

# Primer



## Drug Offenses



Prepared by the  
Office of the General Counsel

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## I. INTRODUCTION

This primer provides an overview of the statutes, sentencing guidelines, and case law applicable to federal drug offenses. Although the primer identifies some of the key cases and concepts, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

## II. THE STATUTORY SCHEME

The most commonly prosecuted federal drug statutes prohibit the manufacture, distribution, importation, and exportation of controlled substances.<sup>1</sup> They also prohibit attempts and conspiracies to do the same.<sup>2</sup> As discussed below, the statutory penalties for these offenses vary based on (A) the quantity of the drug (B) the defendant's prior commission of certain felony offenses, and (C) any serious injury or death that resulted from using the drug. These statutes and guidelines are addressed in this Part of the primer and in Parts III and IV.

Other less frequently prosecuted federal drug statutes, including those prohibiting the distribution of listed chemicals, possession and distribution of drug paraphernalia, and possession of controlled substances, are addressed in Part V of the primer along with the guideline applicable to those statutes.

### A. PROHIBITED CONDUCT: 21 U.S.C. §§ 841(A), 960(A)

The most commonly prosecuted drug offenses are violations of 21 U.S.C. §§ 841(a) and 960(a). Section 841(a) prohibits the knowing or intentional manufacture, distribution, dispensation, or possession with intent to manufacture, distribute or dispense a controlled substance.<sup>3</sup> Section 960(a) prohibits the knowing and intentional importation or exportation of a controlled substance.<sup>4</sup> The statutory penalties for violating these provisions are set forth in 21 U.S.C. §§ 841(b)(1) and 960(b).

### B. STATUTORY PENALTIES: 21 U.S.C. §§ 841(b)(1), 960(b)

#### 1. *Mandatory Minimum Penalties Based on Quantity*

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Both 21 U.S.C. §§ 841(b)(1) and 960(b) require mandatory minimum penalties in certain cases, depending on the quantity and type of controlled substance involved in the

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<sup>1</sup> 21 U.S.C. §§ 841, 960.

<sup>2</sup> Inchoate and conspiracy offenses are subject to the same penalties as completed offenses. *See id.* §§ 846, 963.

<sup>3</sup> *Id.* § 841(a).

<sup>4</sup> *Id.* § 960(a).

offense. When certain quantity thresholds are met, a five-year mandatory minimum penalty and a maximum term of 40 years applies,<sup>5</sup> while larger amounts increase the mandatory minimum to ten years, with a maximum of life imprisonment.<sup>6</sup> Table 1 outlines the quantity thresholds triggering mandatory minimum penalties under these statutes for common controlled substances.

Controlled Substance	5 Year Minimum	10 Year Minimum
Heroin	100 g	1 kg
Cocaine	500 g	5 kg
Cocaine base <sup>7</sup>	28 g	280 g
Methamphetamine (actual)	5 g	50 g
Methamphetamine (mixture)	50 g	500 g
Fentanyl <sup>8</sup>	40 g	400 g
Fentanyl analogue	10 g	100 g
Marijuana	100 kg	1,000 kg

Quantity, as with any fact (other than a prior conviction) that subjects a defendant to a higher statutory minimum or maximum penalty, must be alleged in the charging instrument (such as an indictment) and proved beyond a reasonable doubt.<sup>9</sup> Where the defendant is convicted of several substantive counts, the drug amounts may not be added together to reach a mandatory minimum sentence.<sup>10</sup> Importantly, this approach differs

<sup>5</sup> *Id.* §§ 841(b)(1)(B), 960(b)(2).

<sup>6</sup> *Id.* §§ 841(b)(1)(A), 960(b)(1).

<sup>7</sup> See Part IV.A.4.a. for an explanation of how the term “cocaine base” in the statute differs from the guideline definition in U.S. SENT’G COMM’N, *Guidelines Manual*, §2D1.1(c)(Note D) (Nov. 2021) [hereinafter USSG].

<sup>8</sup> Congress included fentanyl as a Schedule II controlled substance, along with heroin and other opiates. 21 U.S.C. § 812 (Schedule II at (b)(6)). While the term “fentanyl” does not appear again in title 21 of the U.S. Code, sections 841 and 960 establish penalties for a substance called “N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propenamide.” 21 USC §§ 841(b)(1) (A)(vi), 960(b)(1)(F). A federal regulation explains that this substance is “commonly known as fentanyl.” 28 C.F.R. § 50.21(d)(4)(vi).

<sup>9</sup> See, e.g., *Alleyne v. United States*, 570 U.S. 99, 111–16 & n.1 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

<sup>10</sup> See, e.g., *United States v. Harrison*, 241 F.3d 289, 292 (2d Cir. 2001) (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).

from the approach mandated by §2D1.1, discussed below, which requires adding drug quantities to determine the applicable guideline range.<sup>11</sup>

## ***2. Prior Serious Drug Felonies and Serious Violent Felonies***

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Defendants who otherwise would be subject to a five-year mandatory minimum penalty based on quantity (as discussed above) face an increased ten-year mandatory minimum, with a maximum of life imprisonment, if they have a prior conviction for a “serious drug felony offense” or “serious violent felony.”<sup>12</sup> Similarly, a qualifying prior conviction increases a ten-year mandatory minimum to a 15-year mandatory minimum (the maximum remains life).<sup>13</sup> Defendants previously convicted of two or more prior serious drug felonies or serious violent felonies are subject to a 25-year mandatory minimum term of imprisonment.<sup>14</sup>

A “serious drug felony” is defined as an offense (A) involving manufacturing or distribution (or intent to do either) of a federally controlled substance in violation of state or federal law for which the maximum sentence is at least ten years, (B) for which the defendant served more than 12 months of imprisonment, and (C) for which the defendant was released “from any term of imprisonment . . . within 15 years of the commencement of the instant offense.”<sup>15</sup> The term “serious violent felony” is defined as a conviction for any one of a variety of violent offenses “for which the offender served a term of imprisonment of more than 12 months.”<sup>16</sup>

For any sentencing enhancement based on a prior conviction, the government must provide notice of the prior convictions on which it intends to rely pursuant to the procedures set forth in 21 U.S.C. § 851.<sup>17</sup> The court may find prior convictions by a preponderance of the evidence for purposes of sentencing.<sup>18</sup>

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<sup>11</sup> See *infra* Part IV.A.2.

<sup>12</sup> 21 U.S.C. §§ 841(b)(1)(B), 960(b)(2).

<sup>13</sup> *Id.* §§ 841(b)(1)(A), 960(b)(1).

<sup>14</sup> *Id.* §§ 841(b)(1)(A), 960(b)(1).

<sup>15</sup> *Id.* § 802(57) (citing 18 U.S.C. § 924(e)(2)).

<sup>16</sup> *Id.* § 802(58) (citing 18 U.S.C. §§ 113, 3559(c)(2)). Determining whether a prior conviction qualifies as a “serious drug felony” and “serious violent felony” requires applying the categorical approach. See generally U.S. SENT’G COMM’N, PRIMER ON CATEGORICAL APPROACH (2021), <https://www.ussc.gov/guidelines/primers/categorical-approach>.

<sup>17</sup> 21 U.S.C. § 851(a)(1). The defendant’s statutory punishment may not be increased “by reason of one or more prior convictions” unless the government first files an information before trial or before entry of a guilty plea stating the prior convictions on which it intends to rely. *Id.* The defendant then may deny the fact of any prior conviction or challenge its validity, and the court must hold a hearing to “determine any issues” in dispute. *Id.* § 851(c)(1).

<sup>18</sup> See *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998). In *Apprendi v. New Jersey*, the Court preserved *Almendarez-Torres*’s holding regarding prior convictions “as a narrow exception to the general rule” that facts that increase a defendant’s statutory sentence must be found beyond a reasonable

### 3. Death or Serious Bodily Injury Results

Regardless of the quantity, if death or serious bodily injury resulted from a Schedule I or II controlled substance,<sup>19</sup> the mandatory minimum term of imprisonment is 20 years and the maximum is life.<sup>20</sup> Additionally, if the defendant was previously convicted of a qualifying offense<sup>21</sup> and death or serious bodily injury resulted from the use of the substance, the defendant is subject to a mandatory minimum term of life imprisonment.<sup>22</sup>

By way of example, Table 2 illustrates the various mandatory minimum penalties that apply under 21 U.S.C. § 841(b)(1) depending on whether the defendant had a qualifying prior felony conviction, whether death or serious bodily injury resulted, or both.

Statutory Provision	Baseline	Qualifying Prior Conviction	Death or Serious Bodily Injury	Both
21 U.S.C. § 841(b)(1)(A)	10 years	15 years (25 if two or more)	20 years	Life
21 U.S.C. § 841(b)(1)(B)	5 years	10 years	20 years	Life
21 U.S.C. § 841(b)(1)(C)	None	None	20 years	Life

### C. ATTEMPTS AND CONSPIRACIES: 21 U.S.C. §§ 846, 963

Title 21, sections 846 and 963 of the U.S. Code provide the same penalties for “[a]ny person who attempts or conspires to commit any offense” set forth in the respective subchapters.<sup>23</sup>

doubt. 530 U.S. 466, 490 (2000).

<sup>19</sup> Current schedules of controlled substances are published in the Code of Federal Regulations, Title 21, Part 1308. See also DRUG ENF’T ADMIN., U.S. DEP’T OF JUST., CONTROLLED SUBSTANCE SCHEDULES, <https://www.deadiversion.usdoj.gov/schedules/>. Schedules of controlled substances are revised regularly. See 21 U.S.C. § 812.

<sup>20</sup> 21 U.S.C. §§ 841(b)(1)(C), 960(b)(1). “Serious bodily injury” is defined as a “bodily injury which involves (A) a substantial risk of death; (B) protracted and obvious disfigurement; or (C) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” 21 U.S.C. § 802(25). Death or serious bodily injury “results from” the use of the substance if the use was a “but-for cause of the death or injury.” *Burrage v. United States*, 571 U.S. 204, 210–11, 219 (2014).

<sup>21</sup> Unlike for the increased mandatory minimum penalties under sections 841(b)(1)(A)–(B) and 960(b)(1)–(2), a prior drug felony need not be a “serious” drug felony to trigger an elevated sentence under section 841 (b)(1)(C)–(D) and 960(b)(3). As noted above, the government must provide notice of the prior drug felony in compliance with the procedures in 21 U.S.C. § 851.

<sup>22</sup> 21 U.S.C. § 841(b)(1)(A)–(C).

<sup>23</sup> *Id.* §§ 846 (control and enforcement subchapter), 963 (import and export subchapter).



To convict a defendant of an attempted drug offense, the government must prove that the defendant intended the criminal conduct and took a “substantial step” toward that purpose.<sup>24</sup> Arranging the terms and location for a drug deal and taking physical steps to execute the deal may serve as a substantial step toward a distribution offense<sup>25</sup>; purchasing chemicals and equipment for a drug laboratory may serve as a substantial step toward a manufacturing offense.<sup>26</sup>

To convict a defendant of a drug conspiracy, “the [g]overnment must prove beyond a reasonable doubt that two or more people agreed to commit a crime covered by the [drug] conspiracy statute (that a conspiracy existed) and that the defendant knowingly and willfully participated in the agreement (that he was a member of the conspiracy).”<sup>27</sup> A defendant may be convicted of a conspiracy to distribute controlled substances without, for example, ever selling a drug.

The quantities of each of the same type of drug charged and proved beyond a reasonable doubt within the same conspiracy are aggregated to establish the statutory penalties described above.<sup>28</sup> Uncharged drug quantities may not be included to establish statutory penalties.<sup>29</sup>

Conspiracy liability and sentencing liability under the *Guidelines Manual’s* relevant conduct rules are not the same. In general, as explained below in Parts III.B and IV.A.3.a, the relevant conduct rules hold each defendant responsible for all reasonably foreseeable acts of others that are within the scope of a “jointly undertaken criminal activity” and in furtherance of that activity.<sup>30</sup> But because conspiracy counts “may be worded broadly and include the conduct of many participants over a period of time, the scope of the ‘jointly

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<sup>24</sup> United States v. Beltz, 385 F.3d 1158, 1163 (8th Cir. 2004).

<sup>25</sup> See, e.g., United States v. Conley, 875 F.3d 391, 398 (7th Cir. 2017) (“to sustain a conviction for attempt, the government had to prove that Conley intended to possess cocaine with the intent to distribute it and knowingly took a substantial step toward that goal”).

<sup>26</sup> See, e.g., *Beltz*, 385 F.3d at 1163 (“a large number of separated pseudoephedrine tablets, an extensive amount of equipment used in the manufacture of methamphetamine, substances resulting from various stages of production of the drug, and a substantial amount of money and firearms” seized from defendant’s residence supported finding of a substantial step).

<sup>27</sup> United States v. Williams, 974 F.3d 320, 367 (3d Cir. 2020) (quoting *Smith v. United States*, 568 U.S. 106, 110 (2013)).

<sup>28</sup> See, e.g., United States v. Pressley, 469 F.3d 63, 66 (2d Cir. 2006) (collecting cases and explaining that “with respect to sentencing any given member of the conspiracy pursuant to § 841(b), the violation ‘involv[es]’ the aggregate quantity of all the subsidiary transactions attributable to that particular member”).

<sup>29</sup> 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”).

<sup>30</sup> USSG §1B1.3(a)(1)(B).

undertaken criminal activity’ is not necessarily the same as the scope of the entire conspiracy.”<sup>31</sup>

### III. OVERVIEW OF DRUG GUIDELINES

The guidelines instruct users to determine the applicable Chapter Two offense guideline by referring to Appendix A (Statutory Index) for the offense of conviction (*i.e.*, the offense conduct of which the defendant was convicted). Chapter 2, Part D (Offenses Involving Drugs and Narco-Terrorism) sets forth the applicable guidelines for violations of federal drug laws. There are 17 drug guidelines divided into three subparts: 12 guidelines apply to drug trafficking and manufacturing offenses,<sup>32</sup> three guidelines apply to unlawful possession offenses,<sup>33</sup> and two guidelines apply to regulatory violations.<sup>34</sup>

This primer discusses §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) at length<sup>35</sup> before addressing the drug trafficking and manufacturing guidelines at §§2D1.2, 2D1.6, 2D1.8, 2D1.11, and 2D1.12 and the unlawful possession guideline at §2D2.1.<sup>36</sup> This Part first explains several important concepts that apply across the drug guidelines, such as how to determine the base offense level for most drug offenses and how relevant conduct may factor into the guidelines analysis.

#### A. DETERMINING THE BASE OFFENSE LEVEL

After identifying the applicable Chapter Two, Part D offense guideline, the next step is to determine the base offense level.<sup>37</sup> The Drug Quantity Table in §2D1.1(c) provides the base offense level for the vast majority of offenses to which §2D1.1 applies and also applies via reference from many of the other, less frequently applied Part D offense guidelines.<sup>38</sup>

The Drug Quantity Table consists of 17 different base offense levels beginning at level six and progressively increasing by two levels to a maximum of level 38. The base offense level under the Drug Quantity Table is determined primarily by (1) the controlled

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<sup>31</sup> USSG §1B1.3, comment. (n.3(b)).

<sup>32</sup> See USSG Ch. 2, Pt. D, Subpt. 1 (Unlawful Manufacturing, Importing, Exporting, Trafficking, or Possession; Continuing Criminal Enterprise).

<sup>33</sup> See USSG Ch. 2, Pt. D, Subpt. 2 (Unlawful Possession).

<sup>34</sup> See USSG Ch. 2, Pt. D, Subpt. 3 (Regulatory Violations).

<sup>35</sup> See *infra* Part IV.

<sup>36</sup> See *infra* Part V.

<sup>37</sup> USSG §1B1.1(a)(2).

