

RELEVANT CONDUCT-GUNS AND DRUGS

Scenario #1

Defendant Marc Smith plead guilty to a heroin conspiracy that, according to the Indictment, began in February 15, 2017 and ended on December 15, 2017. The total amount of drugs for the conspiracy is 3 kilos of methamphetamine. Smith never sold drugs on the streets; rather, his role was to transport heroin from a supplier in New Jersey to street level dealers in Virginia so the street level dealers could sell the drugs. Smith was paid a flat fee for each trip. The Indictment lists three instances where Smith delivered drugs:

April 1, 2017: 50 grams

May 20, 2017: 50 grams

September 2017: 50 grams

Smith knew that the conspiracy involved many other people but he didn't know who they were. After his last shipment, Smith heard that someone died of a drug overdose from heroin and Smith decided that he would stop transporting drugs. He was arrested for the instant federal offense on January 1, 2019.

1(a): What quantity of drugs will be attributed to Smith?

Answer: 150 grams. Even though the conspiracy amounted to 3 kilos, we first look at the defendant's jointly undertaken criminal conduct. Here, from the facts in front of us, his jointly undertaken criminal conspiracy is three trips, each totaling 50 grams of meth, for a total 150 grams. There is no indication he had any further involvement with others in conspiracy so he cannot be held liable for the entire three kilos. A defendant's scope of jointly undertaken criminal conspiracy is not necessarily equal to the scope of the criminal conspiracy.

1(b): The probation officer reads through the discovery and learns that Smith actually made two other trips from New Jersey to Virginia on the following dates

January 19, 2017: 60 grams of heroin

June 3, 2017: 60 grams of heroin

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After learning this Information, what quantity of drugs would you assign to Smith?

Answer: 270 grams. Drugs are the type of offense for which expanded relevant conduct applies. That means that we can look beyond the offense of conviction to all acts that were within the same course of conduct or common scheme or plan as the offense of the conviction. Here, it appears that these additional trips would be the same course of conduct and/or common scheme or plan as the conduct described in the Indictment because they involve the same type of drugs in the same quantity and the trips have temporal proximity.

Remember, for drug offenses, relevant conduct is not limited to the dates in the Indictment. See §1B1.3(a)(2) and App. Note 5(B).

1(c): Upon further research, you learn that Mr. Smith was stopped by the New Jersey police during his trip on January 19, 2017. He was arrested after a search of his car turned up the drugs. On January 25, 2017, he pleaded guilty to possession of heroin and received a sentence of probation.

Does this information change the drug amount attributed to Smith?

Answer: Yes. The first trip on January 19th that resulted in a conviction will not count for relevant conduct purposes. Application Note 5(c) to U.S.S.G. §1B1.3 states that any conduct “associated” with a prior sentence that occurred before the start of the offense will not count as relevant conduct and is counted as criminal history instead. So, in this case, the drug amount will be reduced by 60 for a total of 210 grams.

1(d): Mr. Smith argues that he is eligible for safety valve under the First Step Act. The government counters that he cannot get safety valve relief because there was a death that resulted as a part of this conspiracy. Specifically, the government has proof that three people died as a result of the drugs distributed during this conspiracy. Therefore, the third criteria; “the offense did not result in death or serious bodily injury”- has not been met.

Is Mr. Smith eligible for safety valve?

Maybe but we need more information. The conspiracy resulted in a death but we don’t know if the death was within Smith’s jointly undertaken criminal conduct. Was Mr. Smith involved with the drugs that led to the death? Did he agree to work with other who distributed the drugs that led to the death?

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Scenario #2

Mr. Howard's home was the subject of a search warrant where the law enforcement officers found two firearms and 35 grams of methamphetamine. The drugs and guns were found together in a locked box in the defendant's closet. Defendant Howard plead guilty to the following offenses:

- Count 1: Conspiracy to distribute methamphetamine in violation of 18 USC 841(a)(1) and (b)(1)(C) – Statutory maximum of 20 years
- Count 2: Felon in possession of a firearm in violation of 18 U.S.C. 922(g)(1) – Statutory maximum of 10 years
- Count 3: Possession of a firearm in connection with a drug trafficking offense – mandatory minimum 5 years

2(a): Does the specific offense characteristic for possession of a dangerous weapon at 2D1.1(b)(1) apply in this case?

Answer: No. The specific offense characteristic (SOC) for possession of firearm cannot be used because of the Possession of a Firearm in Furtherance of a Drug Trafficking Crime charge (18 U.S.C. §924(c)). Section 2K2.4, Application Note 4 indicates, "Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c)"

2(b): Does the specific offense characteristic for possessing a firearm in connection with another felony offense at 2K2.1(b)(6)(B) apply in this case?

Section 2K2.4, Application Note 4 also precludes the application of §2K2.1(b)(6)(B) for the same reasons stated above.

2(c): Do Counts 1 and 2 group?

Two counts – felon in possession and distribution of heroin – group under Rule (c). The firearms guideline includes a specific offense characteristic at (b)(6)(B) for using or possessing any firearm in connection with another felony offense. The drug trafficking guideline includes a specific offense characteristic at (b)(1) adding two levels if a dangerous weapon (including a firearm) was possessed. It does not matter that, because of the § 924(c) count, you don't actually apply either SOC.

The respective SOCs embody the conduct represented in the other count of conviction. The higher of the two offense levels becomes the single offense level for both counts of conviction. The mandatory consecutive sentence for the §924(c) offense is added to the single offense level for the felon in possession and distribution of heroin.

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Scenario #3

Defendant Washington was convicted of the one count Felon in Possession of a Firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Mr. Washington was pulled over for drunk driving. Because he had an outstanding warrant, the officer searched the defendant's vehicle and found a .40 caliber pistol which is the pistol in the 18 U.S.C. §922(g) violation. A subsequent search of the defendant's home resulted in the discovery of six additional firearm. These firearms are not listed in the indictment. One of the firearms found in the home was a sawed-off shotgun that the police were able to trace to a robbery where the security guard was shot and gravely wounded. The security guard was shown a picture of Mr. Washington and positively identified him as the person who shot him.

3(a): Will the defendant get an increase under §2K2.1(b)(1) for number of firearms to include the weapons found at his home?

Answer: Yes, the specific offense characteristic will apply. Remember, firearms are the type of offense for which expanded relevant conduct will apply. That means we are not limited by the Indictment. That means we can look outside the offense of conviction. Here, the defendant is convicted of being a felon in possession of a firearm. That means that any weapon the possessed by the defendant is unlawful so weapons found in the defendant's home are part of his relevant conduct.

3(b): Will the defendant get an increase for use of a firearm in connection with another offense under §2K2.1(b)(6)(B) apply?

Answer: Yes. The specific offense characteristic applies to "any weapon" used in connection with another offense. Because of expanded relevant conduct, we can count any firearm in the relevant conduct determination. Here, we know that that one of the weapons found in the home was used in connection with another offense, the robbery, so the specific offense characteristic applies.

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

Answer: NO. The cross-reference specifically states that the cross reference applies if the weapon was "cited in the offense of conviction." Here, the weapon connected with the robbery was not cited in the Indictment so it cannot be the basis for the cross reference.