Drugs and Guns

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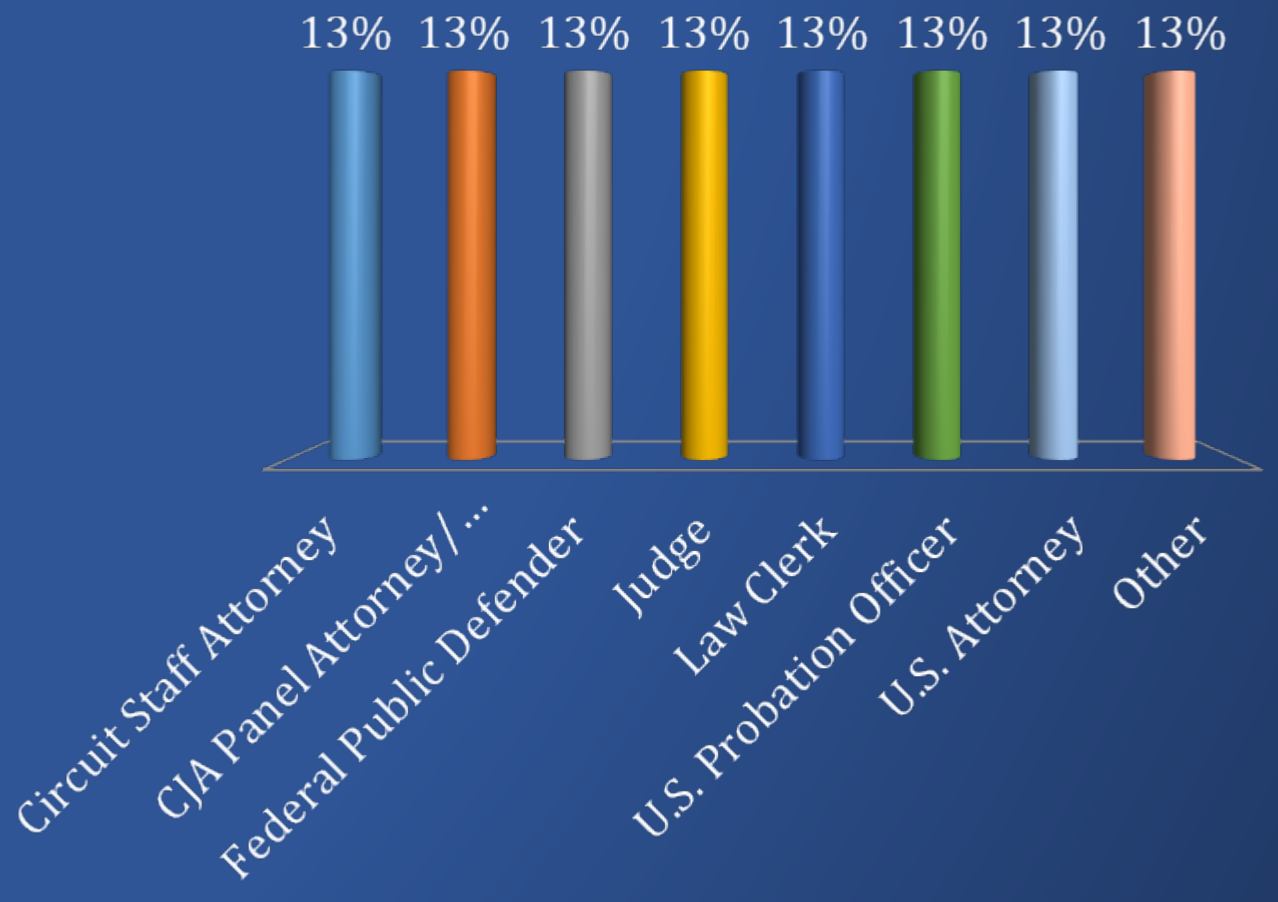
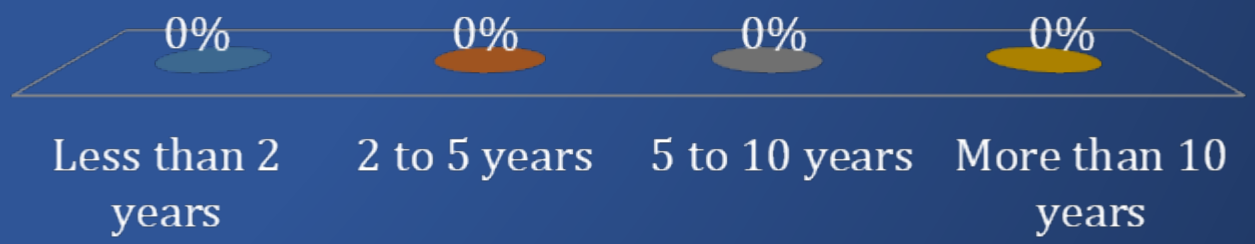
Who's in the audience?

A. Circuit Staff Attorney
B. CJA Panel Attorney/ Private Defense Attorney
C. Federal Public Defender
D. Judge
E. Law Clerk
F. U.S. Probation Officer
G. U.S. Attorney
H. Other



Years of experience with federal sentencing?

A. Less than 2 years
B. 2 to 5 years
C. 5 to 10 years
D. More than 10 years



§2D1.1 - Drugs

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

§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	**43**
(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	**38**

§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	**30**
(4) defendant convicted under 21/841(b)(1)(E), or 960(b)(5), and conviction establishes death/serious injury from drug use	**26**

§2K2.1 – "Felon-in-Possession"

Unlawful Receipt, Possession, or Transportation of Firearms; or Prohibited Transactions Involving Firearms

§2K2.1(a) – Base Offense Levels (BOLs)

Eight BOLs, from 6 to 26, determined by various factors, including:

- Status, including
  - "felon-in-possession" ("basic" case is BOL 14)
  - "straw purchaser" ("basic" case is BOL 14)
- More serious types of firearms
- Prior convictions of "crime of violence" or "controlled substance offense"

Use of "Crime of Violence" and "Controlled Substance Offense" in BOLs

- Requires use of the "Categorical Approach"
- The terms are defined at the *Career Offender* guideline
  - Per §2K2.1, App. Note 1 referring to §4B1.2(a)&(b) and App. Note 1

Drugs and Guns and Relevant Conduct

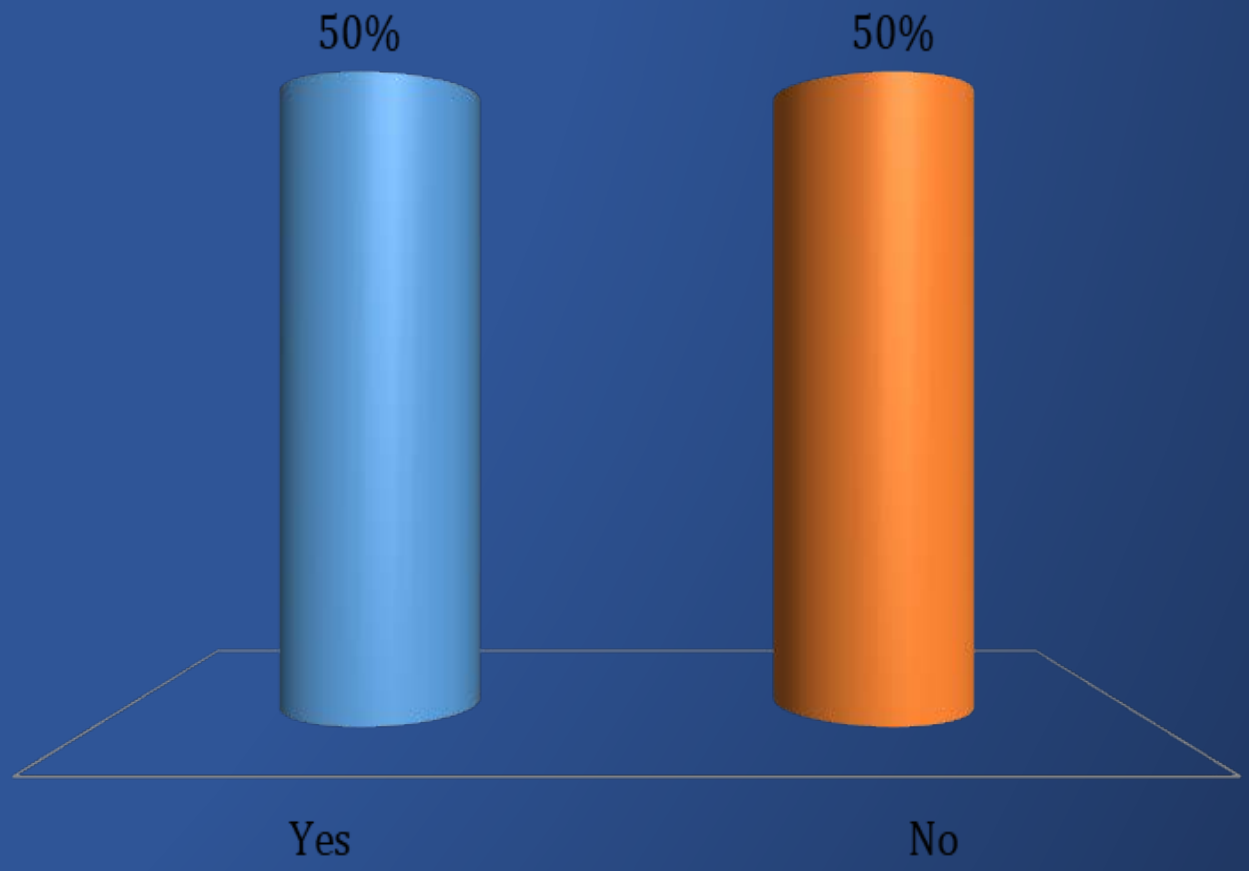
§§2D1.1, 2K2.1 & 1B1.3(a)(2)

- 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 §2K2.1 (or a similar guideline)
  - This does not require that there actually be multiple counts of conviction, however

Scenario #1: Does the SOC at §2D1.1 for possession of a dangerous weapon apply in this case?

A. Yes

B. No



"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

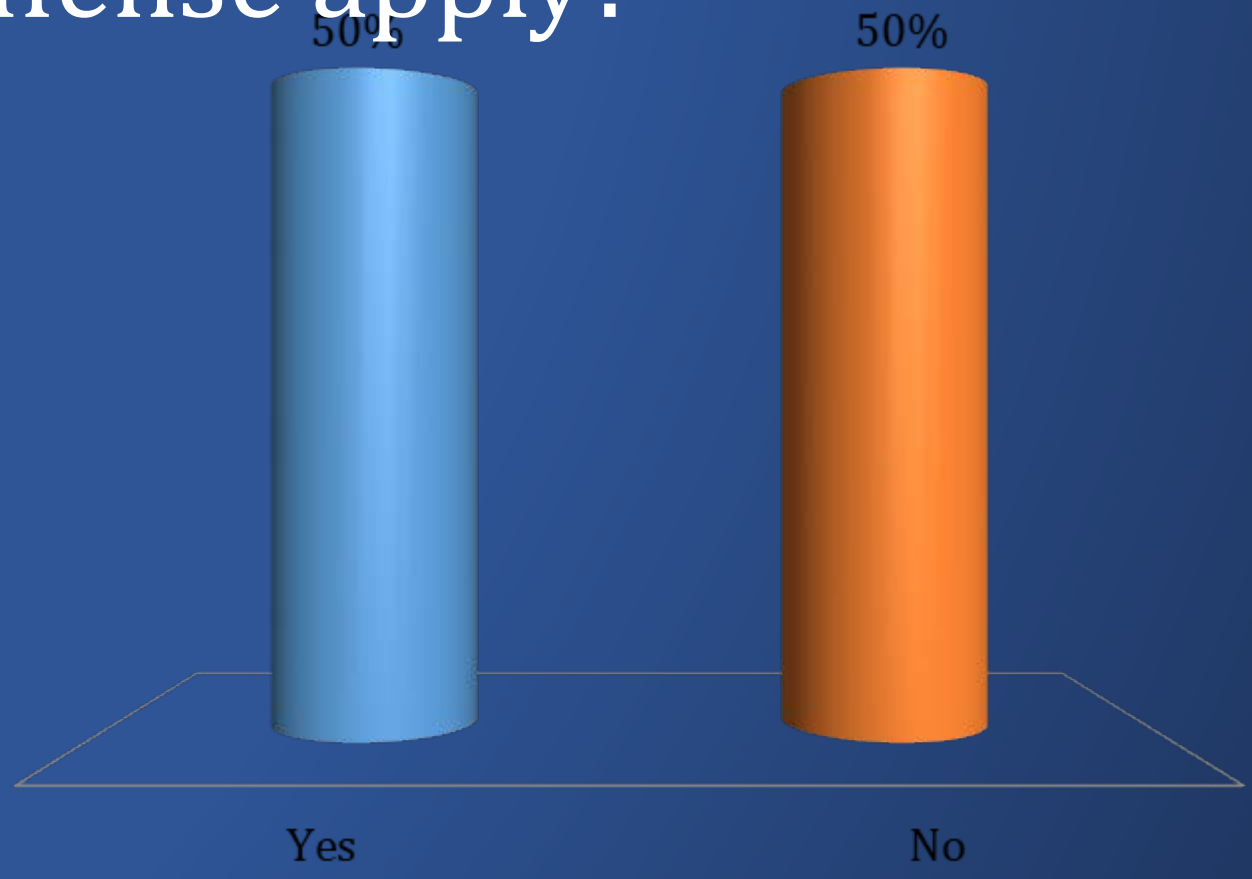
Impact of § 924(c) on SOCs

§2K2.4, App. Note 4

- **Do not apply** the firearm (weapon) SOC in guideline for the *underlying* offense
  - § 924(c) accounts for any weapon SOC for the underlying offense
  - § 924(c) accounts for any weapon within the relevant conduct

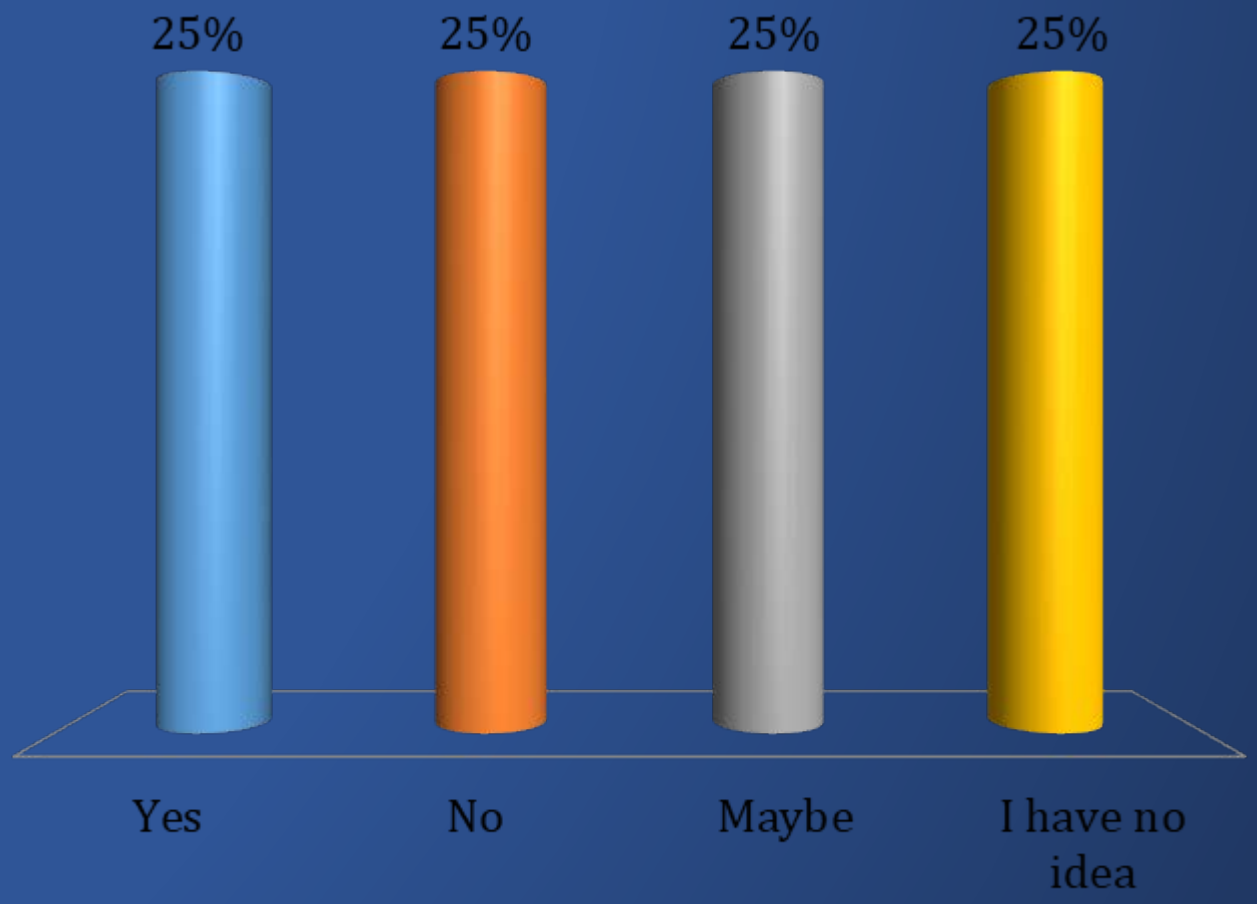
Scenario#1: Does the SOC at §2K2.1 for using/possessing a firearm in connection with another felony offense apply?

A. Yes
B. No



Scenario #1: Does the cross reference at §2K2.1 apply?

A. Yes
B. No
C. Maybe
D. I have no idea



"Use/Possession" *SOC*

§2K2.1(b)(6)(B)

- If the defendant:
  - Used or possessed any firearm or ammunition in connection with another felony offense

OR

  - Possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense

Increase by 4 levels, with floor of 18

"Use/Possession" *Cross Reference*

§2K2.1(c)(1)

- If the defendant:
  - Used or possessed any firearm or ammunition cited in the offense of conviction in connection with commission or attempted commission of another offense

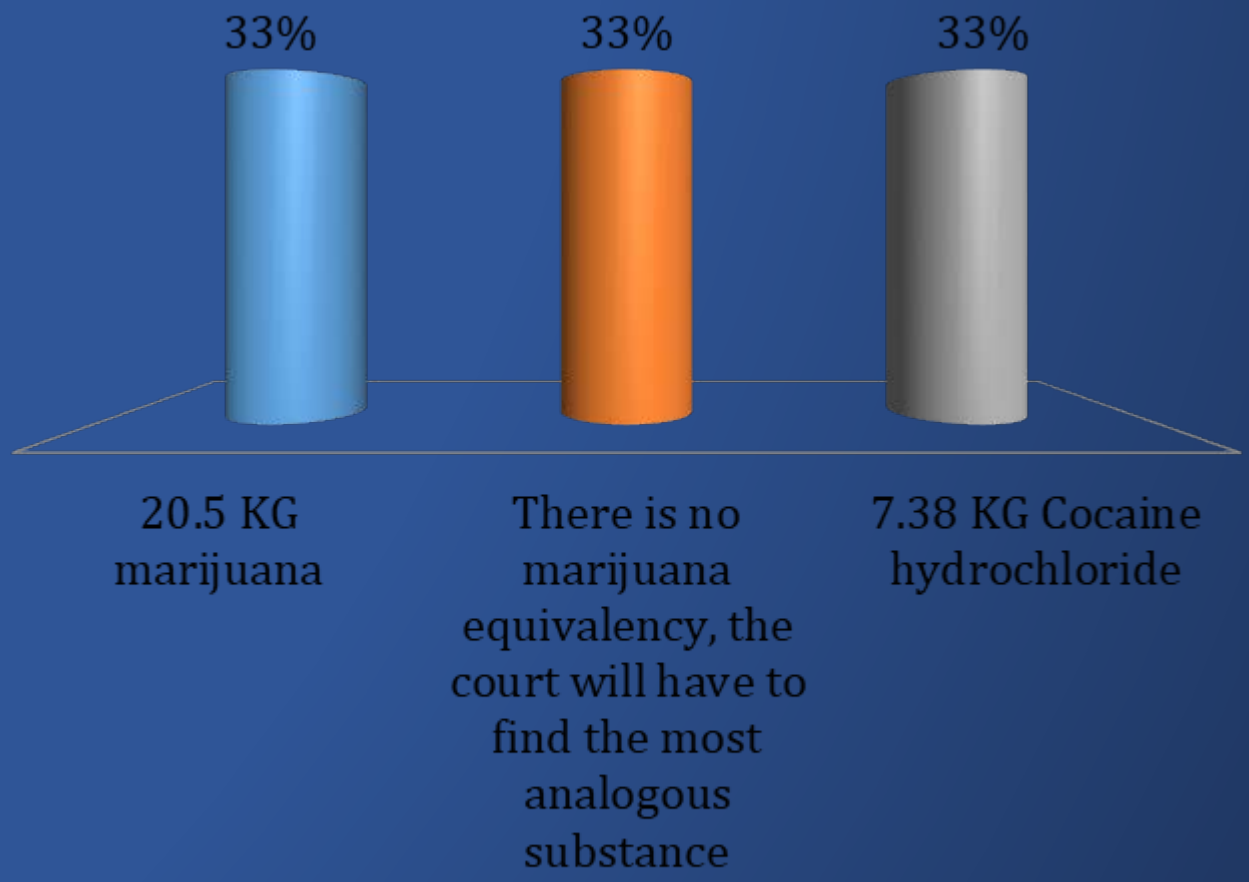
OR

  - Possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another felony offense

Apply the cross reference

Scenario #2: What is the marijuana equivalency of the drugs in this case?

A. 20.5 KG marijuana
B. There is no marijuana equivalency, the court will have to find the most analogous substance
C. 7.38 KG Cocaine hydrochloride



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

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

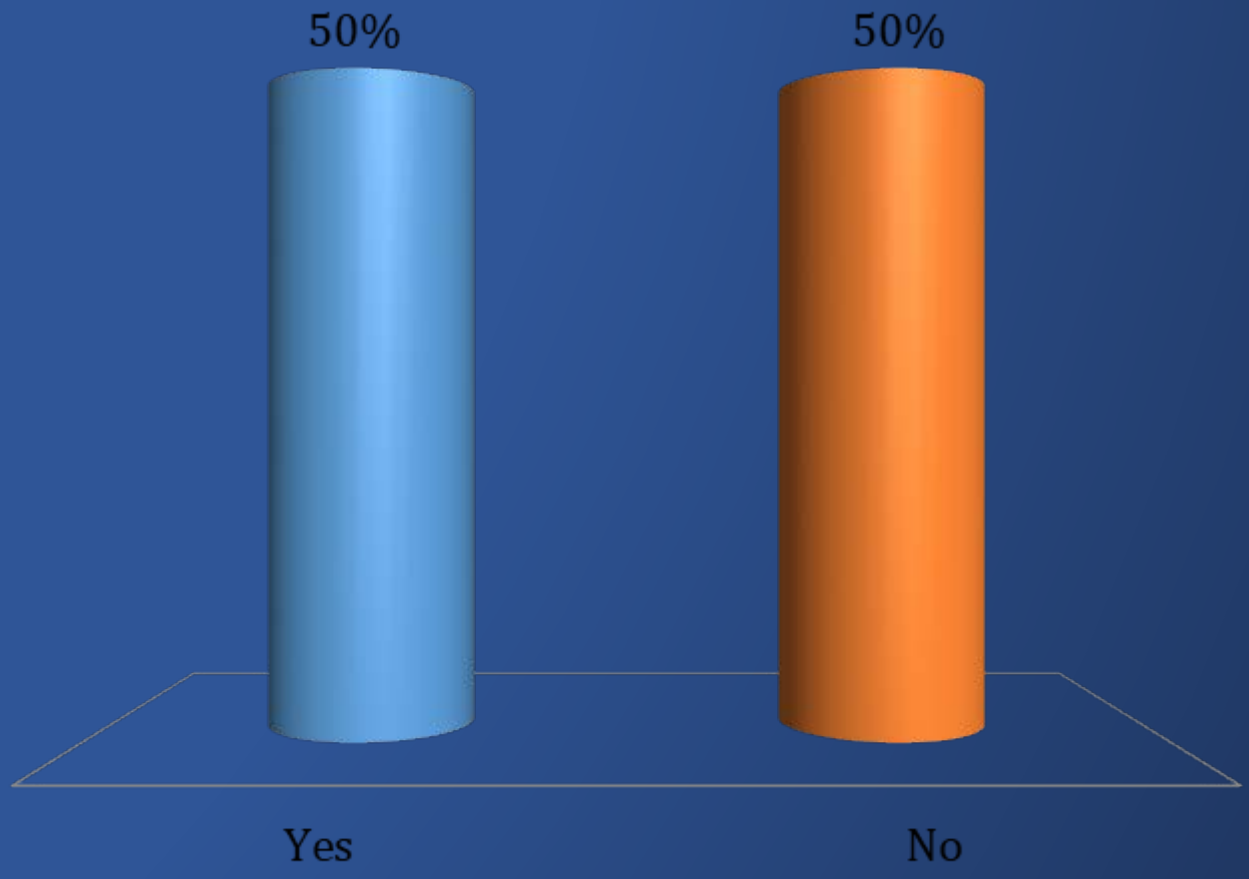
Proposed Amendment for Synthetic Drugs (Submitted to Congress May 1, 2018)

- Three part amendment addressing synthetic cathinones, synthetic cannabinoids, fentanyl and fentanyl analogues
- Synthetic cathinones-
  - Class based approach: 1gram = 380 grams marihuana
- Synthetic cannabinoids-
  - Class based approach 1gram = 167 grams marihuana
- Fentanyl analogues-
  - 1 gram = 10 kilograms marihuana

Scenario#2: Does the SOC for possession of a dangerous weapon at §2D1.1(b)(1) apply?

A. Yes

B. No



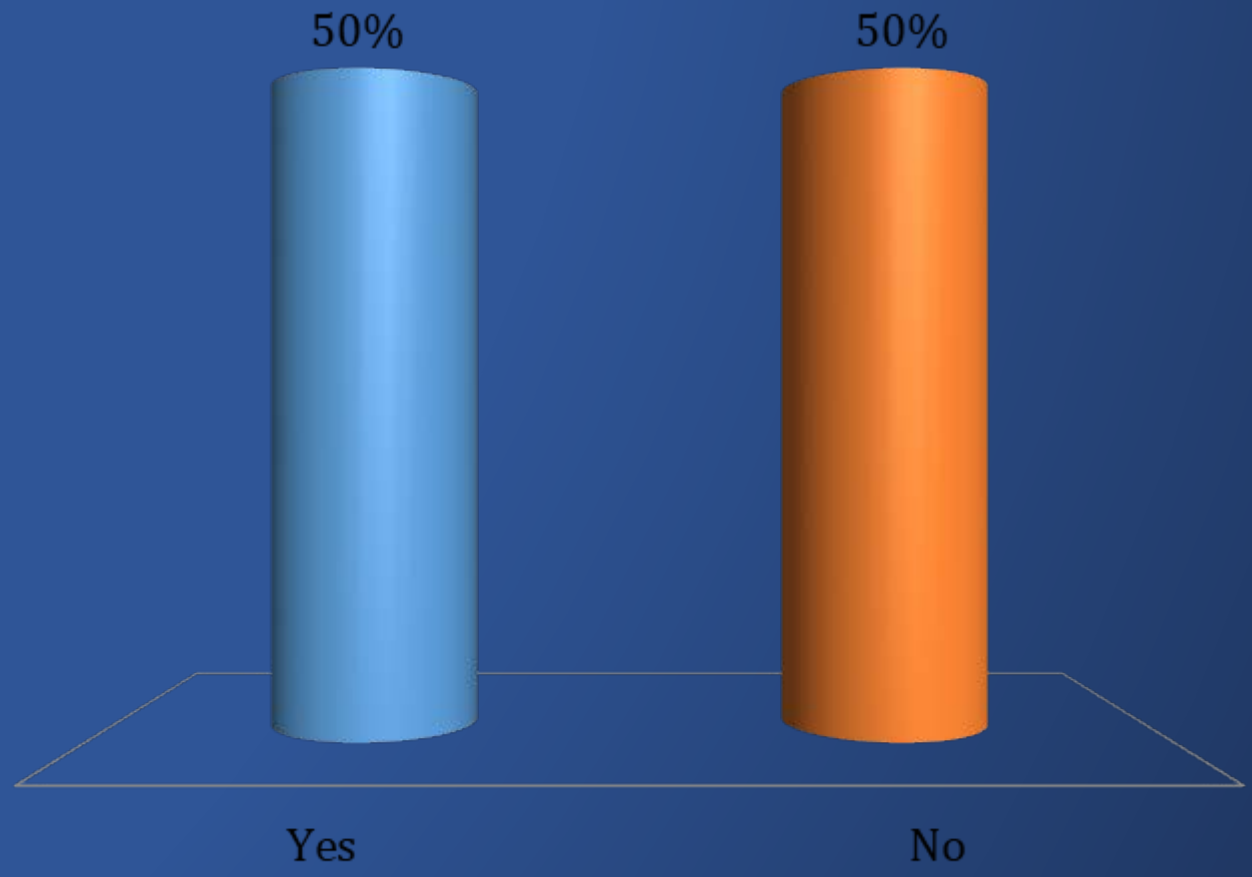
Impact of § 924(c) on SOCs

§2K2.4, App. Note 4

- **Do not apply** the firearm (weapon) SOC in guideline for the *underlying* offense
  - § 924(c) accounts for any weapon SOC for the underlying offense
  - § 924(c) accounts for any weapon within the relevant conduct

Scenario #3: Does the SOC at §2D1.1 for possession of a firearm apply?

A. Yes
B. No



Impact of § 924(c) on SOCs

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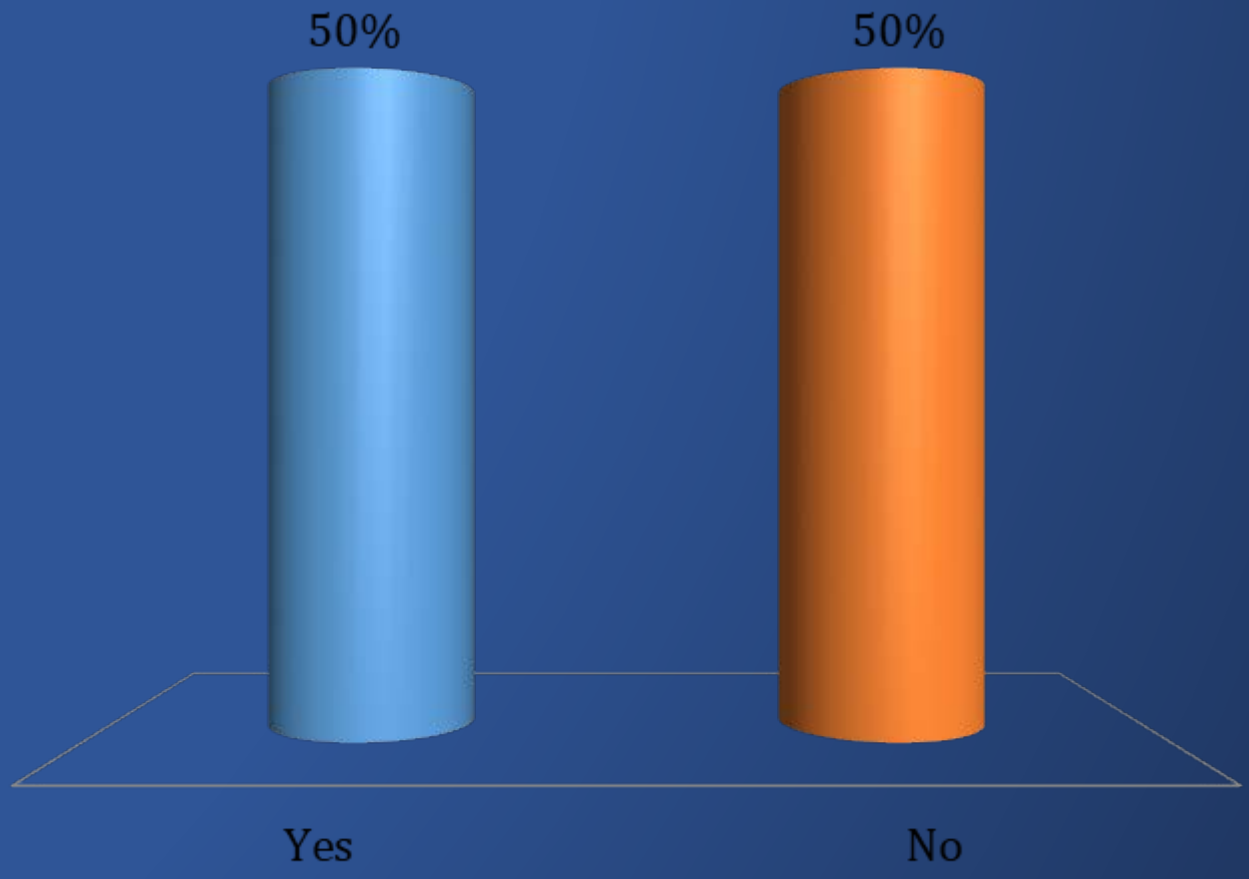
  - § 924(c) accounts for any weapon SOC for the underlying offense
  - § 924(c) accounts for any weapon within the relevant conduct

Scenario#4: Does the Career Offender (§4B1.1) override apply?