<sup>38</sup> See, *e.g.*, USSG §§2D1.2(a)(1)–(2), 2D1.8(a) (setting forth base offense levels that depend on application of §2D1.1).

substance involved in the offense and (2) the quantity involved. An “extraordinary case” involving a quantity above the maximum set forth in the Drug Quantity Table, such as a quantity over ten times that required to trigger base offense level 38, may warrant an upward departure.<sup>39</sup>

A guideline provision referencing the Drug Quantity Table also may provide for an alternative base offense level or other adjustments, either by default<sup>40</sup> or based on other factual circumstances.<sup>41</sup>

## B. RELEVANT CONDUCT FOR DRUG OFFENSES

As §1B1.3 (Relevant Conduct) explains, unless otherwise provided, the applicable base offense level, specific offense characteristics, cross references, and adjustments for an offense are determined based upon relevant conduct. Relevant conduct may include conduct that is charged or uncharged, as well as acquitted conduct.<sup>42</sup> In the case of jointly undertaken criminal activity, relevant conduct includes acts and omissions of others that were within the scope of the jointly undertaken criminal activity, in furtherance of that activity, and reasonably foreseeable.<sup>43</sup> For offenses which would require grouping of multiple counts under §3D1.2(d)—including offenses for which §2D1.1 applies, but excluding §2D2.1 (Unlawful Possession)—relevant conduct includes “all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction.”<sup>44</sup>

Under relevant conduct principles, courts may consider “types and quantities of drugs not specified in the count of conviction” in determining the offense level under the Drug Quantity Table.<sup>45</sup> However, several other drug base offense levels and specific offense

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<sup>39</sup> USSG §2D1.1, comment. (n.27(B)).

<sup>40</sup> *E.g.*, USSG §2D1.10 (directing the application of the greater of “3 plus the offense level from the Drug Quantity Table” or 20).

<sup>41</sup> *E.g.*, USSG §2D1.8 (directing the application of “[t]he offense level from §2D1.1” subject to a four-level reduction “[i]f the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises”).

<sup>42</sup> This provision does not require that the defendant be convicted of multiple counts. USSG §1B1.3, comment. (backg’d) (“Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range.”); *see also* United States v. Watts, 519 U.S. 148, 157 (1997) (sentencing court may consider conduct of which defendant has been acquitted, so long as that conduct has been proved by a preponderance of the evidence).

<sup>43</sup> USSG §1B1.3(a)(1)(B).

<sup>44</sup> USSG §1B1.3(a)(2); *see* USSG §3D1.2(d) (listing §§2D1.1, 2D1.2, 2D1.5, 2D1.11, and 2D1.13 as “[o]ffenses . . . to be grouped under this subsection” and thus subject to the “expanded relevant conduct” rules of §1B1.3(a)(2) but “[s]pecifically excluding” §2D2.1, such that unlawful possession may not be considered “part of the same course of conduct or common scheme or plan” as the offense of conviction).

<sup>45</sup> USSG §2D1.1, comment (n.5.); United States v. Williamson, 953 F.3d 264, 269–70 (4th Cir.) (quoting USSG §2D1.1, comment (n.5.)), *cert. denied*, 141 S. Ct. 638 (2020).

characteristics require a specific conviction. For example, the alternative base offense levels in §2D1.1(a)(1)–(4) require a conviction under certain statutes.<sup>46</sup> The specific offense characteristics in §2D1.1(b)(6), (10), (14)(B), and (14)(C)(i) and the cross reference in §2D1.1(d)(2) also require a conviction under certain statutes.<sup>47</sup> Thus, for these provisions to apply, it is not enough for a defendant to have committed uncharged or acquitted acts that could have been charged under the referenced statutes—rather, the defendant must be convicted under the specified statute for the base offense level, specific offense characteristic, or cross reference to apply.

Other guideline provisions limit the court’s consideration to only the defendant’s actions, not the acts or omissions of others. The defendant’s actions include acts “committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant.”<sup>48</sup> For example, the 2-level enhancement in §2D1.1(b)(2) applies only where “the *defendant*” used, threatened, or directed the use of violence.<sup>49</sup>

#### IV. SECTION 2D1.1

Section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offense); Attempt or Conspiracy) applies to violations of 21 U.S.C. §§ 841 and 960, among other drug statutes. This guideline provides five alternative base offense levels, 18 specific offense characteristics, and two cross references. The court must apply the greatest base offense level.<sup>50</sup>

The first four base offense levels, set out in §2D1.1(a), are as follows:

- (1) 43, if the defendant is convicted under 21 U.S.C. §§ 841(b)(1)(A)–(C) or 960(b)(1)–(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after at least one conviction for a similar offense; or
- (2) 38, if the defendant is convicted under 21 U.S.C. §§ 841(b)(1)(A)–(C) or 960(b)(1)–(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (3) 30, if the defendant is convicted under 21 U.S.C. §§ 841(b)(1)(E) or 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that

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<sup>46</sup> See USSG §2D1.1(a)(1)–(4).

<sup>47</sup> See USSG §§2D1.1(b)(6), (10), (14)(B), (14)(C)(i), 2D1.1(d)(2).

<sup>48</sup> USSG §1B1.3(a)(1)(A); see, e.g., USSG §5C1.2, comment. (n.4) (explaining that this use of the term “defendant” is consistent with §1B1.3).

<sup>49</sup> USSG §2D1.1(b)(2) (emphasis added).

<sup>50</sup> USSG §2D1.1(a).

the defendant committed the offense after at least one conviction for a similar offense; or

- (4) 26, if the defendant is convicted under 21 U.S.C. §§ 841(b)(1)(E) or 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance.<sup>51</sup>

These base offense levels are rarely invoked and therefore are rarely the subject of published judicial opinions. In addition, these base offense levels cannot apply based on the relevant conduct rules because they apply only where “the defendant is convicted under” one of 21 U.S.C. § 841(b)(1)(A)–(C), (E) or 21 U.S.C. § 960(b)(1)–(3), (5).

The fifth base offense level, under §2D1.1(a)(5), is “the offense level specified in the Drug Quantity Table,” subject to special provisions that apply when a defendant receives a mitigating role adjustment under §3B1.2.<sup>52</sup>

## A. DRUG QUANTITY TABLE

The Drug Quantity Table referenced in §2D1.1(a)(5) applies in the overwhelming majority of drug cases.<sup>53</sup> The offense levels set forth in the Drug Quantity Table depend primarily on drug type and drug quantity.<sup>54</sup> These factors are addressed below, followed by common application issues for specific drugs and the special base offense levels in §2D1.1(a)(5) that are triggered by the mitigating role adjustment under §3B1.2.

### 1. Drug Type

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Drug type is the starting point for determining the applicable base offense level in the Drug Quantity Table. The government has the burden of proving drug type by a preponderance of the evidence.<sup>55</sup> It may do so by offering the defendant’s admission, for

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<sup>51</sup> USSG §2D1.1(a)(1)–(4). These base offense levels apply only where “the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance.” *Id.* As the Supreme Court has explained, death or serious bodily injury “results from” the use of the substance if the use was a “but-for cause of the death or injury.” *Burrage v. United States*, 571 U.S. 204, 210–11, 219 (2014).

<sup>52</sup> USSG §2D1.1(a)(5); *see* discussion *infra* Part IV.A.5.

<sup>53</sup> *See* U.S. SENT’G COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: GUIDELINE CALCULATION BASED 27–28 (2020), [https://www.usc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/Use\\_of\\_SOC\\_Guideline\\_Based.pdf](https://www.usc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/Use_of_SOC_Guideline_Based.pdf) [hereinafter USE OF GUIDELINES] (in FY2020, §2D1.1(a)(5) applied in 99.5% of cases, §2D1.1(a)(1) applied in .1% of cases, §2D1.1(a)(2) applied in .4% of cases, and §§2D1.1(a)(3) and (a)(4) did not apply to any cases).

<sup>54</sup> Detailed materials on the Commission’s 2014 amendment that reduced sentencing guideline penalties for most federal drug trafficking offenders by two levels are available at U.S. SENT’G COMM’N, *Materials on 2014 Drug Guidelines Amendment*, <https://www.usc.gov/policymaking/amendments/materials-2014-drug-guidelines-amendment>.

<sup>55</sup> *See, e.g.*, *United States v. Lugo*, 702 F.3d 1086, 1089 (8th Cir. 2013) (“The government, for sentencing purposes, bears the burden to prove drug type by a preponderance of the evidence.”); *United States v. Padilla*, 520 F.3d 766, 769 (7th Cir. 2008) (same); USSG §6A1.3, comment (proposing preponderance of the evidence

example, as part of a stipulation, proffer, or plea agreement.<sup>56</sup> The government also may test a sample of the substance, when such sample is available.<sup>57</sup> When a sample of the substance is unavailable, the government must rely on circumstantial evidence or eyewitness testimony to establish the type of substance at issue.<sup>58</sup>

### a. Analogues

Federal law also controls analogues and other substances beyond the more common controlled substances identified on the Drug Quantity Table.<sup>59</sup> Except where otherwise provided, any reference to a controlled substance in §2D1.1 includes all analogues, salts, isomers, and salts of isomers.<sup>60</sup> An analogue of ketamine, for example, is treated the same as ketamine for the purposes of the Drug Quantity Table.

Fentanyl serves as one important exception where this rule does not apply because the guideline provides for the separate treatment of “any substance . . . , whether a controlled substance or not, that has a chemical structure that is similar to fentanyl.”<sup>61</sup> The Drug Quantity Table lists this “fentanyl analogue” separately from fentanyl, with separate threshold quantities. Thus, while a defendant must be responsible for at least 36 kilograms of fentanyl to receive the maximum base offense level of 38, the same base offense level would apply to offenses involving only 9 kilograms of fentanyl analogue.<sup>62</sup>

Further, the general rule for analogues does not apply to an analogue that is subsequently listed as a controlled substance.<sup>63</sup> Such substances instead must follow the rules applicable to controlled substances not referenced in the Drug Quantity Table.

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standard for resolving guideline disputes).

<sup>56</sup> *Cf., e.g.,* United States v. Etienne, 772 F.3d 907, 923 (1st Cir. 2014) (affirming application of statutory minimum sentence based upon defendant’s stipulation to drug type and quantity).

<sup>57</sup> *See, e.g.,* United States v. Castaneda, 906 F.3d 691, 694 (7th Cir. 2018) (affirming district court’s finding that defendant distributed ice where, among other things, “the pound of methamphetamine seized from a coconspirator was 100% pure”).

<sup>58</sup> *See, e.g.,* United States v. Verdin-Garcia, 516 F.3d 884, 896 (10th Cir. 2008) (“Narcotics need not be seized or tested to be held against a defendant at sentencing.”).

<sup>59</sup> *See, e.g.,* United States v. Giggey, 867 F.3d 236, 240 (1st Cir. 2017) (§2D1.1 “do[es] not exhaust the universe of prohibited drugs”); United States v. Koss, 812 F.3d 460, 467 (5th Cir. 2016) (“the Drug Quantity Table refers only to the more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, LSD, and marijuana, that are mentioned in the penalty provision of the Controlled Substances Act”); 21 U.S.C. § 813 (“A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I.”).

<sup>60</sup> USSG §2D1.1, comment. (n.6).

<sup>61</sup> USSG §2D1.1(c)(Note J).

<sup>62</sup> USSG §2D1.1(c)(1).

<sup>63</sup> *See* USSG §2D1.1, comment. (n.6) (defining “analogue” by reference to 21 U.S.C. § 802(32), which expressly excludes controlled substances).

## b. Controlled substances not referenced in the Drug Quantity Table

For controlled substances not specifically referenced in the Drug Quantity Table, courts must identify the “most closely related controlled substance” that is referenced in the guideline.<sup>64</sup> To do so, courts must consider whether the substance:

- (i) has a chemical structure that is substantially similar to a referenced substance;
- (ii) has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to that of a referenced substance; and
- (iii) requires a lesser or greater quantity to produce a substantially similar effect on the central nervous system as a referenced substance.<sup>65</sup>

District courts are accorded significant discretion in addressing these factors to determine which referenced substance is most closely related to the substance at issue.<sup>66</sup> Expert testimony may assist courts with these factors.<sup>67</sup> Lay testimony and admissions from the defendant may help establish the latter two factors concerning the effect of the substance.<sup>68</sup> Further, “a sentencing court is not obliged to match substances under each of

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*; *see also* 21 U.S.C. § 802(32)(A) (similarly defining the term “controlled substance analogue”). At least two circuits have reached opposite conclusions on whether a closely related controlled substance must come from Schedules I and II or instead may include any controlled substance. *Compare, e.g., United States v. Moreno*, 870 F.3d 643, 647–48 (7th Cir. 2017) (“[T]he application note allows defendants to propose a Schedule V controlled substance as the most closely related drug . . . [I]n light of the breadth of designer drugs, there might still be instances when a Schedule V drug ends up being the most closely related substance—but that is likely going to be rare.”), *with United States v. Giggey*, 867 F.3d 236, 241 (1st Cir. 2017) (dictum) (suggesting that “the plain language of both the statute and the application note indicate that the proper comparator for an unreferenced controlled substance analogue must be drawn from Schedule I or II” but explaining that the district judge’s findings “obviate[d] the need for us to make a definitive holding”).

<sup>66</sup> *E.g., United States v. El Hage*, 741 F. App’x 194, 200 (5th Cir. 2018) (citing *United States v. Malone*, 828 F.3d 331, 337 (5th Cir. 2016)) (“The identification of the most closely related controlled substance is a fact question we review for clear error.”); *United States v. Giggey*, 867 F.3d 236, 242 (1st Cir. 2017) (agreeing with other circuits that a district court’s selection of the most closely related controlled substance is a factual determination that “engenders review only for clear error”).

<sup>67</sup> *See, e.g., Giggey*, 867 F.3d at 242–43 (affirming district court’s resolution of “dueling experts”); *United States v. Novak*, 841 F.3d 721, 730 (7th Cir. 2016) (affirming district court’s reliance on expert testimony regarding physiological effects of drug); *see also, e.g., United States v. Malone*, 828 F.3d 331, 337 (5th Cir. 2016) (affirming district court’s determination that AM-2201 is most closely related to THC and finding it “significant that the district court gave this matter studied attention” at a “day-long evidentiary hearing” during which parties examined and cross-examined expert witnesses).

<sup>68</sup> *See, e.g., Giggey*, 867 F.3d at 242 & n.6 (affirming finding regarding potency of most closely related substance in part due to defendant’s admission that the drug was “a powerful, highly addictive poisonous chemical that left me with a mind riddled with poor judgment”); *United States v. Moreno*, 870 F.3d 643, 649 (7th Cir. 2017) (affirming “most closely related” finding based on “the live, in-court testimony of three users of Alpha-PVP,” which “established that the powerful stimulant effect of the drug was more like methcathinone

the factors.”<sup>69</sup> Different factors may prove more salient depending on the case; for example, “a substance that is not the best fit in terms of chemical structure may still be the most appropriate comparator because of substantially similar pharmacological effect and potency.”<sup>70</sup>

## 2. Drug Quantity

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Once the drug type is established, the next step is to determine the quantity of drugs attributable to the defendant.

### a. Weight

For most drugs listed on the Drug Quantity Table, quantity is determined by the drug’s weight. Except where specified,<sup>71</sup> the weight specified in the Drug Quantity Table “refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance.”<sup>72</sup> The term “mixture or substance” excludes “materials that must be separated from the controlled substance” before it can be used, such as “the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance.”<sup>73</sup> An offense involving separable additives that would not qualify as part of the “mixture” may nonetheless warrant an upward departure when used “in an unusually sophisticated manner in order to avoid detection.”<sup>74</sup>

Except in cases where the government seizes and then measures all drugs attributable to a defendant, the court must “approximate the quantity of the controlled

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instead of the relatively mild pyrovalerone”).

<sup>69</sup> *Giggey*, 867 F.3d at 243 (internal quotation and citation omitted).

