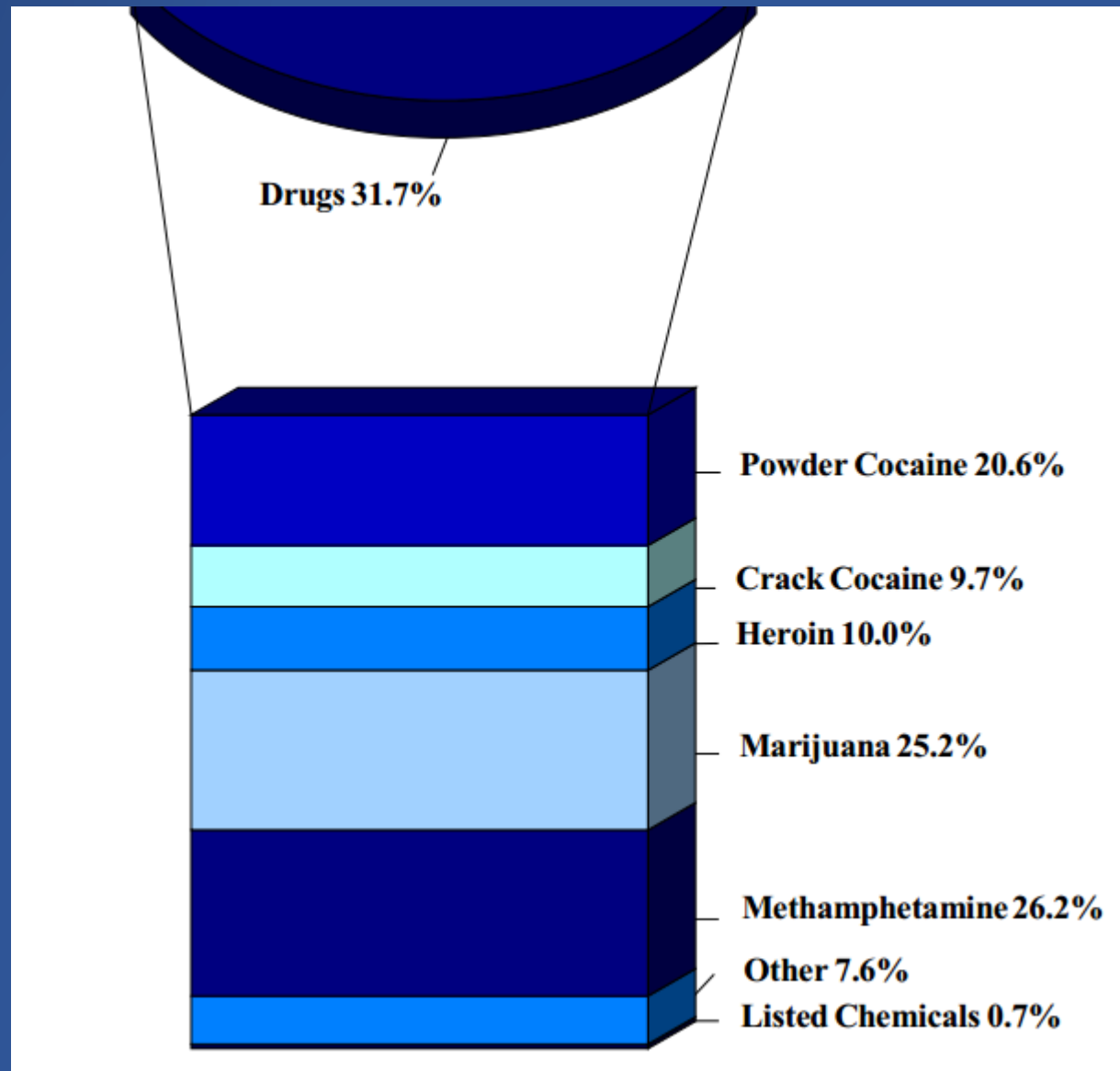


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Drug Cases FY2014: 22,193 of 75,836 Total Cases





Proposed Amendments Relating to Drug Offenses



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Mitigating Role

§3B1.2

- Provides additional guidance to assist the courts in the determination of whether a mitigating role adjustment applies



Mitigating Role (cont.)