A. Yes

B. No



Career Offender "Override"

§4B1.1; Pursuant to Directive at 28 § 994(h)

- Criminal History Category is VI

- Offense level determined by a table based on statutory maximum
  - Unless the offense level from Chapters Two and Three is greater

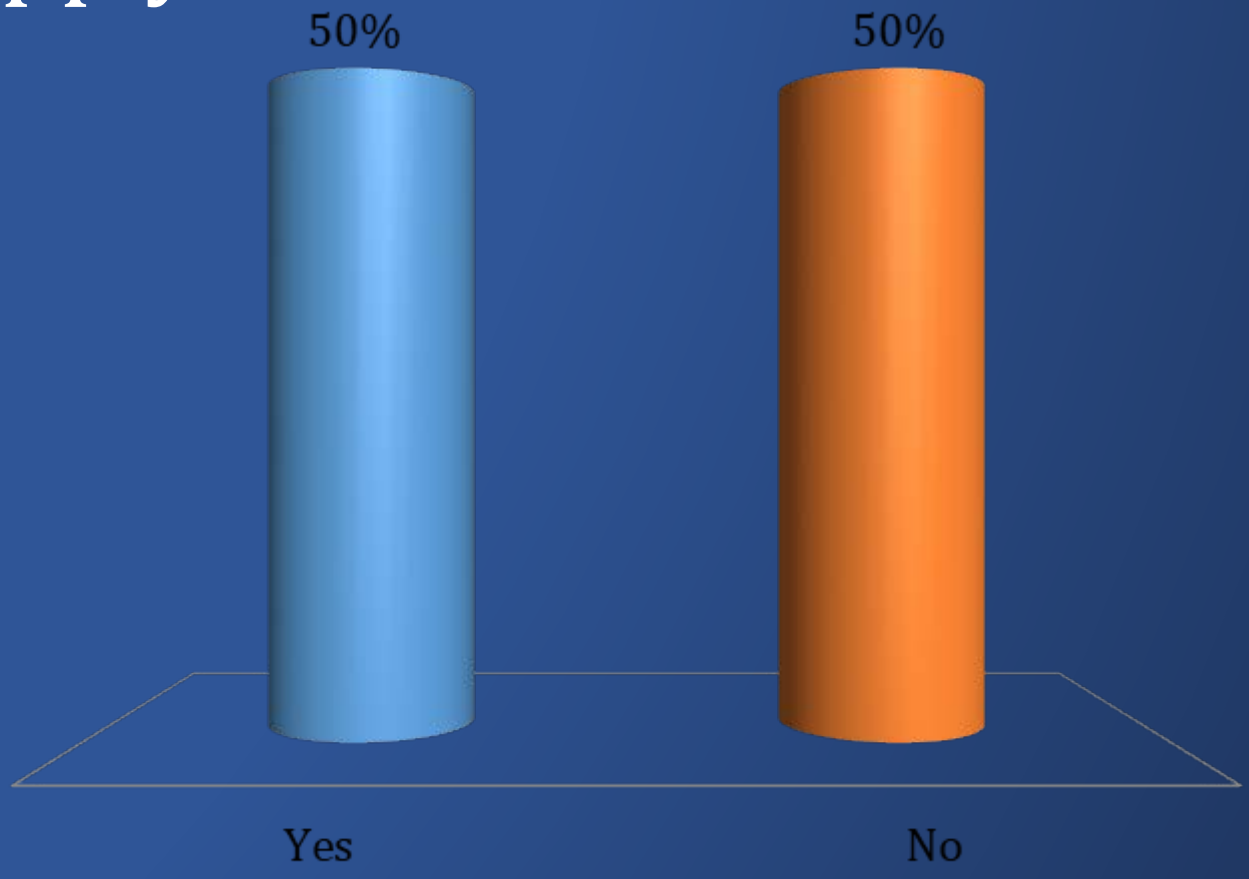
Statutory Maximum	Offense Level *
Life	37
25 years +	34
20 years +	32
15 years +	29
10 years +	24
5 years +	17
More than 1 year	12

* **Decrease by number of levels (0 or -2 or -3) at §3E1.1 (Acceptance of Responsibility)**

Scenario #5: Does the SOC at §2K2.1 for use/possession of a firearm in connection with another felony offense apply?

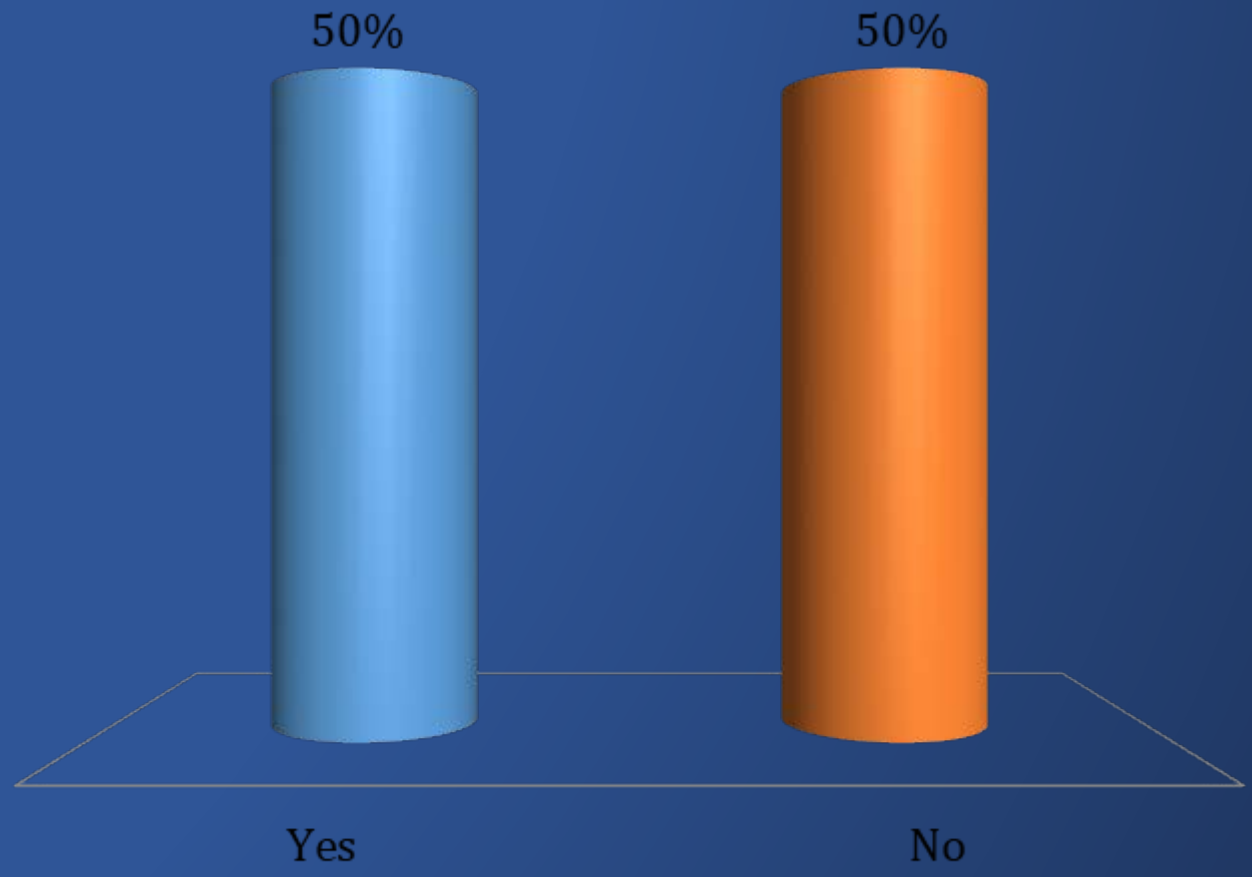
A. Yes

B. No



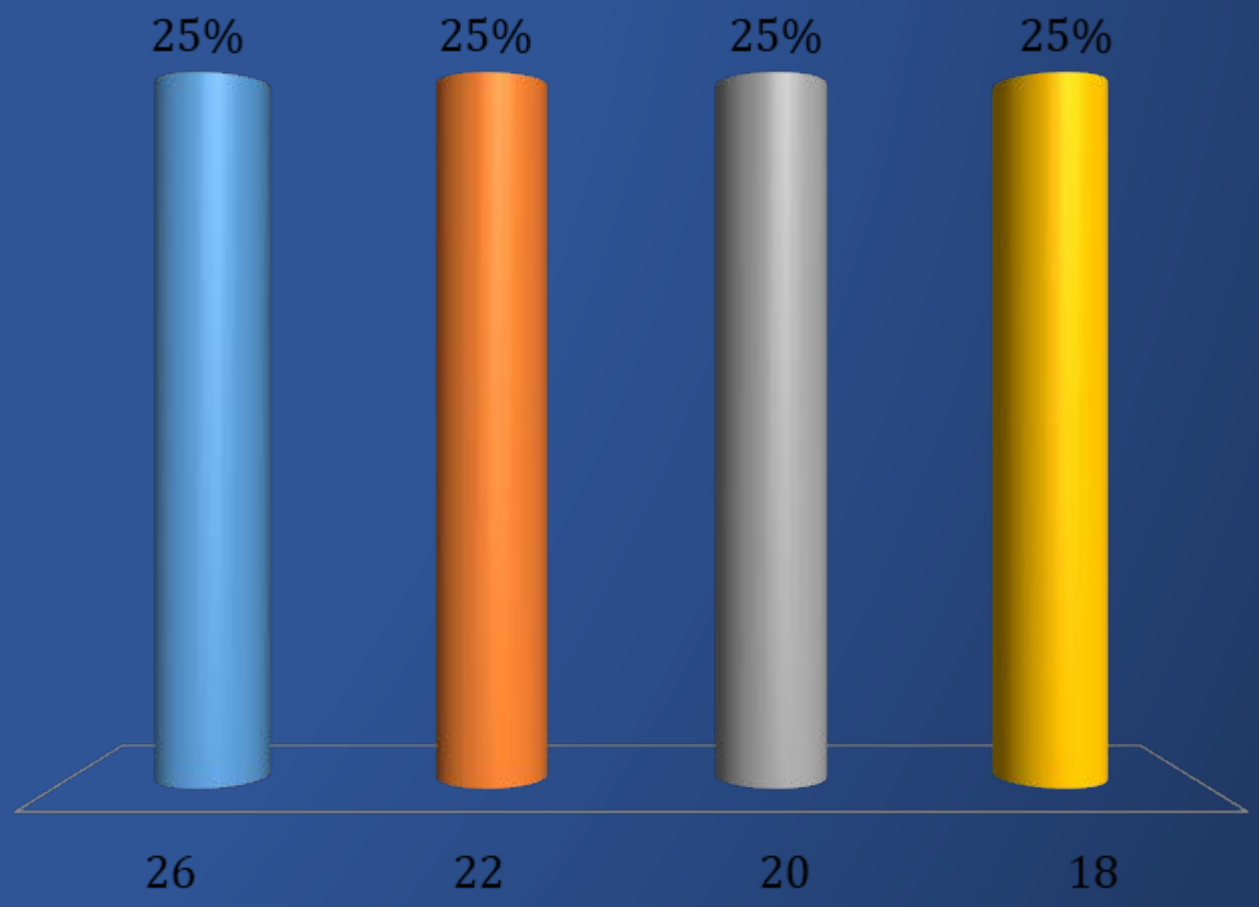
Scenario #5: Does the SOC for possession of a dangerous weapon at §2D1.1 apply?

A. Yes
B. No



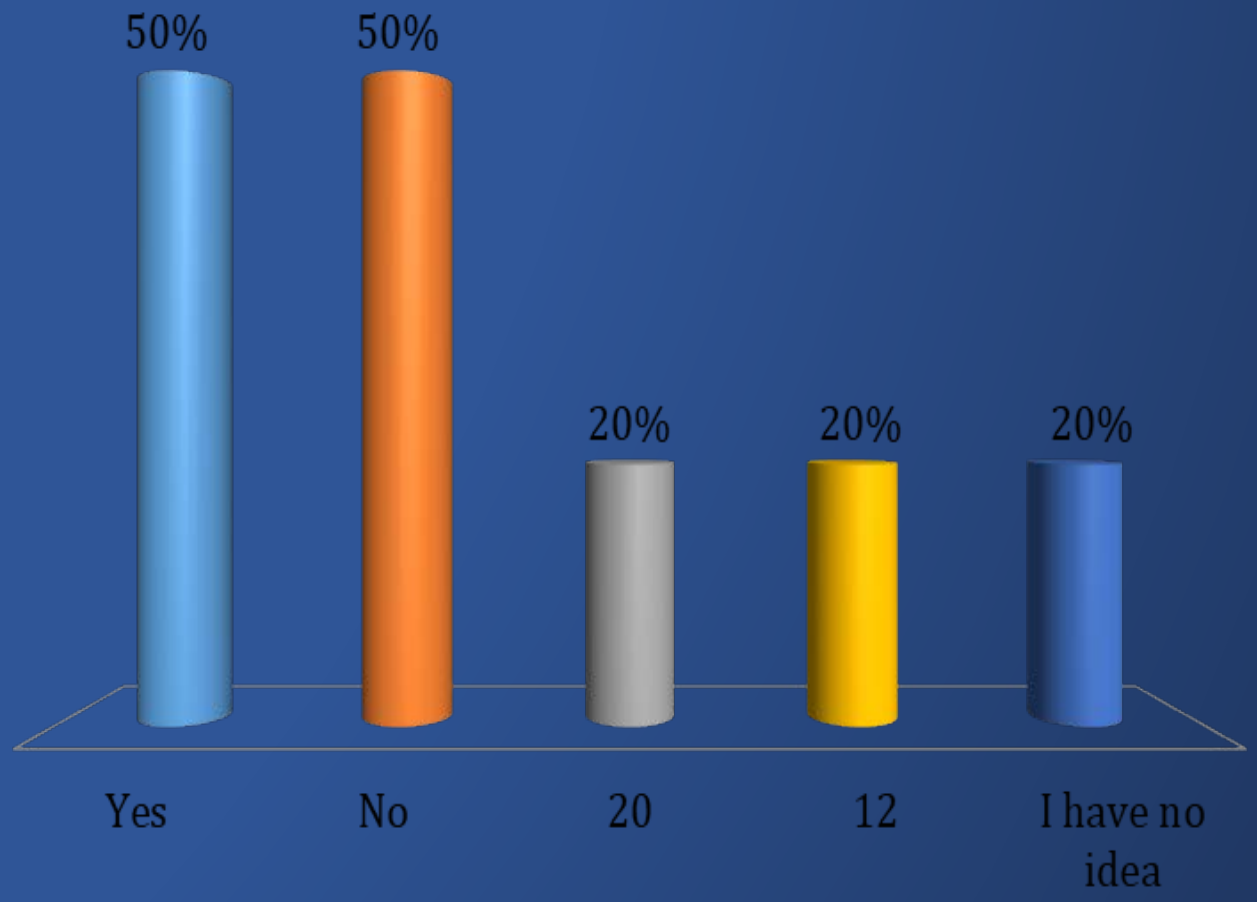
Scenario# 6: What is the BOL at §2K2.1?

A. 26
B. 22
C. 20
D. 18



Scenario#6: Would the defendant's base offense level change if his previous controlled substance offense had not been assigned criminal history points?

A. Yes
B. No

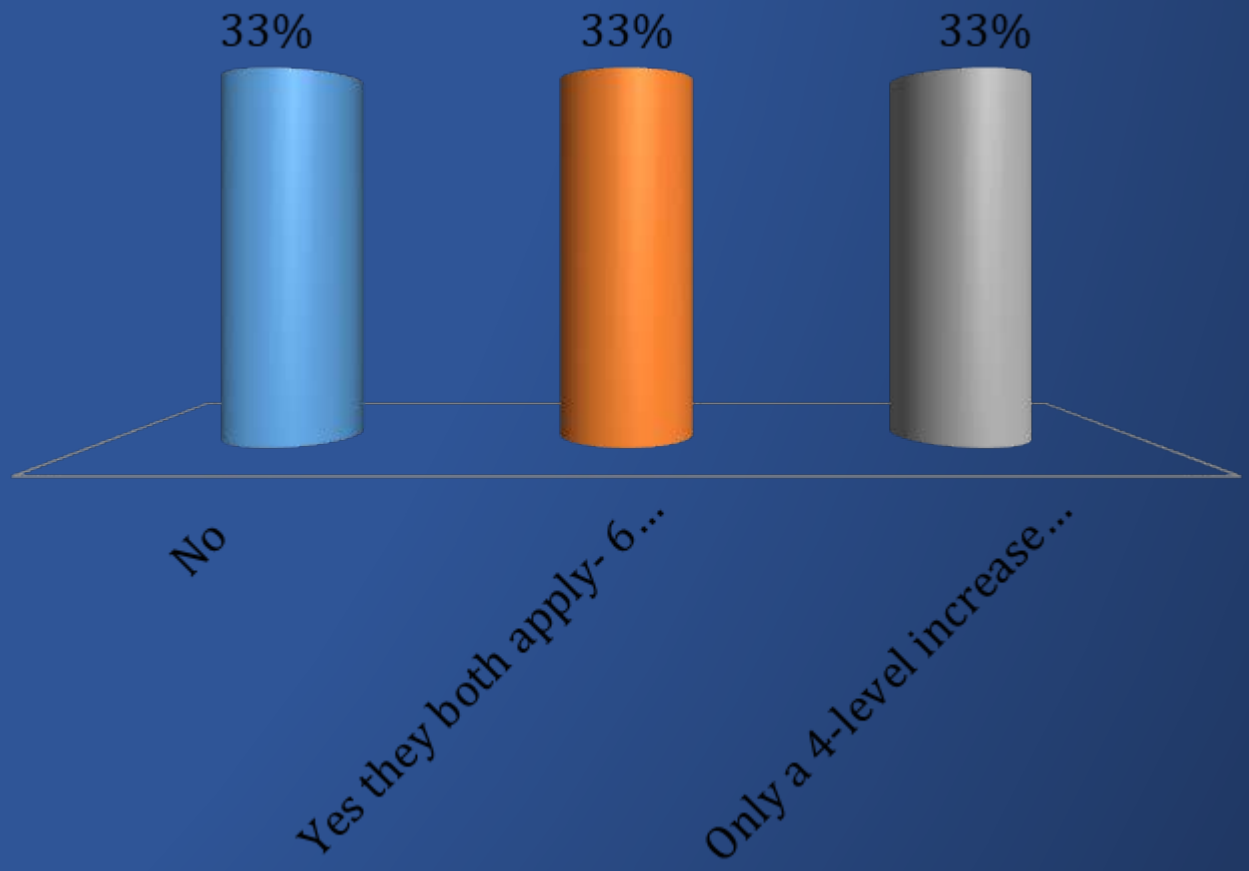


Use of "Crime of Violence" and "Controlled Substance Offense" in BOLs

- For the priors to be used in the BOLs, use only those felony convictions that receive criminal history points and are counted *separately* for Criminal History at §4A1.1(a), (b), or (c)
  - Per §2K2.1, App. Note 10
  - Note: This results in time limits on priors
  - Note: This also results in "single/separate" determinations

Scenario# 6: Do the SOC's for a firearm being stolen and having an altered or obliterated serial number apply?

A. No
B. Yes they both apply- 6 level increase
C. Only a 4-level increase for altered/obliterated serial number



Stolen Gun/Obliterated Serial Number SOC

§2K2.1(b)(4), App. Note 8

- Strict liability standard

- If any firearm
  - Was stolen, increase by 2 levels

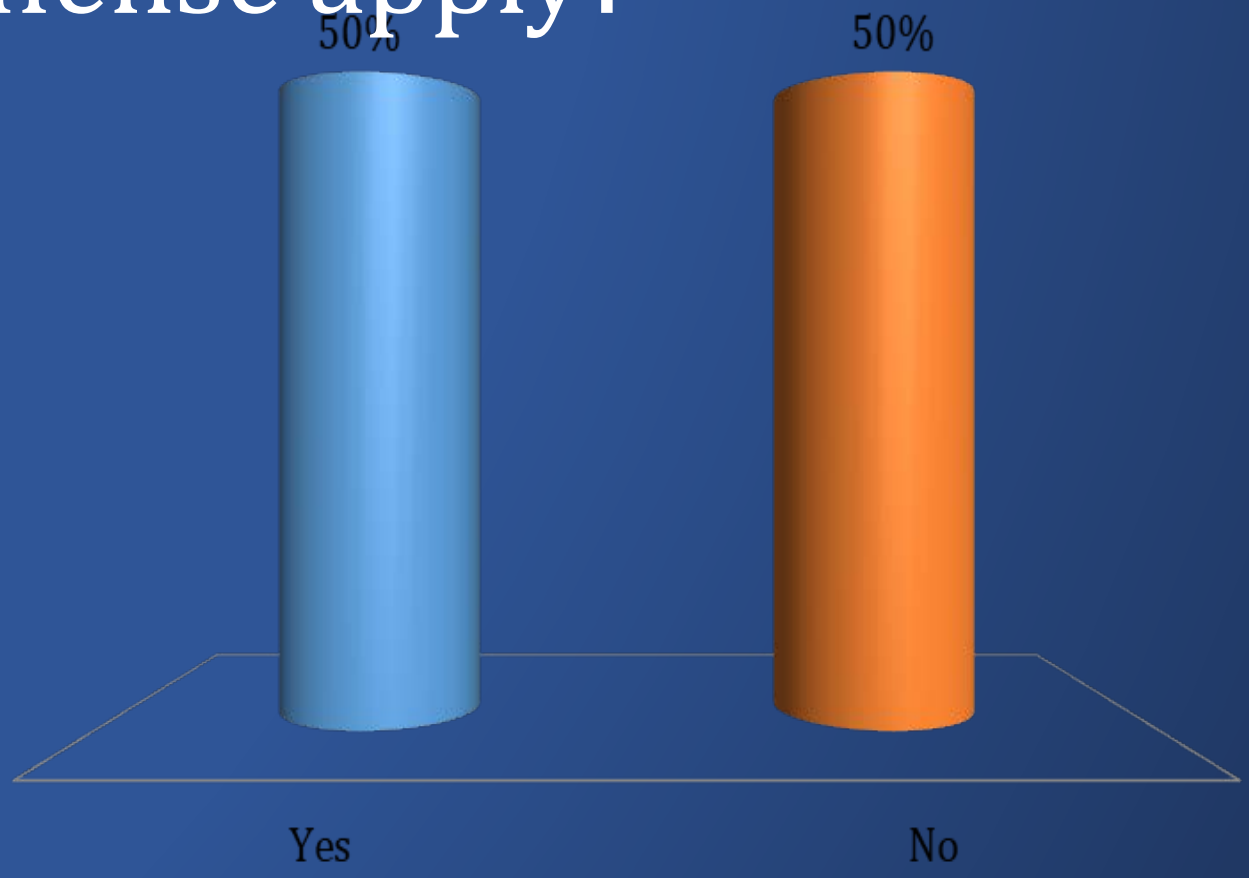
    OR

    (*i.e.*, <u>cannot</u> give both; use the greater)
  - Had an altered or obliterated serial number, increase by 4 levels

Scenario #6: Does the SOC at §2K2.1 for use/possession of a firearm in connection with another felony offense apply?

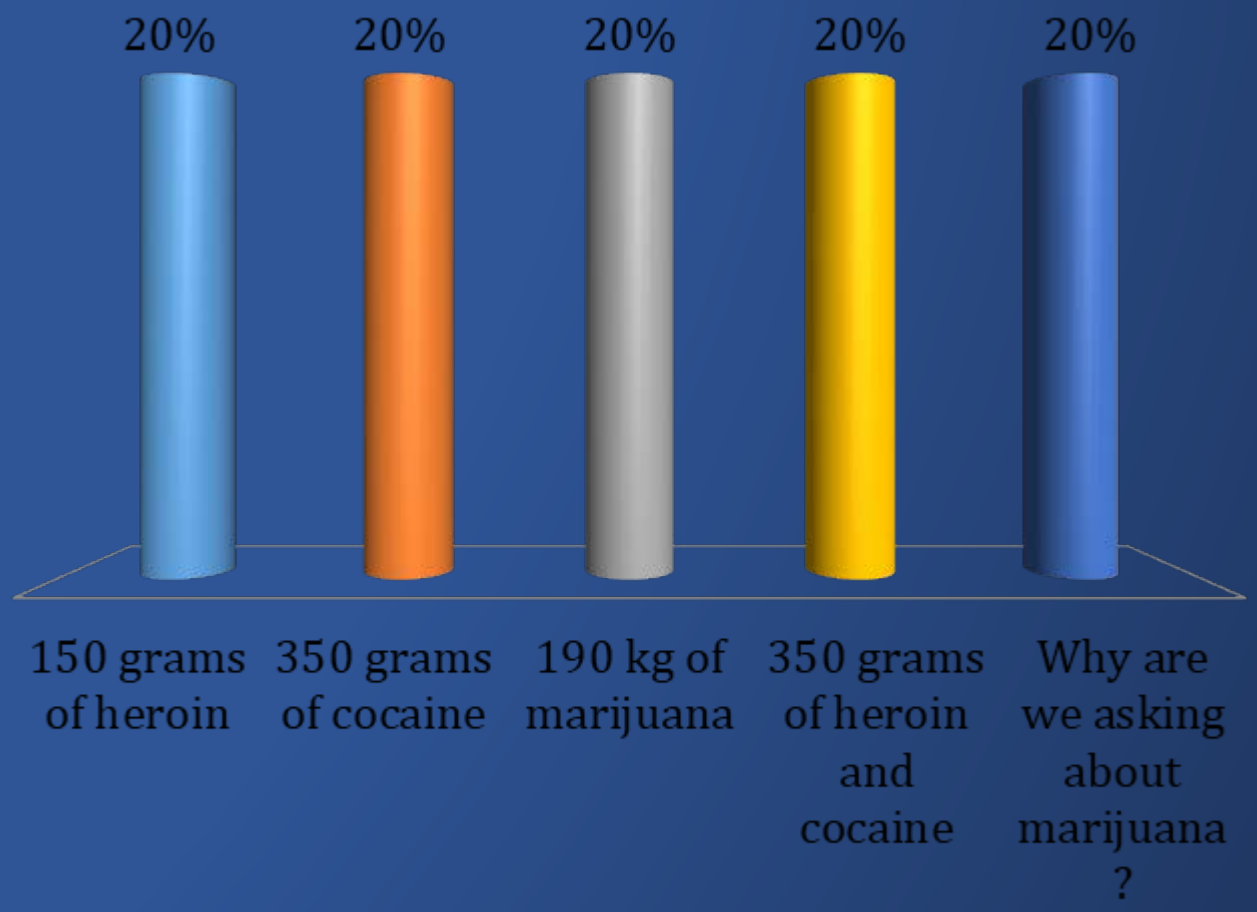
A. Yes

B. No



Scenario# 7: What is the total marijuana equivalency of all the drugs in this case?

A. 150 grams of heroin
B. 350 grams of cocaine
C. 190 kg of marijuana
D. 350 grams of heroin and cocaine
E. Why are we asking about marijuana ?



Drug *Equivalency* Tables

§2D1.1, App. Note 8

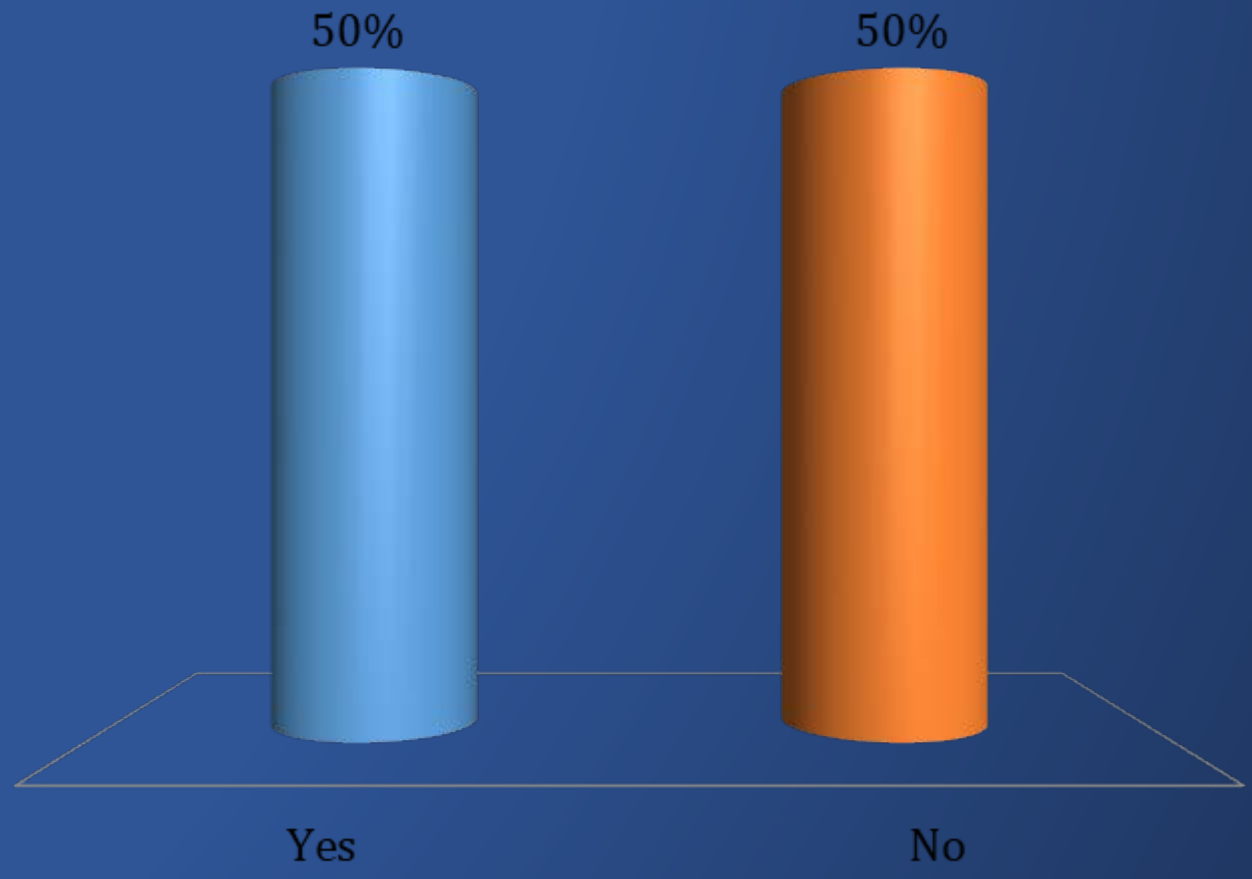
- Drugs **not** included on the Drug *Quantity* Table are converted to marijuana
  - *E.g.*, MDMA ("ecstasy") 1 gm. = 500 gm. marijuana

- Different types of drugs are converted to marijuana so as to be added together
  - *E.g.*, cocaine and heroin

Scenario# 7: Does the SOC at §2D1.1 for possession of a dangerous weapon apply?