<sup>70</sup> *Id.*; *see, e.g., Novak*, 841 F.3d at 730 (affirming finding that XLR-11 was most closely related to THC despite the government’s concession “that none of the analogues involved in this case had a chemical structure similar to any controlled substance referenced in the [g]uidelines” based on the “evidence on the latter two factors”); *United States v. Chowdhury*, 639 F.3d 583, 586 (2d Cir. 2011) (affirming “most closely related” finding based on similar effect, despite “the absence of a substance with a substantially similar chemical structure or reliable information regarding the relative potency of the two substances”).

<sup>71</sup> *See, e.g.*, discussion of LSD *infra* Part IV.A.4.e.

<sup>72</sup> USSG §2D1.1(c)(Note A).

<sup>73</sup> USSG §2D1.1, comment. (n.1); *see, e.g., United States v. Ramos*, 814 F.3d 910, 920 (8th Cir. 2016) (affirming inclusion of total weight of “synthetic cannabinoids sprayed onto inert plant material” where the “plant material was not removed prior to the drug’s use, nor was it easily separable”).

<sup>74</sup> USSG §2D1.1, comment. (n.1).



substance.”<sup>75</sup> Courts exercise significant discretion in selecting and applying a method for estimating drug quantities, and they often must do so “based on imprecise evidence.”<sup>76</sup>

A few examples illustrate the variety of circumstantial evidence that may support a reasonable estimate. In *United States v. Gibson*, for example, the Seventh Circuit affirmed the district court’s use of a formula based on: (1) the total number of calls made to two drug phones, supported by phone records; (2) the average number of calls required to complete each drug transaction, supported by the testimony of a coconspirator and an officer who participated in controlled buys; and (3) a conservative estimate of the quantity of drugs sold per transaction, again supported by testimony from individuals who witnessed or participated in the conspiracy.<sup>77</sup> In *United States v. Shaw*, the Eighth Circuit affirmed the district court’s drug quantity estimate based in part on the amount of a fentanyl analogue found in a confiscated nasal spray bottle and testimony regarding the number of bottle refills customers purchased.<sup>78</sup> In *United States v. French*, the First Circuit affirmed the district court’s drug quantity estimate based on business records demonstrating how much fertilizer the defendants purchased and testimony concerning how much fertilizer it took to grow each marijuana plant.<sup>79</sup> And in many other cases, courts of appeals have affirmed quantity estimates based on the quantity of drugs sold on an average day multiplied by the duration of the drug activity.<sup>80</sup>

The court must ensure that the method used to estimate drug quantity is both reliable and supported by the record. For example, the First Circuit rejected as unreliable the use of 12 controlled buys to estimate and extrapolate the drug quantity covering six

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<sup>75</sup> USSG §2D1.1, comment. (n.5). Several courts advise that a district court should “err on the side of caution” in approximating drug quantity. *United States v. Flores*, 725 F.3d 1028, 1036 (9th Cir. 2013); *see, e.g., United States v. Jeross*, 521 F.3d 562, 570–71 (6th Cir. 2008) (same); *see also, e.g., United States v. Almedina*, 686 F.3d 1312, 1316 (11th Cir. 2012) (quantity approximations should be “conservative”). The Fourth Circuit has squarely rejected that position. *United States v. Kiulin*, 360 F.3d 456, 461 (4th Cir. 2004) (“This court has not heretofore required that sentencing courts ‘err on the side of caution’ in approximating drug quantity, and we decline to do so today.”).

<sup>76</sup> *United States v. Shaw*, 965 F.3d 921, 927 (8th Cir. 2020) (citation omitted), *cert. denied*, 141 S. Ct. 1248, 141 S. Ct. 1253 (2021).

<sup>77</sup> 996 F.3d 451, 464–66 (7th Cir. 2021).

<sup>78</sup> *Shaw*, 965 F.3d at 927–28.

<sup>79</sup> 904 F.3d 111, 122–23 (1st Cir. 2018).

<sup>80</sup> *See, e.g., United States v. Maldonado-Pena*, 4 F.4th 1, 58 (1st Cir. 2021) (affirming quantity estimate based on cooperating witness testimony of “how the sellers were organized first in one day shift but eventually evolved into a 24-hour operation” and how much was “sold on each day of the week”); *United States v. Lee*, 966 F.3d 310, 327 (5th Cir.) (affirming drug quantity estimate based on the number of prescriptions issued by pill mill “discounted . . . by 25% to account for prescriptions that may have been legitimate,” a conservative estimate in the absence of “evidence that even 25% of the clinic’s prescriptions were legitimate”), *cert. denied*, 141 S. Ct. 639 (2020); *United States v. Kearby*, 943 F.3d 969, 974 (5th Cir. 2019) (affirming drug quantity estimate of 60 ounces where evidence showed that defendant purchased one to three ounces of meth per day from a coconspirator and did so for 60 days), *cert. denied*, 140 S. Ct. 2584 (2020).

months of drug activity.<sup>81</sup> The Tenth Circuit reversed a drug quantity estimate where the district court, which had been provided with only the packaged weight, determined the weight of the substance itself (*i.e.*, without the packaging) based on photographs of the package.<sup>82</sup> The court must independently ensure that its quantity determination is supported by reliable evidence, even where the defendant lacks countervailing evidence to rebut the government's proffer of drug quantity.<sup>83</sup>

*i. Estimates based on cash seizure*

Courts also may rely on financial records and laboratory capacity to estimate drug quantity.<sup>84</sup> When cash is seized from a drug defendant, courts may equate the cash with a corresponding drug quantity as long as there is a plausible and reliable basis for connecting the money to a relevant sale.<sup>85</sup> For example, the court may consider the proximity of the cash to drugs,<sup>86</sup> testimony concerning the defendant's selling habits,<sup>87</sup> and the defendant's lack of legitimate sources of income.<sup>88</sup>

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<sup>81</sup> See, *e.g.*, *United States v. Maldonado-Peña*, 4 F.4th 1, 58 (1st Cir. 2021) (reiterating that "a dozen controlled buys over a six-month period was not sufficiently reliable for estimating the overall drug quantity").

<sup>82</sup> *United States v. Aragon*, 922 F.3d 1102, 1112 (10th Cir. 2019).

<sup>83</sup> See, *e.g.*, *United States v. Rollerson*, 7 F.4th 565, 570 (7th Cir. 2021) ("A truly bare allegation [of drug quantity] and bare denial would be in equipoise, unable to meet the prosecution's burden of proof by a preponderance of the evidence. Once the prosecution presents sufficiently reliable evidence, however, it will meet its burden unless the defense can muster evidence in the other direction."); *United States v. Holding*, 948 F.3d 864, 870–71 (7th Cir. 2020) (reversing where the district court did not require "some modicum of reliability of the CI information [of drug quantity] supplied to the probation officer charged with preparing the PSR"); *cf.* *United States v. Hopper*, 934 F.3d 740, 769 (7th Cir. 2019) (though defendant did not object, district court plainly erred in adopting PSR that double counted drug quantities).

<sup>84</sup> USSG §2D1.1, comment. (n.5) ("[T]he court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.").

<sup>85</sup> See, *e.g.*, *United States v. Lucio*, 985 F.3d 482, 488 (5th Cir. 2021) (affirming conversion of approximately \$18,000 into quantity of methamphetamine using defendant's stated price where the defendant did not contest that the cash was from drug proceeds, the evidence showed that the defendant "regularly dealt in kilogram quantities in meth," and nothing suggested that the defendant could have sold enough other substances (cocaine or marijuana) to amass the sized sum); *United States v. Barry*, 978 F.3d 214, 218–19 (5th Cir. 2020) (affirming conversion of \$14,658 into 852.2 grams of methamphetamine where there was "little direct evidence tying the money to sales of meth" but "ample circumstantial evidence").

<sup>86</sup> See, *e.g.*, *United States v. Salas*, 455 F.3d 637, 643 (6th Cir. 2006) (cash hidden in cooler with seized cocaine supported finding that cash was from cocaine transaction).

<sup>87</sup> See, *e.g.*, *United States v. Mills*, 710 F.3d 5, 15–16 (1st Cir. 2013) (confidential informant's testimony on defendant's oxycodone sales practices corroborated other evidence tying currency exchange records to drug sales); *United States v. Russell*, 595 F.3d 633, 647 (6th Cir. 2010) (upholding finding that cash was tied sale of cocaine base where ex-girlfriend testified "that a large majority of [the defendant's] income originated from selling cocaine," that "any sales of marijuana or methadone were 'occasional' or 'once in a while,'" and that the defendant's "proceeds from managing prostitutes were minimal").

<sup>88</sup> See, *e.g.*, *Barry*, 978 F.3d at 217–20 (methamphetamine sales were "probative of how [the defendant], who was unemployed and previously had only part-time employment, could have accrued such a large sum of

In determining the appropriate dollars-to-drugs conversion rate, the court may rely on admissions or evidence from the defendant,<sup>89</sup> testimony from drug purchasers,<sup>90</sup> or expert testimony.<sup>91</sup> The court then must divide the cash attributed to drug sales by the conversion rate to arrive at the applicable drug quantity.

*ii. Estimates based on laboratory capacity*

Courts also may use the size or capability of a drug laboratory to estimate drug quantities.<sup>92</sup> This approach may involve, for example, evaluating expert testimony to estimate production capacity based on the available equipment<sup>93</sup> or amount of precursor chemicals seized from the laboratory.<sup>94</sup> That estimate may not be a purely theoretical

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cash”; though the defendant maintained that there were “alternative sources for the money, he presented no evidence supporting those possibilities”). *Compare, e.g.,* United States v. Chavez, 584 F.3d 1354, 1367 (11th Cir. 2009) (rejecting the defendant’s contention that “the district court merely speculated that the [d]efendant’s wherewithal in cash was derived from dealing in methamphetamine” where the defendant “had admitted his involvement in the charged conspiracy,” “was found to have possessed large sums of currency with no apparent explanation of its origin,” and “was one of the sources of the methamphetamine involved in the conspiracy”), *with* United States v. Sandridge, 385 F.3d 1032, 1037–38 (6th Cir. 2004) (“Even assuming, *arguendo*—based on Defendant’s lack of gainful employment, his admitted drug dealing, and the sizable amount of cash—that the \$919 was connected to some sort of drug business, . . . the \$919 in cash cannot be used as a proxy for an additional quantity of cocaine base above and beyond the quantity found in Defendant’s car unless a preponderance of the evidence shows that the cash was either proceeds from other cocaine base that was just sold or money to purchase additional cocaine base.”).

<sup>89</sup> *See, e.g.,* United States v. King, 518 F.3d 571, 575 n.5 (8th Cir. 2008) (conversion rate set per defendant’s stipulation).

<sup>90</sup> *See, e.g.,* United States v. Jones, 531 F.3d 163, 177 (2d Cir. 2008) (“[T]he district court reasonably found that the seized \$883 would have purchased 25.75 grams of crack cocaine. It based this calculation on the price the government’s confidential informant had paid for crack cocaine recently purchased from the subject premises.”); United States v. Keszthelyi, 308 F.3d 557, 578 (6th Cir. 2002) (“Several of defendant’s former customers testified that defendant’s regular practice was to sell cocaine in gram quantities at a price of approximately \$100 per gram.”).

<sup>91</sup> United States v. Kiulin, 360 F.3d 456, 461–62 (4th Cir. 2004) (affirming ecstasy conversion rate estimate in PSR supported by “law enforcement officer who, it is reasonable to presume, possessed specialized knowledge of the price of ecstasy in North Carolina at the time of [the defendant’s] arrest”).

<sup>92</sup> *See, e.g.,* United States v. Bautista, 532 F.3d 667, 673 (7th Cir. 2008) (affirming quantity estimate based in part on evidence that “the members of an experienced meth operation believed they were going to have a lab outfitted with whatever they needed . . . to manufacture twelve pounds of meth,” even though the lab was not yet functional; the application note “is designed to match the penalty to the true scale of the drug operation,” not evaluate “what was seized” (internal quotation omitted)).

<sup>93</sup> *Cf.* United States v. Chase, 499 F.3d 1061, 1069 (9th Cir. 2007) (reversing drug quantity estimate based on expert testimony wholly reliant on theoretical yield of 5,000-milliliter flask where no precursor chemicals were seized, and no evidence suggested that 5,000-milliliter flask had been used).

<sup>94</sup> *Cf., e.g.,* United States v. Forrester, 616 F.3d 929, 950 (9th Cir. 2010) (acknowledging potential usefulness of expert’s conservative estimate of ecstasy yield based on seized precursor chemicals but vacating and remanding sentence because district court failed to make “explicit findings about the amount of ecstasy involved”).

estimate of a drug lab’s potential output, but instead must represent a reasonable estimate of the amount attributable to the particular defendant’s drug activity.<sup>95</sup>

Further, since 2001, the Application Notes to §2D1.1 have provided drug conversion values for certain precursor chemicals for offenses involving the manufacture of amphetamine or methamphetamine.<sup>96</sup> Thus, when precursor chemicals are seized in such production offenses, the drug conversion table should be used to calculate an appropriate base offense level.<sup>97</sup>

## b. Purity

For most substances, purity plays no role in determining drug quantity. Except as specified, as long as the substance contains a detectable amount of a controlled substance, the entire weight counts for purposes of the Drug Quantity Table.<sup>98</sup> An upward departure may be warranted in cases of “unusually high purity” for some controlled substances.<sup>99</sup>

Five controlled substances (PCP, amphetamine, methamphetamine, hydrocodone, and oxycodone) have base offense levels based on the “weight of the controlled substance, itself, contained” in the mixture, substance, pill, or capsule, as applicable.<sup>100</sup> For substances containing PCP, amphetamine, or methamphetamine, the Drug Quantity Table specifies alternative base offense levels for both the “actual” weight of the substance (*i.e.*, accounting for purity) and the substance as part of a mixture; the greatest base offense levels applies. Methamphetamine, discussed in detail below in Part IV.A.4.c, is further subdivided by differentiating the level of purity among mixtures containing methamphetamine, methamphetamine (actual), and “Ice,” defined as “d-methamphetamine hydrochloride of at least 80% purity.”<sup>101</sup> Quantities of LSD are determined consistent with how the substance is ordinarily prepared and used, as discussed in Part IV.A.4.e.

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<sup>95</sup> See, e.g., *United States v. Anderson*, 236 F.3d 427, 430 (8th Cir. 2001) (“[T]he relevant inquiry is not what a theoretical maximum yield would be, or even what an average methamphetamine cook would produce, but what appellants themselves could produce.”).

<sup>96</sup> See USSG App. C, amend. 611 (effective May 1, 2001) (adding certain List I chemicals to the drug conversion tables); USSG §2D1.1 comment. (n.8(D)) (Drug Conversion Tables).

<sup>97</sup> See, e.g., *United States v. Gonzalez-Rodriguez*, 63 F. App’x 299, 301–02 (9th Cir. 2003) (discussing difference between using precursor chemicals to estimate the total drug quantity versus calculating a base offense level based on the seized precursor chemicals).

<sup>98</sup> USSG §2D1.1(c)(Note A).

<sup>99</sup> USSG §2D1.1, comment. (n.27(C)).

<sup>100</sup> USSG §2D1.1(c)(Note B); see also USSG §2D1.1, comment. (n.27(C)) (“in the case of PCP, amphetamine, methamphetamine, hydrocodone, or oxycodone . . . the guideline itself provides for the consideration of purity”).

<sup>101</sup> USSG §2D1.1(c)(Note C).

The government may establish the purity of a substance by testing a representative sample.<sup>102</sup> Courts, in turn, may consider eyewitness testimony (such as from drug sellers or users) or expert testimony concerning factors such as the appearance, price, and quality of the drugs to support a purity finding, though courts differ on whether such evidence can suffice on its own to establish a particular purity level.<sup>103</sup>

### c. Converted Drug Weight

The Drug Quantity Table also includes “Converted Drug Weight” (previously called “marihuana equivalency”), a measurement used to determine the base offense level in two circumstances.<sup>104</sup> First, it is used when the defendant’s relevant conduct involves two or more controlled substances (and not merely a single mixture of two substances). Second, it is used when the defendant’s relevant conduct involves a controlled substance referenced to the guideline, but not specifically listed on the Drug Quantity Table.<sup>105</sup>

In either situation, the weight of the controlled substance is converted into a Converted Drug Weight using the Drug Conversion Tables (previously called “Drug Equivalency Tables”). A Drug Conversion Calculator is available to assist with these calculations.<sup>106</sup> As discussed further below, depending on the substances involved, a minimum base offense level or “capped” Converted Drug Weight may apply.