Application Note 3(A)

- Resolves circuit conflict regarding the determination of “average participant”
- Specifies that the court should compare defendant to the average participant in the criminal activity at issue, not to the typical offender who commits similar crimes



Mitigating Role (cont.)

Application Note 3(A)

- Provides that certain individuals who perform limited functions in the criminal activity **“may receive”** a role adjustment
- Previously stated “is not precluded from”



Mitigating Role Factors

Application Note 3(C)

- Adds a non-exhaustive list of factors for the court to consider:
 - i. The degree to which the defendant understood the scope and structure of the criminal activity
 - ii. The degree to which the defendant participated in the planning/organization of the activity



Mitigating Role Factors (cont.)

Application Note 3(C)

- iii. The degree to which the defendant exercised decision-making authority
- iv. The nature and extent of the defendant's participation in the commission of the criminal activity
- v. The degree to which the defendant stood to benefit from the criminal activity



Mitigating Role (cont.)

Application Note 3(C)

- Provides an example that a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment
- Provides that the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative



Hydrocodone Offenses

§2D1.1

- Addresses the rescheduling of hydrocodone products from Schedule III to Schedule II
- Calculation of the BOL is based upon the amount of actual hydrocodone, not the entire weight of the pill
- 1 gram hydrocodone = 6700 grams marijuana
- Removes reference to Schedule III hydrocodone





§2D1.1 - Drugs

Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

75,836 total cases in FY-2014; 22,193 sentenced under Chapter Two, Part D;
of those, 21,907 sentenced under §2D1.1



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The Drug Guideline §2D1.1 and the “Included List” at §3D1.2(d)

§§2D1.1 & 3D1.2(d)

- §2D1.1 is on the “included list” at §3D1.2(d), which makes *two* determinations regarding application:
 - Relevant Conduct
 - Multiple Counts



Chapter Two Offense Guidelines

Included at §3D1.2(d):

Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;

§§2C1.1, 2C1.2, 2C1.8;

§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;

§§2E4.1, 2E5.1;

§§2G2.2, 2G3.1;

§2K2.1;

§§2L1.1, 2L2.1;

§2N3.1;

§2Q2.1;

§2R1.1;

§§2S1.1, 2S1.3;

§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.



The Drug Guideline §2D1.1 and Relevant Conduct

§§2D1.1 & 1B1.3(a)(2)

- Relevant Conduct is “expanded” to include drug offenses in the same course of conduct or common scheme or plan as the offense of conviction for which the applicable Chapter Two guideline would also be §2D1.1 (or a similar guideline)
 - This does not require that there actually be multiple counts of conviction, however



The Drug Guideline §2D1.1 and Multiple Counts

§§2D1.1 & 3D1.2(d)

- When there *are* multiple counts of conviction that use the §2D1.1 drug guideline, all of those counts will be addressed by a single application of the multiple counts, thereby grouping under “Rule (d)”



Grouping Under “Rule (d)”

**Count 1:
§2D1.1
Drugs**

**Count 2:
§2D1.1
Drugs**

**Count 3:
§2D1.1
Drugs**

One application, with the offense level for the group based on an aggregate of the drugs and the offense conduct “taken as a whole”



The Drug Guideline §2D1.1 and Multiple Counts (cont.)

§§2D1.1 & 3D1.2(d)

- Relevant conduct will necessarily include acts in the same course of conduct or common scheme or plan of *any* of the offenses of conviction under §2D1.1
- Application will include an aggregate of the drugs and the offense conduct “taken as a whole”



§2D1.1 Drug Trafficking, Etc.

(a) Base Offense Level (BOL) (apply the greatest):

Level

(1) defendant convicted under 21/841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 960(b)(1), (b)(2), or (b)(3), and conviction establishes death/serious injury from drug use; and committed after similar prior conviction

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(2) defendant convicted under 21/841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 960(b)(1), (b)(2), or (b)(3), and conviction establishes death/serious injury from drug use

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§2D1.1 Drug Trafficking, Etc. (cont.)