A. Yes

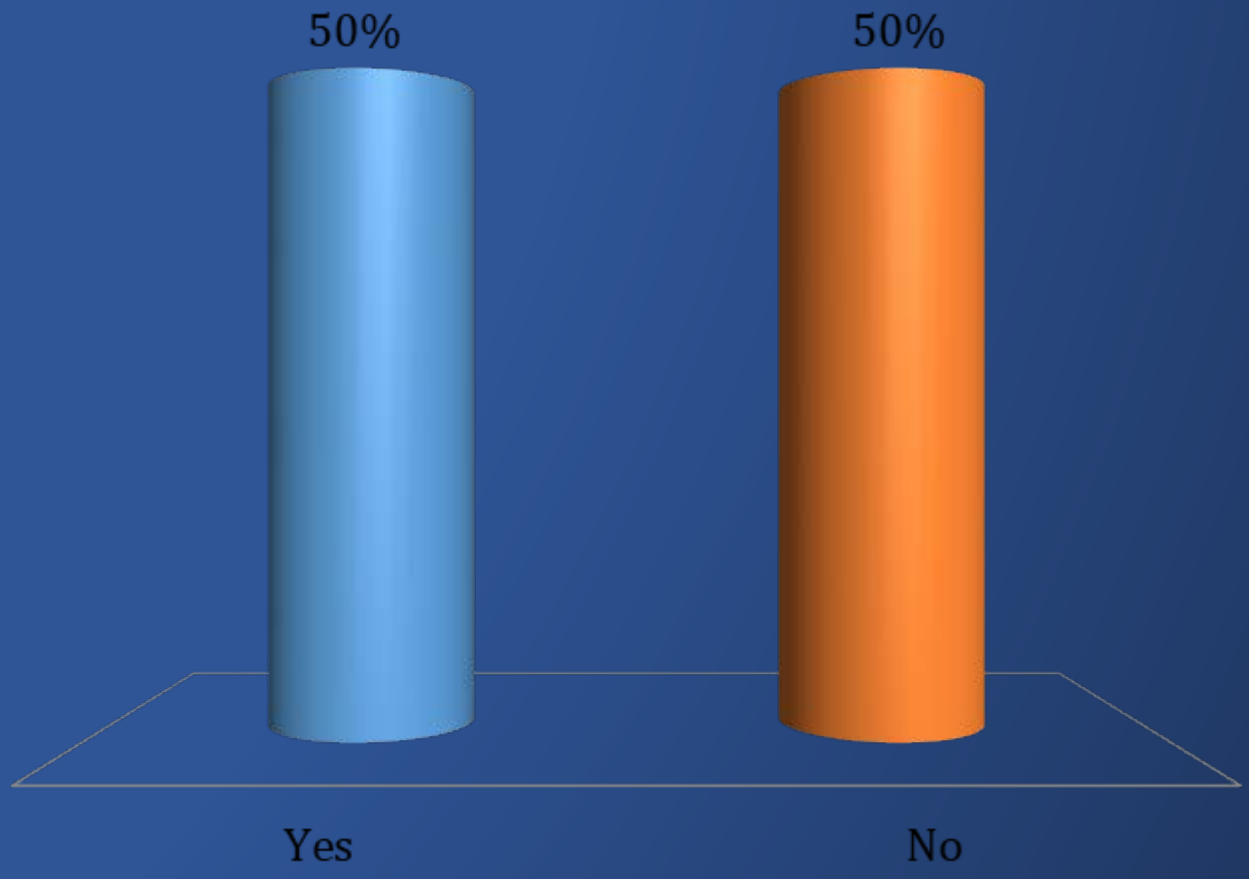
B. No



Scenario #8: Does the SOC for possession of a dangerous weapon at §2D1.1(b)(1) apply?

A. Yes

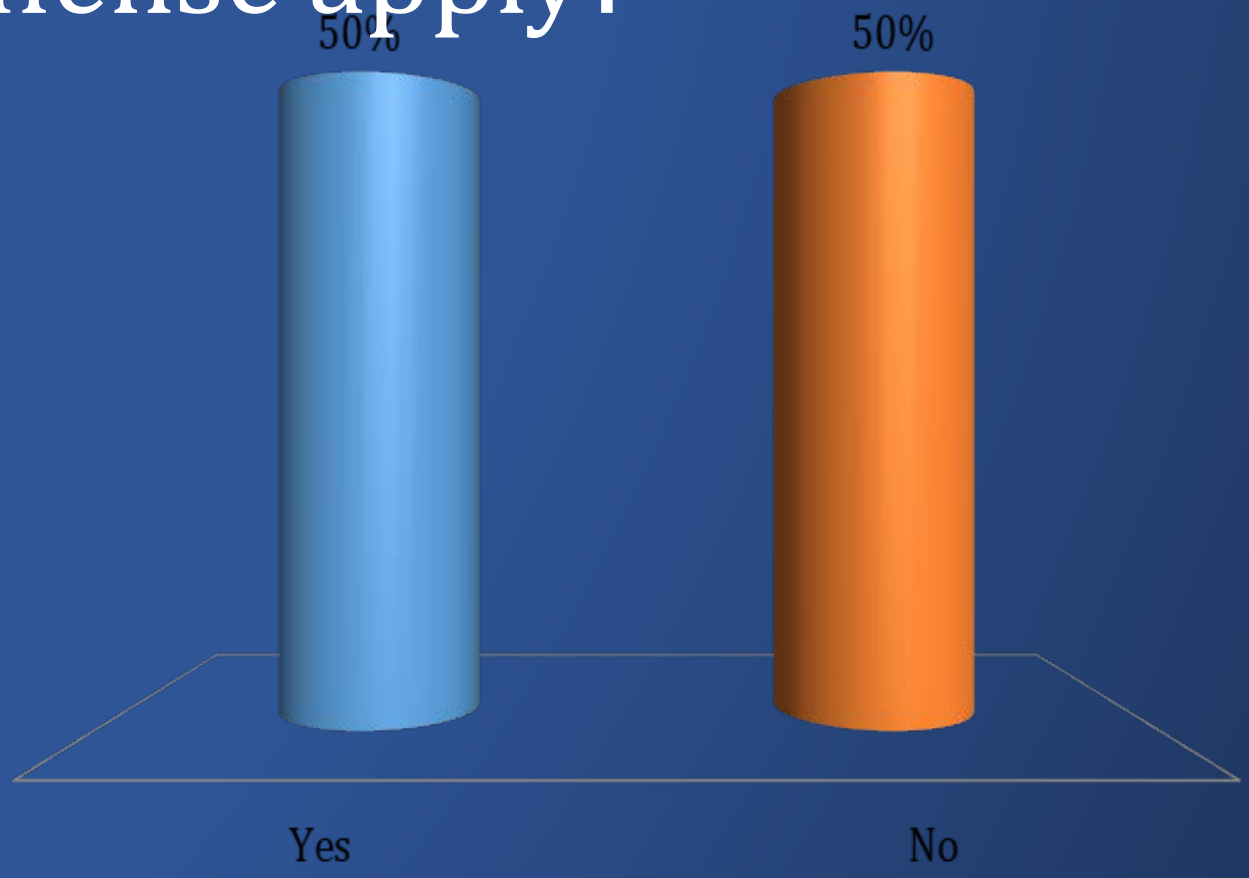
B. No



Scenario #8: Does the SOC at §2K2.1 for use/possession of a firearm in connection with another felony offense apply?

A. Yes

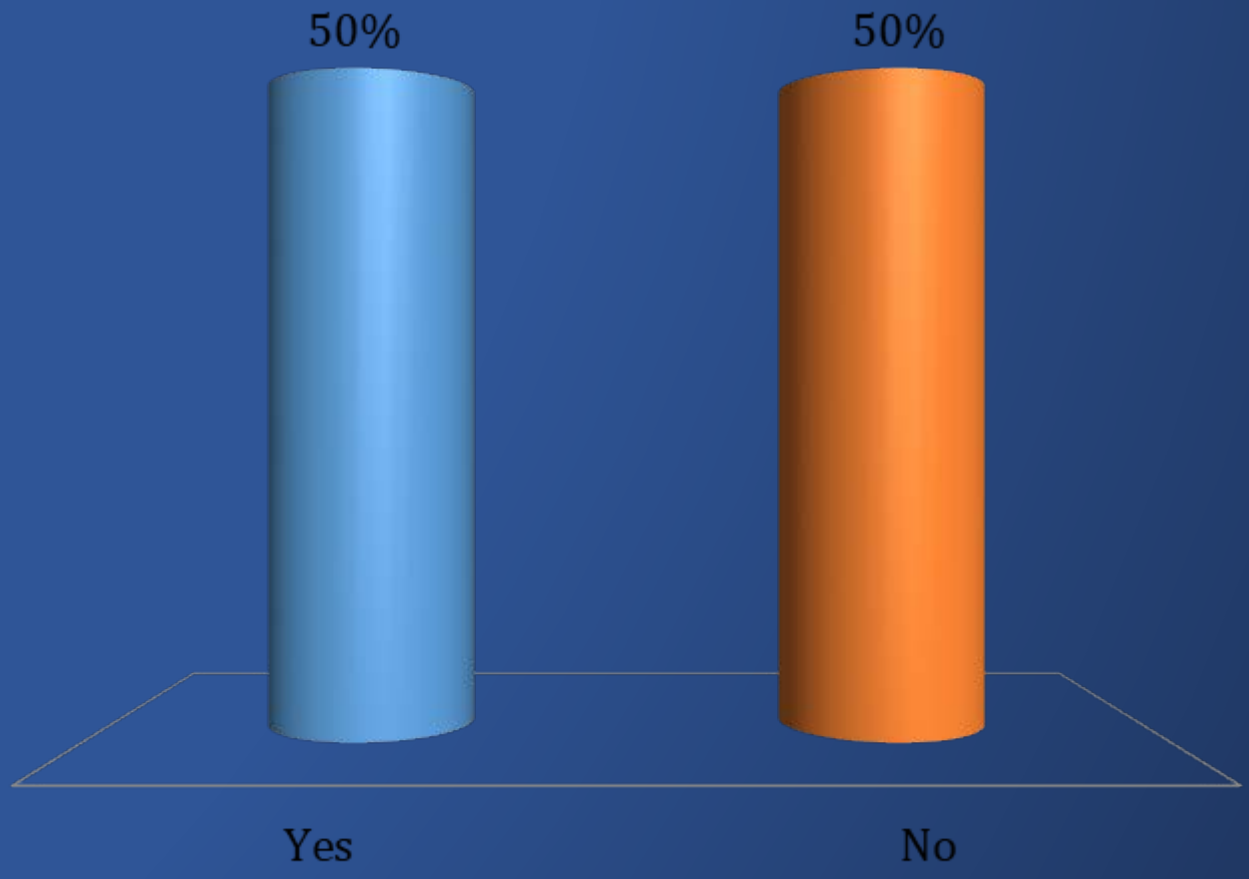
B. No



Scenario#8: Does the SOC for number of firearms at §2K2.1 apply?

A. Yes

B. No



Impact of § 924(c) on SOCs

§2K2.4, App. Note 4

- **Do not apply** the firearm (weapon) SOC in guideline for the *underlying* offense
  - § 924(c) accounts for any weapon SOC for the underlying offense
  - § 924(c) accounts for any weapon within the relevant conduct

GUIDELINE SCENARIOS – DRUGS AND GUNS

Scenario #1

Defendant Hill pled guilty to the following offenses:

- Conspiracy to Distribute Methamphetamine; in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) - 0 - 20 years' imprisonment
- One count Felon in Possession of a Firearm and Ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and,
- Possessing a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i).

The offense conduct involved a total of 35 grams of methamphetamine mixture (not methamphetamine actual or "Ice") and two firearms. The drugs and the guns were found in a safe in the defendant's home. The Indictment for all three offenses only listed one of the two firearms found in the safe.

1. Does the SOC for possession of a dangerous weapon at §2D1.1(b)(1) apply in this case?

2. Does the SOC for using or possessing a firearm in connection with another felony offense at §2K2.1(b)(6)(B) apply in this case?

3. Does the cross reference at §2K2.1(c)(1) apply?

Scenario #2

Defendant Jones is convicted of the following:

- Possession with Intent to Distribute Cocaine Hydrochloride in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and
- Possession of a Firearm in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. § 924(c)(1)(A).

GUIDELINE SCENARIOS – DRUGS AND GUNS

On September 30, 2016 a confidential source (CS) placed a call to the defendant to arrange for the purchase of one ounce of "Molly" (MDMA). The defendant agreed to sell the CS one ounce of "Molly" for $1,000. They agreed to meet at the Dick's Sporting Goods parking lot later that day. When the defendant arrived, the CS entered the passenger side of the vehicle and the defendant sold the CS approximately 44 grams of "Molly". A subsequent laboratory analysis revealed the MDMA was actually Methylone and had a net weight of 41 grams.

On October 2, 2016, the defendant contacted the CS and indicated that he had several ounces of cocaine hydrochloride for sale. Arrangements were made between the defendant and the CS to make the purchase. The defendant was intercepted on his way to meet the CS when authorities conducted a traffic stop. When the officer approached the defendant's vehicle, he observed a semi-automatic handgun on the driver's side floorboard between the defendant's feet.

The officer asked for permission to search the defendant's vehicle and his person. A clear plastic bag containing 36.9 grams of cocaine hydrochloride was found on the defendant. The weapon was identified as a .40 caliber Taurus semi-automatic handgun.

1. What is the marijuana equivalency of the drugs in this case?

2. Does the SOC for possession of a dangerous weapon at §2D1.1(b)(1) apply in this case?

Scenario #3

Defendant Washington was convicted of the following:

- Possession with Intent to Distribute Methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C)
- Possessing a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i).

Defendant Washington sold methamphetamine to an undercover officer. After the arrest, the officer searched the defendant's vehicle and found a .40 caliber pistol which is the pistol in the 18 U.S.C. § 924(c) violation. A subsequent search of the defendant's home resulted in the discovery of several additional firearms that were used in connection with the drug offense.

1. Does the SOC for possession of a firearm at §2D1.1(b)(1) apply in this case?

Scenario #4

Defendant Cole has been convicted of the following:

- Distribution of Heroin in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)- 10 years imprisonment to life- Applicable guideline is §2D1.1
- Felon in Possession of a Firearm and Ammunition, in violation of 18 U.S.C. §§ 922(g)(1) - Applicable guideline is §2K2.1

The defendant has two prior convictions for crimes of violence. The defendant went to trial in this case and the adjustment for Acceptance of Responsibility (§3E1.1) will not apply.

The guideline calculations are as follows:

§2D1.1	**§2K2.1**
BOL 32 (2 kg heroin)	BOL 24 (2 prior COV's)
+ 2 (gun)	+ 2 (5 guns)
	+ 4 (obliterated serial number)
	+ 4 (in connection with felony offense)
= **32**	= **34**

The defendant qualifies as both a Career Offender (§4B1.1) and an Armed Career Criminal (§4B1.4), however, the calculations under the Career Offender guideline (§4B1.1) come out higher than what the Armed Career Criminal (§4B1.4) guideline calls for.

1. Does the Career Offender (§4B1.1) override apply in this case?

Scenario #5

Defendant Emerson was convicted of the following:

- Unlawful Importing, Manufacturing, or Dealing in Firearms in violation of 18 U.S.C. § 922(a)(1)(A) - Applicable guideline is §2K2.1

- Possession of a Controlled Substance with Intent to Distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) - Applicable guideline is §2D1.1

During approximately a one-month period, Emerson sold undercover ATF agents, and/or confidential informants a total of six firearms and .15 grams of heroin. The sale of the .15 grams of heroin did not occur on the same day as any of the sales of the firearms.

The defendant, the ATF undercover agent, and the confidential informant had numerous telephone conversations and exchanged numerous texts, during which they discussed Emerson selling both guns and illegal drugs (heroin and cocaine) to the ATF undercover agent; however, Emerson was never observed to be in possession of weapons and illegal drugs at the same time.

1. Does the SOC for use or possession of a firearm in connection with another felony offense at §2K2.1(b)(6)(B) apply in this case?

2. Does the SOC for possession of a dangerous weapon at §2D1.1(b)(1) apply in this case?

Scenario #6

Defendant Dane was convicted of the following counts:

- Conspiracy to Possess with Intent to Distribute Heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) - Applicable guideline is §2D1.1, and
- Felon in Possession of a Firearm (2 counts) in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(1) - Applicable guideline is §2K2.1

During a two-year period, Dane conspired with others to possess with intent to distribute and to distribute heroin, cocaine, and marijuana. Dane was a middle-level participant in the conspiracy. At one point, he was arrested after his vehicle was stopped for traffic violations, at which time he was found to be in possession of heroin, cocaine, marijuana, a large amount of cash, and a .38 caliber revolver. The gun was found to have an obliterated serial number and to be stolen.

The following day, a search warrant was executed at Dane's home, which resulted in the recovery of additional heroin, cocaine, marijuana, scales, more cash, and three additional firearms. One

firearm was found to be stolen and one was a semiautomatic firearm that was loaded with a magazine containing 17 rounds of ammunition.

Dane's criminal history computation resulted in a total of 7 points. A previous felony conviction for a controlled substance offense accounted for three of those points.

1. What is the Base Offense Level at §2K2.1?

2. Would the defendant's Base Offense Level change if his previous felony conviction for a controlled substance offense had not been assigned any criminal history points?

3. Do the SOC's for a firearm being stolen at §2K2.1(b)(4)(A) and a firearm having an altered or obliterated serial number at §2K2.1(b)(4)(B) apply in this case?

4. Does the SOC for use or possession of a firearm in connection with another felony offense at §2K2.1(b)(6)(B) apply in this case?

Scenario #7

Defendant Christopher was convicted of the following counts:

- Possession with Intent to Distribute Heroin in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(B),

- Possession with Intent to Distribute Cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), and
- Felon in Possession of Firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Christopher sold large amounts of heroin and cocaine using three different residences, none of which were owned or occupied by him. Officers conducted surveillance of Christopher for approximately one week, during which time they observed many different people entering one of the residences and leaving a short time later. They also observed Christopher engaging in hand-to hand transactions with others while sitting in his car that was parked at one of the residences.

Officers conducted a traffic stop of Christopher's vehicle, and later searched that vehicle and the residences that he was using. The officers found a handgun in a hidden compartment of the Christopher's vehicle and a significant amount of cash on him. They also found the following items at the residences:

- First residence- A firearm and mail addressed to the defendant
- Second residence- Drug weighing and packaging material and equipment as well as a firearm
- Third residence- Numerous bags containing illegal drugs located in the dining room and kitchen along with a firearm located in the basement.

The agents received the results from the crime lab for the drugs seized from the third residence, which are as follows: 150 grams of heroin, and 200 grams of cocaine.

1. What is the total marijuana equivalency of all the drugs in this case?

2. Does the SOC for possession of a dangerous weapon at §2D1.1(b)(1) apply in this case?

Scenario #8

Defendant Wilson was convicted of the following counts:

- Possession of a silencer in violation of 18 U.S.C. § 922(g)(1)- Applicable guideline is §2K2.1
- Possession of a Controlled Substance with Intent to Distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) - Applicable guideline is §2D1.1 and

GUIDELINE SCENARIOS – DRUGS AND GUNS

- Possessing a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i)- Applicable guideline is §2K2.4.

The defendant always carried a gun during his drug transactions. The defendant also sold five guns and the silencer during one of his drug deals.

1. Does the SOC for possession of a dangerous weapon at §2D1.1(b)(1) apply in this case?

2. Does the SOC for use or possession of a firearm in connection with another felony offense at §2K2.1(b)(6)(B) apply in this case?

3. Does the SOC for number of firearms at §2K2.1(b)(1) apply in this case?

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Defendants charged with drug trafficking offenses in federal court are often also charged with firearms offenses in connection with drug trafficking. This document highlights the interplay between the two.

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§2D1.1(b)(1) Weapon Enhancement:

§2D1.1(b)(1) Weapon Enhancement:

- If a dangerous weapon (including a firearm) was possessed, add 2 levels.
- Include all firearms that are part of relevant conduct including:
  - All weapons the defendant possessed, including weapons outside the offense of conviction.
  - In some cases, weapons possessed by co-defendants.
- Enhancement applies if the weapon is present, unless it is clearly improbable that the weapon was connected with the offense. *See Application Note 11(A).*

§2K2.1(b)(6) Use of Firearm "In Connection With" Another Offense:

§2K2.1(b)(6): Use of Firearm "In Connection With" Another Offense

- Add 4 levels if the weapon was used in connection with another felony offense.
  - Underlying offense can be any federal, state, or local offense punishable by more than one year, regardless of whether the defendant was charged or convicted of the underlying offense. *See* Application Note 14(C).
- Firearm must have facilitated another offense; however, the other offense cannot be another firearms offense.
- Special rules (Application Note 14(B)):
  - In a drug trafficking offense, the firearm must be in close proximity to the drugs.
  - In a burglary offense, the enhancement applies if the firearm stolen during the course of a burglary.
- Enhancement applies to firearms in the indictment as well as other firearms as part of relevant conduct.

§2K2.1(c)(1): Cross Reference

§2K2.1(c)(1): Cross Reference

- Cross reference only applies to firearms in the count of conviction.
- Cannot bring in relevant conduct.

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Tips for Guideline Application

- Both guidelines consider "expanded" relevant conduct, that is, similar conduct that is part of the same course of conduct, common scheme or plan as the offense of conviction.
- Base offense levels at §2K2.1 determined by factors such as:
  - Status (prohibited person)
  - Type of firearm (*e.g.* large-capacity)
  - Number and type of prior conviction ("crime of violence"/"controlled substance offense").
- In a drug trafficking offense, the firearm must be in close proximity to the drugs.
- Firearm must be charged in the offense of conviction to apply the cross reference at §2K2.1.
- Weapon enhancement applies at §2D1.1 if firearm is present, unless clearly improbable it is connected with the offense.
- Do not apply weapon enhancements for underlying offense when defendant is also convicted of 18 U.S..C. § 924(c).

Common Statutes

- 21 U.S.C. § 841 (a)(1) (Distribution)
- 21 U.S.C. § 846 (Attempt and Conspiracy to Distribute)
- 18 U.S.C. § 922(g) (Possession of a Firearm by a Prohibited Person)
- 18 U.S.C. § 924(c) (Possessing a Firearm in Furtherance of a Drug Crime)

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The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.

PRIMER

DRUG GUIDELINES

May 2018

Prepared by the Office of General Counsel, U.S. Sentencing Commission

Disclaimer: This document provided by the Commission's Legal Staff is offered to assist in understanding and applying the sentencing guidelines. The information in this document does not necessarily represent the official position of the Commission, and it should not be considered definitive or comprehensive. The information in this document is not binding upon the Commission, courts, or the parties in any case. Pursuant to Fed. R. App. P. 32.1 (2007), some cases cited in this document are unpublished. Practitioners should be advised that citation of such cases under Rule 32.1 requires that such opinions be issued on or after January 1, 2007, and that they either be "available in a publicly accessible electronic database" or provided in hard copy by the party offering them for citation.

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I. INTRODUCTION

The purpose of this primer is to provide a general overview of the sentencing guidelines, pertinent statutes, and issues related to the sentencing of drug offenses under the guidelines.[1] It is not, a comprehensive compilation of all issues or case law involving drug sentencing.

II. DRUG STATUTES

A. THE STATUTORY SCHEME

The most commonly used drug statutes include 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] Detailed materials on the Commission's 2014 drug guidelines amendments are available at http://www.ussc.gov/policymaking/amendments/materials-2014-drug-guidelines-amendment. In addition, a detailed discussion of retroactivity, including issues related to the Fair Sentencing Act and the Supreme Court's decisions in *Dorsey v. United States*, 567 U.S. 260 (2012), and *Dillon v. United States*, 560 U.S. 817 (2010), is presented in the Commission's subject matter primer on *Retroactivity*, available at http://www.ussc.gov/guidelines/primers.

1 kilogram of Heroin
5 kilograms of Cocaine (powder)
280 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)(2), a statutory range of 5 to 40 years applies to offenses involving at least:

100 grams of Heroin
500 grams of Cocaine (powder)
28 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 0 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. *See* 21 U.S.C. §§ 841(b)(1)(D) and 960(b)(4).

B. LEGAL ISSUES

1. 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. *United States v. Harrison*, 241 F.3d 289, 292 (2d Cir. 2001) (noting drug quantities from separate transactions are not aggregated for purposes of calculating a mandatory minimum, but the combined quantities are relevant under §2D1.1 to establish the base offense level); *United States v. Rettelle*, 165 F.3d 489, 492 (6th Cir. 1999) (holding that it was error to construe the statutory penalty as applying to aggregate amounts of drugs held manufactured on various separate occasions); *United States v. Santos*, 195 F.3d 549, 553 (10th Cir. 1999); *United States v. Rodriguez*, 67 F.3d 1312, 1324 (7th Cir. 1995); *United States v. Estrada*, 42 F.3d 228, 232 n.4 (4th Cir. 1994).

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. Pressley*, 469 F.3d 63, 66 (2d Cir. 2006); *United States v. Gori*, 324 F.3d 234, 237 (3d Cir. 2003). Note however that uncharged drug quantities are not included to

establish statutory penalties. *See Alaniz v. United States*, 351 F.3d 365, 368 (8th Cir. 2003) (reviewing 28 U.S.C. § 2255 challenge to conspiracy to distribute marijuana conviction and explaining that "[e]very circuit that has considered the issue has concluded that a second, uncharged drug type cannot be added to the charged drug type in order to trigger a higher statutory penalty range").

2. Enhanced Penalties

Sections 841(b) and 960(b) include enhancement provisions based on the defendant's prior record, which are applicable only if the government provides notice pursuant to 21 U.S.C. § 851 (proceedings to establish previous convictions). 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. The general rule that a jury must find any fact that will increase the penalty for an offense does not apply to prior convictions. *See*, *e.g.*, *United States v. Thomas*, 398 F.3d 1058, 1065 (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*); *United States v. Harris*, 741 F.3d 1245, 1249 (11th Cir. 2014) (district court's imposition of mandatory life sentence did not violate *Alleyne* or *Apprendi*).

Higher penalty ranges also apply if death or serious bodily injury results from use of the controlled substance. *See* 21 U.S.C. §§ 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 applied *Apprendi* to the federal sentencing guidelines in *United States v. Booker*, reaffirming that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." 543 U.S. 220, 244 (2005). The Supreme Court remedied this constitutional violation by rendering the sentencing guidelines advisory in nature.[2]

Following *Apprendi*, circuits were split regarding whether this rule also applied to facts that increase the mandatory minimum sentence. Prior to *Apprendi*, the Supreme Court had ruled in *Harris v. United States*, 536 U.S. 545 (2002), that the Constitution does not require facts that increase a mandatory minimum sentence to be determined by a jury. The Supreme Court overruled *Harris* in *Alleyne v. United States*, 133 S. Ct. 2151 (2013),

[2] In *Booker*, the Supreme Court excised 18 U.S.C. § 3553(b)(1), which made the guidelines binding on the sentencing court, and § 3742(e), which required *de novo* review of sentences on appeal. 543 U.S. at 258.

however, holding that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." For further discussion, *see* Section IX, Part A.

C. LESSER OFFENSES

Other statutes with lower statutory penalty ranges include:

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

21 U.S.C. § 843(a)(6). Possession of a listed chemical with intent to manufacture a controlled substance has a four-year maximum sentence with additional penalty provisions applicable to subsequent violations and methamphetamine manufacturing.

21 U.S.C. § 843(b) ("phone count"). Using a communication facility to commit a drug trafficking offense has a four-year maximum sentence. There is a "doubling" provision and additional penalty provisions.

Simple possession (21 U.S.C. § 844) is a misdemeanor, with enhancement provisions.

21 U.S.C. § 856 (Maintaining drug-involved premises) has a 20-year maximum sentence. There are no mandatory minimum or enhancement provisions.

III. 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 Appendix A (Statutory Index). *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 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).

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, 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 (Unlawful Possession; Attempt or Conspiracy), not §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), because while § 841(a) contains general language prohibiting drug trafficking, § 841(b)(4) provides the more specific penalties for distribution of a small amount of marijuana for no remuneration, which is to be treated as simple possession.

B. SECTION 2D1.1 (UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, OR TRAFFICKING (INCLUDING POSSESSION WITH INTENT TO COMMIT THESE OFFENSES); ATTEMPT OR CONSPIRACY)[3]

For the most widely used code sections in drug cases — 21 U.S.C. § 841(a) and (b)(1) (and conspiracy under § 846 to violate § 841(a) and (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 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.

Note that, to the extent that a fact other than a prior conviction (such as death or serious bodily injury, drug type, or drug quantity) increases a defendant's otherwise applicable statutory maximum or mandatory minimum sentence beyond the sentence authorized by the offense of conviction, such a fact must be submitted to a jury and proved beyond a reasonable doubt, or admitted to by the defendant. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000) (statutory maximums); *Alleyne v. United States*, 133 S. Ct. 2151 (2013) (mandatory minimums). But factual findings made for the purposes of applying the sentencing guidelines that do not increase the applicable statutory maximum or mandatory minimum sentence do not violate this rule. For further discussion, *see* Section IX, Part A.

[3] The specific offense characteristics at §2D1.1 and the application notes that follow are occasionally renumbered when the guideline is amended. The designations used in this primer were in effect at the time of its publication. Case citations may reflect pre-amendment designations of specific offense characteristics or application notes.

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)(5), (c).

Note regarding the 2018 Amendment replacing the term "marihuana equivalency" in the Drug Quantity Table. In a technical amendment promulgated on April 12, 2018, the Commission adds the new term "converted drug weight" to replace the term "marihuana equivalency," which is used in the Drug Equivalency Tables for determining penalties for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances. *See* Amendment 4 of the amendments submitted by the Commission to Congress on April 12, 2018, 83 Fed. Reg. 20145 (May 7, 2018). The revision is the result of public comment expressing concern that the term "marihuana equivalency" was misleading and resulted in confusion for individuals not fully versed in the guidelines. In addition, the amendment adds the new term "converted drug weight" to all provisions of the Drug Quantity Table at §2D1.1(c), changes the title of the "Drug Equivalency Tables" to "Drug Conversion Tables," and makes technical changes throughout the *Guidelines Manual* to account for the new term. This amendment is not intended as a substantive change in policy for §2D1.1.

Absent action by Congress to the contrary, the amendment will take effect on November 1, 2018.

Note regarding the 2014 Amendment to the Drug Quantity Table. Effective November 1, 2014, the Commission amended the Drug Quantity Table to reduce by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties, resulting in corresponding guideline ranges that include the mandatory minimum penalties (rather than guideline ranges that are above the mandatory minimum penalties). The amendment also adjusted the offense levels downward two levels for quantities above and below the mandatory minimum threshold quantities, except that it retained the minimum base offense level of 6 and the maximum base offense level of 38 for particular drug types. The amendment also made parallel changes to the quantity tables in §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy). *See* USSG App. C, amend. 782 (eff. Nov. 1, 2014).

These reductions apply retroactively, with reduced sentences taking effect on November 1, 2015. *See* USSG App. C, amend. 788 (eff. Nov. 1, 2014).[4]

[4] Detailed materials on the Commission's 2014 drug guidelines amendments are available at http://www.ussc.gov/policymaking/amendments/materials-2014-drug-guidelines-amendment.

b. Death or serious bodily injury

Subsections 2D1.1(a)(1)-(4) provide for enhanced base offense levels (**43**, **38**, **30**, and **26**, respectively), if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3)." The Supreme Court held that, "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014.)

(i) *"Offense of Conviction."* The Commission's view is that the "offense of conviction" language limits the application of these offense levels to cases where death or serious bodily injury is proved beyond a reasonable doubt by plea or to the factfinder. *See* USSG App. C, amend. 123 (eff. Nov. 1, 1989) ("[t]he 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 circumstances specified in the statutes cited")[5]. Before *Alleyne*, the circuit courts applied *Apprendi* to solve the issue if the "offense of conviction" language limited the application of these enhancements to such cases or whether they may be applied after mere judicial fact finding. This resulted in a circuit split. After *Alleyne*, the Seventh Circuit held that "§2D1.1(a)(2) applies only when a resulting death (or serious bodily injury) was an element of the crime of conviction, proven beyond a reasonable doubt or admitted by the defendant. *United States v. Lawler* 818 F.3d 281 (7th Cir. 2016). For more information about this circuit split, *see* Section V, Part C.

(ii) *"Serious Bodily Injury."* For the increased offense levels under §2D1.1(a)(1)-(4) to apply, the offense of conviction must establish 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)-(4) is triggered by the guidelines definition or the statutory definition. However, one court noted in an unpublished opinion that the Supreme Court has held a statutory definition should be given preference over a general guideline definition. *See United States v. Alvarez*, 165 F. App'x 707, 708-09 (11th

[5] Amendment 727 added §2D1.1(a)(3)-(4) as a response to the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Pub. L. 110–425. "[T]he amendment addresses the sentencing enhancement added by the Act, which applies when the offense involved a Schedule III controlled substance and death or serious bodily injury resulted from the use of such substance." The Amendment's effective date was November 1, 2009.

Cir. 2006) (citing *United States v. LaBonte*, 520 U.S. 751, 757 (1997), and *Stinson v. United States*, 508 U.S. 36, 38 (1993), for the propositions that the guidelines "must bow to the specific directives of Congress," and "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute," respectively).

(iii) Violence Cross-References. 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 III, Part D(1)-(2).

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 pursuant to §2D1.1(a)(5).[6] This section provides a graduated reduction of two to four levels for offenders whose quantity level under §2D1.1 results in a base offense level of 32 or greater. *See* §2D1.1(a)(5). If the resulting offense level is greater than 32 and the defendant receives the 4-level reduction at §3B1.2(a), the offense level is reduced to a maximum of 32 (*i.e.*, "capped" at this offense level). The eligible defendant receives the 2- to 4-level downward role adjustment in addition to the reduced base offense level. *See* §3B1.2, comment. (n.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 that substance generates relatively greater penalties.

[6] Amendment 794, effective November 1, 2015, resolved a circuit split and clarified that the "average participant", which a defendant is compared to in determining minor role, is a person who actually participated in the criminal activity at issue in the defendant's case, and not the universe of persons participating in similar crimes. As a clarifying amendment, it applies to cases on direct appeal. *United States v. Quintero-Leyva*, 823 F.3d 519 (9th Cir. 2016). The amendment was the result of Commission studies' finding that the mitigating role adjustment is applied inconsistently and more sparingly than it intended. In drug cases, specifically, the Commission determined the adjustment is applied inconsistently to drug defendants who performed similar low-level functions, and that rates of application varied widely from district to district.