As an example of a multiple substance case, consider a defendant responsible for 100 grams of heroin and 100 grams of cocaine. The court would perform the following steps:

**Step 1.** Reference the Drug Conversion Tables to identify the conversion ratio for each controlled substance.

*Heroin:* 1 gram = 1,000 grams (1 kg) Converted Drug Weight, per the Drug Conversion Table for Schedule I or II Opiates

*Cocaine:* 1 gram of cocaine = 200 grams Converted Drug Weight, per the Drug Conversion Table for Cocaine and Other Schedule I and II Stimulants

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<sup>102</sup> See, e.g., *United States v. Walker*, 688 F.3d 416, 425 (8th Cir. 2012) (“Scientific testing of at least part of a quantity of suspected ‘ice’ methamphetamine seized from a conspiracy is one of the strongest means by which the government can meet its burden of proving the methamphetamine attributed to a defendant is ‘ice’ as defined in the [g]uidelines.”); *United States v. Verdin-Garcia*, 516 F.3d 884, 896 (10th Cir. 2008) (“Laboratory test results are perhaps more persuasive evidence of amounts and purities than eyewitness testimony or wiretapped conversations . . . .”); cf. *United States v. Carnell*, 972 F.3d 932, 944 (7th Cir. 2020) (“We also leave for another day the question of whether all of the methamphetamine attributable to a defendant must be tested [to establish purity], and if not, what would constitute a reliably representative sample.”).

<sup>103</sup> See *infra* Part IV.A.4.c.i.

<sup>104</sup> USSG §2D1.1(c)(Note K).

<sup>105</sup> See USSG §2D1.1, comment. (n.7–8).

<sup>106</sup> U.S. SENT’G COMM’N, *Guidelines Manual*, Drug Conversion Calculator, <https://guidelines.usc.gov/de>.

**Step 2.** Multiply the quantities of heroin and cocaine by their respective conversion ratios and then add them together.

*Heroin:* 100 grams x 1,000 = 100,000 grams (100 kg) Converted Drug Weight

*Cocaine:* 100 grams x 200 = 20,000 grams (20 kg) Converted Drug Weight

TOTAL: 100 kg + 20 kg = 120 kg Converted Drug Weight

**Step 3.** Return to the Drug Quantity Table to identify the applicable base offense level. A total of 120 kg Converted Drug Weight corresponds to base offense level 24.

The same process applies to any substance referenced to §2D1.1 but not specifically identified in the Drug Quantity Table. This list includes, for example, morphine, oxycodone, opium, and psilocybin, among many others. A court sentencing a defendant for an offense involving such a substance would reference the appropriate Drug Conversion Table, convert the weight of the substance into Converted Drug Weight, and then apply the offense level from the Drug Quantity Table.<sup>107</sup>

Certain Drug Conversion Tables provide a minimum offense level for any listed controlled substance “individually, or in combination with another controlled substance.”<sup>108</sup> In the Drug Conversion Tables for heroin and cocaine, as in the above example, the minimum offense level is 12. Thus, in the above example, even had the defendant been responsible for less than 5 kilograms of converted drug weight (and thus theoretically subject to a lower base offense level based solely on the Drug Quantity Table), the defendant still would have been subject to a minimum offense level of 12.

Other Drug Conversion Tables provide for capped converted drug weights. For example, the Schedule V Substances table explains that “the combined converted weight of Schedule V substances shall not exceed 2.49 kilograms of converted drug weight.”<sup>109</sup> The Schedule IV Substances (Except Flunitrazepam) table explains that “the combined converted weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of converted drug weight.”<sup>110</sup> Where a defendant is responsible for substances from more than one schedule, the converted drug weight must be determined separately for each schedule, subject to any cap applicable to that schedule.<sup>111</sup> Then, as

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<sup>107</sup> The “most closely related controlled substance” analysis discussed in Part IV.A.1.b would not apply.

<sup>108</sup> USSG §2D1.1, comment. (n.8(D)).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> USSG §2D1.1, comment. (n.8(B)).

before, the converted drug weights are added together and referenced to the appropriate base offense level on the Drug Quantity Table.<sup>112</sup>

### ***3. Issues Involving Both Substance Type and Quantity***

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#### **a. Relevant conduct issues**

As required by the relevant conduct rules in §1B1.3, the court must calculate the drug quantity by including not just the drugs that the defendant was directly involved in for the offense of conviction, but also (i) in a jointly undertaken criminal activity, "all quantities of contraband that were involved in transactions carried out by other participants, if those transactions were within the scope of, and in furtherance of, the jointly undertaken criminal activity and were reasonably foreseeable in connection with that criminal activity"<sup>113</sup> and (ii) any additional amounts outside the offense of conviction in which the defendant was directly involved as "part of the same course of conduct or common scheme or plan."<sup>114</sup> Both provisions present fact-based determinations as to whether a particular drug transaction, for example, is within the scope of a jointly undertaken criminal activity or part of a common scheme or plan.

##### *i. Jointly undertaken criminal activity*

A defendant who participates in a jointly undertaken criminal activity, defined as any "criminal plan, scheme, endeavor, or enterprise" undertaken "in concert with others,"<sup>115</sup> is accountable for any drug activity that is (a) within the scope of the jointly undertaken criminal activity, (b) in furtherance of that activity, and (c) reasonably foreseeable.<sup>116</sup> A defendant need not be charged with a conspiracy to be accountable for someone else's activity.<sup>117</sup>

The scope of the agreement may be disputed; "conspiracy-wide drug amounts . . . in many cases will be higher than the defendant's actual scope of agreement."<sup>118</sup> A defendant's accountability is "limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct."<sup>119</sup>

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<sup>112</sup> The combined converted drug weight is subject to the cap, if any, applicable to the combined amounts. *Id.*

<sup>113</sup> USSG §1B1.3, comment. (n.3).

<sup>114</sup> USSG §1B1.3(a)(2).

<sup>115</sup> USSG 1B1.3, comment. (n.3(A)).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *United States v. McReynolds*, 964 F.3d 555, 564 (6th Cir. 2020).

<sup>119</sup> USSG 1B1.3, comment. (n.3(B)); *see, e.g., United States v. Flores*, 995 F.3d 214, 220 (D.C. Cir. 2021) ("He

Application Note 4 to §1B1.3 provides several illustrations. For example, where a defendant steps in to make a drug delivery on one occasion to cover for an ill boyfriend, the defendant would be accountable only for the one delivery to which she agreed.<sup>120</sup> Any other drug sales made by the boyfriend would be outside the scope of the jointly undertaken criminal activity and would not be attributable to the defendant.

Similarly, a street-level drug dealer who buys from the same source as other dealers but otherwise operates independently would be accountable only for the drugs involved in his own activity—not those sold by the other street-level drug dealers.<sup>121</sup> Suppose instead that the same dealer, rather than operating independently, instead pooled his resources and profits with other street-level drug dealers. Such an arrangement would satisfy all three requirements: the other dealers' sales would fall within the scope of the jointly undertaken criminal activity, would further that criminal activity, and would be reasonably foreseeable in connection with that criminal activity.<sup>122</sup> The defendant would be responsible for the drugs sold by the other dealers during the course of his joint undertaking with them.

*ii. Same course of conduct or common scheme or plan*

Drug activity involving uncharged or acquitted drug quantities may be used to determine the base offense level where it falls within either the “same course of conduct” or a “common scheme or plan.” These “closely related concepts” are not applied with rigid tests or rules.<sup>123</sup> The former includes conduct that is “substantially connected . . . by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*.”<sup>124</sup> The latter includes offenses that are “sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses,” considering, for example, “the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses.”<sup>125</sup>

As applied to drug activity, the courts of appeals have framed the analysis in different ways. The Seventh Circuit, for example, has stressed the need to strictly apply the relevant conduct factors, concerned that the inclusion of uncharged drug quantities may “permit[] prosecutors to indict defendants on relatively minor offenses and then seek

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maintains that he had no agreement relating to the importation of drugs and had no direct role in any of the drug trafficking transactions. Yet courts have often attributed to enforcers the entire drug quantity that passes through a conspiracy while they were participants in the conspiracy.”).

<sup>120</sup> USSG 1B1.3, comment. (n.4(C)(v)).

<sup>121</sup> USSG 1B1.3, comment. (n.4(C)(vi)).

<sup>122</sup> *Id.*

<sup>123</sup> USSG §1B1.3, comment. (n.5(B)).

<sup>124</sup> USSG §1B1.3, comment. (n.5(B)(i)).

<sup>125</sup> USSG §1B1.3, comment. (n.5(B)(ii)).



enhanced sentences later by asserting that the defendant has committed other more serious crimes for which, for whatever reason, the defendant was not prosecuted and has not been convicted.”<sup>126</sup> On the other hand, the Fifth Circuit has, “[p]articularly in drug cases, . . . broadly defined what constitutes the same course of conduct or common scheme or plan.”<sup>127</sup>

The courts of appeals are, however, united in some important principles reflected in the Commentary to §1B1.3. On the one hand, “the mere fact that the defendant has engaged in other drug transactions is not sufficient to justify treating those transactions as ‘relevant conduct’ for sentencing purposes.”<sup>128</sup> And on the other hand, “conduct is not unrelated . . . simply because it involves trafficking in a different substance, or because the purportedly related activity occurs at different times.”<sup>129</sup> In all cases, the relevant conduct analysis requires fact-bound consideration of the underlying offense and its relationship to the uncharged or acquitted conduct.

For example, in *United States v. Nava*, the Fifth Circuit affirmed the inclusion of a seizure of methamphetamine as relevant conduct for a defendant who had been convicted of cocaine trafficking.<sup>130</sup> Though the record lacked evidence to show that the methamphetamine operation was “part of a common scheme or plan with his cocaine-trafficking activities,” the district court did not clearly err in concluding that it was part of the same course of conduct.<sup>131</sup> The court explained that “both the cocaine and meth loads were picked up in Ciudad Juarez, concealed in vehicles connected to [the defendant], and transported across the border into the United States”; evidence suggested that the defendant “played a supervisory role in both operations”; and “the meth and cocaine seizures occurred in close temporal proximity.”<sup>132</sup> That said, the court likewise observed that the “district court could reasonably have come out” either way, acknowledging

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<sup>126</sup> *United States v. Draheim*, 958 F.3d 651, 660 (7th Cir. 2020) (quoting *United States v. Ortiz*, 431 F.3d 1035, 1040 (7th Cir. 2005)).

<sup>127</sup> *United States v. Barry*, 978 F.3d 214, 219 (5th Cir. 2020).

<sup>128</sup> *Draheim*, 958 F.3d at 659; *see, e.g.*, *United States v. Horton*, 993 F.3d 370, 377 (5th Cir. 2021) (“At sentencing, Horton referred to a temporal connection between the offenses, which, without more, is insufficient to establish a relevant conduct determination.”).

<sup>129</sup> *United States v. Benton*, 957 F.3d 696, 703 (6th Cir.), *cert. denied*, 141 S. Ct. 831 (2020); *see, e.g.*, USSG §2D1.1, comment. (n.5) (“Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level.”).

<sup>130</sup> 957 F.3d 581, 586–88 (5th Cir. 2020).

<sup>131</sup> *Id.* at 586.

<sup>132</sup> *Id.* at 587; *see also, e.g.*, *United States v. Rollerson*, 7 F.4th 565, 573 (7th Cir. 2021) (affirming determination that uncharged drug buys were relevant conduct and discussing applicable factors); *Barry*, 978 F.3d at 219 (affirming determination that drug quantities determined by converting seized cash were relevant conduct and discussing applicable factors).

evidence that would have supported a finding that the methamphetamine and cocaine offenses were “distinct crimes.”<sup>133</sup>

In contrast, in *United States v. Draheim*, the Seventh Circuit reversed the inclusion of a “bulk order” arranged by the defendant of nearly 30 grams of ice where the offense conduct involved only “an individual sale of two grams of street meth in a city.”<sup>134</sup> Nothing other than cell phone usage and “the defendant’s practice of obtaining methamphetamine and repackaging it for sale” connected the two transactions.<sup>135</sup> This, the Seventh Circuit said, was insufficient: “A one-time order of a large amount of ice from a national distributor does not match up with a small sale of street meth to a local customer.”<sup>136</sup>

In some cases, the defendant may seek to include drug quantities as relevant conduct to receive either a sentence concurrent with an undischarged sentence or a lower criminal history score. First, where a defendant has an undischarged term of imprisonment for an offense that is relevant conduct to the current offense, the guidelines provide that a new sentence should be imposed concurrently with the remainder of any undischarged term of imprisonment.<sup>137</sup> Accordingly, a defendant who demonstrates that the drug activity that led to the undischarged term is relevant conduct may benefit from a concurrent, rather than consecutive sentence, for the instant offense.<sup>138</sup>

Second, if drug activity associated with another conviction is considered relevant conduct to the instant offense, it may not be counted as a “prior sentence” in calculating the defendant’s criminal history score under §4A1.2 (Definitions and Instructions for Computing Criminal History).<sup>139</sup> However, conduct underlying a sentence that was imposed prior to the acts constituting the instant offense would be considered as prior criminal history, not as relevant conduct.<sup>140</sup>

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<sup>133</sup> *Nava*, 957 F.3d at 587.

<sup>134</sup> 958 F.3d 651, 659 (7th Cir. 2020).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 660.

<sup>137</sup> USSG §5G1.3(b); *see, e.g.*, *United States v. Horton*, 993 F.3d 370, 375–77 (5th Cir. 2021) (rejecting defendant’s argument that state offense was relevant conduct); *United States v. Ochoa*, 977 F.3d 354, 357 (5th Cir. 2020) (same), *cert. denied*, 141 S. Ct. 1281 (2021); *United States v. Clark*, 935 F.3d 558, 570–71 (7th Cir. 2019) (rejecting same argument on plain error review).

<sup>138</sup> *See* USSG §5G1.3(b).

<sup>139</sup> *See* USSG §4A1.2, comment. (n.1) (defining “prior sentence” as “a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense”; explain that “conduct that is part of the instant offense” means “conduct that is relevant conduct to the instant offense under the provisions of § 1B1.3 (Relevant Conduct)”).

<sup>140</sup> USSG §1B1.3, comment. (n.5(C)).

## b. Agreements and attempts to sell

Defendants involved in inchoate offenses, such as attempts and conspiracies, are generally responsible for the agreed-upon quantity.<sup>141</sup> Where the sale is completed, however, the sentencing court instead should use the delivered amount if it more accurately reflects the scale of the offense.<sup>142</sup> Thus, where a defendant agrees to sell 500 grams of cocaine and actually delivers 480 grams with no further delivery to follow, the 480 grams best reflects the scale of the offense.<sup>143</sup>

If a defendant both completes a drug transaction and attempts or agrees to an additional transaction, such as where a defendant completes the sale of 5 grams of heroin and attempts to sell an additional 10 grams, the court must aggregate the total amount to determine the scale of the offense.<sup>144</sup>

In a reverse sting operation, where a government agent sells or negotiates to sell a controlled substance to a defendant, the agreed-upon quantity more accurately reflects the scale of the offense, even where the delivery is completed.<sup>145</sup> This is because the actual amount delivered is controlled by the government instead of the defendant.<sup>146</sup> However, the court may depart downward where the selling government agent sets an artificially low price below the market value for the substance, leading the defendant to purchase a greater quantity than his available resources otherwise would have allowed.<sup>147</sup>

## c. Personal use quantities

Several courts have concluded that for a defendant in a non-conspiracy distribution case, personal use quantities of drugs are not counted if they were not “part of or connected to the commission of, preparation for, or concealment of” the distribution offense and “not possessed with the intent to distribute.”<sup>148</sup>

On the other hand, several courts have held that a defendant may be responsible for personal use quantities where the defendant is involved in a conspiracy or charged with conspiracy to distribute. These courts have reasoned that what matters for attributable

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<sup>141</sup> USSG 2D1.1, comment. (n.5).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> USSG §2D1.1, comment. (n.27(A)).