(a) Base Offense Level (BOL) (apply the greatest):

Level

(3) defendant convicted under 21/841(b)(1)(E) or 960(b)(5), and conviction establishes death/serious injury from drug use; and committed after similar prior conviction

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(4) defendant convicted under 21/841(b)(1)(E), or 960(b)(5), and conviction establishes death/serious injury from drug use

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§2D1.1 Drug Trafficking, Etc. (cont.)

(a) Base Offense Level (BOL) (apply the greatest):

(5) the offense level from the Drug Quantity Table
EXCEPT if *mitigating* role (§3B1.2) applies:

<u>BOL</u>	<u>Reduction</u>
32	-2
34 or 36	-3
38	-4

If resulting BOL is greater than 32, and
minimal role (§3B1.2(a)) applies, decrease to BOL 32



Mitigating Role Reduction

§2D1.1(a)(5)

- After the BOL reduction(s), the Specific Offense Characteristics (SOCs) and other adjustments are then applied
- Necessarily the defendant will also receive a mitigating role adjustment in Chapter Three (§3B1.2)



Example: §2D1.1 Drug Quantity Table Cocaine BOLS

Post Nov. 1, 2014, “Drugs Minus 2” Amendment #782

450 KG	↑	Level 38
150 KG	↑	Level 36
50 KG	↑	Level 34
15 KG	↑	Level 32
5 KG	↑	Level 30
3.5 KG	↑	Level 28
2 KG	↑	Level 26



Example: §2D1.1 Drug Quantity Table Cocaine BOLS (cont.)

Post Nov. 1, 2014, “Drugs Minus 2” Amendment #782

500 G	↑	Level 24
400 G	↑	Level 22
300 G	↑	Level 20
200 G	↑	Level 18
100 G	↑	Level 16
50 G	↑	Level 14
< 50 G	↑	Level 12



Weight of Controlled Substance

Note (A) to Drug Quantity Table

- *Unless otherwise specified*, the weight of a controlled substance refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance



Weight of Controlled Substance (cont.)

Note (A) to Drug Quantity Table

- If a mixture or substance contains more than one controlled substance, the weight is based on the one that results in the greater offense level



“Mixture or Substance”

§2D1.1, App. Note 1

- Mixture or substance does not include materials that must be separated for use, *e.g.*, waste water from an illicit laboratory used to manufacture a controlled substance
 - Possible distinctions for statutory determinations



Drug “Actual” (*i.e.*, Pure Drug)

Drug Quantity Table Notes (B) & (C)

- Drug purity is only factored for methamphetamine, amphetamine, “ice,” oxycodone, and PCP
- For meth, amphetamine, and PCP, a comparison is made between the offense level for the drug “actual” and the offense level for the mixture or substance of the drug, and the greater is used



Drug *Equivalency* Tables

§2D1.1, App. Note 8

- Drugs **not** included on the Drug *Quantity* Table are converted to marijuana
 - *E.g.*, MDMA (“ecstasy”) 1 gm. = 500 gm. marijuana
- Different types of drugs are converted to marijuana so as to be added together
 - *E.g.*, cocaine and heroin



Drug *Quantity* Table

Base Offense Levels for Marijuana

90,000	KG	↑	Level 38
30,000	KG	↑	Level 36
10,000	KG	↑	Level 34
3,000	KG	↑	Level 32
1,000	KG	↑	Level 30
700	KG	↑	Level 28
400	KG	↑	Level 26



100	KG	↑	Level 24
80	KG	↑	Level 22
60	KG	↑	Level 20
40	KG	↑	Level 18
20	KG	↑	Level 16
10	KG	↑	Level 14
5	KG	↑	Level 12
2.5	KG	↑	Level 10
1	KG	↑	Level 8
Less than 1	KG	↑	Level 6



Scenario 1

- 450 gm of cocaine (mixture/substance) and 350 gm heroin (mixture/substance)
- Cocaine and heroin are each listed on the Drug *Quantity Table*
 - BOL 22 and BOL 24, respectively



Scenario 1 (cont.)