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. Johnson,* 396 F.3d 902, 904 (7th Cir. 2005) (collecting cases as to enforceable stipulations, including drug type); *United States v. Roman*, 121 F.3d 136, 141 n.4 (3d Cir. 1997); *Cf. 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 on admissions to the court by a defendant during a guilty plea colloquy. *See United States v. Rosado-Perez*, 605 F.3d 48, 57 (1st Cir. 2010); *United States v. James*, 78 F.3d 851, 856 (3d Cir. 1996); *United States v. Faulks*, 143 F.3d 133, 139 (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, because the guidelines define cocaine base as crack cocaine); *United States v. Alfeche*, 942 F.2d 697, 698 (9th Cir. 1991) (per curiam) (court relied on unchallenged chemical analysis to determine identity of substance). Crack cocaine is a form of cocaine base; usually, a chemist will testify in terms of whether the substance is "cocaine base," while 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 determine identity. District courts may rely on random sampling for identification purposes. *See 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. Jackson*, 470 F.3d 299, 310-11 (6th Cir. 2006) (same); *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 an experienced agent that all of the plants were marijuana).

(iv) 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* §2D1.1(c), Note (D), evidence need not be established that the substance contains sodium bicarbonate before a court can conclude the drug was in fact crack. *See United States v. Diaz*, 176 F.3d 52, 119 (2d Cir. 1999); *United States v. Waters*, 313 F.3d 151, 156 (3d Cir. 2002); *United States v. Jones*, 159 F.3d 969, 982-83 (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).[7]

(v) Government need not perform chemical analysis, but may rely on lay testimony and circumstantial evidence to establish identity. See United States v. Gibbs, 190 F.3d 188, 220 (3d Cir. 1999); *see also United States v. Bryce*, 208 F.3d 346, 353-54 (2d Cir. 1999) (circumstantial evidence sufficient to establish identity of substance may include physical appearance, substance produced expected effects when sampled by someone familiar with illicit drug, substance used in same manner as illicit drug, high price was paid in cash for substance, transactions were carried on with secrecy or deviousness, and 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 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. Walker*, 688 F.3d 416, 423-24 (8th Cir. 2012) (district court properly relied on testimony of co-conspirators that methamphetamine was "ice" based on its appearance, form, price, and quality).

Because no chemical test can distinguish between cocaine base and crack cocaine, it is sufficient for a court to rely on the testimony of "those who spend their lives and livelihoods enmeshed with the drug-users, dealers, and law enforcement officers who specialize in narcotics crimes." *See United States v. Stephenson*, 557 F.3d 449, 453 (7th Cir. 2009); *see also 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, 73-274 (7th Cir. 1997)

[7] *See also* the discussion concerning the definition of "cocaine base" at Section III, Part E(1)(b).

(drug supplier, purchasers, and assistants testified that substance was crack); *United States v. Cantley*, 130 F.3d 1371, 1378-79 (10th Cir. 1997) (multiple police officers and lay witnesses who purchased substance from, or sold substance to, defendant testified that substance was crack); *United States v. Roman*, 121 F.3d 136, 140-41 (3d Cir. 1997) (affirming sentence where 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, 189-90 (3d Cir. 1998) (same).

b. "Mixture or substance"

The 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 contain only 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 Tables

Note regarding the 2018 Amendment replacing the term "marihuana equivalency" in the Drug Equivalency Tables. As noted above, the Commission in April 2018 promulgated a technical amendment to replace the term "marihuana equivalency" with the term "converted drug weight" in the Drug Equivalency Tables. Absent action by Congress to the contrary, the amendment will take effect on November 1, 2018.

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.8).

For example, if a case involves opium (a Schedule II opiate),[8] ***do not*** *apply the base offense level for heroin. Instead, convert the opium to marijuana by using the Drug Equivalency*

[8] Schedules of controlled substances are revised regularly. *See* 21 U.S.C. § 812 (Schedules of controlled substances). 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

Table. Compare *1 gram of opium (50 gm of marijuana),* with *1 gram of heroin (1 kg of marijuana).*

"Equivalent" is a guidelines term of art. Conversion ratios are not necessarily pharmacological equivalents. *See* §2D1.1, comment. (n.8(B)).

d. Analogues/drugs not listed in guideline

Note regarding the 2018 Amendment adding new substances to the Drug Equivalency Tables. In an amendment promulgated on April 12, 2018, the Commission revised the Drug Equivalency Tables to make a number of changes regarding synthetic drugs. The amendment adopts a new definition of "fentanyl analogue" as "any substance (including any salt, isomer, or salt of isomer), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide)." The definition is intended to create a class of fentanyl analogues identical to that already created by statute, clarify the legal confusion that has resulted from the current definition of "analogue" in §2D1.1, and reaffirm that fentanyl analogues are treated differently than fentanyl under the guidelines as well as the statute. In addition, the amendment creates an entry in the Drug Equivalency Tables for the class of synthetic cathinones, providing a 380-gram marihuana equivalency, and applies a minimum base offense level of 12 to the class of synthetic cathinones. It also creates an entry in the Drug Equivalency Tables for the class of synthetic cannabinoids, providing a 167-gram marihuana equivalency, and applies a minimum base offense level of 12 to the class of synthetic cannabinoids. *See* Amendment 3 of the amendments submitted by the Commission to Congress on April 12, 2018, 83 Fed. Reg. 20145 (May 7, 2018).[9]

Absent action by Congress to the contrary, the amendment will take effect on November 1, 2018.

In cases involving a drug analogue or if a drug is not listed in either the Drug Quantity Table or the Drug Equivalency Table, apply the offense level for the most analogous drug. *See* §2D1.1, comment. (n.6); §2X5.1. Courts should, to the extent practicable, consider whether the chemical structure of the analogue/unlisted drug is substantially similar to a drug listed in the guideline; whether the stimulant, depressant, or hallucinogenic effect of the analogue/unlisted drug is substantially similar to a drug listed in the guideline; and whether a lesser or greater quantity of the analogue/unlisted drug is needed to produce substantially the same effect as a drug listed in the guidelines. §2D1.1, comment. (n.6(A)-(C)).

[9] As explained in this section, for substances that do not appear in either the Drug Quantity Table or the Drug Equivalency Table, §2D1.1, comment. (n.6) provides courts the process for calculating drug quantities. Because Commission data indicated that the majority of cases relying on the Application Note 6 process involved certain fentanyl analogues, synthetic cathinones, and synthetic cannabinoids, the Commission adopted this amendment to alleviate the burden associated with its application.

e. 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.8) (limiting the §2D1.11(c) cross reference).

f. Drug equivalencies—more than one drug[10]

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. (n.8(B)). Where an offense involves more than one drug, 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.8(B), (C)).

3. Drug Quantity

For most drug-related sentences, quantity is the most important consideration. Drug quantity determinations do not necessarily correspond to the amounts charged in the offense of conviction. A defendant will be held responsible for drug quantities involved in his or her "relevant conduct," which may include a defendant's own acts as well as the acts of others. *See* §1B1.3. The sentencing guidelines hold the defendant accountable for the "reasonably foreseeable acts and omissions 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 will 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. Rodriguez*, 731 F.3d 20, 28 (1st Cir. 2013); *United States v. Laboy*, 351 F.3d 578, 582 (1st Cir. 2003).

[10] *See supra* notes of this primer regarding 2018 amendments replacing the term "marihuana equivalency" with the term "converted drug weight" in subsections (B)(1)(a) and (B)(2)(c).

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 eyewitnesses as to the amounts attributable to the defendant can provide sufficiently reliable evidence of quantity); *United States v. Fudge*, 325 F.3d 910, 922-23 (7th Cir. 2003) (court relied on co-conspirators' testimony to determine quantity); *United States v. Matthews*, 168 F.3d 1234, 1247-48 (11th Cir. 1999) (same); *United States v. Rodriguez*, 398 F.3d 1291, 1297 (11th Cir. 2005) (calculation of drug amount that included co-conspirator's estimates of number 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 585, 592 (4th Cir. 1998).

(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. See* §2D1.1, comment. (n.5). *See also United States v. Jeross*, 521 F.3d 562, 576-77 (6th Cir. 2008); *United States v. Betancourt,* 422 F.3d 240, 246-47 (5th Cir. 2005); *United States v. Lopes-Montes*, 165 F.3d 730, 732 (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:* (1) determining the production capacity of a laboratory based on the amount of precursor drug found in a defendant's possession; (2) determining the production capacity of a laboratory based on the size and capability of the laboratory; (3) converting seized cash or drug notations into drug amounts; and (4) extrapolating the volume of a defendant's drug trafficking from evidence of the defendant's or similarly situated defendant's actual trafficking. *See United States v. Mahaffey*, 53 F.3d 128, 132 (6th Cir. 1995) (court may approximate amount that laboratory could have produced based on yields of similarly-situated defendants); *United States v. Shaffer*, 993 F.2d 625, 627 (7th Cir. 1993) (court may approximate amount that laboratory could have produced based on 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 on quantity of precursor chemicals, size of laboratory, and recipes to "cook" methamphetamine seized); *United States v. Lopes-Montes*, 165 F.3d 730, 731-32 (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 on testimony of DEA chemist and characteristics of laboratory equipment seized); *United States v. Carroll,* 6 F.3d 735, 743 (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 of methamphetamine); *United States v. Almedina*, 686 F.3d 1312, 1317 (11th Cir. 2012) (court properly approximated both type and quantity of drug by extrapolating from the contents and price of one seized package to an earlier package); *but see United States v. Marquez*, 699 F.3d 556, (1st Cir. 2012) (while extrapolation is a common and permissible way to determine drug quantity, it must be based on reliable estimates; broken and garbled telephone exchange that may have been mere boasting was insufficient).

(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. Culps*, 300 F.3d 1069, 1076 (9th Cir. 2002) (district court must error on side of caution in approximating drug quantity); *United States v. Garcia*, 994 F.2d 1499, 1509 (10th Cir. 1993) (vacating sentence based on average size

shipment of all marijuana traffickers rather than size of particular shipments of marijuana made by defendants); *United States v. Butler*, 41 F.3d 1435, 1447-48 (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 United States v. Krasinski*, 545 F.3d 546, 552-53 (7th Cir. 2008) (no clear error to rely on estimation of drug quantity based on ranges admitted by defendant, despite fact that more conservative estimate would have resulted in lower guideline range); *United States v. Dalton*, 409 F.3d 1247, 1251 (10th Cir. 2005) (upholding district court's drug quantity estimation based on co-defendant's testimony and corroborating evidence); *United States v. Flores*, 725 F.3d 1028, 1036-37 (9th Cir. 2013) (court properly used "multiplier method" by estimating length of conspiracy, number of pills sold by conspiracy per day, and tablet strength of pills); *but see United States v. Laboy*, 351 F.3d 578, 583 (1st Cir. 2003) ("rote 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, 229-31 (1st Cir. 1999) (sentence vacated where district court relied on testimony of agent regarding 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 six-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 drug quantities based on 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 "specific evidence," such as drug records, admissions or live testimony, to prove a relevant conduct quantity of drugs for sentencing purposes. The evidence may be circumstantial — such as sampling — but must point to a specific drug

quantity for which the defendant is responsible. *United States v. Tran*, 519 F.3d 98, 106 (2nd Cir. 2008) (*citing Shonubi*, 998 F.2d at 89-90).

(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, 890-91 (7th Cir. 2000) (court should not rely on a theoretical yield analysis of 100 percent to extrapolate clandestine laboratory yield), *superseded by statute as stated in United States v. Martin*, 438 F.3d 621 (6th Cir. 2006); *United States v. Rosacker*, 314 F.3d 422, 427-28 (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), *superseded by statute as stated in United States v. Martin*, 438 F.3d 621 (6th Cir. 2006); *United States v. Mahaffey*, 53 F.3d 128, 132-33 (6th Cir. 1995) (same); *Rosacker*, 314 F.3d at 429; *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. Havens*, 910 F.2d 703, 706 (10th Cir. 1990) ("[t]he factual question is what each specific defendant could have actually produced, not the theoretical maximum amount produceable [sic] from the chemicals involved"); *United States v. Higgins*, 282 F.3d 1261, 1279-82 (10th Cir. 2002) (estimate by agent of 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. *Id.*; United *States v. Becker*, 230 F.3d 1224, 1234-36 (10th Cir. 2000); *United States v. Smith*, 240 F.3d 927, 930-31 (11th Cir. 2001) (per curiam).

(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, 626-29 (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, 1072-74 (9th Cir. 1993) (court permitted to rely on expert testimony that estimated production capability based on lab equipment, 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, 703-04 (8th Cir. 2003) (court properly relied on chemist's testimony regarding analyzed samples from defendant's residence and from lab to approximate quantity).

(viii) Courts may convert money into quantities of drugs. Where cash is seized and 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 that are relevant conduct under §1B1.3. *See, e.g., United States v. Simmons*, 582 F.3d 730, 737 (7th Cir. 2009) ("[w]hen there is a sufficient basis to believe that cash found in a defendants possession was derived from drug sales, a court properly includes the drug equivalent of that cash in the drug-quantity calculation"); *United States v. Hinson*, 585 F.3d 1328, 1340-41 (10th Cir. 2009) (search of methamphetamine trafficker's car yielded over $40,000, which was converted to a methamphetamine-equivalent of 1.5 kilograms); *United States v. Jackson*, 3 F.3d 506, 511 (1st Cir. 1993)("[w]hen 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").

(ix) Courts should be careful in their calculations to avoid double counting of both the proceeds and the narcotics themselves. See United States v. Eisom, 585 F.3d 552, 555 (1st Cir. 2009); *United States v. Sampson*, 140 F.3d 585, 592 (4th Cir. 1998).

(x) Courts have extrapolated from other money involved in the drug trade to arrive at a drug quantity. See United States v. Eke, 117 F.3d 19, 22-24 (1st Cir. 1997) (court affirmed extrapolation of quantity from fees paid

to couriers); *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), *overruled on other grounds as stated in United States v. Caseslorente*, 220 F.3d 727 (6th Cir. 2000).

(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, 731-32 (9th Cir. 1999) (court reasonably calculated amount of pure methamphetamine that would have been delivered by defendant based on purity of delivered amount and assumption that negotiated remaining amount to be delivered would have same purity). Courts have also used evidence such as drug ledgers or defendant's admissions to determine quantity attributable to a defendant. *See e.g.*, *United States v. Spiller*, 261 F.3d 683, 691 (7th Cir. 2001) (defendant held responsible for dealing 28 kilograms of crack cocaine based on evidence in handwritten ledgers belonging to defendant in which he recorded drug sales); *United States v. Lincoln,* 413 F.3d 716, 717 (8th Cir. 2005) (district court properly made drug quantity estimate based on defendant's post-arrest admissions to 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, 456 (5th Cir. 2002); *United States v. Barnett*, 989 F.2d 546, 553, n.6 (1st Cir. 1993); *United States v. Shelton*, 400 F.3d 1325, 1329-30 (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 the 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, specifically for offenses involving PCP, amphetamine, methamphetamine, oxycodone, and hydrocodone. For offenses involving these controlled

substances, the actual weight of the controlled substance is used to determine the base offense level. *See* Note (B) to 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 III, Part E for discussion of marijuana, methamphetamine, and LSD.

e. Methods for determining purity

Generally, purity is determined by laboratory testing. *See, e.g.*, *United States v. Verdin-Garcia*, 516 F.3d 884, 896 (10th Cir. 2008) ("[l]aboratory test results are perhaps more persuasive evidence of amounts and purities than eyewitness testimony or wiretapped conversations, but they are not unreliable as a matter of law"). *See also United States v. Eli*, 379 F.3d 1016, 1021 (D.C. Cir. 2004) (rejecting defendant's argument that a substance was too impure to be considered crack and too contaminated to be usable).

(i) When no drugs have been recovered, court may not assume that the quantities defendant admitted to agent were "actual methamphetamine quantities." In a case where no drugs were recovered and no expert testified as to the typical purity of methamphetamine manufactured, district court erred in assuming that quantities defendant admitted to agent were actual methamphetamine. *United States v. Houston*, 338 F.3d 876, 881 (8th Cir. 2003) ("[w]hen a lay person is asked in general terms how much methamphetamine he helped someone else cook, his answer will almost certainly be in terms of the size of the resulting mixture, not the net weight of one of its components"). 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, 731-32 (9th Cir. 1999).

(iii) 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. *See* §2D1.1, comment. (n.27(C)); *see United States v. Doe*, 149 F.3d 634, 640 (7th Cir. 1998); *United States v. Legarda*, 17 F.3d 496, 501-02 (1st Cir. 1994) (high purity of cocaine justified an upward departure). Some courts have held, however, that Application Note 27 does not authorize a court to depart based on the *low* purity of drugs. *See*, *e.g.*, *United States v. Beltran*, 122 F.3d 1156, 1159-60 (8th Cir. 1997) (rejecting departure based on purity of methamphetamine); *United States v. Benish*, 5 F.3d 20, 27-28 (3d Cir. 1993) (court did not have discretion to depart downward 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). *See generally United States v. Berroa-Medrano*, 303 F.3d 277, 280 n.3 (3d Cir. 2002) ("Given the Sentencing Commission's omission of any discussion of a downward departure for low drug purity, some courts have decided that a downward departure is permissible while others have disagreed") (*comparing United States v. Mikaelian*, 168 F.3d 380, 390 (9th Cir.1999)("the low purity of heroin involved in a crime cannot be categorically excluded as a basis for a downward departure"), *with United States v. Upthegrove*, 974 F.2d 55, 56-57 (7th Cir.1992) ("downward departure based on the low quality of the relevant drug is improper" partly because the Application Notes contain "no corresponding provision suggesting a downward departure for low quality drugs")).

C. SELECTED SPECIFIC OFFENSE CHARACTERISTICS

Note regarding the 2018 Amendment adding a new enhancement §2D1.1(b)(13). In an amendment promulgated on April 12, 2018, the Commission added a new specific offense characteristic at §2D1.1(b)(13) providing a 4-level enhancement that would apply if the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue." *See* Amendment 3 of the amendments submitted by the Commission to Congress on April 12, 2018, 83 Fed. Reg. 20145 (May 7, 2018).

Absent action by Congress to the contrary, the amendment will take effect on November 1, 2018.

1. §2D1.1(b)(1)

2-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, even if the possession was only constructive. *See United States v. Rea*, 621 F.3d 595, 606 (7th Cir. 2010) ("[t]he defendant need not have actual possession of the weapon; constructive possession is sufficient") (internal citations omitted); *United States v. Renteria-Saldana*, 755 F.3d 856, 859 (8th Cir. 2014) (as one who possessed key to stash house and paid bills, defendant had dominion over area where gun was found, he regularly accessed place where gun was found, and it was reasonable to infer he knew about loaded gun).

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. *See United States v. Ruiz*, 621 F.3d 390, 396 (5th Cir. 2010) ("[t]he Government bears the burden of proving by a preponderance of the evidence that the defendant possessed the weapon and may do so by showing 'that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant,' which suffices to establish that the defendant personally possessed the weapon"); *United States v. Castro-Perez*, 749 F.3d 1209, 1211 (10th Cir. 2014) (court improperly applied enhancement because there was no physical relation between the weapon and the drug trafficking activity). 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.11(A)). 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. *See United States v. Villarreal*, 613 F.3d 1344, 1359 (11th Cir. 2010) ("[a] co-conspirator's possession of a firearm may be attributed to the defendant for purposes of this enhancement if his possession of the firearm was reasonably foreseeable by the defendant, occurred while he was a member of the conspiracy, and was in furtherance of the conspiracy"). 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 and was connected to the conspiracy. *United States v. Woods*, 604 F.3d 286, 290 (6th Cir. 2010) ("[t]he government concedes that there is no evidence that defendant ever possessed a firearm himself or even was actually aware that the firearm was present. Under such circumstances, the possession of a firearm by a coconspirator must (1) be connected to the conspiracy and (2) be reasonably foreseeable").

At least one circuit has found that, because firearms are tools of the trade in drug trafficking offenses, a co-conspirator's possession of such is usually reasonably foreseeable. *United States v. Mena-Robles*, 4 F.3d 1026, 1036 (1st Cir. 1993) ("we often observe that firearms 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. Bianco*, 922 F.2d 910, 911-12 (1st Cir. 1991) (accord); *United States v. Batista*, 684 F.3d 333 (2d Cir. 2012) (firearm enhancement appropriate in case of narcotics detective who aided illegal drug ring run by individual who kept gun; defendant was experienced narcotics detective well-aware that drug dealers are often armed who knew size and scope of drug dealer's drug operation); *but see United States v. Block*, 705

F.3d 755, 764 (7th Cir. 2013) (clear error for court to rely on irrelevant facts to fill gap between what is known generally about drug industry's use of firearms and particular circumstances of this drug conspiracy to determine whether firearms use was reasonably foreseeable to defendant); *United States v. Ramirez*, 783 F.3d 687, 691 (7th Cir. 2015) ("requirement of an individualized inquiry suggests that the scale, scope, and nature of the conspiracy, and the defendant's role in it, should usually be considered when determining whether gun possession was reasonably foreseeable to the defendant").

d. Application of safety valve and firearm possession

A defendant who receives the 2-level firearm enhancement (§2D1.1(b)(1)) is *not* automatically ineligible for relief under §5C1.2, *see* discussion at Section IX, Part B.[11] However, when a defendant receives a 2-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. Ruiz*, 621 F.3d 390, 397 (5th Cir. 2010); *United States v. Herrera*, 446 F.3d 283, 286 (2d Cir. 2006) ("[t]he district court did *not* assume that, because [defendant] incurred the two-level increase under §2D1.1(b)(1), he was automatically ineligible for the safety valve") (emphasis in original). *Cf. United States v. Nelson*, 222 F.3d 545, 549-51 (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)(16)

In most circuits, a defendant who receives the 2-level enhancement based on a co-defendant's possession of the firearm is not rendered ineligible for relief under §5C1.2 and the 2-level reduction under §2D1.1(b)(16). *See United States v. Delgado-Paz*, 506 F.3d 652, 655-56 (8th Cir. 2007) ("the circuits are unanimous in holding that possession of a weapon by a defendant's co-conspirator does not render the defendant ineligible for safety-valve relief unless the government shows that the defendant induced the co-conspirator's possession") (collecting cases); *but see United States v. Johnson*, 344 F.3d 562, 565 (6th Cir. 2003) (defendant who received a 2-level sentence enhancement for possession of weapon based on co-defendant's possession of weapon would be ineligible for safety valve reduction).

[11] In the Tenth Circuit, a defendant is precluded from receiving safety valve relief only where he actively possessed a firearm. *See, e.g., United States v. Zavalza-Rodriguez*, 379 F.3d 1182, 1188 (10th Cir. 2004) ("for purposes of §5C1.2 we look to the defendant's own conduct in determining whether the defendant has established by a preponderance of the evidence that the weapon was not possessed 'in connection with the offense'").

f. Burden of proof

Most circuits generally have held that once the government has shown by a preponderance of evidence possession of a weapon during the offense, the evidentiary burden shifts to the defendant to establish that it was clearly improbable that the weapon was connected to the offense. *See United States v. Anderson*, 452 F.3d 87, 90 (1st Cir. 2006) ("[t]he government has the initial burden of establishing 'that a firearm possessed by the defendant was present during the commission of the offense.' Once the government has made that showing, 'the burden shifts to the defendant to persuade the factfinder that a connection between the weapon and the crime is clearly improbable'") (internal citations omitted); *United States v. Napolitan*, 762 F.3d 297 (3d Cir. 2014) (same); *United States v. Peroceski*, 520 F.3d 886, 887 (8th Cir. 2008); *United States v. Davidson*, 409 F.3d 304, 312 (6th Cir. 2005); *United States v. Corral*, 324 F.3d 866, 872 (7th Cir. 2003).

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 United States v. Fouse*, 578 F.3d 643, 654 (7th Cir. 2009) (*citing* §2K2.4, comment. (n.4)); *Cf. United States v. Chavez*, 549 F.3d 119, 132-33 (2d Cir. 2008) (noting that had defendant not been convicted of the § 924(c) offense, his drug conviction's sentence would have been enhanced two levels pursuant to §2D1.1(b)(1)). *See also United States v. Aquino*, 242 F.3d 859, 864 (9th Cir. 2001)(addressing the inapplicability of §2D1.1(b)(1)'s 2-level enhancement for possession of a dangerous firearm when the defendant is convicted of a § 924(c) offense).

2. Section 2D1.1(b)(2)

2-level enhancement if the defendant used violence, made a credible threat to use violence, or directed the use of violence

Application Note 11(B) explains that §2D1.1(b)(1) and (b)(2) may be applied cumulatively. In a case where the defendant possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct violence, however, subsection (b)(2) would not apply. Note also that a sentence under §2K2.4 accounts for conduct that would subject the defendant to an enhancement under (b)(2). In such a case, §2D1.1(b)(2) is not applicable. *See* §2K2.4, comment. (n.4).

3. Section 2D1.1(b)(5)

2-level enhancement if the offense involved the importation of amphetamine or methamphetamine and the defendant does not receive a mitigating role adjustment

The enhancement does not apply if a defendant receives the adjustment from §2D1.1(b)(3) (related to importing or exporting by means of an aircraft or vessel). *See* §2D1.1, comment. (n.12). Circuits have held that subsection (b)(5) is not limited to "only those defendants who themselves transport methamphetamine across the border[.]" *United States v. Perez-Oliveros*, 479 F.3d 779, 784 (11th Cir. 2007). "The scope of actions that 'involve the importation of drugs' is larger than the scope of those that constitute the actual importation." *United States v. Rodriguez*, 666 F.3d 944, 946 (5th Cir. 2012).

In *United States v. Serfass*, 684 F.3d 548, 553 (5th Cir. 2012), the Fifth Circuit held that the plain language of §2D1.1(b)(5) supported the conclusion that the enhancement applied to "a defendant who possesses methamphetamine that had itself been unlawfully imported" regardless of whether he or she had actual knowledge of the importation. However, the Ninth Circuit in *United States v. Job*, No. 14-50472, 2017 WL 971803 (9th Cir. Mar. 14, 2017) declined to adopt the Fifth Circuit's conclusion.

4. Section 2D1.1(b)(7)

2-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

"Mass-marketing by means of an interactive computer service" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. *See* §2D1.1, comment. (n.13). "Interactive computer service" has the meaning given that term in 47 U.S.C. § 230(f)(2). *Id.*

5. Section 2D1.1(b)(11)

2-level enhancement if the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of a drug trafficking offense

Application Note 16 provides that subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant because such conduct is covered by §3C1.1.

6. Section 2D1.1(b)(12)

2-level enhancement if the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance

Application Note 17 lists among the factors the court should consider in applying the enhancement: (A) whether the defendant held a possessory interest in (*e.g.*, owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises. The application note explains that manufacturing or distributing drugs need not be the sole purpose for which the premises is maintained, but must be one of the primary or principal uses of the premises. *Id.*; *see also United States v. Miller*, 698 F.3d 699, 707 (8th Cir. 2012) (§2D1.1(b)(12) applies when defendant uses premises for purpose of substantial drug-trafficking activities, even if premises was also her family home at the times in question); *United States v. Johnson*, 737 F.3d 444, 447-48 (6th Cir. 2013) (enhancement proper where defendant maintained at least one room in home for purpose of storing marijuana for later distribution); *United States v. Renteria-Saldana*, 755 F.3d 856, 859 (8th Cir. 2014) (although defendant did not own or reside at stash house, he exercised control over it and operated his drug-dealing business from premises); *United States v. Jones*, 778 F.3d 375 (1st Cir. 2015) (enhancement can apply even if defendant does not own or rent premises in his name; defendant also need not control access to premises to the exclusion of all others).

7. Section 2D1.1(b)(13)

2-, 3-, 6-level enhancements if manufacture of amphetamine or methamphetamine created a substantial risk of harm to a minor, human life, or the environment

Application Note 18(B) 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. Loesel*, 728 F.3d 749, 752 (8th Cir. 2013) (that risk to human lives included risk to lives of co-conspirators and owner of remote farm was immaterial; even if they "assumed the risk," as defendant asserted, they were still human lives placed at substantial risk of harm); *United States v. Chamness,* 435 F.3d 724, 728-29 (7th Cir. 2006) (methamphetamine laboratory in trailer posed substantial risk to human life or environment, warranting imposition of enhancement); *United States v. Florence*, 333 F.3d 1290, 1292-93 (11th Cir. 2003) (holding that defendant's activities created substantial risk of harm to life of minors who were staying at hotel and this enhancement does not require district court to identify specific minor at risk).

8. Section 2D1.1(b)(15)

2-level super-aggravating role enhancement

Section 2D1.1(b)(15) provides for a 2-level enhancement if a defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved one or more of the super-aggravating factors listed at (b)(15)(A)-(E). Application Note 20 to §2D1.1, Application Note 2 to §3B1.4, and Application Note 7 to §3C1.1 provide guidance on the application of the enhancement at (b)(15).

9. Section 2D1.1(b)(16)

2-level minimal participant reduction

Section 2D1.1(b)(16) provides for a 2-level reduction if the defendant receives the four-level reduction at §3B1.2(a) ("minimal participant") and the offense involved all of the factors listed at (b)(16)(A)-(C).

10. Section 2D1.1(b)(17)

2-level safety valve reduction

Section 2D1.1(b)(17) provides for a 2-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 IX, Part B. *See, e.g.*, *United States v. Torres-Landrua*, 783 F.3d 58, 62 (1st Cir. 2015).

The 2-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)(17) even if the defendant is convicted of violating a statute that is not listed at §5C1.2(a), and therefore is 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)-(4). To receive the base offense levels under §2D1.1(a)(1)-(4), the offense of conviction, not just "circumstances" as in §2D1.1(d)(1), must establish that death or serious bodily injury occurred, *see* discussion at Section V, Part C, 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 violating 21 U.S.C. § 841(b)(7) (distribution of a controlled substance with intent to commit a crime of violence).[12] The higher offense level, as determined under §2D1.1 or §2X1.1, applies.

Crime of violence is defined in 18 U.S.C. § 16. Section 841(b)(7) specifically includes rape as a crime of violence.

For a defendant to be convicted under § 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.[13]

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

[12] In *Johnson v. United* States, 135 S. Ct. 2551 (2015), the Court struck down the residual clause of the Armed Career Criminal Act as unconstitutionally vague. In the wake of *Johnson,* three circuits have held the similarly worded residual clause in 18 U.S.C. § 16 to be unconstitutional as well. *Diyama v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), cert. granted, 137 S. Ct. 31 (2016), *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015), *United States v. Gonzalez-Longoria*, 813 F.3d 225 (5th Cir.), *rehearing en banc granted,* 815 F.3d 189 (Feb. 26, 2016) (holding residual clause of 18 U.S.C. § 16 unconstitutional).

[13] This cross reference is limited to cases involving a conviction under 21 U.S.C. § 841(b)(7). Amendment 667, which 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.

E. APPLICATION ISSUES FOR SPECIFIC DRUGS

1. Cocaine

a. Powder cocaine v. cocaine base or "crack"

The Fair Sentencing Act of 2010 (FSA) sets an 18:1 ratio between powder cocaine and cocaine base, or "crack." In other words, it takes 18 times the quantity of powder cocaine to trigger the same statutory punishment as crack cocaine. *See United States v. Gomes*, 621 F.3d 1343, 1346 (11th Cir. 2010) (per curiam) ("The FSA . . . changes . . . the crack-to-powder ratio . . . to about 18:1. The Act amends the sentencing provisions in 21 U.S.C. § 841(b)(1) by raising from 50 grams to 280 grams the amount of crack necessary to trigger the 10-year mandatory minimum sentence, and raising the amount from 5 to 28 grams necessary to trigger the 5-year minimum.") (internal citations omitted). *See also* 21 U.S.C. § 841(b)(1)(A)(ii), (iii). The FSA's lower mandatory minimum penalties apply to offenders who committed crimes prior to the FSA's effective date of August 3, 2010, but who were sentenced after that date. *See Dorsey v. United States*, 567 U.S. 260, 273 (2012).

A court may consider the crack/powder cocaine disparity when imposing sentence. *Spears v. United States*, 555 U.S. 261, 264-66 (2009) (per curiam); *Kimbrough v. United States*, 552 U.S. 85, 111 (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.

In *DePierre v. United States*, 564 U.S. 70, 76-81 (2011), the Court considered whether the term "cocaine base" at 21 U.S.C. § 841 referred to any form of cocaine that is chemically classified as a base (*i.e.*, $C_{17}H_{21}NO_4$, the molecule found in crack cocaine, freebase, and coca paste) or is instead limited to only crack cocaine. The cocaine base at issue in *DePierre* did not contain a detectable amount of sodium bicarbonate, a component specified in the definition of "cocaine base" at Note (D) to the Drug Quantity Table. The Court held that the most natural reading of the term "cocaine base" means cocaine in its base form and reaches more broadly than only crack cocaine. The Court's decision resolved the deep circuit split on this question.

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 III, Part B, 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.2). *See also United States v. Foree*, 43 F.3d 1572, 1581 (11th Cir. 1995) (cutting or seedling from marijuana plant is not considered a plant until it 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, 88 (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 an 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 663.