<sup>148</sup> *United States v. Wilson*, 17 F.4th 994, 1002 (10th Cir. 2021) (quotation omitted) (also noting that the Second, Third, Sixth, Seventh, Eighth, and Ninth Circuits have reached similar conclusions and that the Eleventh Circuit has reached a contrary result).

quantity in the conspiracy context is the “total quantity of drugs involved in the entire enterprise, not what individual co-conspirators choose to do with those drugs.”<sup>149</sup>

The Fourth Circuit has applied the same logic in a case involving aiding and abetting the distribution of a controlled substance, holding that drugs set aside for an accomplice’s personal use were within the scope of the criminal activity and therefore were attributable to the defendant.<sup>150</sup>

#### 4. Application Issues

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Though the above drug quantity principles generally apply throughout §2D1.1, several application issues apply to certain drug types.

##### a. Cocaine

The Drug Quantity Table sets forth different threshold quantities for each base offense level for “cocaine” (frequently called “powder cocaine”) and “cocaine base.” The guideline defines “cocaine base” as “crack,” a “form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.”<sup>151</sup> In contrast, the statutory definition of cocaine base “reaches more broadly than just crack cocaine”<sup>152</sup> to include “cocaine in its chemically basic form.”<sup>153</sup> As a result, certain forms of cocaine base may trigger a statutory minimum under 18 U.S.C. § 841(b)(1)(B)(iii), even if those substances would not be treated as “cocaine base” (crack) under §2D1.1 and the Drug Quantity Table.

Courts have described differentiating between crack and powder cocaine, as defined in the guideline, as a “complicated task.”<sup>154</sup> Unlike cocaine base, as defined by the drug statutes, crack does not have a distinct chemical makeup. Rather, crack “is merely one form of cocaine base—a form that arises as the end result of one method of turning the salt form of cocaine, cocaine hydrochloride (powder cocaine), back into a base form.”<sup>155</sup> Beyond the “rocklike” physical appearance that often indicates crack cocaine, crack and powder cocaine frequently are consumed differently: “Crack can be smoked, but not snorted or

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<sup>149</sup> *United States v. Williamson*, 953 F.3d 264, 270 (4th Cir.) (collecting cases from the First, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits), *cert. denied*, 141 S. Ct. 638 (2020).

<sup>150</sup> *Williamson*, 953 F.3d at 270–72.

<sup>151</sup> USSG §2D1.1(c)(Note D).

<sup>152</sup> *DePierre v. United States*, 564 U.S. 70, 79 (2011).

<sup>153</sup> *Id.* at 72.

<sup>154</sup> *United States v. Carnell*, 972 F.3d 932, 940 (7th Cir. 2020) (collecting cases and discussing the difference between distinguishing among types of cocaine and types of methamphetamine).

<sup>155</sup> *Id.* (quoting *United States v. Stephenson*, 557 F.3d 449, 452–53 (7th Cir. 2009)).

injected; powder cocaine can be snorted, but not smoked.”<sup>156</sup> Because the two cannot be distinguished through chemical test, the government may rely on eyewitness and expert testimony to establish that a particular offense involves crack rather than powder.<sup>157</sup>

Consistent with the changes made by the Fair Sentencing Act of 2010,<sup>158</sup> §2D1.1 sets a quantity ratio of just under 18:1 between crack and powder cocaine, such that an offense involving powder cocaine would need to involve 18 times the quantity of crack cocaine to trigger a particular base offense level.<sup>159</sup>

The Supreme Court has held that district courts may “vary from the crack cocaine [g]uidelines based on policy disagreement with” the disparate treatment of crack and powder cocaine offenses, “and not simply based on an individualized determination that they yield an excessive sentence in a particular case.”<sup>160</sup> Courts are not required to do so, however, and may instead exercise their “discretion to stick to the 18:1 ratio in the guidelines.”<sup>161</sup>

## b. Marijuana

As explained above, ordinarily drug quantity is determined by the entire weight of the mixture or substance. For marijuana, two special rules apply.

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<sup>156</sup> *Id.* (quoting *Stephenson*, 557 F.3d at 452–53).

<sup>157</sup> *See, e.g., id.* (experts in distinguishing crack from powder cocaine are “those who spend their lives and livelihoods enmeshed with the drugs—users, dealers, and law enforcement officers who specialize in narcotics crimes” (internal quotation omitted)); *United States v. Whitehead*, 487 F.3d 1068, 1071–72 (8th Cir. 2007) (crediting testimony of DEA agent who observed substance); *United States v. Linton*, 235 F.3d 328, 329–30 (7th Cir. 2000) (identification of substance as crack was supported by expert testimony and “direct evidence of the visual characteristics of the cocaine base”).

<sup>158</sup> The Fair Sentencing Act increased the threshold quantities of crack cocaine that trigger five- and ten-year mandatory minimum penalties, resulting in an 18:1 quantity ratio between powder cocaine and crack cocaine. Pub. L. No. 111-220, § 2, 124 Stat. 2372. Previously, certain statutes required 100 times more powder cocaine than crack cocaine to trigger the same five- and ten-year mandatory minimum penalties (100:1 drug quantity ratio). *See* 21 U.S.C. §§ 841(b)(1)(A)(ii)–(iii), (B)(ii)–(iii), 960(b)(1)(B)–(C), (2)(B)–(C) (2009). The First Step Act of 2018 provides for the retroactive application of the Fair Sentencing Act to eligible offenders who were sentenced before its passage. Pub. L. No. 115-391, § 404, 132 Stat. 5194.

<sup>159</sup> *See* USSG App. C, amend. 748 (effective Nov. 1, 2010) (amending §2D1.1 to reflect the changes made by the Fair Sentencing Act); *see also* USSG App. C, amend. 782 (effective Nov. 1, 2014) (reducing by two offense levels the base offense levels assigned to quantities that trigger the statutory mandatory minimum penalties, resulting in corresponding guideline ranges that include (rather than exceed) the mandatory minimum penalties); USSG App. C, amend. 788 (effective Nov. 1, 2014) (making the changes retroactive).

<sup>160</sup> *Spears v. United States*, 555 U.S. 261, 264 (2009); *Kimbrough v. United States*, 552 U.S. 85, 110 (2007) (“[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence “greater than necessary” to achieve § 3553(a)’s purposes, even in a mine-run case.”).

<sup>161</sup> *United States v. Maldonado-Pena*, 4 F.4th 1, 62 (1st Cir. 2021).

First, with respect to marijuana that is unsuitable for consumption without first being dried, such as bales of rain-soaked marijuana or freshly harvested marijuana, such excess moisture content should be excluded when approximating the weight of the marijuana.<sup>162</sup>

Second, where an offense involves marijuana plants, the quantity is the greater of either 100 grams of marijuana per plant or the actual weight of the harvested marijuana.<sup>163</sup> The 100 grams-per-plant conversion ratio is based on the average yield from a mature marijuana plant.<sup>164</sup> The ratio applies to all plants, defined as “an organism having leaves and a readily observable root formation,”<sup>165</sup> regardless of sex.<sup>166</sup>

Courts diverge in how and whether to apply the plant-to-marijuana ratio for dry plants. The majority of courts of appeals have held that the equivalency may apply to all plants, dead or alive.<sup>167</sup> The Second Circuit has held that the conversion ratio does not apply to dry plants.<sup>168</sup> Rather, the quantity attributed to dry plants must be based solely on the dry weight of the marijuana.<sup>169</sup> The Sixth Circuit has adopted a third approach, holding that the ratio applies to dry plants only in manufacturing offenses, while an estimate of the actual weight of the dry plants must be used in possession and distribution offenses.<sup>170</sup>

Section 841 of Title 21, U.S. Code, sets a higher ratio of 1 kilogram per plant for the manufacture, distribution, and possession with intent to manufacture or distribute marijuana plants.<sup>171</sup> For example, an offense involving 1,000 marijuana plants would carry the same penalty as an offense involving at least 1,000 kilograms of marijuana.<sup>172</sup>

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<sup>162</sup> USSG §2D1.1, comment. (n.1).

<sup>163</sup> USSG §2D1.1(c)(Note E).

<sup>164</sup> USSG §2D1.1, comment. (backg'd).

<sup>165</sup> USSG §2D1.1, comment. (n.2); *see, e.g.*, *United States v. Foree*, 43 F.3d 1572, 1581 (11th Cir. 1995) (cutting or seedling is not considered a marijuana plant until it develops roots of its own).

<sup>166</sup> USSG §2D1.1(c)(Note E); *see, e.g.*, *United States v. Fletcher*, 74 F.3d 49, 55 & n.6 (4th Cir. 1996) (affirming calculation based on all marijuana plants, male and female, even though “cutting and discarding commercially unproductive male plants[] is part of the marijuana cultivation process” and explaining that “male plants are necessary for seeding” and “constitute an integral part of the initial production process”).

<sup>167</sup> *See, e.g.*, *United States v. Swanson*, 210 F.3d 788, 791–92 (7th Cir. 2000) (citing examples from the Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits).

<sup>168</sup> *United States v. Blume*, 967 F.2d 45, 49 (2d Cir. 1992).

<sup>169</sup> *Id.*

<sup>170</sup> *United States v. Olsen*, 537 F.3d 660, 664–66 (6th Cir. 2008)

<sup>171</sup> 21 U.S.C. §§ 841(b)(1)(A)(vii), (B)(vii), (D).

<sup>172</sup> *Id.* § 841(b)(1)(A)(vii).

**c. Methamphetamine**

*i. Purity*

Though most substances are measured according to the total weight of any mixture or substance in which they are contained,<sup>173</sup> methamphetamine is among the few substances for which the base offense level varies by purity. Specifically, the Drug Quantity Table differentiates among:

- (A) “Ice,” defined as “a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity”;<sup>174</sup>
- (B) “Methamphetamine (actual),” referring to the actual weight (purity) of the methamphetamine contained in the mixture;<sup>175</sup> and
- (C) Methamphetamine, which includes the entire weight of the mixture or substances.<sup>176</sup>

The guideline reflects a 10:1 quantity ratio between methamphetamine on the one hand and Ice and methamphetamine (actual) on the other, such that it takes ten times more methamphetamine mixture than Ice or methamphetamine (actual) to trigger the same base offense level. Under this ratio, Ice is treated the same as pure methamphetamine. Thus, if a substance contains methamphetamine of at least 80 percent purity, the entire substance is treated as Ice.

If the substance is not Ice, the applicable quantity is either the actual weight or the mixture, whichever results in the greater offense level. For example, a 5-kilogram (5,000 g) mixture of 60 percent purity would be equivalent to 3 kilograms of methamphetamine (actual) (5,000 g x 60% = 3,000 g). Three kilograms of methamphetamine (actual) results in the greater base offense level (36) than the 5 kilograms of methamphetamine mixture (34) and therefore will set the base offense level for the substance.

Courts differ in whether purity, and specifically in whether a substance is pure enough to be Ice, may be proven by circumstantial evidence. Most appellate courts have acknowledged the issue without squarely holding one way or the other where the ultimate classification would not impact the defendant’s sentence.<sup>177</sup>

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<sup>173</sup> USSG §2D1.1(c)(Note A).

<sup>174</sup> USSG §2D1.1(c)(Note C).

<sup>175</sup> USSG §2D1.1(c)(Note B).

<sup>176</sup> *Id.*

<sup>177</sup> See, e.g., *United States v. Carnell*, 972 F.3d 932, 945 (7th Cir. 2020) (collecting cases from the Fifth, Tenth, and Eleventh Circuits).

The Eighth Circuit squarely addressed the issue and held that laboratory testing is not required.<sup>178</sup> Rather, as with identification of crack cocaine, eyewitness testimony concerning the appearance (clarity), quality, price, or name (calling a substance “Ice”) may establish that a substance is Ice—even where there is an actual seizure of methamphetamine that could have been (but was not) tested.<sup>179</sup> The Tenth Circuit similarly has suggested that, while “[l]aboratory test results are perhaps more persuasive evidence of amounts and purities than eyewitness testimony or wiretapped conversations,” the latter “are not unreliable as a matter of law.”<sup>180</sup>

On the other hand, the Seventh Circuit has expressly rejected the Eighth Circuit’s approach, holding that it “defies common sense that even the most experienced dealer, user, or police officer could somehow detect the difference between 79% pure methamphetamine and 80% pure methamphetamine.”<sup>181</sup> The court left open the possibility that a lab report may not be required in all instances,<sup>182</sup> suggesting, for example, that “evidence connecting the visual description of the methamphetamine to the purity” could, demonstrate that a substance is Ice.<sup>183</sup> The court distinguished Ice from crack, explaining that while the latter is not rigidly defined or susceptible to laboratory confirmation, the former is defined by its purity.<sup>184</sup>

As with the crack-to-powder cocaine quantity ratio, courts have the discretion—but no obligation—to deviate from the 10:1 methamphetamine ratio based on policy disagreements.<sup>185</sup>

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<sup>178</sup> United States v. Lugo, 702 F.3d 1086, 1089–91 (8th Cir. 2013) (citing, *e.g.*, United States v. Walker, 688 F.3d 416 (8th Cir. 2012)).

<sup>179</sup> *Id.*

<sup>180</sup> United States v. Verdin-Garcia, 516 F.3d 884, 896 (10th Cir. 2008). However, in light of the quantities at issue, the Tenth Circuit ultimately did not need to decide the issue. *Id.* at 897.

<sup>181</sup> United States v. Carnell, 972 F.3d 932, 941 (7th Cir. 2021).

<sup>182</sup> *Id.* at 941.

<sup>183</sup> *Id.* at 944.

<sup>184</sup> *Id.* at 940.

<sup>185</sup> *See, e.g.*, United States v. Wickman, 988 F.3d 1065, 1068 (8th Cir. 2021) (“[I]t is not our proper appellate role to compel a district court to diverge from the [g]uidelines in accordance with a defendant’s proffered policy reasons.” (internal quotation omitted)); United States v. Heim, 941 F.3d 338, 340 (8th Cir. 2019) (rejecting argument that decision of one judge to follow 10:1 ratio resulted in an unwarranted sentencing disparity despite apparent agreement among other judges of the same district court to vary from the ratio); United States v. Bostock, 910 F.3d 348, 350 (7th Cir. 2018) (the 10:1 ratio mirrors the quantities that trigger statutory ranges in 21 U.S.C. § 841(b)(1); “a district judge is not required even to articulate a reason for sticking with the [g]uidelines and may give the silent treatment to stock arguments asking the court to disregard the Commission’s recommendations”).



ii. *Wastewater and other mixture substances*

As explained above, the term “mixture or substance” excludes “materials that must be separated from the controlled substance before the controlled substance can be used.”<sup>186</sup> The weight of any wastewater generated in the manufacturing process must be excluded.<sup>187</sup> However, there is a split among the circuits as to whether waste products may be included for purposes of determining whether a statutory minimum applies.<sup>188</sup>

d. **Pills**

Where the number of doses, pills, or capsules but not the weight of the controlled substance is known, quantity is determined by multiplying the number of doses, pills, or capsules by the typical weight per dose as set forth in the Typical Weight Per Unit Table found in the Commentary to §2D1.1.<sup>189</sup> For example, in a case involving 1,000 pills of MDMA, the court would consult the Table to determine a typical weight per pill of 250 mg.<sup>190</sup> Then, the court would multiply the 1,000 pills by 250 mg to arrive at an estimated weight of 250 g (250,000 mg).