- Drug *Equivalency* Table
 - 1 gm cocaine = 200 gm marijuana
 - 450 gm cocaine x 200 = 90,000 gm = **90 kg marijuana**

 - 1 gm heroin = 1 kg marijuana
 - 350 gm heroin x 1 kg = **350 kg marijuana**

- Drug *Quantity* Table
 - **440 kg marijuana = BOL 26**



Scenario 2

- 1000 tablets of MDMA with tablet weight of 200 mg each
- MDMA is not listed on the Drug *Quantity* Table
- MDMA is listed on the Drug *Equivalency* Table



Scenario 2 (cont.)

- 1000 tablets (mixture/substance) of 200 mg each = 200,000 mg = 200 gm of MDMA
- Drug *Equivalency* Table
 - 1 gm MDMA = 500 gm marijuana
 - 200 gm MDMA x 500 = 100,000 gm = 100 kg marijuana
- Drug *Quantity* Table
 - 100 kg marijuana = **BOL 24**



Scenario 3

- 1000 tablets containing methamphetamine
- Meth and meth “actual” (purity) are listed on the Drug *Quantity* Table
- Each tablet weighs 190 mg and contains 22 mg of meth “actual” (purity)
- Weight of all 1000 tablets = 190,000 mg = 190 gm of meth mixture/substance



Scenario 3 (cont.)

- Weight of meth “actual” in all 1000 tablets = 22,000 mg = 22 gm
- Drug *Quantity* Table
 - 190 gm meth mixture = BOL 24
 - 22 gm meth “actual” = BOL 26
- Greater BOL is to be used: **BOL 26**



Scenario 4

- 1000 tablets called “ecstasy” but really a mixture of MDMA and meth
- Meth and meth “actual” (purity) are listed on the Drug *Quantity* Table but MDMA is not listed there
- MDMA is listed on the Drug *Equivalency* Table, where the guidelines consider the entire mixture or substance containing MDMA but do not consider MDMA “actual” (purity)



Scenario 4 (cont.)

- Each tablet weighs 190 mg and contains 25 mg of MDMA (purity) and 22 mg of meth “actual” (purity)
- Weight of all 1000 tablets = 190,000 mg = 190 gm of mixture/substance containing MDMA and meth
- Weight of meth “actual” in all 1000 tablets = 22,000 mg = 22 gm



Scenario 4 (cont.)

- Drug *Equivalency* Table

- 1 gm MDMA = 500 gm marijuana
- 190 gm MDMA mixture/substance x 500 = 95,000 gm = 95 kg marijuana

- Drug *Quantity* Table

- 95 kg marijuana (190 gm MDMA mixture) = BOL 22
- 190 gm meth mixture = BOL 24
- 22 gm meth “actual” = BOL 26

- Greatest BOL is to be used: **BOL 26**



Controlled Substances That Are Not Referenced in the Drug Guideline

§2D1.1, App. Note 6

- Determine the most closely related substance *that is referenced*, by considering the following
 - Similar chemical structure
 - Similar stimulant, depressant or hallucinogenic effect on the central nervous system
 - Lesser or greater quantity needed to produce a similar effect on the central nervous system



§2D1.1 Specific Offense Characteristics

- The most frequently applied SOC at §2D1.1
 - (b)(1) Firearm/Dangerous Weapon - 12.3%
 - Note: An additional 3.8% (appx.) did not get this SOC because of a § 924(c) firearm conviction
 - (b)(17) “Safety Valve” Subdivision Criteria - 33.4%

Only two other SOC at §2D1.1 are applied in more than 1% of drug cases:
(b)(5) Importation re: meth - 2.4%; (b)(12) Maintaining a premises - 4.4%

Nationally - FY-2014 Sentencing Data



§2D1.1(b) Specific Offense Characteristics

	<u>Level</u>
(1) firearm, dangerous weapon possessed	+2

(17) if defendant meets the <u>subdivision criteria</u> (1)-(5) of §5C1.2(a) (“the safety valve”)	-2



“Firearm” SOC

§2D1.1(b)(1) & App. Note 11

“...should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.”