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 as a mixture or substance that is at least 80 percent pure d-methamphetamine, the same as methamphetamine (actual). *See* Note (C) to Drug Quantity Table.

b. Waste water (and other mixture substances)

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

Note. The circuit courts are split on the question whether waste water weight (and the weights of other "waste" substances used in illegal drug manufacturing) counts when establishing a statutory minimum. *Compare United States v. Stewart*, 361 F.3d 373, 379- 80 (7th Cir. 2004) (waste water weight does not trigger statutory minimums) (collecting cases), *with United States v. Treft*, 447 F.3d 421, 424-25 (5th Cir. 2006) (waste water weight does trigger statutory minimums).

c. Precursor chemicals

Certain precursor chemicals used to manufacture methamphetamine or amphetamine are included in the base offense level under §2D1.1 only if a defendant is sentenced under §2D1.1 (as opposed to being sentenced under §2D1.11 for a listed chemical offense), and the defendant's relevant conduct included the manufacture or attempt to manufacture methamphetamine or amphetamine.

If the above condition is met, and the precursor is listed in the List I Chemical Equivalency Table, *see* §2D1.1, comment. (n.8), convert the precursor (List I Chemical) to marijuana as discussed at Section III, Part B.

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. 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, 426 (9th Cir. 2002) (holding that district court erred in relying on forensic laboratory report that was based on unsupported assumptions); *United States v. Eschman*, 227 F.3d 886, 890-91 (7th Cir. 2000) (reversing district court's use of 1:1 conversion from pseudoephedrine to methamphetamine based on theoretical 100 percent yield where expert testimony established lower practical yields), *superseded by statute as stated in United States v. Martin*, 438 F.3d 621 (6th Cir. 2006).

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 IV, Part D.

d. Grouping offenses from §§2D1.1 and 2D1.11

Cases involving convictions for precursor chemicals (sentenced under §2D1.11) and for methamphetamine (sentenced under §2D1.1) group under §3D1.2(b). *See* §2D1.11, comment. (n.9). 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 III, Part B, where LSD is on a carrier medium (*e.g.*, blotter paper), Note (G) to the Drug Quantity Table (§2D1.1(c)) establishes that each dose of LSD on the carrier medium is equal to 0.4 milligrams for the purposes of the Drug Quantity Table. *See* Note (G) 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 Neal v. United States*, 516 U.S. 284, 294 (1996) (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, 463-64 (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). For purposes of applicability of mandatory statutory minimums, however, the 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.

IV. OTHER OFFENSE GUIDELINE SECTIONS

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

Section 2D1.2 "applies only in a case in which the defendant is convicted of a statutory violation of drug trafficking in a protected location or involving an underage or pregnant individual (including an attempt or conspiracy to commit such a violation) or in a case in which the defendant stipulates to such a statutory violation." *See* §2D1.2, comment. (n.1).

1. Base Offense Level

Apply two plus the offense level from §2D1.1[14] 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). Apply the greatest of these alternatives.

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

Section 2D1.8 applies the offense levels set forth in §2D1.1, except that if "the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises," the offense level from §2D1.1 is reduced by 4 levels, and the offense level is no greater than 26. *See* §2D1.8(a)(2). The defendant is ineligible for a role reduction under Chapter Three. *See* §2D1.8(b)(1).

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 have since 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).

[14] 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. SECTION 2D1.10 (ENDANGERING HUMAN LIFE WHILE ILLEGALLY MANUFACTURING A CONTROLLED SUBSTANCE; ATTEMPT OR CONSPIRACY)

Where the defendant is convicted under 21 U.S.C. § 858 of endangering human life while illegally manufacturing a controlled substance, 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 3-level enhancement if the offense involved the manufacture of amphetamine or methamphetamine; and a 6-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)(13) at Section III, Part C.

D. SECTION 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) or (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 would be manufactured. It is not required, however, that the defendant himself was involved in the manufacturing. *See* 21 U.S.C. § 841(c)(2) ("Any person who . . . possesses or distributes a listed chemical knowing, or having reasonable cause to believe, [it] . . . will be used to manufacture a controlled substance[.]").

1. Base Offense Level

Apply the base offense level specified in the Chemical Quantity Table. *See* §2D1.11(a), (d), (e).

Note regarding the 2014 Amendment to the Chemical Quantity Table. Effective November 1, 2014, in conjunction with its amendment to the Drug Quantity Table, the Commission amended the Chemical Quantity Table to generally reduce by two levels the

offense levels assigned to most chemical quantities. *See* USSG App. C, amend. 782 (eff. Nov. 1, 2014).

These reductions apply retroactively, with reduced sentences taking effect on November 1, 2015. *See* USSG App. C, amend. 788 (eff. Nov. 1, 2014).

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

a. Section 2D1.11(b)(1) provides a 2-level enhancement if a dangerous weapon (including a firearm) was possessed. But unlike §2D1.1(b)(1), this provision allows a defendant to avoid the enhancement on a lesser evidentiary showing. *Compare* §2D1.1, comment. (n.11) ("unless it is *clearly improbable* that the weapon was connected with the offense") (emphasis added), *with* §2D1.11, comment. (n.2) ("unless it is *improbable* that the weapon was connected with the offense") (emphasis added).

b. Section 2D1.11(b)(2) provides a 3-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. Convictions under 21 U.S.C. §§ 841(c)(2) and (f)(1), and 960(d)(2), (d)(3), and (d)(4) do not require that the defendant have knowledge or an actual belief that the listed chemical was to be used to manufacture a controlled substance unlawfully. This reduction therefore 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.3).

c. Section 2D1.11(b)(4) provides a 2-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)(7).

d. Section 2D1.11(b)(6) provides for a 2-level reduction for defendants who meet the safety valve criteria at 18 U.S.C. § 3553(f)(1)-(5) and §5C1.2(a)(1)-(5). *See* §2D1.11(b)(6).

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, e.g., United States v. Jessup*, 305 F.3d 300, 302-03 (5th Cir. 2002) ("[i]n order to show that the defendant attempted to manufacture methamphetamine, the government must show that the defendant (1) acted with the required criminal intent, and (2) engaged in conduct constituting a 'substantial step' toward commission of the substantive offense") (internal citations omitted).

E. SECTION 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. Section 2D1.12(b)(3) adds a 2-level enhancement for distribution of a controlled substance, listed chemical, or prohibited equipment, through the use of an interactive computer service. *See* §2D1.12, comment. (n.4).

b. Section 2D1.12(b)(4) provides a 6-level enhancement if the offense involved stealing anhydrous ammonia or transporting stolen anhydrous ammonia.

F. SECTION 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 provides a flat base offense level that is set based on the type of controlled substance. Distribution of "a small amount of marihuana for no remuneration," 21 U.S.C. § 841(b)(4), is treated as simple possession and sentenced under §2D2.1. *See* §2D1.1, comment. (n.26).

1. Cross Reference

Section 2D2.1(b) provides a cross reference to §2P1.2, if the offense involved possession of a controlled substance in a prison, correctional facility, or detention facility.

V. 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." §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 omissions that are part of "the same course of conduct or common scheme or plan as the offense of conviction." §1B1.3(a)(2); *see also United States v. Walker*, 688 F.3d 416, 421 (8th Cir. 2012) ("[i]n a drug conspiracy case, the district court may consider amounts from drug transactions in which the defendant was not directly involved if those dealings were part of the same course of conduct or scheme") (internal citations omitted). 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.5(B)). Of course, "the relevant conduct must be unlawful." *United States v. Chube*, 538 F.3d 693, 702-03 (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"); *see also United States v. Bell*, 667 F.3d 431, 443 (4th Cir. 2011) (calculation of drug quantity must exclude prescription medications lawfully obtained and consumed by the defendant).

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 United States v. Hill*, 79 F.3d 1477, 1481-85 (6th Cir. 1996) (finding that discrete incident of possession separated in time by over one year from offense of conviction could not be part of 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.5(B)). *See also 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 the criminal history computation and specifically excludes a "sentence for conduct that is part of the instant offense." Application Note 1 explains that conduct that is part of the instant offense 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 later 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, 878-79 (7th Cir. 2003) (prior state cocaine conspiracy conviction was not relevant to defendant'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.5(C)).

C. BASE OFFENSE LEVELS IF DEATH RESULTS

Section 2D1.1(a)(1)-(4) provides base offense levels for offenses that involve death or serious bodily injury from the use of a controlled substance. Each of these four provisions contains a requirement that, among other things, "the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance[.]." *See* §2D1.1(a)(1)-(4). The Sentencing Commission's view is that this "offense of conviction" language, which tracks the statutory language verbatim, *see* 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(E), 960(b)(1), (3), and (5), limits the application of these offense levels to cases where death or serious bodily injury is proved beyond a reasonable doubt by plea or to the factfinder. *See* USSG App. C, amend. 123 (eff. Nov. 1, 1989) ("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."). *See also* Amendment 727 adding §§2D1.1(a)(3)-(4.)

Before *Alleyne*, there was a circuit split over whether the "offense of conviction" language limits the application of these enhancements to such cases or whether they may be applied after mere judicial fact finding. After *Alleyne*, the Seventh Circuit, in *United States v. Lawler,* 818 F.3d 281 (7th Cir. 2016) agreed with *United States v. Rebmann*, 321 F.3d 540, 543-44 (6th Cir. 2003) (enhanced base offense level not triggered by judicial fact finding at sentencing) ; *United States v. Pressler*, 256 F.3d 144, 157 n.7 (3d. Cir. 2001) (same, in *dicta*), and *United States v. Greenough*, 669 F.3d 567 (5th Cir. 2012). The following circuit courts reached their opposite decisions based on an *Apprendi* analysis: *United States v. Rodriguez*, 279 F.3d 947, 950 (11th Cir. 2002) (enhanced offense level applied after court made findings by a preponderance 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), *abrogated by Burrage v. United States*, 134 S. Ct. 881 (2014) (defendant cannot be liable under the penalty enhancement provision of § 841(b)(1)(C) unless use of a drug is the but-for cause of the death or injury).

A similar circuit split exists in cases where a defendant is charged with conspiring to commit the underlying substantive counts. *Compare United States v. Wexler*, 522 F.3d 194, 207 (2d Cir. 2008) (approving of instruction requiring jury to make separate finding by proof beyond a reasonable doubt whether death or serious bodily injury resulted from the conspiracy offense), *with United States v. Westry*, 524 F.3d 1198, 1217-21 (11th Cir. 2008) (per curiam) (applying enhanced offense levels under a §1B1.3 "relevant conduct" analysis and rejecting requirement for jury finding of "death" or "serious bodily injury" by proof beyond a reasonable doubt.)

D. PERSONAL USE QUANTITIES AND RELEVANT CONDUCT

Because simple possession of a controlled substance is an offense that is sentenced under a Chapter Two guideline that 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 various court opinions.

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, 151-53 (6th Cir. 2003) (because defendant's possession of drugs for personal use was not act that occurred during commission of offense of conviction, in preparation for that offense, or in course of attempting to avoid detection or responsibility for that offense, it

could not be considered relevant conduct); *United States v. Olson*, 408 F.3d 366, 374 (7th Cir. 2005) ("On the one hand, [defendant] possessed a small amount of marijuana . . . suggesting that [he] held the drugs for his own personal use. If so, then the underlying conduct would be considered mere possession of a controlled substance, and would therefore not constitute relevant conduct to the instant offense of possession with intent to distribute. On the other hand, the subdivision of those two ounces of marijuana in six smaller baggies might suggest that [he] did intend to distribute the drugs, in which case the prior conviction would have been for relevant conduct.").

If the case includes a conspiracy count, personal use amounts may or may not be included in the base offense level computation. *Compare United States v. Ault*, 598 F.3d 1039, 1041 (8th Cir. 2010) ("[s]imple possession of an amount of methamphetamine consistent with personal use is not in itself preparation or furtherance of a conspiracy to distribute methamphetamine") (internal quotations omitted), *with United States v. Asch*, 207 F.3d 1238, 1240 (10th Cir. 2000) (where member of conspiracy to distribute drugs handles drugs both for personal consumption and distribution in course of conspiracy, entire quantity of drugs handled is relevant conduct for purposes of calculating base offense level pursuant to guidelines). *See also 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, 209-10 (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, without recognizing distinctions among offenses).

VI. SENTENCING MANIPULATION / 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 the analogous "sentencing entrapment"—when the defendant can show he was predisposed to commit a minor or lesser offense, but was entrapped to commit a greater offense—would require sentencing the defendant for the crime he was predisposed to commit rather than the crime he did commit. Few courts have found, however, that defendants have proved sentencing entrapment.

Courts have also considered claims of sentencing manipulation. While often used interchangeably, the Ninth Circuit clarified that, distinct from sentencing entrapment, sentencing manipulation occurs when the government increases a defendant's guideline sentence by conducting a lengthy investigation that increases the number of drug transactions and quantities for which the defendant is responsible. *See United States v. Boykin*, 785 F.3d 1352, 1360-61 (9th Cir. 2015).

A. GUIDELINES REMEDIES FOR SENTENCING MANIPULATION/ENTRAPMENT

Application Notes 5 and 27(A) 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. Application Note 5 to §2D1.1

Note 5 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. *See, e.g.*, *United States v. Love*, 706 F.3d 832 (7th Cir. 2013) (court erred by including in amount of drugs agreed-upon amount of crack cocaine in reverse sting operation, when it was undisputed defendant never actually intended to sell drugs that day).

2. Application Note 27(A) to §2D1.1

Note 27(A) 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.

Note 27(A) 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 e.g., United States v. Gaviria*, 116 F.3d 1498, 1527 (D.C. Cir. 1997) (per curiam) (denying downward departure where defendant presented no evidence that agreed upon price was substantially below market price). The Eighth Circuit added a third consideration: whether the defendant is predisposed to buying drugs. *See United States v. Searcy*, 233 F.3d 1096, 1099-1102 (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 by 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, 251 (9th Cir. 1995) (finding strong evidence DEA agents were trying to increase quantity of drugs purchased by offering to buy back unsold quantities).

Application of Note 27(A) is primarily factor-driven. *See United States v. Lora*, 129 F. Supp. 2d 77, 91 (D. Mass. 2001) (where drug quantity was used to measure defendant's culpability, quantity at issue must be product of defendant's proclivity and not government's effort to ratchet up sentence); *United States v. Goodwin*, 317 F.3d 293, 297-98 (D.C. Cir. 2003) (denying defendant's motion for downward departure where it found quantity discounts and minimal down payments for drugs were common occurrence in illicit drug trade.); *United States v. Panduro*, 38 F. App'x 36, 37-38 (2d Cir. 2002) (holding Note 27(A) is applicable where government agents offered drugs on nearly 50 percent consignment basis). The transaction need not be monetary based. *See United States v. Cambrelen*, 29 F. Supp. 2d 120, 126 (E.D.N.Y. 1998) (granting sentence reduction where court found government agent's influence led defendant to steal drugs from warehouse).

B. Other Sentencing Manipulation/Entrapment

Courts have also recognized other forms of sentencing manipulation and/or entrapment by the government. *See*, *e.g.*, *United States v. Bigley*, 786 F.3d 11, 14 (D.C. Cir. 2015) (per curiam) (remanding for consideration of defense argument that government introduced camera into discussion of sexual conduct with minor in order to manipulate and increase defendant's sentence). 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 United States v. Staufer*, 38 F.3d 1103, 1108 (9th Cir. 1994); *see also United States v. Searcy*, 233 F.3d 1096, 1100 (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. Riewe*, 165 F.3d 727, 729 (9th Cir. 1998) (per curiam); *United States v. Montoya*, 62 F.3d 1, 3 (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, 1277 (10th Cir. 2003). The Sixth and Eleventh Circuits have rejected "sentencing entrapment" as a ground for departure. *See United States v. Hammadi*, 737 F.3d 1043, 1048 (6th Cir. 2013); *United States v. Ciszkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007) (but recognizing outrageous government conduct defense and sentencing manipulation).

VII. CHAPTER THREE: ADJUSTMENTS

A. ROLE ADJUSTMENTS

Sections 2D1.1 and 2D1.11 give offense level decreases to defendants who receive a mitigating role adjustment under §3B1.2 (Mitigating Role); the decreases in the Chapter Two guidelines are in addition to the adjustments from Chapter Three. First, defendants who receive a mitigating role adjustment under §3B1.2 also receive a graduated reduction in the applicable base 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)(5) at Section III, Part B, and discussion of §2D1.11 at Section IV, Part D. Furthermore, defendants who receive a §3B1.2(a) "minimal participant" role reduction may also receive an additional 2-level reduction pursuant to §2D1.1(b)(16).

B. ABUSE OF POSITION OF TRUST OR USE OF A SPECIAL SKILL

Application Note 23 of §2D1.1 provides that an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) ordinarily would apply in cases where the defendant used a position of trust or special skills in the commission of an offense. For example, an adjustment under §3B1.3 would ordinarily 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. Likewise, an adjustment under §3B1.3 ordinarily would apply in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility. *See* 21 U.S.C. § 822(g).

Courts have applied the adjustment for use of a special skill in drug trafficking cases. *See, e.g., United States v. Calderon,* 127 F.3d 1314, 1339-40 (11th Cir. 1997) (upholding adjustment for defendants who captained vessel on high seas during drug smuggling operation); *United States v. Nelson-Rodriguez,* 319 F.3d 12, 57-58 (1st Cir. 2003) (defendant's skills with communication equipment and ability to determine and locate frequencies necessary to communicate with Colombians significantly facilitated commission of offense and was thus special skill); *United States v. Chastain,* 198 F.3d 1338, 1353 (11th Cir. 1999) (defendant who acted as pilot for conspiracy to import marijuana into United States was properly subject to adjustment for use of special skill); *United States v. Campbell,* 61 F.3d 976, 982 n. 7 (1st Cir. 1995) (upholding application of adjustment for defendant who had "near PhD training as a chemist," who was charged with manufacturing P2P, a precursor chemical for methamphetamine). *Cf. United States v. Montero-Montero,* 370 F.3d 121, 123-24 (1st Cir. 2004) (reversing application of adjustment where evidence failed to show defendant navigated boat used for smuggling operation); *United States v. Burt,* 134 F.3d 997, 999 (10th Cir. 1998) (adjustment should not have been applied to

suspended deputy sheriff involved in drug dealing based on 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. Section 3B1.4 "Using" a Minor to Commit Crime

This enhancement does not apply in cases where the Chapter Two offense guideline incorporates this factor. *See* §3B1.4, comment. (n.2). For example, if a defendant receives a §2D1.1(b)(15)(B) enhancement for involving a person less than 18 years of age in the offense, §3B1.4 does not apply. *See id*.

Another issue is whether a 2-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. Five circuits have held that is it not enough if the defendant and the minor are equal participants in a crime. *United States v. Radermacher*, 474 F.3d 999, 1002 (7th Cir. 2007); *United States v. Suitor*, 253 F.3d 1206, 1210 (10th Cir. 2001); *United States v. Pojilenko*, 416 F.3d 243, 247 (3d Cir. 2007) ("[w]e agree with our sister Circuits that some affirmative act is necessary beyond mere partnership in order to implicate § 3B1.4"); *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 minor requires more affirmative action on part of 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 armed bank robbery with minor). Other circuits take the position that an enhancement under §3B1.4 is warranted where, although the defendant did not personally engage a minor, he could "reasonably foresee" a co-conspirator's use of a minor. *See, e.g.*, *United States v. Lewis*, 386 F.3d 475, 479-80 (2d Cir. 2004).

Courts have applied the adjustment in instances where the minor was not actively involved in the crime. *See, e.g., United States v. Andres*, 703 F.3d 828, 835 (5th Cir. 2013) (enhancement applied even assuming young girl already inside truck when defendant got into truck containing 20 kilograms of cocaine and drove it from Laredo to Chicago); *United States v. Gaskin,* 364 F.3d 438, 464-65 (2d Cir. 2004) (adjustment was warranted where defendant drove son to parking lot and took delivery of an RV containing marijuana so that son could drive defendant's car); *United States v. Castro-Hernandez,* 258 F.3d 1057, 1059-60 (9th Cir. 2001) (adjustment was warranted where defendant was transporting three-year-old son as passenger in truck at same time he was smuggling drugs); *United States v. Warner*, 204 F.3d 799, 801 n.2 (8th Cir. 2000) (upholding adjustment where defendant offered to leave eight-year-old daughter with drug purchasers as collateral for payment money they entrusted to him).

2. Section 3B1.4 Use of Minor and Defendant's Age

A circuit split exists about whether a 2-level upward adjustment for using a minor to commit an offense applies to defendants of all ages. *Compare United States v. Butler,* 207 F.3d 839, 850-51 (6th Cir. 2000) (conc. op'n) (finding that §3B1.4 violated Violent Crime Control and Law Enforcement Act of 1994, which directed Commission to "promulgate guidelines or amend existing guidelines to provide that defendant 21 years of age or older who has been convicted of offense shall receive appropriate sentence enhancement if the defendant involved a minor in the commission of the offense"), *with United States v. Murphy,* 254 F.3d 511, 513 (4th Cir. 2001) (Commission complied with congressional directive because every defendant over the age of 21 will receive §3B1.4 adjustment), *United States v. Ramsey,* 237 F.3d 853, 858 & n.7 (7th Cir. 2001) (Congress implicitly approved of §3B1.4 by failing to disapprove it in 1995 during the waiting period before amendment went into effect even though Congress disapproved crack cocaine and money laundering amendments also proposed that same year).

VIII. CHAPTER FOUR: CRIMINAL HISTORY, CAREER OFFENDER, AND ARMED CAREER CRIMINAL (ACCA)

Application of the career offender guideline at §4B1.1 or the Armed Career Criminal Act (ACCA) guideline at §4B1.4 requires, *inter alia*, that (1) the defendant's instant conviction be either a crime of violence or a controlled substance offense (career offender cases), or a violent felony or a serious drug offense (ACCA cases); and (2) the defendant's record include the requisite number of predicate offenses (two previous such offenses for career offender status and three such offenses for ACCA status). Section 4B1.4 notes that the definitions of "crime of violence" and "violent felony" as well as "controlled substance offense" and "serious drug offense" are *not* identical. *See* §4B1.4, comment. (n.1). "Crime of violence" and "controlled substance offense" are defined by the guidelines. "Violent felony" and "serious drug offense" are defined in 18 U.S.C. § 924(e)(2)(A) & (B)[15] and incorporated by the guidelines in §4B1.4.

While circuit courts may often treat these terms interchangeably where portions of the career offender and ACCA provisions are materially similar, they also recognize that the

[15] The Commission promulgated an amendment changing the definition of "crime of violence" at §4B1.2 the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), striking down the "residual clause" of the ACCA as unconstitutionally vague. *See* USSG App. C, amend. 798 (eff. Aug. 1, 2016). The amendment is also a result of the Commission's multi-year study of statutory and guideline definitions relating to the nature of a defendant's prior convictions (*e.g.*, "crime of violence," "aggravated felony," "violent felony," "drug trafficking offense," and "felony drug offense,"). Subsequent to Amendment 798, the Court in *Beckles v. United States*, 137 S. Ct. 886 (2016), held that the guidelines were not subject to a vagueness challenge because the guidelines do not fix the sentencing range, but only guide the court when it exercises its discretion in choosing an appropriate sentence within a statutory range.

differing definitions may lead to a prior conviction qualifying for one enhancement but not the other. *Compare United States v. Harrison*, 558 F.3d 1280, 1291-92 (11th Cir. 2009) (career offender's residual clause language materially identical to ACCA's residual clause), *abrogated on other grounds by Sykes v. United States*, 564 U.S. 1 (2011), *with United States v. Ross*, 613 F.3d 805, 809-10 (8th Cir. 2010) (career offender and ACCA provisions are the same in some respects but their express differences may lead to different results in a given case).

While the career offender and ACCA provisions are not identical, courts apply the same "categorical" and "modified categorical" legal analyses when determining whether a predicate offense qualifies for the career offender (§4B1.1) or ACCA (§ 924(e) and §4B1.4) sentencing enhancement. *See Taylor v. United States,* 495 U.S. 575, 600 (1990), *Johnson v. United States*, 559 U.S. 133, 144 (2010), *Shepard v. United States,* 544 U.S. 13, 19-20 (2005), and *Descamps v. United States*, 133 S. Ct. 2276, 2283-86 (2013) (explaining the "categorical" and "modified categorical approach" analyses and what evidence may be considered in those analyses). *See* also *Mathis v. United States*, 136 S. Ct. 2243 (2016), as to the application of the categorical approach analysis when a state statute sets forth alternative *means* of committing the crime, as opposed to setting forth alternative *elements.*

The Supreme Court has spoken infrequently about "controlled substance offenses" and "serious drug offenses" for purposes of the career offender or ACCA enhancement. *See, e.g*., *McNeill v. United States*, 563 U.S. 816(2011) (when determining whether "an offense under State law" is "serious drug offense" for purposes of ACCA, sentencing court should consult maximum term of imprisonment applicable to defendant's offense at time of state conviction); *United States v. Rodriguez*, 553 U.S. 377 (2008) (ACCA's "serious drug offense" definition -- "an offense under State law, involving manufacturing, distributing, or possessing with intent to distribute, a controlled substance . . . . for which a maximum term of imprisonment of ten years or more is prescribed by law" -- includes reference to state recidivist provisions). But the circuit courts have unremarkably observed that sentencing courts must apply the categorical analyses when determining whether a state drug offense qualifies as a career offender or ACCA predicate offense. *See*, *e.g.*, *United States v. Robinson*, 583 F.3d 1292, 1295 (11th Cir. 2009) (per curiam) (determinations about whether particular conviction qualifies as serious drug offense under ACCA proceeds under "a formal categorical approach").

IX. 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." *Id.,* 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 appeals have uniformly held that the rule announced there applies to facts-such as drug type, drug quantity, death or serious bodily injuryBthat 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) and (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) advises courts to run sentences consecutively to the extent necessary to achieve the guideline range. As noted by the Tenth Circuit, "in multiple-count cases to which *Booker* applies, § 5G1.2(d) 'is no longer mandatory, but a sentence consistent with it carries a badge of reasonableness we are bound to consider.'" *United States v. Hollis*, 552 F.3d 1191, 1195 (10th. Cir. 2009) (*citing United States v. Eversole*, 487 F.3d 1024, 1033 (6th Cir. 2007)).

2. *Statutory Mandatory Minimum Sentences*[16]

a. *Alleyne v. United States*, 133 S. Ct. 2151 (2013)

In *Alleyne*, the Supreme Court held that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury. In so holding, the Court overruled its prior decision in *Harris v. United States*, 536 U.S. 545 (2002) (holding that *Apprendi* did not preclude judicial fact finding that increased a mandatory minimum sentence), explaining that "there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum[.]" The Supreme Court in *Alleyne* further held that because the judge's finding by a preponderance of the evidence that the defendant brandished a firearm increased the penalty to which the defendant was subjected, it was an element to be found by a jury beyond a reasonable doubt.

Applying *Alleyne,* courts have held that a jury must determine the type and quantity of controlled substances involved in the offense if the drug type and/or quantity increases the statutorily prescribed minimum sentence. *See United States v. Delgado-Marrero*, 744 F.3d 167, 185 (1st Cir. 2014); *United States v. Harakaly*, 734 F.3d 88, 95 (1st Cir. 2013); *United States v. Claybrooks*, 729 F.3d 699, 708 (7th Cir. 2013).

However, factual findings made for the purposes of applying the sentencing guidelines that do not increase the applicable mandatory minimum sentence do not violate the rule in *Alleyne*. *See United States v. Ramirez-Negron*, 751 F.3d 42, 49 (1st Cir. 2014); *United States v. Hernandez*, 731 F.3d 666, 672 (7th Cir. 2013); *United States v. Johnson*, 732 F.3d 577, 583-84 (6th Cir. 2013).

b. Statutory minimum trumps guideline range

Under §5G1.1(b) and (c)(2), the statutory minimum sentence trumps the otherwise applicable guideline range. *See*, *e.g.*, *United States v. Padilla*, 618 F.3d 643, 644 (7th Cir. 2010) (per curiam) (under §5G1.1(b), advisory range of 155-188 months yielded to statutory minimum to establish 240-month guideline sentence); *United States v. Brehm*, 442 F.3d 1291, 1296 (11th Cir. 2006) (under §5G1.1(c), advisory range of 108-135 months yielded to 120-month statutory minimum to establish 120 to135-month range).

[16] A detailed discussion of statutory mandatory minimum sentencing is presented in the Commission's *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011), available at http://www.ussc.gov. Additionally, in October 2017, the Commission published a report on mandatory minimum penalties for drug offenses, providing sentencing data on offenses carrying drug mandatory minimums, the impact on the Federal Bureau of Prisons population, and differences observed when analyzing each of five main drug types. *See Mandatory Minimum Penalties for Drug Offenses in the Federal System* (October 2017), available at http://www.ussc.gov.

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,' §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) (per curiam) (citing cases). Said another way, conspiratorial liability is broader than the scope of relevant conduct.

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

For violations of 21 U.S.C. §§ 841, 844, 846, 960, and 963, the "safety valve" provision at 18 U.S.C. § 3553(f) directs courts to impose sentences "without regard to any statutory minimum sentence" if the five conditions listed at § 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 nearly 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. Zakharov*, 468 F.3d 1171, 1181 (9th Cir. 2006) ("[t]he defendant holds the burden of demonstrating by a preponderance of the evidence that he qualifies for . . . safety valve treatment"); *United States v. Johnson*, 375 F.3d 1300, 1302 (11th Cir. 2004) ("[t]he burden is on the defendant to show that he has met all of the safety valve factors"). 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, 941 (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. *See e.g.*, *United States v. Hernandez-Castro*, 473 F.3d 1004, 1005-06 (9th Cir. 2007) (post-*Booker*, "courts have no authority to adjust criminal history points for the purpose of granting safety valve

relief"); *accord United States v. McKoy*, 452 F.3d 234, 239 (3d Cir. 2006); *United States v. Brehm*, 442 F.3d 1291, 1300 (11th Cir. 2006) (per curiam); *United States v. Barrero*, 425 F.3d 154, 157-58 (2d Cir. 2005); *United States v. Bermudez*, 407 F.3d 536, 544-45 (1st Cir. 2005).

b. No violence or weapon

This criterion is met if *the defendant* did not possess a firearm in connection with the offense.

The term "offense" as used in subsections (a)(2)-(4) and "offense or offenses" as used in subsection (a)(5) mean the offense of conviction and all relevant conduct. *See* §5C1.2, comment. (n.3). But for purposes of determining whether a defendant used violence or possessed a firearm (or induced another to do so), "defendant" as used in subsection (a)(2) limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused. *See* §5C1.2, comment. (n.4). For example, even 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 safety-valve 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, 987-89 & n.2 (10th Cir. 2002) (overruling prior circuit authority to the contrary). *Cf. United States v. Matias*, 465 F.3d 169, 173-74 (5th Cir. 2006) (while defendant may still qualify for safety-valve if co-conspirator possessed firearm, his own constructive possession of firearm would prevent application of safety-valve); *accord United States v. Jackson*, 552 F.3d 908, 909-10 (8th Cir. 2009) (collecting cases) ("there is no reason to distinguish between actual, physical possession and constructive possession when defining what constitutes 'possession' for purposes of § 5C1.2. Accordingly, we hold that constructive possession is sufficient to preclude a defendant from receiving safety valve relief under § 5C1.2").

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. Anderson*, 452 F.3d 87, 90-92 (1st Cir. 2006); *United States v. Zavalza-Rodriguez*, 379 F.3d 1182, 1187 (10th Cir. 2004)("there is a difference in evidentiary standards when applying the two provisions [§2D1.1 and §5C1.2]"); *United States v. Nelson*, 222 F.3d 545, 549-50 (9th Cir. 2000). *But see United States v. Vasquez*, 161 F.3d 909, 911-12 (5th Cir. 1998) (per curiam) ("despite any difference in semantics between §§2D1.1(b)(1) and 5C1.2(2), the two provisions should be analyzed analogously").

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 with* §5C1.2, comment. (n.4).

d. No leadership role adjustment

This criterion is not met if a defendant is subject to an aggravating role adjustment under §3B1.1. *See* §5C1.2, comment. (n.5). *See e.g.*, *United States v. Doe*, 613 F.3d 681, 690 (7th Cir. 2010) ("[b]ecause we find that [defendant's] . . . sentence was properly enhanced under §3B1.1 for his aggravating role, he is ineligible for application of the safety-valve provision").

In addition, this criterion is not met if a defendant was engaged in a continuing criminal enterprise. As Application Note 6 explains, a defendant engaged in a continuing criminal enterprise will not be eligible because: (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, *see* 21 U.S.C. § 848(c)(2)(A) and §3B1.1, and thus be ineligible for the reduction.

e. Full and truthful disclosure

The final criterion is that the defendant make full, truthful disclosure to the government no later than sentencing. Disclosure need not come by way of a private debriefing with the government. *See*, *e.g.*, *United States v. De La Torre*, 599 F.3d 1198, 1207 (10th Cir. 2010) ("Though undoubtedly rare, there are circumstances in which trial testimony could be sufficiently thorough so as to constitute adequate compliance with this requirement. The language of USSG §5C1.2(a)(5) and 18 U.S.C. § 3553(f)(5) does not require the defendant to consent to a private de-briefing with the Government."). 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. But nor does this provision permit a defendant "to withhold information on the ground that the government has secured it from another source." *United States v. Pena*, 598 F.3d 289, 293 (6th Cir. 2010).