The Typical Weight Per Unit Table should not be used where a “more reliable estimate of the total weight is available from case-specific information.”<sup>191</sup>

e. **LSD**

LSD may be distributed using a carrier medium, such as blotter paper.<sup>192</sup> Unlike most other substances, a quantity of LSD on a carrier medium is measured not by its gross weight in a mixture or substance, but by a conversion rate of 0.4 milligrams per dose.<sup>193</sup> LSD on blotter paper typically is marked by dose; when this is not the case, each ¼ inch-by-

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<sup>186</sup> USSG §2D1.1, comment. (n.1).

<sup>187</sup> *Id.*

<sup>188</sup> *Compare, e.g.,* Griffith v. United States, 871 F.3d 1321, 1336 (11th Cir. 2017) (defining “mixture or substance” in both 21 U.S.C. § 841(b) and §2D1.1 to exclude wastewater), *and* United States v. Stewart, 361 F.3d 373, 379–80 (7th Cir. 2004) (collecting cases and concluding that wastewater weight does not count toward statutory minima), *with, e.g.,* United States v. Treft, 447 F.3d 421, 424–25 (5th Cir. 2006) (reaching opposite conclusion). *See, e.g.,* United States v. Long, 958 F. Supp. 2d 1334, 1337 (M.D. Fla. 2013) (“The law of the Fifth, Eighth, Ninth, and Tenth Circuits generally supports the government’s broad view that the defendant should be held accountable for the entire weight of the solution notwithstanding that it was a toxic byproduct not ingestible or marketable, while the Sixth and Seventh Circuits have reached the opposite conclusion.”).

<sup>189</sup> USSG §2D1.1, comment. (n.9).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> USSG §2D1.1(c)(Note G).

<sup>193</sup> *Id.*

¼ inch section is presumed to equal one dose.<sup>194</sup> Where LSD is not on a carrier medium, the weight of the LSD itself, contained within a liquid solution, should be used to determine the quantity.<sup>195</sup>

However, the weight of the entire substance, including any blotter paper or solution, counts for purposes of determining whether a statutory minimum penalty applies.<sup>196</sup>

## 5. Mitigating Role Adjustment

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The mitigating role adjustment in §3B1.2 may apply to any offense involving more than one participant.<sup>197</sup> It plays a special role in setting the applicable base offense level under §2D1.1(a)(5) and is frequently at issue in drug-conspiracy cases given the different roles individuals may play.

Section 3B1.2 provides a 4-level reduction if the defendant was “a minimal participant in any criminal activity”<sup>198</sup> and a 2-level reduction if the defendant was “a minor participant in any criminal activity.”<sup>199</sup> A 3-level reduction applies in cases falling between the 4- and 2-level reductions.<sup>200</sup>

Section 2D1.1(a)(5), in turn, provides that a defendant who receives any mitigating role adjustment (2-, 3-, or 4-level) may receive one of the following reductions:

- (a) A defendant whose base offense level under the Drug Quantity Table is 32 receives a 2-level decrease;
- (b) A defendant whose base offense level under the Drug Quantity Table is 34 or 36 receives a 3-level decrease; and
- (c) A defendant whose base offense level under the Drug Quantity Table is 38 receives a 4-level decrease.<sup>201</sup>

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<sup>194</sup> USSG §2D1.1, comment. (n.10).

<sup>195</sup> *Id.*; *see, e.g.*, *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).

<sup>196</sup> *Neal v. United States*, 516 U.S. 284, 294 (1996); *Chapman v. United States*, 500 U.S. 453, 456 (1991).

<sup>197</sup> USSG §3B1.2, comment. (n.2). “A ‘participant’ is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (*e.g.*, an undercover law enforcement officer) is not a participant.” USSG §3B1.1, comment. (n.1); *see also* USSG §3B1.2, comment. (n.1) (using this definition for purposes of §3D1.2).

<sup>198</sup> USSG §3B1.2(a).

<sup>199</sup> USSG §3B1.2(b).

<sup>200</sup> USSG §3B1.2.

<sup>201</sup> USSG §2D1.1(a)(5).

Finally, if the resulting offense level is greater than level 32, and the defendant receives the 4-level minimal participant reduction, then the offense level is decreased to level 32.<sup>202</sup> A defendant whose base offense level “was reduced by operation of the maximum base offense level in § 2D1.1(a)(5)” also receives the applicable reduction under §3B1.2.<sup>203</sup>

In general, the §3B1.2 adjustments apply to a “defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.”<sup>204</sup> A “minimal participant” is one who “plays a minimal role in the criminal activity” and is “plainly among the least culpable of those involved in the conduct of group.”<sup>205</sup> A “minor participant” is one whose role could not be described as “minimal,” but “who is less culpable than most other participants in the criminal activity.”<sup>206</sup>

Some courts have rejected the argument that a defendant’s role as a drug courier “automatically entitle[s] him to a minor role reduction,” explaining that “[n]ot every courier is a minor participant, and not every minor participant is a courier . . . . Section 3B1.2(b)’s application instead turns on culpability.”<sup>207</sup> In fact, it is possible for none of the defendants in a group of conspirators to be minor participants, particularly where they all play important roles in the offense.<sup>208</sup>

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<sup>202</sup> *Id.*

<sup>203</sup> USSG §3B1.2, comment. (n.6).

<sup>204</sup> USSG §3B1.2, comment. (n.3(A)).

<sup>205</sup> USSG §3B1.2, comment. (n.4).

<sup>206</sup> USSG §3B1.2, comment. (n.5); *see, e.g.*, *United States v. Bandstra*, 999 F.3d 1099, 1102 (8th Cir. 2021) (it is not enough for a defendant to show “that he or she is a minor participant by comparison with other participants” or that there was “a larger-scale upstream distributor”; no clear error in refusing to grant a minor-role reduction to such a defendant who was “deeply involved in the offense” by distributing drugs, interacting with members of the conspiracy, collecting payments via his girlfriend, and tracking debts); *United States v. Sanchez*, 989 F.3d 523, 544–45 (7th Cir. 2021) (“the relevant comparison is the defendant’s role to that of an average member of the conspiracy, not to that of the leaders” (quotation and citation omitted)).

<sup>207</sup> *Sanchez*, 989 F.3d at 544 (internal quotation omitted) (affirming denial of minor role reduction where defendant was responsible for 170 kg of cocaine and 10 kg of heroin and, “[b]esides couriering drugs, . . . recruited members into the conspiracy, unloaded narcotics at stash houses, and even blocked law enforcement from apprehending” a coconspirator); *see, e.g.*, *United States v. Mendoza-Maisonet*, 962 F.3d 1, 25 (1st Cir. 2020) (affirming denial of reduction where evidence showed that defendant “was not substantially less culpable than” his codefendant); *United States v. Bello-Sanchez*, 872 F.3d 260, 264 (5th Cir. 2017) (“[T]he mere fact that Bello-Sanchez was but a courier is not dispositive.”).

<sup>208</sup> *See, e.g.*, *United States v. Cabezas-Montano*, 949 F.3d 567, 605–08 (11th Cir.) (affirming denial of three codefendants’ requests for minor role reductions where all three “knowingly participated in the illegal transportation of a large quantity of high-purity and high-value cocaine, that they and their transportation roles were important to that scheme, and that they were held accountable for that conduct only”), *cert. denied*, 141 S. Ct. 814, 141 S. Ct. 162 (2020). For a more detailed explanation regarding the mitigating and aggravating role adjustments and relevant caselaw, *see generally* U.S. SENT’G COMM’N, PRIMER ON AGGRAVATING AND MITIGATING ROLE ADJUSTMENTS (2021), <https://www.ussc.gov/guidelines/primers/aggravating-and-mitigating-role-adjustments>.

## B. SECTION 2D1.1(b): SPECIFIC OFFENSE CHARACTERISTICS

Section 2D1.1(b) sets forth 18 specific offense characteristics; however, most of these are applied very infrequently.<sup>209</sup> Below, five notable specific offense characteristics are discussed, with the remainder briefly outlined thereafter.

### 1. Section 2D1.1(b)(1): Dangerous Weapons

Section 2D1.1(b)(1) provides a 2-level increase if “a dangerous weapon (including a firearm) was possessed.”<sup>210</sup> Reflecting the “increased danger of violence when drug traffickers possess weapons,” the enhancement applies whenever “the weapon is present, unless it is clearly improbable that the weapon was connected with the offense.”<sup>211</sup>

The government must prove, by a preponderance of the evidence, that the weapon was “present.” If the government meets this burden, the defendant must show that it was “clearly improbable that the weapon was connected with the offense.”<sup>212</sup> To ensure that the enhancement does not apply, for example, where a defendant “had an unloaded hunting rifle in the closet,”<sup>213</sup> courts look for a “temporal and spatial relation . . . between the weapon, the drug trafficking activity, and the defendant.”<sup>214</sup> The Third Circuit, for example,

<sup>209</sup> See USE OF GUIDELINES, *supra* note 53, at 28–30.

<sup>210</sup> USSG §2D1.1(b)(1). “Dangerous weapon” and “firearm” are defined by reference to USSG §1B1.1, comment. (n.1(E), (H)). USSG §2D1.1, comment. (n.11(A)). “ ‘Dangerous weapon’ means: (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (*e.g.* a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).” USSG §1B1.1, comment. (n.1(E)); *see, e.g.*, *United States v. Leyva*, 916 F.3d 14, 27 (D.C. Cir.) (citing this definition to conclude that an “inoperable collector’s” pistol was a dangerous weapon “within the meaning of § 2D1.1 regardless of whether it is capable of being fired”), *cert. denied*, 140 S. Ct. 413 (2019). “ ‘Firearm’ means: (i) 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; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device.” USSG §1B1.1, comment. (n.1(H)).

<sup>211</sup> USSG §2D1.1, comment. (n.11(A)).

<sup>212</sup> *See, e.g.*, *United States v. Denmark*, 13 F.4th 315, 318–20 (3d Cir. 2021) (articulating this two-step inquiry); *United States v. Montenegro*, 1 F.4th 940, 946 (11th Cir. 2021) (same); *United States v. Lee*, 966 F.3d 310, 328 (5th Cir.) (same), *cert. denied*, 141 S. Ct. 639 (2020); *United States v. Stamps*, 983 F.3d 945, 949 (7th Cir. 2020) (same).

<sup>213</sup> USSG §2D1.1, comment. (n.11(A)).

<sup>214</sup> *Lee*, 966 F.3d at 328; *United States v. Bandstra*, 999 F.3d 1099, 1101 (8th Cir. 2021) (articulating same test); *see, e.g.*, *Montenegro*, 1 F.4th at 946 (explaining that “the government is not required to prove that the firearm was used to facilitate the distribution of drugs for the firearms enhancement to apply; its mere presence during the drug offense is sufficient” and that the “potential use” is key); *cf.*, *e.g.*, *Denmark*, 13 F.4th at 319 (“We reject only the narrow position that §2D1.1(b)(1) can never apply unless the guns are physically near drugs or paraphernalia. And this case illustrates why: Although [the defendant] may never have possessed meth at his residence, police watched him agree to sell the meth via FaceTime in the same home where the guns were found a month later. That alone makes it difficult for him to show that the guns were not

examines factors such as: “(1) the type of gun involved, with handguns more likely to be connected with drug trafficking than hunting rifles; (2) whether the gun was loaded; (3) whether the gun was stored (or, we add, possessed) near the drugs or drug-related items; and (4) whether the gun was accessible.”<sup>215</sup> The weapon may be “present” at any point in the offense or during relevant conduct for which the defendant is responsible.<sup>216</sup>

Further, courts may apply the dangerous weapon enhancement to constructive possession.<sup>217</sup> To prove constructive possession, the government must show that “the defendant knew of, and was in a position to exercise dominion and control over,” the weapon.<sup>218</sup> In *United States v. Baldon*, for example, the Ninth Circuit found that the defendant had constructive possession over a gun found in a storage unit where he “used the storage unit and . . . stored his drugs in the backpack where the gun was found, in the unit he paid for.”<sup>219</sup> The court contrasted the defendant’s situation from “a mere passenger in a car, a roommate in a house where guns are found, or a roommate dealing drugs from a cohort’s bedroom.”<sup>220</sup> In *United States v. Bagcho*, the D.C. Circuit held that the government failed to prove the defendant’s constructive ownership of a firearm found at a compound where the defendant operated a drug enterprise.<sup>221</sup> The court observed that “no evidence link[ed] the weapon to [the defendant] beyond the fact that it was found at the compound he owned,” and that the defendant shared the compound with “many people” who lived and worked there.<sup>222</sup>

Courts also may apply the dangerous weapon enhancement to a defendant based on another person’s possession, so long as that possession was within the scope of a jointly undertaken criminal activity, in furtherance of that activity, and reasonably foreseeable.<sup>223</sup>

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connected with his drug offense.”).

<sup>215</sup> *United States v. Perez*, 5 F.4th 390, 401 (citing *United States v. Napolitan*, 762 F.3d 297, 308 (3d Cir. 2014)).

<sup>216</sup> *See* USSG §1B1.3(a) (applicable relevant conduct principles); *see, e.g., Denmark*, 13 F.4th at 321 (affirming application of enhancement where “strong evidence” showed that the defendant “had access to weapons during his drug-trafficking activities” and the defendant failed to “produce[] any evidence to the contrary”); *United States v. Gomez*, 6 F.4th 992, 1008 (9th Cir. 2021) (“Even when defendants were arrested miles away from the firearms stored at their homes or places of business, we held that the defendants possessed weapons during the commission of the drug-trafficking offenses for purposes of this sentencing enhancement.”); *United States v. West*, 962 F.3d 183, 187 (6th Cir. 2020) (quotation omitted) (“[A]ll that the government need show is that the dangerous weapon be possessed during ‘relevant conduct.’”).

<sup>217</sup> *See, e.g., United States v. Gomez*, 6 F.4th 992, 1008 (9th Cir. 2021) (“We have held that possession of the firearm may be actual or constructive.”).

<sup>218</sup> *United States v. Bagcho*, 923 F.3d 1131, 1138 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 2677 (2020).

<sup>219</sup> 956 F.3d 1115, 1128 (9th Cir. 2020) (emphasis omitted).

<sup>220</sup> *Id.*

<sup>221</sup> *Bagcho*, 923 F.3d at 1138–40.

<sup>222</sup> *Id.* at 1139.

<sup>223</sup> USSG §1B1.3(a)(1)(B).

The defendant need not be aware of the other person’s possession of the weapon for the enhancement to apply.<sup>224</sup> Acknowledging that firearms are common tools of the drug trade, some courts have, “absent evidence of exceptional circumstances,” found 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.”<sup>225</sup>

On the other hand, at least one court, the Sixth Circuit, has “explicitly rejected the fiction that a firearm’s presence always will be foreseeable to persons participating in illegal drug transactions” and has required “at a minimum, . . . that there be objective evidence that the defendant knew the weapon was present, or at least knew it was reasonably probable that his coconspirator would be armed.”<sup>226</sup> The court nonetheless recognized “that the *quantity* of drugs and cash involved in a conspiracy may make the possession of a firearm reasonably foreseeable,” such as in one case where “narcotics worth at least \$60,000 [were] located near the firearm.”<sup>227</sup>

To avoid double counting for the role of the weapon, the §2D1.1(b)(1) enhancement does not apply to a defendant convicted under 18 U.S.C. § 924(c) (for use or possession of a firearm in connection with an underlying crime of violence or drug trafficking crime), or where §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) otherwise applies, for the same underlying drug offense.<sup>228</sup>

Finally, application of the §2D1.1(b)(1) enhancement does not necessarily preclude application of the guideline “safety valve” at §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), which requires (among other things) that the “defendant did not . . . possess a firearm or other dangerous weapon.”<sup>229</sup> That is because §2D1.1(b)(1) and §5C1.2 have different parameters (the latter requires the defendant, and not a another person, to have possessed the weapon)<sup>230</sup> and different

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<sup>224</sup> See, e.g., *United States v. Hernandez*, 964 F.3d 95, 105 (1st Cir. 2020).