Note: Under relevant conduct a defendant can be held accountable for a co-participant’s firearm



“Firearm” SOC & 18 U.S.C. § 924(c)

§2D1.1(b)(1) & §2K2.4, App. Note 4

- When the defendant is also convicted of § 924(c) (Use/Carry/Possession of a Firearm in a Crime of Violence or Drug Trafficking) **do not apply** the dangerous weapon SOC at §2D1.1**(b)(1)**
 - § 924(c) mandatory min. *at least 5 yrs. consecutive*
 - This accounts for **any** weapon in relevant conduct
 - §2D1.1**(b)(2)** (use of violence) also **would not apply**



Impact: Single Count of § 924(c) & Multiple Counts of Drug Trafficking

Count 1:
§2D1.1
Drugs

Count 2:
§2D1.1
Drugs

Count 3:
§2D1.1
Drugs

**One application: Offense level for the group based on drug aggregate;
Firearm SOC NOT APPLIED**

**Count 4: §2K2.4
§ 924(c)
Re: Ct. 2 Drugs
60 mos. consec.**

**Count 4
Runs consecutively
to ALL Counts**



SOC (b)(17) at §2D1.1: “The Safety Valve SOC”

2-Level Decrease

- The defendant must only meet the criteria set forth in **subdivisions (1)-(5)** of subsection (a) of §5C1.2 (“The Safety Valve”)



SOC (b)(17) at §2D1.1:
“The Safety Valve SOC” (cont.)

2-Level Decrease

- Defendant does not have to be convicted under select statutes listed at §5C1.2(a) that qualify for “The Safety Valve” (18 USC § 3553(f))
- Defendant does not have to otherwise be subject to a mandatory minimum penalty





“Safety Valve”

18 USC § 3553(f)
& §5C1.2



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“Safety Valve”

18 U.S.C. § 3553(f)

- Court makes determination; no government motion required
- Sentence without regard to mandatory minimums for violations of select drug statutes
- Downward departures for mitigating factors or variances possible



“Safety Valve”

§5C1.2(a)

In the case of an **offense subject to a mandatory minimum** sentence under **21 U.S.C. §§ 841, 844, 846, 960, or 963**, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds the defendant meets the criteria set forth below:



§5C1.2(a)

Subdivisions (1) – (5)

1. Defendant does not have more than 1 Criminal History Point
2. Defendant did not use violence/threats of violence or possess a firearm or other dangerous weapon in connection with the offense
3. Offense did not result in death or serious bodily injury



4. Defendant was not an organizer/leader/manager/supervisor of others in the offense; was not engaged in a CCE

5. Not later than the time of the sentencing hearing, defendant has truthfully provided 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 common scheme or plan.



Use of the Term “Defendant” in the Safety Valve

- **NOTE:** while a defendant may be accountable for a firearm at §2D1.1(b)(1) based on the act of another, he/she may still qualify for the SOC reduction at §2D1.1(b)(17) (“safety valve” subdivision criteria) or for the “safety valve” itself, because §5C1.2(a)(2) only requires that “the **defendant** did not . . . possess a firearm . . . in connection with the offense”



§2D1.1(b) Specific Offense Characteristics

	<u>Level</u>
(1) firearm, dangerous weapon possessed	+2

(17) if defendant meets the <u>subdivision criteria</u> (1)-(5) of §5C1.2(a) (“the safety valve”)	-2
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§5C1.2(a)

- the defendant did not . . . possess a firearm . . .



§5C1.2(b)

In the case of a defendant

1. Who meets the criteria set forth in subsection (a);
and
2. Who is facing a mandatory minimum sentence of
at least five years,

The offense level applicable from Chapters
Two and Three shall not be less than level **17**

Note: The guideline range for OL 17 at CHC I is 24-30 mos.;
a departure or variance below this range is still possible



Thank you!