(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. Stephenson*, 452 F.3d 1173, 1180 (10th Cir. 2006)

("[w]hen the offense involves conspiracy or a jointly undertaken criminal venture, we require the defendant to disclose not only everything he knows about his own actions, but also everything he knows about his co-conspirators"); *United States v. Tinajero*, 469 F.3d 722, 725 (8th Cir. 2006) (defendant convicted of aiding and abetting amphetamine distribution denied safety-valve for minimizing his role); *United States v. Woods*, 210 F.3d 70, 76 (1st Cir. 2000).

(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 not later than the commencement of the sentencing hearing. *Compare United States v. Mejia-Pimental*, 477 F.3d 1100, 1105 (9th Cir. 2007)("'lies and obstruction' before sentencing do not preclude safety valve eligibility"); *United States v. Madrigal*, 327 F.3d 738, 743-44 (8th Cir. 2003), *with United States v. Fletcher*, 74 F.3d 49, 56 (4th Cir. 1996) (given the lower court's finding of defendant's perjury at trial, "it is not illogical to assume that the judge similarly determined that Fletcher failed to comply with the fifth condition in 18 U.S.C. § 3553(f))."); *United States v. Edwards*, 65 F.3d 430, 433 (5th Cir. 1995).

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. 1996) (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, 144, 150 (2d Cir. 2000) (requirement not satisfied where defendant, who suffered 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 does not satisfy the requirement. *United States v. Cervantes*, 519 F.3d 1254, 1257 (10th Cir. 2008) ("We agree with our sister circuits and hold that a defendant

does not meet the requirements of the 'safety valve' provision merely by meeting with a probation officer during the presentence investigation.") (collecting cases).

Note. A defendant is not, however, required to give information to a specific government attorney. *See United States v. Real-Hernandez*, 90 F.3d 356, 361 (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, 747 (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, 1094-95 (7th Cir. 1998) (reversing where district court continued sentencing hearing numerous times to "coax the truth out of" the defendant).

2. Section 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 level 17.

3. Safety Valve and §2D1.1(b)(17)

If the district court finds that the defendant failed to disclose everything he knew concerning his offense and relevant conduct, it may deny the 2-level "safety valve" reduction under §2D1.1(b)(17). *United States v. Virgen-Chavarin*, 350 F.3d 1122, 1130 (10th Cir. 2003). The 2-level reduction applies regardless of whether the 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)(17) 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. *See id.*

4. Safety Valve and Departures/Variances

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: §5K1.1

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

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*. at 130-31.

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, 89 (1st Cir. 2000); *United States v. Cordero,* 313 F.3d 161, 165 (3d Cir. 2002); *United States v. Hayes,* 5 F.3d 292, 294-95 (7th Cir. 1993); *United States v. Schaffer*, 110 F.3d 530, 533-34 (8th Cir. 1997); *United States v. Head,* 178 F.3d 1205, 1207-08 (11th Cir. 1999).

When a district court departs below a mandatory minimum sentence based on substantial assistance, only factors that relate to the defendant's substantial assistance may influence the extent of the departure. *See United States v. Williams*, 687 F.3d 283 (6th Cir. 2012); *see also United States v. Winebarger*, 664 F.3d 388, 396 (3d Cir. 2011).

X. Chapter Six: Sentencing Procedures and Plea Agreements

A. Plea Agreement Considerations

Because of the potential 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. *See* Fed. R. Crim. P. 11(c)(4).

4. Withdrawal of Plea

If the court rejects a plea agreement that contains provisions of the type specified in Fed. R. Crim. P. 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).

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. Section 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.

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* §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, 697 (9th Cir. 2008). In addition, the court may consider conduct underlying charges dismissed pursuant to a plea agreement in determining whether to depart from the sentencing guidelines. *See* §5K2.21.

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. *See* §6B1.2(b), (c).

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. Hodge*, 469 F.3d 749, 757 (8th Cir. 2006) ("[w]hile a § 1B1.8 agreement precludes the Government from using the

self-incriminating information in the calculation of the proper Guidelines range, absent such an agreement, self-incriminating information is properly considered in calculating the advisory Guidelines range"); *United States v. Shorteeth*, 887 F.2d 253, 255 (10th Cir. 1989); *United States v. Jarman*, 144 F.3d 912, 914-15 (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, pursuant to §1B1.8, a court may not, in calculating the guideline range, use information disclosed by a defendant in the course of cooperating. 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, 887 (5th Cir. 2002) (prosecutor improperly used information gained under §1B1.8 to support its argument for leadership role enhancement); *United States v. Thornton*, 306 F.3d 1355, 1357-58 (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, 456 (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, 370-71 (2d Cir. 1998) (§1B1.8 does not cover proffer agreements); *United States v. Baird*, 218 F.3d 221, 228-29 (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. *See* §1B1.8, comment. (n.1); *United States v. Gonzalez*, 309 F.3d 882, 886-87 (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. This information may be used in determining a defendant's sentencing range if: (1) it was 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) it concerns the existence of prior convictions and sentences in determining criminal history and career offender; (3) there is a prosecution for perjury or giving a false statement; (4) there is a breach of the cooperation agreement by the defendant, *United*

States v. Bradbury, 189 F.3d 200, 206 (2d Cir. 1999); or (5) it is relevant in determining whether, or to what extent, a downward departure is warranted for substantial assistance under §5K1.1. *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. Pham*, 463 F.3d 1239, 1244 (11th Cir. 2006) (per curiam) ("so long as the information is obtained from independent sources or separately gleaned from codefendants, it may be used at sentencing without violating § 1B1.8"); *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) (per curiam); *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, 725 (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 §5K1.1. *See United States v. Mills*, 329 F.3d 24, 28-29 (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. *See* §1B1.8, comment. (n.1).

PRIMER

FIREARMS

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Prepared by the Office of General Counsel, U.S. Sentencing Commission

TABLE OF CONTENTS

I. INTRODUCTION

The purpose of this primer is to provide a general overview of the major statutes, sentencing guidelines, issues, and case law relating to firearms offenses and enhancements for possession or use of firearms related to other offenses. Although the primer identifies some applicable cases and concepts, it is not intended as a comprehensive analysis of issues relating to all issues of federal firearms law and sentencing.

II. RELEVANT STATUTES

A. SUBSTANTIVE OFFENSES

1. Firearms Transfer Offenses: 18 U.S.C. §§ 922(a)(6) ("straw purchase"), 922(d) ("prohibited person"), 924(a)(1)(A) ("false statement in a record"), 1715 ("firearms as nonmailable")

Section 922(a)(6) makes it unlawful for any person in connection with the acquisition, or attempt to acquire, any firearm or ammunition from a licensed dealer to knowingly make any false oral or written statement intended or likely to deceive the dealer with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under any provision of 18 U.S.C. §§ 921 *et seq*. A violation of section 922(a)(6) is punishable by a statutory maximum term of imprisonment of ten years.

Section 922(d) makes it unlawful for any person to sell or dispose of any firearm or ammunition to any person knowing or having reason to believe that such person:

(1) is under indictment or has been convicted of a felony;
(2) is a fugitive from justice;
(3) abuses any controlled substance;
(4) has been adjudicated as suffering from mental health issues;
(5) is an (A) illegal alien or (B) an alien admitted under a non-immigrant visa;[1]

[1] The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is charged with promulgating regulations pertaining to section 922. Where the statute is silent as to the meaning of a term, a court will defer to the ATF's regulations at 27 C.F.R §§ 478 *et seq*. *See, e.g.*, United States v. Anaya-Acosta, 629 F.3d 1091, 1094 (9th Cir. 2011) (using the meaning of "illegally or unlawfully in the United States" at 27 C.F.R. § 478.11 to interpret section 922(g)(5)(A)).

(6) has been dishonorably discharged from the Armed Forces;
(7) has renounced his or her United States citizenship;
(8) is subject to a restraining court order prohibiting harassing, stalking, or threatening an intimate partner or child; or
(9) has been previously convicted of a misdemeanor crime of domestic violence.

A violation of section 922(d) is punishable by a statutory maximum term of imprisonment of ten years.

Section 924(a)(1)(A) makes it unlawful to knowingly make any false statement or representation with respect to the information required by the provisions of 18 U.S.C. §§ 921 *et seq*. to be kept in the records of a person licensed under the same said provisions or in applying for any license or exemption or relief from disability under those same provisions. A violation of section 924(a)(1)(A) is punishable by a statutory maximum term of imprisonment of five years.

Section 1715 makes it unlawful to knowingly deposit for mailing or delivery any pistols, revolvers, and other firearms capable of being concealed on the person. A violation of section 1715 is punishable by a statutory maximum term of imprisonment of two years.

The guideline applicable to sections 922(a)(6), 922(d), 924(a)(1)(A), and 1715 offenses is §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). *See* USSG Appendix A (Statutory Index).

Some overlap appears to exist with the conduct covered under the three offenses. The following discussion includes examples of case law where a specific statute is charged. False statements on ATF Form 4473 - Firearms Transaction Record, the form required to lawfully transfer a firearm from a federally licensed dealer, will trigger prosecution.[2] A common offense charged under section 922(a)(6) is the "straw purchase," which entails a material misrepresentation as to the identity of the actual firearm purchaser.[3] In *Abramski*

[2] *See* United States v. Banks, 514 F.3d 769, 778 (8th Cir. 2008) ("Unlike other businesses, a firearms dealer is required to record all of its sales on Form 4473.") (citing 27 C.F.R. § 478.124(a)).

[3] *See, e.g.*, United States v. Frazier, 605 F.3d 1271, 1280 (11th Cir. 2010) ("[W]e find the act of falsifying the identity of the 'actual buyer' on Form 4473 to be a violation of § 922(a)(6)."); United States v. Blake, 394 F.3d 1089, 1090 (8th Cir. 2005) (purchasing firearms on behalf of another for "some quick money" is a "straw purchase"); United States v. Ortiz, 318 F.3d 1030, 1037 (11th Cir. 2003) ("'straw purchases' equally misrepresent the identity of the purchaser in a firearm sale and violate 18 U.S.C. § 922(a)(6)" and occur when an unlawful purchaser uses a lawful "straw man" purchaser to obtain a firearm); *see also* ATF Form 4473, Question 11.a. ("Warning: You are not the actual transferee/buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual transferee/buyer, the dealer cannot transfer the firearm(s) to you.").

v. United States, the Supreme Court held that the true identity of the purchaser of a firearm is a material fact under 18 U.S.C. § 922(a)(6) even when the true purchaser is legally eligible to acquire a firearm.[4] The Court's decision resolved a circuit split concerning section 922(a)(6)'s materiality requirement in favor of the Fourth, Sixth, and Eleventh Circuits, and contrary to the Fifth Circuit's position.[5] Although frequently charged in such cases, section 922(a)(6) on its face does not prohibit straw purchases,[6] and section 924(a)(1)(A) may be charged instead.[7]

The firearm purchaser's place of residence is a material fact; an incorrect street address on Form 4473 is a section 922(a)(6) violation.[8]

Note also that the defendant's intent may also be a factor considered when charging section 922(a)(6) because it is a general intent crime and therefore the government is relieved from proving that the defendant specifically intended to violate a federal law.[9]

Violations of section 922(d) occur when a prohibited person acquires a firearm or when a person transfers a firearm knowing or having a reasonable cause to believe the person is prohibited from acquiring it. Typically, the offense involves the transfer of a firearm to a convicted felon.[10] Section 922(d) may also be charged in cases where a firearm purchaser makes a false misrepresentation on Form 4473. Each of the nine circumstances

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4 134 S. Ct. 2259 (2014).

5 *Compare* United States v. Abramski, 706 F.3d 307 (4th Cir. 2013); United States v. Morales, 687 F. 3d 697, 700–701 (6th Cir. 2012) (a misrepresentation about the true purchaser's identity is material even when he can legally own a gun); United States v. Frazier, 605 F. 3d 1271, 1279–1280 (11th Cir. 2010) (same) *with* United States v. Polk, 118 F.3d 286, 295 (5th Cir. 1997).

6 *See Abramski,* 134 S. Ct. at 2270.

7 *See* United States v. Wilson, 175 F. App'x 294 (11th Cir. 2006) (per curiam) (finding that falsely claiming on Form 4473 to be the actual purchaser of the firearm is a violation of section 924(a)(1)(A)).

8 *See, e.g.*, United States v. Bolwing, 770 F.3d 1168, 1177–78 (7th Cir. 2014) (stating a false address can be material misrepresentation and a violation of section 922(a)(6)); United States v. Gudger, 472 F.2d 566 (5th Cir. 1972) (same); United States v. Behenna, 552 F.2d 573, 575–76 (4th Cir. 1977) (same); United States v. Buck, 548 F.2d 871, 876 (9th Cir. 1977) (same); United States v. Crandall, 453 F.2d 1216 (1st Cir. 1972) (same).

9 *See, e.g.*, United States v. Edgerton, 510 F.3d 54, 57 (1st Cir. 2007) ("Section 922(a)(6) . . . does not presuppose deceptive intent or even knowledge that one's conduct is unlawful"); United States v. Elias, 937 F.2d 1514, 1518 (10th Cir. 1991) ("[T]he phrase 'likely to deceive' in section 922(a)(6) does not establish a specific intent element but only requires proof the defendant imparted false information with the general intention of deceiving or being likely to deceive the dealer.").

10 *See, e.g.,* United States v. Dotson, 570 F.3d 1067 (8th Cir. 2009) (attempting to transfer a firearm to a convicted felon is a violation of section 922(d)(1)); United States v. Rose, 522 F.3d 710 (6th Cir. 2008) (selling a firearm to a convicted felon is a violation of sections 922(d)(1) and 924(a)(2)); United States v. Peters, 403 F.3d 1263 (11th Cir. 2005) (same). *See also* the discussion of 18 U.S.C. § 922(g), prohibiting possession of a firearm by a felon, *infra* at II(A)(2).

enumerated in section 922(d) are listed on Form 4473 at Questions 11. and 12, and the transferee must affirmatively state whether any are applicable. A false answer to a question may result in prosecution under section 922(d).

Section 924(a)(1)(A) may also be charged when a person provides false responses to questions on Form 4473. Examples of district court cases include the purchase of a firearm after conviction for a misdemeanor crime of domestic violence,[11] and counseling another person to falsely state that she was the transferee/buyer of a firearm.[12] However, as previously noted, section 924(a)(1)(A) is sometimes charged in "straw purchase" cases.[13] The penalty for a violation of section 922(a)(6) is up to ten years' imprisonment, while a violation of section 924(a)(1)(A) is up to five years. Charging section 922(a)(6) in lieu of section 924(a)(1)(A) may be based upon the surrounding circumstances or seriousness of conduct in the case.

Recognizing that these statutes sometimes cover similar conduct, in 2011, subsections (a)(4)(B) and (a)(6) of §2K2.1 were amended to increase penalties for a defendant who is convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person.[14] The amendment ensures that defendants convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A) receive the same punishment as defendants convicted under 18 U.S.C. § 922(d) when the conduct is similar. In addition, the amendment provided a new Application Note 15 stating that, in a case in which the defendant is convicted under any of the three statutes, a downward departure may be warranted if (A) none of the enhancements in subsection (b) of §2K2.1 apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense. A defendant meeting these criteria is generally less culpable than the typical straw purchaser.

2. 18 U.S.C. § 922(g) - Prohibited Persons ("Felon-in-Possession")

This subsection bans specified classes of people from transporting or possessing in interstate or foreign commerce any firearm or ammunition or from receiving any firearm or ammunition that has been transported in interstate or foreign commerce. The banned classes include: convicted felons; fugitives; unlawful users of controlled substances; adjudicated "mental defectives"; illegal aliens; dishonorably discharged service personnel;

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11 *See* United States v. Tooley, 717 F. Supp. 2d 580 (S.D. W. Va. 2010).

12 *See* United States v. Sanelli, 2010 WL 1608416 (W.D. Va. Apr. 20, 2010).

13 *See* United States v. Torres, 2010 WL 3190659 (D. Ariz. June 21, 2010).

14 *See* USSG App. C, amend. 753 (Nov. 1, 2011).

those who have renounced their U.S. citizenship; and misdemeanor domestic violence offenders or those subject to certain restraining orders in domestic violence matters. The statutory maximum penalty for the offense is ten years of imprisonment.

The guideline applicable to section 922(g) offenses is §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).[15]

Issue—Multiplicity in the Charging Instrument:

All circuits have now agreed that the "allowable unit of prosecution" is an incident of possession even if a defendant is a "prohibited person" under more than one category under section 922(g). In *United States v. Richardson*, the Fifth Circuit, reversed its past precedent and joined every other circuit to address the issue, concluding that Congress, by rooting all the firearm possession offenses in a single legislative enactment and including all the offenses in subsections of the same statute, signaled that it did not intend multiple punishments for the possession of a single weapon.[16]

A related set of issues, to which a similar analysis applies, arises in situations in which a defendant possesses multiple firearms or firearms and ammunition. Courts have held that possession of more than one firearm and ammunition by a prohibited person generally supports only one conviction under 18 U.S.C. § 922(g). Courts have noted that the prohibited conduct, possession of any firearm or ammunition, could arguably occur every time a disqualified person picks up a firearm even though it is the same firearm or every time a disqualified person picks up a different firearm. "The [statute] does not delineate whether possession of two firearms—say two six-shooters in a holster—constitutes one or two violations, whether the possession of a firearm loaded with one bullet constitutes one or two violations, or whether possession of a six-shooter loaded with six bullets constitutes one or two or seven violations."[17]

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[15] *See* USSG Appendix A (Statutory Index).

[16] United States v. Richardson, 439 F.3d 421, 422 (8th Cir. 2006) (en banc); *see also* United States v. Dunford, 148 F.3d 385, 389 (4th Cir. 1998) (felon and drug user); United States v. Johnson, 130 F.3d 1420, 1426 (10th Cir. 1997) (same); United States v. Munoz-Romo, 989 F.2d 757 (5th Cir. 1993), United States v. Winchester, 916 F.2d 601 (11th Cir. 1990); *accord* United States v. Shea, 211 F.3d 658, 673 (1st Cir. 2000).

[17] *Dunford*, 148 F.3d at 389 (reversing all but one conviction where defendant possessed six firearms and ammunition); *see also* United States v. Tann, 577 F.3d 533, 537 & n.5 (3rd Cir. 2009) (collecting circuit cases); United States v. Parker, 508 F.3d 434, 440 (7th Cir. 2007); *Richardson*, 439 F.3d at 422 ("allowable unit of prosecution" is one incident of possession regardless of whether defendant satisfies more than one classification or possessed more than one firearm or firearm and ammunition); United States v. Verrecchia, 196 F.3d 294, 297–98 (1st Cir. 1999); United States v. Cunningham, 145 F.3d 1385, 1398–99 (D.C. Cir. 1998); United States v. Keen, 104 F.3d 1111, 1119–20 (9th Cir. 1996); United States v. Throneburg, 921 F.2d 654, 657 (6th Cir. 1990); United States v. Pelusio, 725 F.2d 161, 168–69 (2d Cir. 1983); United States v. Valentine, 706 F.2d 282, 292–94 (10th Cir. 1983).

However, this general rule is subject to exceptions: where the evidence demonstrates that the defendant stored the weapons in different places or acquired the weapons at different times, he can be convicted of multiple counts of illegal possession.[18] The Eighth Circuit, for example, has clarified that its holding in *Richardson* does not mean that "any period of overlap" in the possession of two firearms means that only one possession conviction may be obtained; rather, the question is "whether the two items were separately acquired or stored."[19]

From a procedural standpoint, this general rule does not preclude the *charging* of multiple counts, only convictions. As the Supreme Court in *Ball v. United States* explained: "To say that a convicted felon may be prosecuted simultaneously for violation of [two firearms offenses], however, is not to say that he may be convicted and punished for two offenses."[20] The district court at sentencing may merge the counts of conviction that are duplicative.[21]

3. 18 U.S.C. § 922(q) - Possession or Discharge of a Firearm in a School Zone

Section 922(q)(2)(A) prohibits the possession a firearm that has moved in interstate or foreign commerce in a place that a person knows, or has reasonable cause to believe, is a school zone. Section 922(q)(3)(A) prohibits the discharge or attempted discharge of a firearm that has moved in interstate or foreign commerce in a place that a person knows is a school zone. A violation of either section 922(q)(2)(A) or section 922(q)(3)(A) is punishable by a statutory maximum term of imprisonment of five years.[22] However, the term of imprisonment for either offense must be imposed consecutively to any other term of imprisonment imposed.[23] For example, when a defendant is convicted of section

[18] United States v. Hutching, 75 F.3d 1453, 1460 (10th Cir. 1996) (sustaining three counts of conviction where one firearm was stored in the defendant's bedroom, one in a car parked in the garage, and one in another vehicle); *see also* United States v. Olmeda, 461 F.3d 271, 280 (2d Cir. 2006) (multiple rounds of ammunition in two different jurisdictions warranted two prosecutions despite some temporal overlap); United States v. Goodine, 400 F.3d 202, 209 (4th Cir. 2005); United States v. Buchmeier, 255 F.3d 415, 423 (7th Cir. 2001); United States v. Adams, 214 F.3d 724, 728 (6th Cir. 2000).

[19] United States v. Woolsey, 759 F.3d 905, 908 (8th Cir. 2014); *see also* United States v. Washington, 666 F. App'x 544, 546 (7th Cir. 2016) (affirming convictions for two section 992(g)(1) convictions where defendant maintained ammunition and weapons separately in home and in car, and citing cases for same).

[20] 470 U.S. 856, 861 (1985).

[21] *See, e.g.,* United States v. Throneburg, 921 F.2d 654, 657 (6th Cir. 1990) (affirming district court's decision to permit the jury to consider multiple counts, anticipating that if multiplicitous convictions were obtained, it could dismiss counts as necessary).

[22] *See id.* § 924(a)(4).

[23] *Id.*

922(q)(2)(A) as well as another similar conviction arising out of the same act or transaction, the court should first calculate the overall guideline range, apportion the sentence between the count for section 922(q) and the other conviction, and then run the section 922(q) term of imprisonment consecutively.[24]

The guideline applicable to section 922(q)(2)(A) or 922(q)(2)(A) offenses is §2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone).[25]

4. 18 U.S.C. § 924(c) - Using or Carrying a Firearm During a Crime of Violence or Drug Trafficking Offense

18 U.S.C. § 924(c) provides for a fixed mandatory prison term for anyone who uses or carries a firearm during and in relation to any crime of violence or drug trafficking crime, or who possesses a firearm in furtherance of such an offense (in addition to the punishment provided for the crime of violence or drug trafficking crime itself, if charged). For violations of section 924(c), the mandatory minimum penalty for the basic offense is 5 years; if the firearm is brandished, 7 years; if the firearm is discharged, 10 years; if the firearm is a short-barreled rifle or shotgun or semiautomatic assault weapon, 10 years; if a machine gun, destructive device, or firearm equipped with a silencer, 30 years. For second or subsequent convictions under section 924(c), the penalty is 25 years, and if the firearm is a machine gun, etc., life imprisonment without release. These penalties are consecutive to any other sentence, including the sentence for the underlying offense.[26] The firearms involved are subject to seizure.[27] There is no defined maximum penalty, although most circuit courts conclude that the implied maximum penalty is life.[28]

The guideline applicable to this statutory provision is §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes).[29]

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[24] United States v. Figueroa-Ocasio, 805 F.3d 360, 373 (1st Cir. 2015).

[25] *See* USSG Appendix A (Statutory Index).

[26] *See* 18 U.S.C. § 924(c).

[27] *See* 18 U.S.C. § 924(d)(1).

[28] *See*, *e.g.,* United States v. Farmer, 583 F.3d 131, 151 (2d Cir. 2009); United States v. Gamboa, 439 F.3d 796, 811 (8th Cir. 2006); United States v. Dare, 425 F.3d 634, 642 (9th Cir. 2005); United States v. Cristobal, 293 F.3d 134, 147 (4th Cir. 2002); United States v. Avery, 295 F.3d 1158, 1170 (10th Cir. 2002); United States v. Sandoval, 241 F.3d 549, 551 (7th Cir. 2001); United States v. Pounds, 230 F.3d 1317, 1319 (11th Cir. 2000).

[29] *See* USSG Appendix A (Statutory Index).

Issue—Type of gun and manner in which it is used is an issue for the jury

In *United States v. O'Brien*, the Supreme Court held that the nature of the firearm (specifically, if the firearm is a "machinegun" triggering a 30-year mandatory minimum) is an element of the offense to be found by the jury, not a sentencing factor to be found by the judge.[30] The decision resolved a circuit split. Before *O'Brien*, six circuits construed section 924(c) as creating a sentencing issue for the judge.[31] Two construed the statute as creating an element for the jury.[32] Recently, in *United States v. Suarez*, the Fifth Circuit vacated a sentence imposed under section 924(c) because the issue of whether the firearm involved in the offense was a sawed-off shotgun, which would trigger the ten-year mandatory minimum, or a handgun, which would carry a five-year mandatory minimum sentence was not submitted to the jury.[33]

Issue—"During and in relation to" and "in furtherance of" standards:

The statute sets out two different relationships between the firearm in question and the underlying crime of violence or drug trafficking offense, depending on whether the defendant (i) used or carried the firearm or (ii) possessed the firearm. If the defendant *used or carried* the firearm, these acts must only have been done "during and in relation to" the underlying offense for a violation of the statute to have occurred; if the defendant merely *possessed* the firearm, the possession must have been "in furtherance of" the underlying offense.

A significant body of case law has developed interpreting these two phrases, with the general consensus that a closer relationship between the firearm and the underlying offense is required to meet the "in furtherance of" standard than the "during and in relation to" standard. For example, where the defendant only possessed the firearm and the underlying offense is a drug trafficking offense, the Sixth Circuit held that "[i]n order for the possession to be in furtherance of a drug crime, the firearm must be strategically located so that it is quickly and easily available for use" and that other relevant factors "include whether the gun was loaded, the type of weapon, the legality of its possession, the type of drug activity conducted, and the time and circumstances under which the firearm was

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30 560 U.S. 218 (2010).

31 *See* United States v. Cassell, 530 F.3d 1009, 1016–17 (D.C. Cir. 2008); United States v. Ciszkowski, 492 F.3d 1264, 1268 (11th Cir. 2007); United States v. Gamboa, 439 F.3d 796, 811 (8th Cir. 2006); United States v. Avery, 295 F.3d 1158, 1169–71 (10th Cir. 2002); United States v. Harrison, 272 F.3d 220, 225–26 (4th Cir. 2001); United States v. Sandoval, 241 F.3d 549, 550 (7th Cir. 2001).

32 United States v. O'Brien, 542 F.3d 921, 926 (1st Cir. 2008); United States v. Harris, 397 F.3d 404 (6th Cir. 2005).

33 United States v. Suarez, 879 F.3d 626 (5th Cir. 2018) (citing United States v. O'Brien, 560 U.S. 218 (2010) and Alleyne v. United States, 570 U.S. 99 (2013).

found."[34] However, the Ninth Circuit has rejected the use of this list of factors "in closer, and more common, cases" and generally the "checklist" approach.[35] Rather, the Ninth Circuit held "that sufficient evidence supports a conviction under § 924(c) when facts in evidence reveal a nexus between the guns discovered and the underlying offense."[36] In contrast, the Ninth Circuit rejected the claim that possession was in furtherance of a drug trafficking offense where there was no evidence to indicate that the defendant conducted drug trafficking activities in the home where the weapon was found.[37]

Every circuit to address the question has held or assumed without deciding that a defendant who receives firearms in exchange for drugs possesses those firearms "in furtherance of" a drug trafficking offense.[38]

With respect to the "during and in relation to" requirement, courts have interpreted this phrase to include a temporal element ("during") as well as a nexus between the firearm and the underlying offense ("in relation to"). The nexus will depend on the particular facts and circumstances of the offenses, but generally the evidence must support a finding that the weapon's presence was not coincidental; that is, simply carrying the firearm during the course of the offense is not sufficient.[39] Rather, "the evidence must support a finding that the firearm furthered the purpose or effect of the crime . . . ."[40]

Issue—Whether a sentence imposed for a separate offense can supplant a section 924(c) sentence under the statute's prefatory clause:

In *Abbott v. United States*, the Supreme Court resolved a circuit split concerning whether the "except" clause prefacing section 924(c) exempts an offender from prison time for a section 924(c) conviction when sentenced to a greater mandatory minimum term for

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[34] United States v. Mackey, 265 F.3d 457, 462 (6th Cir. 2001) (citing United States v. Ceballos-Torres, 218 F.3d 409, 414–15 (5th Cir. 2000)) (affirming conviction where "there was an illegally possessed, loaded, short-barreled shotgun in the living room of the crack house, easily accessible to the defendant and located near the scales and razor blades" and the defendant was found near the weapon in possession of cocaine and a large amount of cash); *cf.* United States v. King, 632 F.3d 646, 657–58 (10th Cir. 2011) (noting that the Tenth Circuit has not adopted *Mackey*'s "accessibility requirements," and instead applies "a more flexible approach" in which accessibility is but one factor).

[35] United States v. Krouse, 370 F.3d 965, 968 (9th Cir. 2004).

[36] *Id*. (affirming conviction where "[n]o less than five high caliber firearms, plus ammunition, were strategically located within easy reach in a room containing a substantial quantity of drugs and drug trafficking paraphernalia" and "other [uncharged] firearms, which Krouse apparently kept for purposes unrelated to his drug business, . . . were stored elsewhere throughout his home.").

[37] United States v. Rios, 449 F.3d 1009, 1015–16 (9th Cir. 2006).

[38] *See* United States v. Miranda, 666 F.3d 1280, 1283 (11th Cir. 2012) (collecting cases).

[39] United States v. Lampley, 127 F.3d 1231, 1241 (10th Cir. 1997).

[40] United States v. McRae, 156 F.3d 708, 712 (6th Cir. 1998).

a conviction under another statute.[41] Section 924(c) begins: "Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law," and proceeds to outline minimum sentences. Prior to *Abbott*, several circuits interpreted this language to refer to other minimum sentences that may be imposed for violations of section 924(c), not separate offenses.[42] Two circuits held that a defendant is not subject to a section 924(c) minimum sentence if he is subject to a higher minimum sentence, for example as an armed career criminal.[43] The Supreme Court granted certiorari in *Abbott* and *Gould* to resolve the issue. In *Abbott*, the Court held that the clause "by any other provision of law" refers to the conduct section 924(c) proscribes, *i.e.*, possessing a firearm in connection with a predicate crime. The Court rejected the petitioners' alternative reading that the clause relieved a section 924(c) offender from additional punishment if another, higher mandatory minimum sentence was imposed. The Court concluded that such a reading nullifies the statute's ascending series of minimums at section 924(c)(1)(A)–(C), a result contrary to congressional intent.[44]

Although the sentence for a section 924(c) conviction must be imposed consecutive to any other term of imprisonment, the Supreme Court recently held, in *Dean v. United States*,[45] that section 924(c) does not prevent a sentencing court from considering a mandatory minimum sentence that will be imposed pursuant to it when calculating a guidelines sentence for the underlying predicate offense. The Court explained that a sentencing court generally is permitted to consider the sentence imposed for one count of conviction when determining the sentence for other counts of conviction and that nothing in the text of section 924(c) prohibits such consideration. The Court further noted that, in other sections of the criminal code, Congress has explicitly prohibited consideration of a mandatory minimum penalty in determining the sentence for other counts of conviction. For example, 18 U.S.C. § 1028A, which relates to identify theft, provides that a court cannot reduce the term imposed for a predicate offense to compensate for the mandatory term of imprisonment required by section 1028A. Prior to the *Dean* decision, many sentencing courts interpreted section 924(c) to bar consideration of the mandatory minimum penalty when calculating a sentence for an underlying predicate offense.[46]

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41 562 U.S. 8 (2010).

42 *See* United States v. Abbott, 574 F.3d 203 (3d Cir. 2009), *aff'd,* Abbott v. United States, 562 U.S. 8 (2010); United States v. London, 568 F.3d 553 (5th Cir. 2009) (adopting the reasoning of United States v. Collins, 205 F. App'x 196 (5th Cir. 2006)); United States v. Studifin, 240 F.3d 415, 423 (4th Cir. 2001); United States v. Jolivette, 257 F.3d 581, 587 (6th Cir. 2001); United States v. Alaniz, 235 F.3d 386, 389 (8th Cir. 2000).

43 *See* United States v. Whitley, 529 F.3d 150 (2d Cir. 2008); United States v. Almany, 598 F.3d 238 (6th Cir.), *vacated*, 131 S. Ct. 637 (2010).

44 *See Abbott*, 562 U.S. at 18–20.

45 137 S. Ct. 1170 (Apr. 3, 2017).