<sup>225</sup> See, e.g., *id.* (internal quotation omitted).

<sup>226</sup> *United States v. Barron*, 940 F.3d 903, 912 (6th Cir. 2019) (internal quotation omitted).

<sup>227</sup> *Id.* (internal quotation omitted).

<sup>228</sup> USSG §2K2.4, comment. (n.4) (“A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).”).

<sup>229</sup> USSG §5C1.2(a)(2).

<sup>230</sup> See, e.g., USSG §5C1.2, comment. (n.4) (“[T]he term ‘defendant’ . . . limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.”); *United States v. Carrasquillo*, 4 F.4th 1265, 1273 n.1 (11th Cir. 2021) (“The daylight between §2D1.1(b)(1) and §5C1.2(a)(2) is most likely to exist in cases where §2D1.1(b)(1) applies ‘based on a co-conspirator’s reasonably foreseeable possession of a firearm in furtherance of jointly undertaken criminal activity.’ In such circumstances, ‘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.’ ”); *United States v.*

burdens of proof (the former requires the defendant to show that it was “clearly improbable” that the weapon was connected with the offense while the latter must be proved by a preponderance of the evidence).<sup>231</sup> The guideline and statutory safety valves are discussed below in Part VII.

## ***2. Section 2D1.1(b)(2): Use of Violence or Threat of Violence***

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Section 2D1.1(b)(2) provides a 2-level increase if the defendant “used violence, made a credible threat to use violence, or directed the use of violence.”<sup>232</sup> At least one court has defined “violence” to “encompass[] acts where one uses physical force with the intent to injure, regardless whether an injury actually occurs.”<sup>233</sup> Courts also apply the enhancement where the defendant “credibly threatens a violent act, but where that act has not yet come to fruition,”<sup>234</sup> or directs others to use violence.<sup>235</sup>

The dangerous weapon and use of violence enhancements may be applied cumulatively, as is generally the case with specific offense characteristics.<sup>236</sup> As with §2D1.1(b)(1), however, §2D1.1(b)(2) does not apply where a defendant is sentenced pursuant to §2K2.4.<sup>237</sup>

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Hargrove, 911 F.3d 1306, 1329 (10th Cir. 2019) (“[I]n evaluating the safety-valve provision, unlike §2D1.1(b)(1), we focus on the defendant’s ‘own conduct’ and ‘recognize a distinction between constructive and actual possession.’ Thus, while a co-conspirator’s possession of a firearm might satisfy §2D1.1(b)(1), the [g]uidelines commentary to the safety-valve provision limits a defendant’s accountability to his ‘own conduct.’ ” (internal quotations omitted)).

<sup>231</sup> See, e.g., *Carrasquillo*, 4 F.4th at 1272–73 (“Where ‘a firearm was possessed’ by the defendant personally, and yet the defendant also seeks the protection of the safety valve, the district court must determine whether the facts of the case show that a ‘connection’ between the firearm and the offense, though possible, is not probable.”); *United States v. Stamps*, 983 F.3d 945, 949 (7th Cir. 2020) (a defendant’s “inability to meet the higher ‘clearly improbable’ standard” does not “automatically forecloses his chance to meet the lower preponderance of the evidence standard”).

<sup>232</sup> USSG §2D1.1(b)(2); see also, e.g., *United States v. Griffith*, 928 F.3d 855, 873 (10th Cir. 2019) (affirming sentencing enhancement where the district court found that the defendant “was protecting not only his family, but also his property, and his property included marijuana” and rejecting the defendant’s argument that his threats to shoot people on his property were made only “in response to an attack on his home”).

<sup>233</sup> *United States v. Pineda-Duarte*, 933 F.3d 519, 523–25 (6th Cir. 2019) (vacating and remanding for the district court to determine whether the defendant “used violence” against police by swinging a shovel in their direction).

<sup>234</sup> *Id.* at 522, 526 (collecting cases).

<sup>235</sup> See, e.g., *United States v. Perez*, 962 F.3d 420, 451 (9th Cir. 2020) (affirming enhancement based in part on defendant’s direction of the use of violence where “he took young [gang] members to the neighboring Rockwood community to ‘put in work,’ during which time they killed a Rockwood gang member”), *cert. denied*, 141 S. Ct. 1443 (2021).

<sup>236</sup> USSG §2D1.1, comment. (n.11(B)).

<sup>237</sup> USSG §2K2.4, comment. (n.4).

### ***3. Section 2D1.1(b)(3): Importation Involving Aircraft and Boats***

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Section 2D1.1(b)(3) provides a 2-level increase and minimum offense level of 26 for import/export offenses in which:

- (A) An aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance;
- (B) A submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used; or
- (C) The defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance.<sup>238</sup>

Disputes occasionally arise over a defendant's role as an "pilot" or "navigator" on a boat used to import a controlled substance. The courts that have considered the issue have concluded that a defendant does not need to have a particular technical skill or position of authority to qualify.<sup>239</sup> Rather, the enhancement covers any defendant who fills one of the listed roles.<sup>240</sup> Further, the enhancement applies even where the defendant is stopped before actually completing the importation into the United States.<sup>241</sup>

### ***4. Section 2D1.1(b)(12): Maintaining a Premises for Manufacturing or Distributing Controlled Substances***

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Section 2D1.1(b)(12) provides a 2-level increase if "the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance,"<sup>242</sup> sometimes called the "stash-house enhancement."<sup>243</sup> To evaluate whether the defendant "maintained" a premises, courts consider factors such as "(A) whether the defendant held a possessory interest in (*e.g.*, owned or rented) the premises and (B) the extent to which the

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<sup>238</sup> USSG §2D1.1(b)(3).

<sup>239</sup> See, *e.g.*, *United States v. Cruz-Mendez*, 811 F.3d 1172, 1175 (9th Cir. 2016) (collecting cases); *United States v. Trinidad*, 839 F.3d 112, 115–16 (1st Cir. 2016) ("[W]e reject [the defendant's] contention that a person can only qualify as a navigator if he or she knows how to program or adjust a GPS—or other navigational device—and not if he merely relies on it to keep the boat on course.").

<sup>240</sup> See, *e.g.*, *United States v. Davila-Reyes*, 937 F.3d 57, 64 (1st Cir. 2019) (district court did not clearly err in applying the enhancement where the defendant "not only reported being the captain, but . . . admitted that he did, in fact, steer along with the other co-[d]efendants in this case"); *Cruz-Mendez*, 811 F.3d at 1176 ("By Cruz-Mendez's own account, he was a lifelong fisherman hired to transport marijuana bales, and in so doing he operated a boat laden with substantial cargo in open water by controlling both its speed and direction. Such conduct fully justifies the imposition of the two-point enhancement.").

<sup>241</sup> See, *e.g.*, *United States v. Rojas*, 812 F.3d 382, 415 (5th Cir. 2016) (citation and quotation omitted) (no plain error in applying enhancement to defendant even though his plane "was stopped before the actual importation was completed").

<sup>242</sup> USSG §2D1.1(b)(12).

<sup>243</sup> See, *e.g.*, *United States v. McArthur*, 11 F.4th 655, 661 (8th Cir. 2021).



defendant controlled access to, or activities at, the premises.”<sup>244</sup> At least one court has suggested that a defendant may “maintain” a premises as a stash house even where other individuals also retain control over the premises.<sup>245</sup> On the other hand, a defendant does not maintain a stash house simply by owning drug processing equipment that is stored at a premises over which the defendant lacks control.<sup>246</sup>

Drug manufacture or distribution “need not be the sole purpose for which the premises was maintained,” but must be a primary or principal—not incidental or collateral—use, as evaluated by the frequency with which the premises is used by the defendant for drug activity and for lawful purposes.<sup>247</sup> The Tenth Circuit has characterized this approach as a “reciprocal sliding scale,” such that “[a] substantial drug distribution that regularly and quickly passes through the home (two or three days) on a bi-monthly or tri-monthly basis may qualify as a primary use of the premises for drug-related purposes much the same as an exquisitely frequent, but relatively paltry, operation.”<sup>248</sup> The court explained that, “[i]n the same way that a residence is considered to be a home 100% of the time even when not occupied 100% of the time, a home may be used for the primary purpose of unlawful drug activity even when such activity is not constant.”<sup>249</sup>

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## 5. Section 2D1.1(b)(18): Safety Valve

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Section 2D1.1(b)(18) provides a 2-level reduction where a defendant satisfies the five criteria set forth in §5C1.2(a), the guideline “safety valve.”<sup>250</sup> This guideline provision

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<sup>244</sup> USSG §2D1.1, comment. (n.17).

<sup>245</sup> See, e.g., *McArthur*, 11 F.4th at 662 (rejecting the defendant’s argument that his coconspirator alone maintained the stash house where the defendant “encouraged members of [his gang] to use his residence to prepare drugs for distribution”).

<sup>246</sup> See, e.g., *United States v. Lord*, 915 F.3d 1009, 1021–22 (5th Cir.) (“[the defendant’s] control appears to be demonstrated more so through his possessory interest in the pill press than the premises itself. Consequently, the enhancement is improper.”), *cert. denied*, 140 S. Ct. 320 (2019).

<sup>247</sup> USSG §2D1.1, comment. (n.17); see, e.g., *United States v. Mier-Garces*, 967 F.3d 1003, 1033–34 (10th Cir. 2020) (district court did not clearly err in finding that the defendant did not actually live at stash house and explaining that even if the defendant “had stayed there regularly, the regular and repeated use of the home for drug trafficking would still have provided the district court with ample basis to find that a primary or principal use of the home was for drug distribution”), *cert. denied*, 141 S. Ct. 1431 (2021); *United States v. Johnson*, 737 F.3d 444, 447–48 (6th Cir. 2013) (upholding enhancement where defendant maintained at least one room in home for purpose of storing marijuana for later distribution); *United States v. Miller*, 698 F.3d 699, 707 (8th Cir. 2012) (upholding enhancement because the defendant used premises for drug-trafficking activities, even if it also served as the family’s home).

<sup>248</sup> *United States v. Lozano*, 921 F.3d 942, 946 (10th Cir. 2019) (internal quotation omitted) (relevant factors include: “(1) the frequency and number of drugs sales occurring at the home; (2) the quantities of drugs bought, sold, manufactured, or stored in the home; (3) whether drug proceeds, employees, customers, and tools of the drug trade (firearms, digital scales, laboratory equipment, and packaging materials) are present in the home, and (4) the significance of the premises to the drug venture”).

<sup>249</sup> *Id.* (internal quotation omitted).

<sup>250</sup> USSG §2D1.1(b)(18).

and its relationship with the statutory safety valve are addressed in Part VII below.<sup>251</sup>

## 6. Other Specific Offense Characteristics

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Other infrequently applied specific offense characteristics include the following:

- Section 2D1.1(b)(4) provides a 2-level increase if “the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility.”<sup>252</sup>
- Section 2D1.1(b)(5) provides a 2-level increase for certain amphetamine and methamphetamine importation and manufacturing offenses, but it does not apply if the defendant receives the §2D1.1(b)(3) enhancement for importation using aircraft or boats.<sup>253</sup>
- Section 2D1.1(b)(6) provides a 2-level increase for defendants “convicted under 21 U.S.C. § 865,” a sentencing provision that applies to certain methamphetamine-related offenses.<sup>254</sup>
- Section 2D1.1(b)(7) provides a 2-level increase for “distribut[ing] a controlled substance through mass-marketing by means of an interactive computer service.”<sup>255</sup> The enhancement would apply, for example, to a defendant who operated a website to promote the sale of a controlled substance, but it would not apply to coconspirators who used the internet to communicate with one another.<sup>256</sup>

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<sup>251</sup> As explained further in Part VII, the First Step Act of 2018 made changes to the statutory safety valve, including modifying the criminal history requirements for safety valve relief. Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221.

<sup>252</sup> USSG §2D1.1(b)(4); *see, e.g.*, *United States v. Vanderpool*, 566 F.3d 754, 757–58 (8th Cir. 2009) (applying enhancement where “the object of [the defendant’s] offense was to distribute a controlled substance to her cellmate in the Lincoln County jail”); *United States v. Smith*, 824 F. App’x 508, 511–12 (9th Cir. 2020) (applying enhancement).

<sup>253</sup> USSG §2D1.1(b)(5); USSG §2D1.1, comment. (n.12); *see, e.g.*, *United States v. Brune*, 991 F.3d 652, 667 (5th Cir. 2021) (upholding enhancement where the quantity of methamphetamine sold by the defendant and the fact that his “supplier was a member of the Michoacán Cartel based in Dallas,” which “borrow[ed] its name from a Mexican state,” supported the inference that at least some of the drugs were imported).

In *United States v. Serfass*, 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. 684 F.3d 548, 553 (5th Cir. 2012). However, the Ninth Circuit in *United States v. Job*, rejected the Fifth’s Circuit’s conclusion and instead held that actual knowledge is required. 871 F.3d 852, 871–72 (9th Cir. 2017).

<sup>254</sup> USSG §2D1.1(b)(6).

<sup>255</sup> USSG §2D1.1(b)(7).

<sup>256</sup> USSG §2D1.1, comment. (n.13). “Interactive computer service” is defined by reference to 47 U.S.C. § 230(f)(2). *Id.*

- Section 2D1.1(b)(8) provides a 2-level increase if “the offense involved the distribution of an anabolic steroid and a masking agent.”<sup>257</sup>
- Section 2D1.1(b)(9) provides a 2-level increase if the defendant “distributed an anabolic steroid to an athlete.”<sup>258</sup>
- Section 2D1.1(b)(10) provides a 2-level increase if the defendant “was convicted under 21 U.S.C. § 841(g)(1)(A),”<sup>259</sup> which prohibits the distribution of “date rape” drugs over the internet while “knowing or [having] reasonable cause to believe that [] the drug would be used in the commission of criminal sexual conduct.”<sup>260</sup>
- Section 2D1.1(b)(11) provides a 2-level increase if the defendant “bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense.”<sup>261</sup>
- Section 2D1.1(b)(13) provides a 4-level increase 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.”<sup>262</sup>
- Section 2D1.1(b)(14) provides a variety of enhancements and minimum offense levels for drug offenses that result in environmental harm<sup>263</sup> and for methamphetamine offenses that endanger minors, the environment, and other persons.<sup>264</sup>

<sup>257</sup> USSG §2D1.1(b)(8). A “masking agent” is a substance that “prevents the detection of the anabolic steroid in an individual’s body.” USSG §2D1.1, comment. (n.14).

<sup>258</sup> USSG §2D1.1(b)(9); *see* USSG §2D1.1, comment. (n.15) (defining “athlete”).

<sup>259</sup> USSG §2D1.1(b)(10).

<sup>260</sup> 21 U.S.C. § 841(g)(1)(A).

<sup>261</sup> USSG §2D1.1(b)(11). The enhancement “does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant.” USSG §2D1.1, comment. (n.16). Such conduct instead is covered by §3C1.1 (Obstructing or Impeding the Administration of Justice).

<sup>262</sup> USSG §2D1.1(b)(13); *see also* USSG App. C, amend. 807 (effective Nov. 1, 2018) (adding this provision). The term “fentanyl analogue” is defined as “any substance (including any salt, isomer, or salt of isomer thereof), 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).” USSG §2D1.1(c)(Note J).

<sup>263</sup> *See* USSG §2D1.1(b)(14)(A) (“If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.”).

<sup>264</sup> *See* USSG §2D1.1(b)(14)(B)–(D); *see, e.g.*, United States v. Owen, 940 F.3d 308, 313 (6th Cir. 2019) (defendant’s transportation of dangerous items used in the manufacture of methamphetamine in a vehicle presented a risk of harm to a minor riding in the vehicle); United States v. Loesel, 728 F.3d 749, 752 (8th Cir. 2013) (enhancement applied to increased risk of harm to coconspirators).