46 *See, e.g.*, United States v. Dean, 810 F.3d 521 (8th Cir. 2015) (affirming district court's determination that it could not vary from the guidelines range in calculating defendant's sentence for offenses based on the

Issue—Whether section 924(c) authorizes multiple consecutive firearm possession counts arising out of the same offense:

Most courts hold that section 924(c) authorizes a conviction if, during the course of an underlying predicate offense, a defendant uses or carries a firearm at any time; in other words, the "unit of prosecution" for section 924(c) is the underlying crime, rather than each individual "use" to which firearms are put throughout the duration of the underlying crime.[47] However, even in these circuits, a defendant may be subject to multiple section 924(c) charges for the use of the same firearm during one criminal episode where the episode contains more than one independent and unique use of a firearm.[48] Other circuits have held that separate section 924(c) convictions may arise from one predicate offense.[49]

5. 22 U.S.C. § 2778 - Exporting Firearms without a Valid License

Section 2778 prohibits the exportation (and importation) of designated national defense-related articles (or services) without a valid license to do so.[50] Section 2778, a provision of the Arms Export Control Act, authorizes the President to control the import and export of defense articles and services, to designate those items that shall be considered defense articles and services, and promulgate regulations therefor. Items designated by the President as defense articles are added to the United States Munitions

mandatory minimum he would receive under section 924(c)), *overruled by* Dean v. United States 130 S. Ct. 1170 (2017); United States v. Chavez, 549 F.3d 119, 135 (2d Cir. 2008); United States v. Franklin, 499 F.3d 578, 583 (6th Cir. 2007); United States v. Roberson, 474 F.3d 432, 436 (7th Cir. 2007); United States v. Powell, 444 F. App'x 517, 522 (3d Cir.2011) (unpublished); United States v. McCullers, 395 F. App'x 975, 978 (4th Cir. 2010) (unpublished). *But see* United States v. Smith, 756 F.3d 1179, 1190 (10th Cir. 2014) ("Nothing in current law prohibits a district court's considering a § 924(c) conviction and sentence when seeking to assign a just punishment for a related crime of violence."); United States v. Webster, 54 F.3d 1, 4 (1st Cir. 1995) ("[I]n departing from a guideline sentence the district court is free to exercise its own judgment as to the pertinence, if any, of a related mandatory consecutive sentence.").

47 *See* United States v. Rentz, 777 F.3d 1105, 1107 (10th Cir. 2015) (en banc); United States v. Diaz, 592 F.3d 467 (3d Cir. 2010); United States v. Rodriguez, 525 F.3d 85, 111–12 (1st Cir. 2008); United States v. Baptiste, 309 F.3d 274, 278–79 (5th Cir. 2002); United States v. Anderson, 59 F.3d 1323 (D.C. Cir. 1995); United States v. Cappas, 29 F.3d 1187, 1189–90 (7th Cir. 1994); United States v. Taylor, 13 F.3d 986, 992–93 (6th Cir. 1994); United States v. Lindsay, 985 F.2d 666, 676 (2d Cir. 1993); United States v. Hamilton, 953 F.2d 1344 (11th Cir. 1992); United States v. Smith, 924 F.2d 889, 894–95 (9th Cir. 1991).

48 United States v. Hodge, 870 F.3d 184, 197 n.10 (3rd Cir. 2017) (collecting cases); United States v. Vichitvongsa, 819 F.3d 260, 269–70 (6th Cir. 2016).

49 *See* United States v. Phipps, 319 F.3d 177, 186 (5th Cir. 2003); United States v. Camps, 32 F.3d 102, 108-09 (4th Cir. 1994); United States v. Lucas, 932 F.2d 1210, 1222–23 (8th Cir. 1991).

50 Pub. L. No. 94-329, Tit. II (June 30, 1976).

List (USML).[51] Firearms, including their component parts, and ammunition, along with a wide range of other defense-related equipment such as military electronics, aircraft and aircraft parts, and night vision equipment, are on the USML. A violation of section 2778 is punishable by a statutory maximum term of imprisonment of 20 years.

The guideline applicable to a section 2778 offense is §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License).[52] Subsection (a)(2) at §2M5.2 provides for Base Offense Level 14 if the offense involved only (A) two or less non-fully automatic small arms (rifles, handguns, or shotguns), (B) 500 or less rounds of ammunition for non-fully automatic small arms, or (C) both.[53] Subsection (a)(1) provides for Base Offense Level 26 if subsection (a)(2) does not apply.

Firearms cases prosecuted under section 2778 involve the exportation, or attempted exportation, of firearms or ammunition across the U.S. border. Frequently the destination in such cases is Mexico, but the firearms may also be destined for other countries.[54] Violations of section 2778 that involve defense articles and services other than firearms are outside the scope of this primer.[55]

B. STATUTORY SENTENCING ENHANCEMENT

1. 18 U.S.C. § 924(e) - Armed Career Criminal Act of 1984 (ACCA)

This sentencing enhancement imposes a mandatory minimum 15-year sentence of imprisonment (and a life maximum) for section 922(g) violators who have three previous convictions for a violent felony or serious drug offense, committed on occasions different from one another. "Violent felony" means any crime punishable by imprisonment for more than one year, that

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51 *See* 22 C.F.R. § 121.1.

52 *See* USSG Appendix A (Statutory Index).

53 In 2011, the Commission reduced the number of small arms at USSG §2M5.2(a)(2) from ten to two and added the "ammunition only" provision. *See* USSG App. C, amend. 753 (effect. Nov. 1, 2011).

54 *See*, *e.g.*, United States v. Sero, 520 F.3d 187 (2d Cir. 2008) (affirming defendant's sentence for shipping firearms parts and ammunition to the Philippines);United States v. Castro-Trevino, 464 F.3d 536 (5th Cir. 2006) (affirming conviction under section 2778 and sentence under §2M5.2 for attempting to export firearm ammunition to Mexico); United States v. Muthana, 60 F.3d 1217 (7th Cir. 1995) (exporting ammunition to Yemen); United States v. Galvan-Revuelta, 958 F.2d 66 (5th Cir. 1992) (same).

55 *See, e.g.,* United States v. Boltutskiy, 634 F. App'x. 887 (3rd Cir. 2015) (exporting night vision devices to Belarus); United States v. Reyes, 270 F.3d 1158 (7th Cir. 2001) (exporting aircraft components to Iran).

(1) has as an element the use, attempted use, or threatened use of physical force against another;

(2) or is burglary, arson, or extortion, involves the use of explosives, or involves other conduct that presents a serious potential risk of physical injury to another.[56]

"Serious drug offense" is defined as either certain federal drug offenses with a statutory maximum of ten years or more imprisonment, or state offenses involving manufacturing, distributing, or possessing with intent to manufacture or distribute, with a statutory maximum of ten years or more imprisonment. The guideline implementing this statutory provision is §4B1.4 (Armed Career Criminal).[57]

Issue—What is a "violent felony"?

The definition of the term "violent felony" for purposes of the ACCA has been the subject of an ongoing series of Supreme Court cases, in addition to numerous cases in the lower federal courts. The volume of case law on this issue results primarily from the very general language of the statute and the variety of different state laws to which it must be applied. Although an exhaustive treatment of this issue is beyond the scope of this primer, this section will describe the major Supreme Court cases on the issue and sketch the general contours of the question.

The first major Supreme Court case instructing courts how to determine whether a particular prior offense is a "violent felony" was *Taylor v. United States*.[58] The Court in that case addressed the question of how to determine whether a particular state conviction for an offense called burglary qualifies as a "burglary" for purposes of the ACCA. The Court concluded that, rather than relying on what each individual state law determined was a "burglary," Congress intended a "generic, contemporary meaning of burglary" so that, regardless of what the particular offense was *labeled*, if it had as elements of the offense the same elements of generic, contemporary burglary, it would be considered a "burglary" for ACCA purposes.[59] In making this comparison, the Court explained that courts should apply a "formal categorical approach" by which courts would look not to the facts of the particular defendant's offense, but instead look to the elements of the statute under which

[56] As explained in greater detail below, the Supreme Court invalidated the underlined text—known as the "residual clause"—in Johnson v. United States, 135 S. Ct. 2551 (2015). Accordingly, a prior conviction may no longer be counted as an ACCA predicate solely because it meets the residual clause's definition.

[57] *See* USSG Appendix A (Statutory Index).

[58] 495 U.S. 575 (1990).

[59] *Id*. at 598–99.

the defendant was convicted.[60] However, the Court described an exception to this general rule: if the state statute is broader than the generic offense, courts could look to other records of the case to see if the jury determined that the defendant had actually committed the generic offense.[61] The Court addressed this modification of the categorical approach in *Shepard v. United States*.[62] In that case, the Court held that sentencing courts must look only to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."[63] In *Descamps v. United States,*[64] the Court held that this modified categorical approach may not be applied where the statute of conviction is indivisible—that is, one not containing alternative elements. In *Mathis v. United States*,[65] the Court further clarified that this means that even a statute which is indivisible but lists "alternative means" of commission is not subject to the modified categorical approach.

The Court interpreted the phrase "physical force" as used in the ACCA's "violent felony" definition in *Johnson v. United States*.[66] The Court held that in the context of "violent felony," "physical force" means violent force, "capable of causing physical pain or injury to another []."[67] Therefore, the Florida felony offense of battery by "[a]ctually and intentionally touch[ing] another person" does not have as an element the use of physical force and does not constitute a "violent felony" under the ACCA.

More recently, the Supreme Court focused on the application of these principles to the ACCA's "residual clause." The "residual clause" appeared at 18 U.S.C. § 924(e)(2)(B)(ii) following the listed offenses such as burglary; it provided that, in addition to the listed offenses, an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another" is a "violent felony." In *Johnson v. United States*,[68] the Supreme Court held that the ACCA's "residual clause" is unconstitutionally vague and, therefore, imposing an increased sentence under that provision violates the Due Process Clause. Thus, under ACCA, the residual clause may no longer be used to classify offenses as violent felonies. Nearly a year later, in *Welch v. United States*, the Supreme Court held that

60 *Id*. at 600–01.

61 *Id*. at 602.

62 544 U.S. 13 (2005).

63 *Id*. at 26.

64 133 S. Ct. 2276 (2013).

65 579 U.S. ---, 136 S. Ct. 2243 (2016).

66 559 U.S. 133 (2014).

67 *Id.* at 140.

68 135 S. Ct. 2551 (2015).

Johnson's holding invalidating ACCA's residual clause applies retroactively when a defendant seeks review of a previously imposed sentence.[69] Thus, any offender previously sentenced as an armed career criminal on the basis of a conviction qualifying under ACCA's residual clause can challenge their status as armed career criminal and the resulting enhanced penalty.

The language of the "residual clause" also appeared in the sentencing guidelines in the definition of "crime of violence" in the career offender guideline at §4B1.2. In response to the *Johnson* decision, the Commission amended that guideline to remove the residual clause.[70] Under the previous version of the guideline, however, much of the case law on how to determine what constitutes a "violent felony" under the ACCA also applied to determining what constitutes a "crime of violence" under §4B1.2 of the guidelines. In *Beckles v. United States*, the Supreme Court resolved a circuit split, holding that the sentencing guidelines, including the residual clause at §4B1.2, are not subject to vagueness challenges.[71] Prior to *Beckles*, only the Eleventh Circuit had explicitly held that the holding in *Johnson* did not affect the residual clause in §4B1.2.[72] The Third, Sixth, and Tenth Circuits had explicitly held that the holding in *Johnson* rendered the residual clause in §4B1.2 void for vagueness.[73] The First, Second, Fourth, Seventh, Eighth, and Ninth Circuits either accepted the government's concessions, or assumed without deciding, that *Johnson* applies and remanded cases for resentencing.[74] Thus, following the holding in *Beckles*, defendants

[69] 136 S. Ct. 1257 (2016).

[70] USSG, App. C, amend. 798 (effect. Aug. 2016).

[71] No. 15-8544, --- U.S. ---, 137 S. Ct. 886 (Mar. 6, 2017).

[72] United States v. Matchett, 802 F.3d 1185 (11th Cir. 2015) (holding that *Johnson* did not make the residual clause of section §4B1.2(a) also unconstitutionally vague).

[73] *See* United States v. Pawlak, 822 F.3d 902 (6th Cir. 2016) ("Our reading of the current state of the law as established by the Supreme Court compels our holding that the rationale of *Johnson* applies equally to the residual clause of the Guidelines."); United States v. Madrid, 805 F.3d 1204, 1210 (10th Cir. 2015) ("In light of the Supreme Court's decision in [*Johnson*], we hold that the residual clause [in §4B1.2] is unconstitutionally vague . . . . "); United States v. Townsend, 638 F. App'x 172 (3rd Cir. 2015) (holding that *Johnson* applies to identical language in the guidelines' career offender enhancement).

[74] *See* United States v. Hudson 823 F.3d 11 (1st Cir. 2016) (accepting the government's concession that *Johnson's* holding "invalidates the district court's application of United States Sentencing Guidelines §4B1.4(b)"); United States v. Maldonado, 636 Fed. App'x 807, 810 (2nd Cir. 2016) ("We therefore proceed on the assumption that the Supreme Court's reasoning with respect to the ACCA's residual clause applies to the identically worded Guideline §4B1.2(a)(2)'s residual clause."); United States v. Frazier, 621 F. App'x 166, 168 (4th Cir. 2015) (assuming without deciding that *Johnson* applies to the guidelines); Ramirez v. United States, 799 F.3d. 845, 856 (7th Cir. 2015) ("[W]e proceed on the assumption that the Supreme Court's reasoning applies to section 4B1.2 as well"); United States v. Taylor, 803 F.3d 931 (8th Cir. 2015) (remanding for resentencing without deciding whether the guideline is unconstitutionally vague); United States v. Willis, 795

sentenced as career offenders under the residual clause of §4B1.2 prior to its amendment cannot challenge their career offender status on this basis.

III. FIREARMS GUIDELINE: §2K2.1

A. GENERALLY

The offense level under this guideline is determined principally by the type of firearm in question, the defendant's prior convictions for violent felonies or drug-related felonies, and the defendant's status as a person prohibited by law from possessing firearms (for example, a convicted felon or an illegal alien), in addition to other offense and offender characteristics, as discussed below. The base offense level ranges from **6** to **26**, depending on which of these characteristics are present.

B. DEFINITIONS

The guideline defines "firearm" as it is defined in 18 U.S.C. § 921(a)(3): "The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device", *but* does not include an "antique firearm."[75] Generally, the circuit courts are in agreement that section 921(a)(3) requires the government only to prove that the firearm in question was designed to fire a projectile, not that the firearm was operable at the time the offense occurred.[76]

The alternative offense levels at §2K2.1(a)(1)(A)(i), (a)(3)(A)(i), and (a)(4)(B)(i)(I) apply if the offense involved a "semiautomatic firearm that is capable of accepting a large

F.3d 986 (9th Cir. 2015) ("It is an open question, however, whether this residual clause [in §4B1.2(a)] remains valid in the light of *Johnson*…).

[75] An "antique firearm" is defined at 18 U.S.C. § 921(a)(16) to mean, generally, (A) any firearm manufactured before 1898, (B) a replica of a firearm manufactured before 1898, or (C) a muzzle loading firearm designed to use black powder.

[76] *See*, *e.g.*, United States v. Davis, 668 F.3d 576 (8th Cir. 2012); United States v. Gwyn, 481 F.3d 849 (D.C. Cir. 2007) (faulty firing pin); United States v. Rivera, 415 F.3d 284 (2d Cir. 2005) (firing pin broken; firing pin channel blocked); United States v. Brown, 117 F.3d 353 (7th Cir. 1997) (firing pin removed by undercover law enforcement agent); United States v. Hunter, 101 F.3d 82 (9th Cir. 1996) (firing pin bent); United States v. Yannott, 42 F.3d 999 (6th Cir. 1994) (firing pin broken); United States v. Ruiz, 986 F.2d 905 (5th Cir. 1993) (damaged hammer); United States v. Martinez, 912 F.2d 419 (10th Cir. 1990) (unloaded firearm); United States v. York, 830 F.2d 885 (8th Cir. 1987) (missing firing pin).

capacity magazine." As defined in Application Note 2, "a 'semiautomatic firearm that is capable of accepting a large capacity magazine' means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm", but does *not* mean "a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition." One circuit has found that application of the alternative offense level at §2K2.1(a)(3) is applicable to the possession of an inoperable semiautomatic assault weapon unless the weapon has been rendered permanently inoperable.[77]

A provision of the National Firearms Act,[78] 26 U.S.C. § 5845(a), separately defines "firearm" in a more limited fashion than 18 U.S.C. § 921(a)(3). Its definition includes certain shotguns, rifles, machineguns, silencers, destructive devices, and "any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire."[79] Section 5845's definition excludes antique firearms[80] and those found to be "primarily . . . collector's item[s]."

The Commission recently promulgated an amendment to clarify the definition of the term "crime of violence" in §4B1.2.[81] This amendment did not change the "elements clause" of the definition, but modified the "enumerated clause" and removed the "residual clause" completely. Under the new definition, a crime of violence is a federal or state offense punishable by a term of imprisonment exceeding one year that has as an element the use, attempted use, or threated use of physical force against another person. The guideline now specifies several offenses that fit in this category, including murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a)or explosive material as defined in 18 U.S.C. § 841(c).

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77 *See* United States v. Davis, 668 F.3d 576 (8th Cir. 2012).

78 *See* Pub. L. No. 73-757, 48 Stat. 1236, as amended by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1230.

79 *See* 26 U.S.C. § 5845(e).

80 Like 18 U.S.C. § 921, 26 U.S.C. § 5845(g) defines "antique firearm" to mean, generally, any firearm manufactured before 1898 or a replica of such a firearm. Unlike § 921, a muzzle loading firearm designed to use black powder is not included under § 5845.

81 App. C., amend 798 (effect. Aug. 1, 2016).

The commentary to the guideline similarly defines the term "controlled substance offense" by reference to §4B1.2, which in turn defines the term as any felony violation of a law "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense" the substance. As with "crime of violence," some of the issues surrounding the definition of this term are discussed separately below; *see* Section VII.B, *infra*.

At 18 U.S.C. §§ 922(g) and (n), referenced in Application Note 3 to §2K2.1, a defendant is a prohibited person, for purposes of this section, if he: has been convicted of a crime punishable by more than one year of imprisonment; "is a fugitive from justice;" "is an unlawful user of or addicted to any controlled substance;" "has been adjudicated as a mental defective or . . . has been committed to a mental institution;" is an illegal alien or a non-citizen in the country pursuant to certain types of visas; has been dishonorably discharged from the Armed Forces; has renounced his citizenship; is subject to certain court orders relating to domestic violence; has been convicted of a misdemeanor crime of domestic violence; or is under indictment for a crime punishable by imprisonment for a term exceeding one year.

C. Specific Offense Characteristics

The specific offense characteristics represent various increases or decreases to the base offense level described above. A number of common application issues arise when determining whether a particular specific offense characteristic applies.

1. Multiple Firearms

If a defendant possesses three or more firearms, §2K2.1(b)(1) specifies an increase in the base offense level of two, four, six, eight or ten levels, depending on the number of firearms.

In determining the number of firearms possessed for purposes of this specific offense characteristic, it is important to note that §2K2.1 is listed at §3D1.2(d) and therefore is subject to the provisions of §1B1.3(a)(2). As a result, if a court finds by a preponderance of the evidence that the defendant illegally possessed firearms other than those charged in the indictment as a part of the same course of conduct, or as part of a common scheme or plan with the charged firearm(s), the additional firearms will also be counted.

Application Note 5 to this guideline also emphasizes that any firearms *lawfully* possessed by the defendant are *not* counted. Courts have reached different conclusions about whether a firearm illegally possessed under state law but legal under federal law is counted for purposes of the enhancement.[82] Traditional doctrines of constructive possession may apply.[83]

The First Circuit recently held, in *United States v. Matos-de-Jesus*,[84] that the district court did not err in varying upwards based in part on the defendant's possession of two firearms. The defendant argued that because §2K2.1(b)(1) increases penalties for possession of three or more firearms, the guidelines treat possession of one or two firearms the same and that considering the second firearm operated as impermissible double counting. The court rejected this argument, finding that the guidelines did not address possession of two firearms and nothing in the guidelines or any federal criminal statute prohibited consideration of this factor.[85]

2. Sporting Purposes or Collection

For certain defendants, a reduction in the offense level is specified where the court finds that the defendant "possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition."[86] If the court finds that this provision applies, the offense level is reduced to six. The reduction does not apply, however, to base offense levels determined under subsections (a)(1)—(a)(5) (offense levels 26—18) of §2K2.1. The defendant bears the burden of proving the applicability of this reduction.[87] However, the guidelines do not state a requirement that a defendant produce evidence of actual *use* of the firearms in question, only that the firearms were *possessed* for sporting or collection purposes.[88] A district court's finding is reviewed for clear error on appeal.[89] Applicability of the reduction is determined by examining the "surrounding circumstances" including "the number and

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82 *Compare* United States v. Gill, 864 F.3d 1279, 1280–81 (11th Cir. 2017) (firearm can be counted under 2K2.1(b)(1) if illegal under state law even if legal under federal law), *with* United States v. Ahmad, 202 F.3d 588 (2d Cir. 2000) (only firearms illegal under federal law count for purposes of enhancement).

83 *See, e.g.*, United States v. Eastham, 618 F. App'x. 421, 423 (10th Cir. 2015) ("To establish possession, the government can show either actual or constructive possession of the firearms.").

84 856F.3d 174 (1st Cir. 2017).

85 *Id.* at 178–79.

86 USSG §2K2.1(b)(2).

87 United States v. Keller, 947 F.2d 739 (5th Cir. 1991).

88 United States v. Mason, 692 F.3d 178 (2d Cir. 2012).

89 *See* United States v. Massey, 462 F.3d 843 (8th Cir. 2006).

type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (*e.g.*, prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law."[90] Selling weapons will not disqualify a defendant from this reduction, "unless the sales are so extensive that the defendant becomes a dealer (a person who trades for profit) rather than a collector (a person who trades for betterment of his holdings)."[91] "Plinking," a form of target shooting for amusement and recreation, can be a sporting purpose under the guidelines.[92]

If the defendant admits, or the evidence indicates, that he possessed the gun for personal protection, the reduction does not apply, as the provision specifies that the firearm must be possessed *solely* for lawful sporting purposes or collection.[93]

3. Stolen Firearms/Altered or Obliterated Serial Numbers

Section 2K2.1(b)(4) provides for an enhancement where a firearm is stolen or has an altered serial number. Prior to November 1, 2006, possession of either stolen firearms or firearms with altered or obliterated serial numbers subjected a defendant to a 2-level enhancement. After Amendment 691, stolen firearms still lead to a 2-level enhancement, but firearms with altered or obliterated serial numbers lead to a 4-level enhancement. Note

[90] USSG §2K2.1(b)(2), comment (n.6).

[91] United States v. Miller, 547 F.3d 718, 721 (7th Cir. 2008) (citing United States v. Clingan, 254 F.3d 624 (6th Cir. 2001)).

[92] *See* United States v. Hanson, 534 F.3d 1315 (10th Cir. 2008) (citing United States v. Lewitzke, 176 F.3d 1022 (7th Cir. 1999); United States v. Bossinger, 12 F.3d 28 (3d Cir. 1993)).

[93] United States v. Moore, 860 F.3d 1076 (8th Cir. 2017) (evidence of the defendant's interest in hunting, fishing, and gun competitions was insufficient where defendant acknowledged gun was also for protection); United States v. Wyckoff, 918 F.2d 925 (11th Cir. 1990).

that a defendant need not have *known* that a firearm he illegally possessed was stolen[94] or had an altered or obliterated serial number.[95]

If the defendant steals the firearm in a burglary, the enhancement applies.[96] Courts have held that for purposes of the enhancement, the term "stolen" should be interpreted broadly and that a gun can be classified as stolen once taken from the owner without permission even if the defendant did not personally steal it from the owner.[97]

The Ninth Circuit has held that "the phrase 'altered or obliterated' cannot support the contention that a firearm's serial number must be rendered scientifically untraceable for" the provision to apply.[98] Rather, the court said, the provision applies when the serial number "is materially changed in a way that makes accurate information less accessible."[99]

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[94] *See* United States v. Gonzalez, 857 F.3d 46 (1st Cir. 2017) (lack of *mens rea* requirement does not violate due process and is not contrary to congressional intent); United States v. Taylor, 659 F.3d 339, 343–44 (4th Cir. 2011) (holding that the lack of a scienter requirement in the stolen firearm enhancement is permissible); United States v. Martinez, 339 F.3d 759, 761–62 (8th Cir. 2003) (joining other circuits holding the enhancement's lack of a scienter requirement does not raise due process concerns); United States v. Murphy, 96 F.3d 846, 848–49 (6th Cir. 1996) (holding the enhancement does not violate due process despite the absence of a scienter requirement); United States v. Griffiths, 41 F.3d 844 (2d Cir. 1994) (same); United States v. Mobley, 956 F.2d 450 (3d Cir. 1992) (same); United States v. Goodell, 990 F.2d 497, 499–501 (9th Cir. 1993) (same); United States v. Richardson, 8 F.3d 769 (11th Cir. 1993) (same); United States v. Schnell, 982 F.2d 216, 219–22 (7th Cir. 1992) (recounting that the Sentencing Commission intends the enhancement to apply regardless of defendant's knowledge that the firearm is stolen); United States v. Taylor, 937 F.2d 676, 682 (D.C. Cir. 1991) (same); United States v. Singleton, 946 F.2d 23, 26–27 (5th Cir. 1991) (lack of scienter permissible).

[95] *See* United States v. Perez, 585 F.3d 880, 883 (5th Cir. 2009) (holding that the enhancement does not require defendant to know the serial number is altered or obliterated); United States v. Webb, 403 F.3d 373 (6th Cir. 2005) (same); United States v. Abernathy, 83 F.3d 17, 19 (1st Cir. 1996) ("[T]his enhancement explicitly applies 'whether or not the defendant knew or had reason to believe that the firearm . . . had an altered or obliterated serial number.' "); United States v. Williams, 49 F.3d 92 (2d Cir. 1995) ("Nor is due process offended by strict liability construction of [the enhancement] …."); United States v. Schnell, 982 F.2d 216, 219–22 (7th Cir. 1992) (stating absence of the enhancement's scienter requirement does not violate substantive due process); United States v. Shabazz, 221 F. App'x 529 (9th Cir. 2007) ("[T]he enhancement applies without regard to a defendant's mental state."); United States v. McMahon, 153 F.3d 729 (10th Cir. 1998) (same); United States v. Starr, 361 F. App'x 60 (11th Cir. 2010) (same); *see also* United States v. Leake, 396 F. App'x 898, 905 (3d Cir. 2010) (stating that *Kimbrough* does not force a district court to analyze the empirical grounding of the enhancement's lack of a *mens rea* requirement).

[96] United States v. Goff, 314 F.3d 1248, 1249 (10th Cir. 2003) (collecting cases); United States v. Hurst, 228 F.3d 751 (6th Cir. 2000).

[97] United States v. Colby, 882 F.3d 267 (1st Cir. Feb. 14, 2018) (gun was "stolen" where a friend had taken the gun from her mother's closet without permission and another friend took the gun from her friend's closet).

[98] United States v. Carter, 421 F.3d 909, 916 (9th Cir. 2005).

[99] *Id.*; *see also* United States v. Perez, 585 F.3d 880 (5th Cir. 2009) (holding that the district court did not err in finding that the serial number of a firearm was materially changed even though damage to the number did not render it unreadable).

The enhancement applies even where partially obliterated serial numbers can be discerned through use of microscopy or other techniques.[100] The First, Eighth, and Eleventh Circuits have held that if a firearm has more than one serial number on it, only one of the serial numbers needs to be altered to trigger the enhancement.[101]

To avoid double counting, Application Note 8 states that the enhancement should not apply if the only offense to which §2K2.1 applies is one of several specified offenses themselves involving stolen firearms or firearms with altered or obliterated serial numbers and the base offense level is determined under subsection (a)(7).[102]

4. Trafficking

The guideline provides a 4-level enhancement if the defendant trafficked in firearms. Application Note 13(A) defines "trafficking" for purposes of this enhancement, requiring two elements: the defendant must have "transported, transferred, or otherwise disposed of two or more firearms to another individual, or received [such] firearms with the intent to [do so]" *and* the defendant must have known or had reason to believe these acts would cause the firearms to be transferred to an individual who either (i) could not legally possess them or (ii) who intended to use or dispose of them unlawfully.[103] The Sixth Circuit recently interpreted the requirement at (b)(5) that two or more firearms be transferred to "*another individual*" to mean that that at least two firearms must be transferred to the same individual, and not to multiple individuals in the aggregate.[104]

Where a defendant transfers firearms to an undercover agent posing as a prohibited person, the enhancement will apply.[105]

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[100] *See*, *e.g.*, United States v. Jones, 643 F.3d 257 (8th Cir. 2011).

[101] United States v. Serrano-Mercado, 784 F.3d 838, 850 (1st Cir. 2015); United States v. Thigpen, 848 F.3d 841, 845–46 (8th Cir. 2017); United States v. Warren, 820 F.3d 406, 408 (11th Cir. 2016).

[102] *See*, *e.g.*, United States v. Dudley, 509 F. App'x 739 (10th Cir. 2013).

[103] *See, e.g.*, United States v. Garcia, 635 F.3d 472 (10th Cir. 2011); United States v. Juarez, 626 F.3d 246, 252–53 (5th Cir. 2010) (finding the clandestine nature of the firearms transactions and $200 premium per firearm sufficient to cause reason to believe the weapons were intended for unlawful use (export to Mexican drug cartels) and justified the enhancement).

[104] United States v. Henry, 819 F.3d 856 (6th Cir. 2016) (improper to apply enhancement where defendant sold one firearm to confidential informant and one firearm to undercover agent; " 'Another' indicates that the noun that follows is singular.").

[105] *See, e.g.*, *id.* at 870 ("[T]he agent need not have actually been a felon for §2K2.1(b)(5) to apply."); United States v. Fields, 608 F. App'x 806, 813 (11th Cir. 2015) ("Because nothing in the Guidelines commentary suggests that defendant's belief must be true, Fields' focus on the fact he transferred firearms solely to an undercover officer is unpersuasive."); United States v. Sacus, 784 F.3d 1214, 1218 (8th Cir. 2015)

Application Note 13(C) states that where "the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted."[106]

Application Note 13(D) explains that if the defendant both possessed and trafficked three or more firearms, *both* the specific offense characteristics for number of firearms and trafficking would apply. The Second, Fifth, and Seventh Circuits have held that it is impermissible double counting to apply a §2K2.1(b)(5) "trafficking enhancement" in combination with a §2K2.1(b)(6) "another felony offense" enhancement when the they are based on the same trafficking offense.[107]

5. Firearms Leaving the United States

Section 2K2.1(b)(6)(A) provides for an enhancement where the defendant "possessed any firearm or ammunition while leaving or attempting to leave the United States" or possessed or transferred the same with knowledge, intent or reason to believe it would be transported outside the United States. Prior to 2011, when the Commission added subsection (b)(6)(A), some courts applied what is now §2K2.1(b)(6)(B) to cases in which the defendant transported or attempted to transport firearms across an international border of the United States. Those courts concluded that because transporting a firearm outside the United States is generally a felony under federal law, such conduct may qualify as "another felony offense" for purposes of subsection (b)(6).[108]

For clarity, and to promote consistency of application, in 2011 the Commission amended §2K2.1 to add a new prong (A) in subsection (b)(6) that applies "if the defendant possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transferred out of the United States," and redesignated

(affirming enhancement where defendant sold firearms to undercover agent who claimed to have felony convictions).

106 *See, e.g.*, United States v. Hernandez, 633 F.3d 370 (5th Cir. 2011) (affirming an upward departure pursuant to §5K2.0 for trafficking 103 firearms to Mexican drug cartels).

107 United States v. Young, 811 F.3d 592 (2nd Cir. 2016); United States v. Guzman, 623 F. App'x 151 (5th Cir. 2015); United States v. Johns, 732 F.3d 736 (7th Cir. 2013); *see also* United States v. Velasquez, 825 F.3d 257, 259 (5th Cir. 2016) ("Although our opinion in *Guzman* is unpublished, it is nonetheless persuasive.").

108 *See*, *e.g.*, United States v. Juarez, 626 F.3d 246 (5th Cir. 2010) (holding that, under the guideline as amended by the Commission in 2008, the district court did not plainly err in applying §2K2.1(b)(6) to a defendant who transferred firearms with reason to believe they would be taken across the border in a manner that would violate 22 U.S.C. § 2778(b) and (c), which prohibits, among other things, the unlicensed export of defense articles and punishes such violations by up to 20 years' imprisonment); *see also* discussion *supra* regarding 22 U.S.C. § 2778 and §2M5.2.

the existing provision as prong (B).[109] Under the amendment, a defendant receives a 4-level enhancement and minimum offense level 18 if either prong applies.

6. Firearm or Ammunition Possessed "in connection with" Another Offense

Section 2K2.1(b)(6)(B) provides an enhancement if the defendant "used or possessed any firearm or ammunition *in connection with* another felony offense . . . ."[110] Application Note 14 to §2K2.1 provides that a firearm or ammunition is possessed "in connection with" an offense if it "facilitated, or had the potential of facilitating" the offense.[111] The enhancement applies equally to firearms and ammunition only cases.

Application Note 14 further discusses the "in connection with" requirement when the other offense is burglary, providing that the firearm *is* possessed in connection with a burglary when the defendant finds and takes the firearm in the course of committing the burglary. The defendant need not have used the firearm in any other way in the course of the burglary.

When the other offense is a drug trafficking offense, the application note explains that if "a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia," it is possessed "in connection with" the drug trafficking offense. Some courts have interpreted the guideline to mean that, in drug trafficking cases, "[t]he enhancement must be imposed unless it is clearly improbable that [the defendant] possessed the firearm in connection with another felony offense."[112] In such cases, then, the defendant must demonstrate that it is "clearly improbable" that the required relationship exists in order to avoid the enhancement. (The same rule applies to the enhancement at §2D1.1(b)(1), which provides a 2-level enhancement in drug trafficking cases "[i]f a dangerous weapon (including a firearm) was possessed."). Courts have varied in whether they find proximity alone to be sufficient in these cases and the degree of fact-

[109] *See* USSG App. C, amend. 753 (Nov. 1, 2011).

[110] A 2011 amendment redesignated the "in connection with" enhancement at §2K2.1(b)(6) as §2K2.1(b)(6)(B). *See* USSG App. C, amend. 753 (Nov. 1, 2011).

[111] Prior to 2006, there was a split among the circuits regarding the interpretation of the "in connection with" requirement of §2K2.1(b)(6)(B). Most circuits applied the rule announced by the Supreme Court in *Smith v. United States*, in which the Court interpreted the phrase "in relation to" as it is used in 18 U.S.C. § 924(c)(1); "the firearm must have some purpose or effect with respect to the . . . crime; its presence or involvement cannot be the result of accident or coincidence." Other circuits declined to adopt this standard. The Commission resolved the circuit conflict in 2006, adopting the majority position in Amendment 691.

[112] United States v. Agee, 333 F.3d 864, 866 (8th Cir. 2003).

finding required to find a nexus between the drugs and guns.[113] Typically, where the defendant has exchanged drugs for guns, the enhancement will apply.[114]

The Eighth Circuit, however, emphasized one limitation on this rule: in a case in which the defendant was not alleged to have been a drug trafficker or to have carried the drugs and firearm outside his home, and the "other offense" in question was possession of trace amounts of methamphetamine (residue in a baggie), the court reversed the district court's application of the enhancement, concluding that "the mere presence of drug residue . . . and firearms alone is [in]sufficient to prove the 'in connection with' requirement . . . when the 'felony offense' is drug possession."[115] However, where a defendant has "user" amounts of drugs, more than mere residue, and there are other factors that indicate that the firearm could facilitate another felony, the enhancement may apply.[116]

Recently, in *United States v. Jackson*,[117] the Sixth Circuit reversed application of the enhancement where a defendant made separate sales of a gun and drugs to a confidential informant. The court explained that, although the defendant sold "both a gun and drugs in quick succession," the Government's burden was to prove that the gun facilitated or had the potential of facilitating the other offense in some way and "the conduct here does not

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113 *Compare* United States v. Clinton, 825 F.3d 809, 813–15 (7th Cir. 2016) (reversing enhancement because "there was little evidence regarding [defendant's] drug trafficking activities that would support a determination that the firearm" facilitated any offense: firearm kept in closet in bedroom without any evidence of drugs was not in close enough proximity to drug evidence in living room under couch and error to find drugs were exchanged for a weapon where factual finding was merely that purchaser was a drug addict) *with* United States v. Johnson, 654 F. App'x 427, 428 (11th Cir. 2016) ("Mere possession of a firearm can be enough to apply a sentencing enhancement because drugs and guns generally go together, and the firearm was not required to serve a purpose related to the crime.").

114 *See, e.g.*, United States v. Schmitt, 770 F.3d 524, 538–40 (7th Cir. 2014) (enhancement properly applied where preponderance of the evidence supported a finding that he purchased the firearm in exchange for cash and drugs and sold drugs in order to obtain the firearm); *Clinton*, 825 F.3d at 813 ("We have held that the §2K2.1(b)(6)(B) enhancement is proper when the defendant has engaged in an exchange of drugs for a weapon."). *But see* United States v. Gates, 845 F.3d 310 (7th Cir. 2017) (error to apply enhancement where defendant accepted gun as collateral for drugs and then sold gun to confidential informant for money and also gave informant drugs; in neither case was the gun used to facilitate a drug crime).

115 United States v. Smith, 535 F.3d 883, 886 (8th Cir. 2008); *cf.* United States v. Butler, 594 F.3d 955, 966 (8th Cir. 2010) (distinguishing *Smith* when the defendant possessed more than a "'user' amount of drugs"); *see also* United States v. Jeffries, 587 F.3d 690, 694 (5th Cir. 2009) (drug-possession felonies trigger enhancement only if the court makes an affirmative finding that the firearm facilitated or had the potential to facilitate the drug possession); United States v. Johnson, 846 F.3d 1249, 1250–51 (8th Cir. 2017) (same).

116 *See* United States v. Jarvis, 814 F.3d 936, 938 (8th Cir. 2016) (enhancement appropriate even though felony offense was not trafficking because defendant left home with heroin and a loaded firearm in the same pocket and defendant had prior drug distribution conviction).

117 877 F.3d 231, 242–43 (6th Cir. 2017).

provide sufficient reason to conclude that these were anything but independent sales of guns and drugs—both illegal and rightly punishable, but not subject to the extra punishment that our laws reserve for those who make the bad choice of mixing the two."[118]

In 2014, the Commission resolved another circuit split affecting both the (b)(6)(B) SOC and the (c)(1) cross reference. Circuits had disagreed over whether certain relevant conduct principles in §1B1.3(a)(2) operated to restrict application of these enhancements so that they applied only to offenses that would "group" under the rule in §3D1.2(c).[119] Amendment 784 clarified that there was no such restriction; the SOC may apply to "grouping" and "non-grouping" offenses alike.

D. CROSS REFERENCE

The cross reference provides for the use of another guideline "if the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense" and "if the resulting offense level is greater than that determined above."

Application Note 14(C) defines "another offense" for purposes of this provision as "any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained." Subsection (c)(1)(A) directs the sentencing court to apply §2X1.1 "in respect to that other offense . . . ." If death resulted, subsection (c)(1)(B) directs the sentencing court to use the most analogous homicide offense guideline.

As noted above, Amendment 784 resolved a circuit split over whether the cross reference (and the related (b)(6)(B) SOC) could be applied only to "groupable" offenses by clarifying that there was no such limitation. Amendment 784 also, however, restricted the application of the (c)(1) cross reference to situations where the firearm involved in the other offense was the same firearm (or one of the same firearms) "cited in the offense of conviction." Note that this restriction applies only to the cross reference and not to the (b)(6)(B) SOC.

The cross reference also applies if the defendant possessed or transferred a firearm "with knowledge or intent" that the firearm would be used or possessed in connection with

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118 *Id.* at 242–43.

119 *Compare* United States v. Horton, 693 F.3d 463, 478–79 (4th Cir. 2012) (holding that the (c)(1) cross reference could not be applied to the non-grouping offense of murder) *with* United States v. Kulick, 629 F.3d 165, 170 (3d Cir. 2010) (holding that the (c)(1) cross reference could be applied to the non-grouping offense of extortion).

another offense. Where the cross reference is applied because the defendant knew it would be used or possessed in connection with another offense, the defendant need not have known what specific offense was going to be committed, only that another offense was going to be committed. However, note that while the 4-level enhancement at §2K2.1(b)(6)(B) can apply if the defendant possessed or transferred a firearm with "reason to believe" that it would be used in connection with another felony offense, the cross reference requires knowledge or intent.

If the cross reference directs the court to a guideline that itself contains a firearm enhancement, courts have generally held that the firearm enhancement should be applied.[120]

E. DEPARTURES

The commentary to the guideline suggests upward departures in several different circumstances. Application Note 7 suggests that, when the offense involves a destructive device, an upward departure may be warranted when "the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created" are not adequately accounted for by the guideline. By way of example, the application note contrasts "a pipe bomb in a populated train station" with "an incendiary device in an isolated area" because the former presents "a substantially greater risk of death or serious bodily injury" than the latter. The application note also references several specific upward departures in Chapter Five that might apply in such cases, §§5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).

Application Note 11 suggests three other circumstances that may warrant an upward departure. The first is where the number of firearms involved in the offense "substantially exceeded 200." The second is where multiple weapons of particular types are involved: specifically, NFA weapons, "military type assault rifles, [and] non-detectable ('plastic') firearms." The third is where the offense involves "large quantities of armor-piercing ammunition."

IV. GUIDELINE ENHANCEMENTS FOR FIREARMS OUTSIDE §2K2.1

The guidelines provide for increased offense levels through specific offense characteristics that penalize a range of firearm-related conduct.

[120] *See* United States v. Webb, 665 F.3d 1380 (11th Cir. 2012); United States v. Patterson, 947 F.2d 635 (2d Cir. 1991); United States v. Wheelwright, 918 F.2d 226 (1st Cir. 1990). *But see* United States v. Concepcion, 983 F.2d 369 (2d Cir. 1992) ("astronomical" increase in defendant's offense level from applying cross reference provisions required remand to district court to consider whether a departure was warranted).

A. Section 2D1.1(b)(1) - Possession of Firearm During Commission of Drug Offense

In §2D1.1(b), the drug trafficking guideline, two offense levels are added if a firearm was possessed during a drug trafficking offense. These levels are added if a firearm was present unless it is clearly improbable the weapon was connected with the offense.[121]

Section 2D1.1(b)(1) applies where the defendant possesses a firearm in connection with unlawful drug activities. Possession can be actual or constructive, meaning the defendant is able to exercise control or dominion over the firearm.[122] Presence, not use, is the determining factor.[123] However, application of the §2D1.1(b)(1) enhancement may constitute impermissible double punishment if it is levied in conjunction with a sentence for violating 18 U.S.C. § 924(c).[124]

In most circuits, the government must first show the firearm was present when the unlawful activity occurred. The burden then shifts to the defendant to prove it was "clearly improbable" that the weapon had a nexus with the unlawful activity.[125] In conspiracy cases, the reasonable foreseeability that a weapon may be present can be enough to prove possession.[126]

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[121] *See* USSG §2D1.1, comment. (n.11).

[122] United States v. Rea, 621 F.3d 595, 606 (7th Cir. 2010) ("The defendant need not have actual possession of the weapon; constructive possession is sufficient.") (internal citations omitted) United States v. Keszthelyi, 308 F.3d 557, 578 (6th Cir. 2002) ("Constructive possession of a firearm is sufficient and may be established by defendant's ownership, dominion, or control over the item itself, or dominion over the premises where the item is located.") (internal citation and quotation marks omitted); United States v. Haren, 952 F.2d 190, 198 (8th Cir. 1991) ("To receive an enhanced sentence, the defendant need not actually have the weapon in hand; constructive possession is sufficient.").

[123] *See, e.g.,* United States v. Smythe, 363 F.3d 127, 129 (2d Cir. 2004) ("The [g]uideline is a *per se* rule that does not require a case-by-case determination that firearm possession made a particular transaction more dangerous."); United States v. Manigan, 592 F.3d 621, 629 (4th Cir. 2010) ("[G]uns found in close proximity to drug activity are presumptively connected to that activity." (quoting United States v. Corral, 324 F.3d 866, 873 (7th Cir. 2003))).

[124] *See*, *e.g.*, United States v. Cervantes, 706 F.3d 603 (5th Cir. 2013).

[125] *See*, *e.g.*, United States v. Solorio, 337 F.3d 580 (6th Cir. 2003) (the government has the initial burden of showing by a preponderance of the evidence that the defendant possessed the firearm; thereafter, the burden shifts to the defendant to demonstrate that it was clearly improbable that the weapon was connected to the offense); United States v. Salado, 339 F.3d 285 (5th Cir. 2003) (the government has the burden of proof under §2D1.1 of showing by a preponderance of the evidence that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant); United States v. Drozdowski, 313 F.3d 819 (3d Cir. 2002) (courts rely on a number of factors in making the "clearly improbable" determination, including: (i) the type of gun involved; (ii) whether the gun was loaded; (iii) whether the gun was stored near the drugs or drug paraphernalia; and (iv) whether the gun was accessible).

[126] United States v. Villarreal, 613 F.3d 1344, 1359 (11th Cir. 2010) ("A co-conspirator's possession of a firearm may be attributed to the defendant for purposes of this enhancement if his possession of the firearm

In *United States v. Belitz*, the defendant argued he was not the owner of the gun used to increase his offense level in drug offense.[127] His friend had asked him to repair the gun, and the defendant had it in the room for the friend to pick up. The court found lack of ownership and an innocent reason for possession were irrelevant in determining whether this enhancement applied. The gun was loaded and accessible, and the defendant knew there were drugs in the house. The defendant had not shown that it was clearly improbable that the gun was connected to the drug activity.

B. SECTION 2B3.1(B)(2)—ROBBERY

In §2B3.1, the robbery guideline, a specific offense characteristic provides for increases of three to seven offense levels where a firearm or dangerous weapon was involved in the robbery. The particular increase depends on the type of firearm or weapon and the way the defendant involved the firearm; *i.e.*, whether the firearm was simply possessed during the course of the robbery or whether the defendant used a firearm to threaten or coerce a victim. The different factual scenarios that arise in such cases have presented application issues for the enhancement; some of these are discussed below.

1. Weapon "Discharged," "Brandished or Possessed," or "Otherwise Used"

In applying the weapon enhancement to a robbery offense, one question is whether the firearm, or the dangerous weapon, was merely "brandished" or whether it was "otherwise used" in the course of the robbery. The general rule is that "brandishing" constitutes an implicit threat that force might be used, while a firearm or dangerous weapon is "otherwise used" when the threat becomes more explicit.[128] In other words, the difference between "brandishing" and "otherwise used" is a difference based on the

was reasonably foreseeable by the defendant, occurred while he was a member of the conspiracy, and was in furtherance of the conspiracy."); United States v. Nelson-Rodriguez, 319 F.3d 12 (1st Cir. 2003) (the prosecution does not have to show that the defendant or his co-conspirators actually used the gun in perpetrating the offense or intended to do so); United States v. Perez-Guerrero, 334 F.3d 778 (8th Cir. 2003) (for §2D1.1(b)(1) to apply, the government must demonstrate by a preponderance of the evidence that (i) a weapon was present and (ii) it was not "clearly improbable" that the weapon had a nexus with the conspiracy); United States v. Mendoza, 341 F.3d 687 (8th Cir. 2003) (constructive possession suffices if it is reasonably foreseeable that a co-conspirator would have possessed a weapon); United States v. Topete-Plascencia, 351 F.3d 454 (10th Cir. 2003) (in a drug conspiracy case, the government is not required to prove that the defendant personally possessed the firearm if the possession of weapons was known to the defendant or reasonably foreseeable to him).

127 141 F.3d 815 (8th Cir. 1998).

128 *See* United States v. Johnson, 199 F.3d 123 (3d Cir. 1999).

seriousness of the charged criminal conduct.[129] The guideline creates a hierarchy of culpability for varying degrees of involvement during the criminal offense.[130]

The First Circuit has explained the difference between "brandishing" and "otherwise used" by stating that "specifically leveling a cocked firearm at the head or body of a bank teller or customer, ordering them to move or be quiet according to one's direction, is a cessation of 'brandishing' and the commencement of "otherwise used.'" [131] The Fifth Circuit articulated a similar distinction: "Displaying a weapon without pointing or targeting should be classified as 'brandished,' but pointing the weapon at any individual or group of individuals in a specific manner should be 'otherwise used.'" [132] Other appellate courts have reached similar conclusions.[133]

On its face, §2B3.1(b)(2)(E) refers only to weapons that are dangerous; however, the commentary in Application Note 2 directs sentencing courts to impose a 3-level enhancement whenever a harmless object that appears to be a dangerous weapon is brandished, displayed, or possessed by the defendant. In determining whether an enhancement applies under §2B3.1(b)(2)(E), most circuits apply an objective standard in determining whether an object may be considered a dangerous weapon for the purpose of this subsection.[134] In other words, the ultimate inquiry is whether a reasonable individual would believe that the object is a dangerous weapon under the circumstances.

The Sixth Circuit applied this enhancement where a defendant brought a Styrofoam sandwich box into a bank asserting it was a bomb.[135] In arriving at its conclusion, the Sixth Circuit relied on the Seventh Circuit's holding in *United States v. Hart*, where the court upheld a §2B3.1(b)(2)(E) enhancement when the defendant robbed multiple banks by claiming in each instance that he was carrying a bomb in a box, including a lunch box on

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129 *See* United States v. Miller, 206 F.3d 1051, 1053 (11th Cir. 2000).

130 *See* United States v. Wooden, 169 F.3d 674, 675 (11th Cir. 1999).

131 United States v. LaFortune, 192 F.3d 157, 161–62 (1st Cir. 1999).

132 United States v. Dunigan, 555 F.3d 501, 505 (5th Cir. 2009).

133 *See, e.g.*, United States v. Orr, 312 F.3d 141 (3d Cir. 2002) (holding a gun to someone's head is sufficient to trigger the enhancement—infliction of physical violence or a verbalized threat is not required to trigger the enhancement); United States v. Wooden, 169 F.3d 674, 676 (11th Cir. 1999) (pointing a handgun at the victim's head one-half inch away constituted "otherwise used"); United States v. Johnson, 199 F.3d 123 (3d Cir. 1999) (a threat to hit an employee with a baseball bat is sufficient to trigger the enhancement); United States v. Taylor, 135 F.3d 478, 482–83 (7th Cir. 1998) (poking a gun into the bank employee's back while directing her to produce money was "otherwise use" of that weapon).

134 *See* United States v. Wooten, 689 F.3d 570, 577 (6th Cir. 2012) (collecting cases); United States v. Hart, 226 F.3d 602, 606 (7th Cir. 2000); United States v. Dixon, 982 F.2d 116, 124 (3d Cir. 1992); United States v. Taylor, 960 F.2d 115, 116 (9th Cir. 1992). *But see* United States v. Bates, 213 F.3d 1336 (11th Cir. 2000) (relying on the intent of the perpetrator and the subjective perception of the teller).

135 *See* United States v. Rodriguez, 301 F.3d 666, 669 (6th Cir. 2002).

one occasion and a shoe box that was wrapped inside a bag on another—none of the boxes in fact contained an explosive device.[136] Similarly, courts have held that a concealed hand may serve as an object that appears to be a dangerous weapon, and therefore trigger a §2B3.1(b)(2)(E) enhancement.[137]

The Eighth Circuit concluded that a §2B3.1(b)(2)(E) enhancement was inapplicable where a defendant concealed an inoperable replica of a gun, which was possessed during the commission of a robbery, but never used in any way.[138] The court noted that the only reason it knew the defendant had an inoperable replica gun was because he admitted it to the police; therefore, not only did the defendant lack the actual ability to harm anyone during the robbery, but no one knew he had on his person an object that might have appeared to be dangerous.[139] Accordingly, a §2B3.1(b)(2)(E) enhancement was inappropriate.

2. If a "Threat of Death" was Made

Prior to the 1997 amendment of this guideline, there was a split among the circuits as to what constituted an "express threat of death." This issue arose when the courts were confronted with a robbery where the defendant would either hand a note to the teller stating, "I have a gun," or he would state "I have a gun." Most circuits held that the defendant need not have expressed in words or actions an intention "to kill," provided the words or actions employed were such as to place the victim in objectively reasonable fear for his or her life. On the other hand, the Sixth and Eleventh Circuits held that the term "express" contemplated nothing less than the defendant unambiguously declaring, either through words or unambiguous conduct, that he intended to kill the victim.[140]

Effective November 1, 1997, the Commission resolved this conflict by deleting the word "express" and requiring only a "threat of death."[141] The amendment adopted the

[136] 226 F.3d 602 (7th Cir. 2000).

[137] *See* United States v. Davis, 635 F.3d 1222 (D.C. Cir. 2011) (deciding that a hand concealed in a backpack creates the appearance of a dangerous weapon); United States v. Souther, 221 F.3d 626, 628–29 (4th Cir. 2000) (holding a concealed hand appeared to be a dangerous weapon because defendant presented a note stating he had a gun); United States v. Vincent, 121 F.3d 1451, 1455 (11th Cir. 1997) (stating concealed hand appeared to be a dangerous weapon because it was pressed into the victim's side); United States v. Dixon, 982 F.2d 116, 121–124 (3d Cir. 1992) (noting the concealed hand appeared to be a dangerous weapon because it was draped with a towel).

[138] United States v. Hutton, 252 F.3d 1013, 1017 (8th Cir. 2001).

[139] *Id.*

[140] *See* United States v. Alexander, 88 F.3d 427 (6th Cir. 1996); United States v. Moore, 6 F.3d 715 (11th Cir. 1993).

[141] *See* USSG App. C, amend. 552 (1997).

"majority appellate view which holds that the enhancement applies when the combination of the defendant's actions and words would instill in a reasonable person in the position of the immediate victim a greater amount of fear than necessary to commit the robbery."[142] The deletion of the term "express" from §2B3.1(b)(2)(F) broadened the application of this enhancement.[143]

Since the 1997 amendment, all circuits agree that the statement "I have a gun" constitutes a "threat of death," and qualifies for a 2-level enhancement even though no express threat to use a gun is made. The Sixth and Eleventh Circuits have acknowledged that their pre-amendment interpretations of §2B3.1(b)(2)(F) are no longer good law.[144]

C. Section 2B5.1—Offenses Involving Counterfeit Bearer Obligations of the U.S.

In §2B5.1, the counterfeiting bearer obligations guideline, two offense levels are added if a firearm is used in connection with the offense. If the resulting offense level is less than 13, it is increased to level 13. Bearer obligations include currency and coins, food and postage stamps, and other items generally described as bearer obligations of the United States.[145]

The Third Circuit applied this firearm enhancement in *United States. v. Gregory*.[146] In *Gregory*, the defendant claimed he forgot about a gun in his jacket pocket when he passed counterfeit currency. The district court applied the firearm enhancement under §2B5.1(b)(4), stating prior circuit case law mandated it.[147] The defendant argued the district court must first resolve the factual dispute over whether he possessed the handgun "in connection with" the instant offense. The appeals court stated that for the purposes of §2B5.1 a causal, logical, or other type of relationship must exist between the firearm and instant offense to apply the enhancement.[148]

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142 *Id.*

143 *See* United States v. Soto-Martinez, 317 F.3d 477, 479 (5th Cir. 2003); United States v. Day, 272 F.3d 216 (3d Cir. 2001).

144 *See* United States v. Winbush, 296 F.3d 442 (6th Cir. 2002); United States v. Murphy, 306 F.3d 1087, 1090 (11th Cir. 2002).

145 *See* USSG §2B5.1, comment. (n.2).

146 345 F.3d 225 (3d Cir. 2003).

147 *See* United States v. Loney, 219 F.3d 281 (3d Cir. 2000) (affirming the firearm enhancement under §2K2.1(b)(5) where court found a connection between illicit drugs and the loaded firearm the defendant possessed).

148 *Id*. at 285.

V. STANDARD OF PROOF

A. STATUTES

Guilt on the statutory offenses must be established by guilty plea or by a verdict "beyond a reasonable doubt." Section 924(e), the ACCA, is a mandatory sentencing enhancement that does not have to be charged. In contrast, section 924(c) describes an offense that must be charged, not a mere sentencing enhancement.

B. GUIDELINES

The particular showing that must be made with respect to each specific offense characteristic varies, but like all sentencing factors, the standard of proof is a preponderance of the evidence.

C. CODEFENDANT OR CO-CONSPIRATOR LIABILITY

In practice, defendants are not usually held accountable under section 924(c) for firearms that they did not personally use or carry, although there is no legal impediment to holding them criminally liable under the law of conspiracy for an accomplice's foreseeable use or possession of a firearm during the conspiracy to commit the crime of violence or drug trafficking crime.[149] By contrast, under the guidelines, courts are required to apply the specific offense characteristics based on a defendant's relevant conduct, which generally includes all reasonably foreseeable acts and omissions of others in furtherance of jointly undertaken criminal activity.[150]

VI. APPLICATION ISSUES RELATED TO 18 U.S.C. § 924(c)

A. INTERACTION OF FIREARMS ENHANCEMENTS AND SECTION 924(c)

Application Note 4 instructs that a defendant cannot receive both a guideline enhancement for firearms and a mandatory consecutive sentence for section 924(c) based

[149] *See*, *e.g.*, United States v. Shea, 150 F.3d 44 (1st Cir. 1998) (*recognized as abrogated on other grounds*, United States v. Mojica-Baez, 229 F.3d 292 (1st Cir. 2000)); United States v. Wilson, 135 F.3d 291 (4th Cir. 1998); United States v. Washington, 106 F.3d 983 (D.C. Cir. 1997); United States v. Washington, 106 F.3d 1488 (9th Cir. 1997); United States v. Masotto, 73 F.3d 1233 (2d Cir. 1996); United States v. Myers, 102 F.3d 227 (6th Cir. 1996*);* United States v. Wacker, 72 F.3d 1453 (10th Cir. 1995).

[150] *See*, *e.g.*, United States v. Block, 705 F.3d 755 (7th Cir. 2013).

on the same firearm.[151] Courts have held that this note plainly prohibits an enhancement for possession of any firearm—whether it be the one directly involved in the underlying offense or another firearm, even one in a different location. "If the court imposes a sentence for a drug offense along with a consecutive sentence under 18 U.S.C. § 924(c) based on that drug offense, it simply cannot enhance the sentence for the drug offense for possession of any firearm."[152] The same prohibition applies to fake firearms.[153] And the death threat enhancement is inapplicable when related to the firearm that forms the basis of a section 924(c) sentence.[154]

B. Offenses Under Section 924(c) and Grouping

Because 18 U.S.C. § 924(c) requires that any sentence imposed under that statute run consecutive to any other sentence imposed, 18 U.S.C. § 924(c) counts may not group with any other count charged. This is reflected in the guidelines at §5G1.2(a), which provides that sentences for such offenses "shall be determined by that statute and imposed independently."

Most courts to address the issue have held that if a defendant is convicted of a section 924(c) count and additional counts that would ordinarily group under §3D1.2(c), the other counts still group even though §2K2.4 instructs that if a sentence for a section 924(c) conviction is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristics for use of a firearm in connection with the underlying offense do not apply. Ordinarily, §3D1.2(c) directs that offenses should be "grouped" when they reflect "substantially the same harm," a condition that is met "when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the

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151 *See* USSG §2K2.4, comment. (n.4).

152 *See* United States v. Knobloch, 131 F.3d 366 (3d Cir. 1997). Before 2001, some courts added the enhancement in addition to the section 924(c) sentence where defendant had multiple firearms or when a codefendant also possessed a firearm. *See, e.g.,* United States v. Johnson, 208 F.3d 211 (4th Cir. 2000); United States v. Willett, 90 F.3d 404, 408 (9th Cir. 1996) (2-level enhancement on top of the section 924(c)(1) conviction proper where defendant committed drug trafficking offense with multiple weapons); United States v. Washington, 44 F.3d 1271, 1280–81 (5th Cir. 1995) (enhancement on top of section 924(c) conviction proper where accomplice in the crime had another gun); *accord,* United States v. Kimmons, 965 F.2d 1001, 1011 (11th Cir. 1992), *cert. granted, judgment vacated on other grounds*, Small v. United States, 508 U.S. 902 (1993). However, Amendment 599 changed the language in Application Note 4 to §2K2.4 to clarify that this application was not what the Commission intended, and courts have recognized that this addition is improper. *See, e.g.,* United States v. Aquino, 242 F.3d 859, 864–65 (9th Cir. 2001).

153 *See* United States v. Eubanks, 593 F.3d 645, 649–650 (7th Cir. 2010) (remanding for resentencing because the enhancement at §2B3.1(b)(2)(D) is not applicable to a "plastic B.B. gun").

154 *See* United States v. Katalinic, 510 F.3d 744, 748 (7th Cir. 2007) (joining the Fourth and Sixth Circuit holding the same); s*ee also* United States v. Hazelwood, 398 F.3d 792, 798–800 (6th Cir. 2005); United States v. Reevey, 364 F.3d 151, 158–159 (4th Cir. 2004).

guideline applicable to another of the counts."[155] In a case involving a § 924(c) conviction, however, §2K2.4 provides that "if a sentence [for the 924(c)] conviction] is imposed in conjunction with a sentence for an underlying offense, do not apply the specific offense characteristic" for use of a firearm in connection with the underlying offense that would otherwise apply.[156] Thus, a defendant with a § 924(c) conviction, a drug conviction, and a felon-in-possession conviction will not receive the otherwise applicable SOC at §2D1.1(b)(1) for possessing a firearm in connection with the drug offense, or the SOC at §2K2.1(b)(6)(B) for using a firearm in connection with another felony offense.

The Eighth Circuit held that the drug and felon-in-possession offenses should still be grouped even when a defendant also has a section 924(c) conviction because the conduct is accounted for through the section 924(c) sentence even when the weapon enhancements are not applied.[157] Only the Seventh Circuit has disagreed, holding that the drug and felon-in-possession offenses do not "group" under the "same harm" rule of §3D1.2(c), because those two offenses no longer embody conduct "treated as" an SOC in the other guideline.[158]

VII. CRIMES OF VIOLENCE AND DRUG TRAFFICKING OFFENSES AS PRIOR OFFENSES

As noted in the discussion of §2K2.1, that guideline incorporates by reference the definitions of the terms "crime of violence" and "drug trafficking offense" from §4B1.2, the Career Offender guideline. Although a thorough treatment of all the case law surrounding these definitions is beyond the scope of this primer, the following sections describe some basic concepts and issues that arise in applying these definitions.

A. Relationship to Other Guideline and Statutory Definitions of the Terms

As noted in Section II.B of this primer, there is a close relationship between the definition of the term "violent felony" as that term is used in the ACCA and the term "crime of violence" as that term is used in §4B1.2. When applying these definitions, it is important to be aware that there are other uses of the term "crime of violence" in other parts of the guidelines and the U.S. Code, so careful attention to the specific definition being analyzed is particularly important. For example, 18 U.S.C. § 16 defines the term "crime of violence" in a

[155] USSG §3D1.2(c).

[156] USSG §2K2.4 comment. (n.4).

[157] *See* United States v. Bell, 477 F.3d 607, 616 (8th Cir. 2007); *see also* United States v. Gibbs, 395 F. App'x 248 (6th Cir. 2010); United States v. King, 201 F. App'x 715 (11th Cir. 2006) (reaching the same conclusion in unpublished opinions). *But see* United States v. Espinosa, 539 F.3d 926 (8th Cir. 2008) (where firearms enhancements not sought or applied and offenses not "closely intertwined," drug and firearms counts do not group).

[158] United States v. Sinclair, 770 F.3d 1148, 1158 (7th Cir. 2014).

way that is different from the guidelines' definition of the term in §4B1.2, although many of the same offenses are treated similarly under each definition. Additionally, Application Note 1(B)(iii) to §2L1.2 of the guidelines defines the term "crime of violence" for purposes of that guideline's specific offense characteristics. A similar situation exists with respect to the definitions of "drug trafficking offense" and "controlled substance offense" under various statutes and guidelines, so similar attention must be paid when applying those definitions.

B. DEFINITIONS IN §4B1.2

1. Crime of Violence

For an offense to qualify as a crime of violence under §4B1.2, it must have been "punishable by a term of imprisonment exceeding one year." The term "punishable" signifies that the defendant himself need not have received a sentence in excess of one year; rather, the particular statute of conviction must have carried a possible penalty of greater than one year. The conviction may be under state or federal law.

The definition encompasses two basic types of offenses. One type is an offense that has as an *element* of the offense "the use, attempted use, or threatened use of physical force against the person of another." These may be, for example, robbery offenses that are defined as taking property from the person of another using physical force. The second type are the offenses that are enumerated, namely murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. §5845(a) or explosive material as defined in 18 U.S.C. §841(c).[159]

The categorical approach described at Section II.B above applies to determinations of crimes of violence as well. Application Note 1 also provides that convictions for aiding and abetting, conspiring, and attempting to commit crimes of violence are themselves crimes of violence.[160]

[159] App. C, amend 798 (effect. Aug. 1 2016).

[160] *See* USSG §4B1.2 comment (n.1).

2. Controlled Substance Offense

To qualify as a controlled substance offense under §4B1.2, like a crime of violence, must be punishable by a term of imprisonment of more than one year, and may be a violation of state or federal law.

Two basic types of drug offenses qualify: those that involve "the manufacture, import, export, distribution or dispensing" of drugs (or a counterfeit substance), and those that involve possession with "intent to manufacture, import, export, distribute or dispense" the drugs (or a counterfeit substance). Again, the categorical approach described at Section II.B above applies. Application Note 1 provides that convictions for aiding and abetting, conspiring, and attempting to commit controlled substance offenses are themselves controlled substance offenses.