- Section 2D1.1(b)(15) provides a 2-level enhancement if the offense involved the cultivation of marijuana on government land or while trespassing on private land, and the defendant receives an aggravating role adjustment under §3B1.1.<sup>265</sup>
- Section 2D1.1(b)(16) provides a 2-level “super-aggravating” role enhancement for defendants who, having received an aggravating role adjustment under § 3B1.1, satisfy at least one of five criteria: exploitation of others in a distribution offense; distribution to minors, the elderly, or vulnerable persons; direct involvement in importation; obstruction of justice; or criminal conduct as a livelihood.<sup>266</sup>
- Section 2D1.1(b)(17) provides a 2-level reduction for defendants who, having received the 4-level minimal participant reduction in §3B1.2(a), satisfy additional enumerated criteria.<sup>267</sup>

## C. SECTION 2D1.1(d): CROSS REFERENCES

### 1. Section 2D1.1(d)(1): Murder

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Section 2D1.1(d)(1) provides a cross reference to §2A1.1 (First Degree Murder) and §2A1.2 (Second Degree Murder) if a victim was killed under circumstances that would constitute murder.<sup>268</sup> Murder is defined in 18 U.S.C. § 1111 as “the unlawful killing of a human being with malice aforethought.<sup>269</sup> Ordinary relevant conduct principles apply to determine whether a murder cross reference applies.<sup>270</sup> This cross reference applies when the offense level for the applicable murder guideline is higher than the offense level determined under §2D1.1.<sup>271</sup>

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<sup>265</sup> USSG §2D1.1(b)(15).

<sup>266</sup> USSG §2D1.1(b)(16); *see, e.g.*, *United States v. Denson*, 967 F.3d 699, 706 (8th Cir. 2020) (applying criminal livelihood super-aggravator in §2D1.1(b)(16)(E)); *United States v. Aguilar-Alonzo*, 944 F.3d 544, 552 (5th Cir. 2019) (applying enhancement for exploitation of family).

<sup>267</sup> USSG §2D1.1(b)(17) (requiring that “(A) 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; (B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and (C) the defendant had minimal knowledge of the scope and structure of the enterprise”).

<sup>268</sup> USSG §2D1.1(d)(1).

<sup>269</sup> 18 U.S.C. § 1111(g).

<sup>270</sup> USSG §1B1.3(a) (unless otherwise specified, cross references shall be determined based on relevant conduct); *see, e.g.*, *United States v. Shavers*, 955 F.3d 685, 699 (8th Cir. 2020) (rejecting the defendant’s argument that murder was not relevant conduct to drug offense and explaining that “there was ample evidence presented at trial supporting the district court’s finding, by the preponderance of the evidence, that [the defendant] was the one who killed Medellin during the course of, and in furtherance of, a drug deal, even if the jury acquitted [the defendant] on the firearm charge”).

<sup>271</sup> For more information on the murder guidelines at §§2A1.1 and §2A1.2, including the operation of cross references to these guidelines, *see generally* U.S. SENT’G COMM’N, PRIMER ON SELECTED OFFENSES AGAINST THE

## 2. Section 2D1.1(d)(2): Crime of Violence

Section 2D1.1(d)(2) provides a cross reference to §2X1.1 (Attempt, Solicitation, or Conspiracy) where a defendant is convicted under 21 U.S.C. § 841(b)(7).<sup>272</sup>

To be convicted under section 841(b)(7), a defendant must, “with intent to commit a crime of violence . . . against an individual,” distribute a controlled substance or analogue “to that individual without that individual’s knowledge.”<sup>273</sup> “Crime of violence” is defined in 18 U.S.C. § 16 as “an offense that has as an element the use, attempted use, or threatened use of physical force,” including rape, “against the person or property of another.”<sup>274</sup> The term “without that individual’s knowledge” means “the individual is unaware that a substance with the ability to alter that individual’s ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.”<sup>275</sup>

The cross reference applies when the applicable offense level under §2X1.1 is higher than the offense level determined under §2D1.1.<sup>276</sup>

## V. OTHER OFFENSE GUIDELINES

In addition to §2D1.1, Chapter 2, Part D (Offenses Involving Drugs and Narcoterrorism) sets forth other, less frequently used offense guidelines, several of which are addressed below.

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

Violations of 21 U.S.C. §§ 859 (Distribution to persons under age twenty-one), 860 (Distribution or manufacturing in or near schools and colleges), and 861 (Employment or use of persons under 18 years of age in drug operations) are among the offenses most commonly specified to the offense guideline at §2D1.2.<sup>277</sup> Section 2D1.2 applies “only in a case in which the defendant is convicted of a statutory violation of drug trafficking in a

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PERSON AND VICAR 1–5 (2021), <https://www.uscg.gov/guidelines/primers/selected-offenses-against-person-and-vicar>.

<sup>272</sup> USSG §2D1.1(d)(2).

<sup>273</sup> 21 U.S.C. § 841(b)(7)(A).

<sup>274</sup> 18 U.S.C. § 16(a); 21 U.S.C. § 841(b)(7)(A). For more information regarding the term “crime of violence,” see generally U.S. SENT’G COMM’N, PRIMER ON CATEGORICAL APPROACH (2021), <https://www.uscg.gov/guidelines/primers/categorical-approach>.

<sup>275</sup> 21 U.S.C. § 841(b)(7)(B).

<sup>276</sup> USSG §2D1.1(d)(2).

<sup>277</sup> USSG §2D1.2, statutory provisions; *see also* USSG App. A (Statutory Index).

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 stipulated to such a statutory violation.”<sup>278</sup>

Section 2D1.2(a) sets forth four alternative base offense levels, the greatest of which applies:

- (1) 2 plus the offense level from §2D1.1<sup>279</sup> applicable to the quantity of controlled substances directly involving a protected location or an underage or pregnant individual;
- (2) 1 plus the offense level from §2D1.1 applicable to the total quantity of controlled substances involved in the offense;
- (3) 26, if the offense involved a person less than eighteen years of age; and
- (4) A minimum base offense level of 13.<sup>280</sup>

Where only part of the relevant conduct directly involves a protected location, underage person, or pregnant individual, the offense levels in paragraphs (1) and (2) may differ. For example, if a defendant (as part of the same course of conduct) sold 5 grams of heroin near a protected location and 10 grams of heroin elsewhere, the offense level from subsection (a)(1) would be level 14 (two plus the offense level for the sale of 5 grams of heroin near the protected location); the offense level from subsection (a)(2) would be level 15 (one plus the offense level for the sale of 15 grams of heroin, the total amount of heroin involved in the offense).<sup>281</sup> Provided that the offense did not also involve any person under 18, the applicable base offense level would be 15 pursuant to §2D1.1(a)(2) as the greatest possible base offense level.

## **B. SECTION 2D1.6 (USE OF COMMUNICATION FACILITY IN COMMITTING DRUG OFFENSE)**

Section 2D1.6 applies to violations of 21 U.S.C. § 843(b).<sup>282</sup> Section 843(b), known as the “telephone count” provision,<sup>283</sup> makes it unlawful to “knowingly or intentionally use . . . any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under” the federal drug laws.<sup>284</sup> The statute defines

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<sup>278</sup> USSG §2D1.2, comment. (n.1) (citing USSG §1B1.2(a)).

<sup>279</sup> Application of the offense level from §2D1.1 refers to the entire offense guideline, including any applicable specific offense characteristics. *See* USSG §1B1.5, comment. (n.1).

<sup>280</sup> USSG §2D1.2(a).

<sup>281</sup> USSG §2D1.2, comment. (n.1).

<sup>282</sup> USSG App. A (Statutory Index). It also applies to attempts and conspiracies under 18 U.S.C. §§ 846, 963. *Id.*

<sup>283</sup> *See, e.g.,* United States v. Hughes, 726 F.3d 656, 658 (5th Cir. 2013) (using term); United States v. Green, 599 F.3d 360, 363 (4th Cir. 2010) (same).

<sup>284</sup> 21 U.S.C. § 843(b).

“communication facility” as “any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.”<sup>285</sup> “Each separate use of a communication facility” constitutes a separate offense.<sup>286</sup> Absent a prior felony conviction under the federal drug laws, which increase the maximum to 8 years, violations of section 843(b) carry a maximum term of imprisonment of 4 years.<sup>287</sup>

The base offense level under §2D1.6 is the level applicable to the underlying offense.

### C. SECTION 2D1.8 (RENTING OR MANAGING A DRUG ESTABLISHMENT)

Section 2D1.8 applies to violations of 21 U.S.C. § 856 and attempts and conspiracies to violate that statute.<sup>288</sup> Section 2D1.8(a) provides two alternative base offense levels. If the defendant participated in the underlying controlled substance offense, §2D1.1 sets the applicable base offense level.<sup>289</sup> But if “the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises,” the offense level is 4 less than that provided by §2D1.1 for the underlying offense, with a maximum of 26.<sup>290</sup>

Participation is viewed broadly. For example, a defendant “participates” in the underlying offense (and is ineligible for the §2D1.8(a)(2) offense level cap) where he possesses a dangerous weapon in connection with the offense, guards a cache of controlled substances, arranges for the use of the premises for drug activity, allows the use of more than one premises, makes calls to facilitate the underlying offense, or otherwise assists in its commission.<sup>291</sup> Further, §2D1.8(a)(2) does not apply to defendants who “had previously allowed any premises to be used as a drug establishment without regard to whether such prior misconduct resulted in a conviction.”<sup>292</sup> To benefit from §2D1.8(a)(2), the defendant must have “initially leased, rented, purchased, or otherwise acquired a possessory interest in the premises for a legitimate purpose.”<sup>293</sup>

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> 21 U.S.C. § 843(d)(1).

<sup>288</sup> USSG App. A (Statutory Index).

<sup>289</sup> USSG §2D1.8(a)(1).

<sup>290</sup> USSG §2D1.8(a)(2).

<sup>291</sup> USSG §2D1.8, comment. (n.1). *Compare, e.g.,* United States v. Dengler, 695 F.3d 736, 739 (8th Cir. 2012) (affirming application of §2D1.8(a)(1) instead of §2D1.8(a)(2) where the defendant “helped coconspirators distribute drugs, purchased drugs from coconspirators, and distributed drugs to his own customers”), *with* United States v. Patch, 9 F.4th 43, 46–48 (1st Cir. 2021) (reversing application of §2D1.8(a)(1) over §2D1.8(a)(2) where the government’s evidence showed only that, other than allowing the use of her apartment, the defendant rode with her boyfriend while he was picking up drugs (defendant “was merely along for the ride as a passenger”) and was “aware” of what was going on).

<sup>292</sup> USSG §2D1.8, comment. (n.1).

<sup>293</sup> *Id.*

The circuits have diverged as to who bears the burden of proving the defendant's participation in the underlying drug offense. The Ninth and D.C. Circuits have held that the government bears the burden of showing the defendant's participation, while the Tenth Circuit has held that the defendant bears the burden of showing that he did not participate in the underlying offense.<sup>294</sup> Other courts have acknowledged but not resolved the issue.<sup>295</sup>

A defendant who receives a base offense level under §2D1.8(a)(2) is ineligible for a mitigating role adjustment under §3B1.2.<sup>296</sup>

#### **D. SECTION 2D1.11 (UNLAWFULLY DISTRIBUTING, IMPORTING, EXPORTING OR POSSESSING A LISTED CHEMICAL; ATTEMPT OR CONSPIRACY)**

Though structured similarly to §2D1.1, §2D1.11 applies only to violations of statutes pertaining to listed chemicals, which serve as common precursors for the manufacture of controlled substances. Such statutes include 21 U.S.C. §§ 841(c)(1)–(2), (f)(1) and 960(d)(1)–(4).<sup>297</sup> As set forth in 2D1.11(a), the base offense level is primarily determined using at least one of the two Chemical Quantity Tables.<sup>298</sup> Subsection (d) provides the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table for methamphetamine and amphetamine precursors.<sup>299</sup> Subsection (e) provides the Chemical Quantity Table for all other precursors.<sup>300</sup> The tables work similarly to the Drug Quantity Table, with base offense levels corresponding to the quantity of the listed chemicals.

Where a defendant receives a mitigating role adjustment under §3B1.2 and the base offense level per the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity

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<sup>294</sup> Compare *In re Sealed Case*, 552 F.3d 841, 846–57 (D.C. Cir. 2009) (“It makes no difference whatsoever whether the defendant invokes §2D1.8(a)(2)—the Government cannot seek a sentence based on § 2D1.8(a)(1) unless it first proves participation.”), and *United States v. Leasure*, 319 F.3d 1092, 1097–98 (9th Cir. 2003) (“[B]ecause the purpose of § 2D1.8 is to establish a defendant’s base offense level, the government must prove the fact of participation to avoid requiring a defendant to prove ‘the negative of a proposition.’”), with *United States v. Dickerson*, 195 F.3d 1183, 1189–90 (10th Cir. 1999) (suggesting that “subsection (a)(1) effectively presumes that a defendant personally participated in the underlying controlled substance offense,” so “the burden falls on a criminal defendant to prove he did not personally participate in order to obtain the benefits of subsection (a)(2)”).

<sup>295</sup> See, e.g., *Patch*, 9 F.4th at 46 (declining to resolve issue where government conceded that it bore the burden); *Dengler*, 695 F.3d at 739 (declining to resolve issue where evidence compelled result regardless of burden).

<sup>296</sup> USSG §2D1.8(b)(1).

<sup>297</sup> USSG App. A (Statutory Index); cf., e.g., *United States v. Chan*, 729 F. App’x 765, 770–71 (11th Cir. 2018) (explaining application of §2D1.11 to violation of 21 U.S.C. § 841(f)(1)).

<sup>298</sup> USSG §2D1.11(a).

<sup>299</sup> USSG §2D1.11(d).

<sup>300</sup> USSG §2D1.11(e).



Table (not the general Chemical Quantity Table) is (i) 32, (ii) 34 or 36, or (iii) 38, the offense level is decreased by 2, 3, or 4 levels, respectively.<sup>301</sup>

Where the offense involves two or more chemicals from the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, the base offense level is determined by the aggregate quantity of the chemicals.<sup>302</sup> For any other offense involving two or more chemicals, regardless of whether the chemicals are from different tables or categories, the quantity of the single chemical that produces the greatest offense level is used to determine the base offense level.<sup>303</sup> For cases involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, the weight of the chemicals contained within the tablets is used to calculate the base offense level.<sup>304</sup>

Section 2D1.11(b) provides six specific offense characteristics:

- (1) A 2-level increase applies if a dangerous weapon or firearm was possessed.<sup>305</sup>
- (2) If the defendant was convicted of 21 U.S.C. §§ 841(c)(2), (f)(1), or § 960(d)(2)–(4), a 3-level decrease applies unless the defendant knew or believed that the chemical was to be used to unlawfully manufacture a controlled substance.<sup>306</sup>
- (3) A 2-level increase applies if the offense involves unlawful releases into the environment or unlawful transportation, storage, or disposal of hazardous waste.<sup>307</sup>
- (4) A 2-level increase applies if the defendant or a person for whom the defendant is accountable under the relevant conduct rules distributed a listed chemical through mass-marketing using an interactive computer service.<sup>308</sup>

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<sup>301</sup> USSG §2D1.11(a).

<sup>302</sup> USSG §2D1.11(d)–(e), n.(B).

<sup>303</sup> USSG §2D1.11(d)–(e), n.(A).

<sup>304</sup> USSG §2D1.11(d)–(e), n. (C); *see, e.g.*, United States v. Jumah, 599 F.3d 799, 813 (7th Cir. 2010) (“it was plain error for the district court to use the gross weight of the pseudoephedrine tablets”).

<sup>305</sup> *See* USSG §2D1.11, comment. (n.2); *see also supra* Part IV.B.1 (discussing similar enhancement in §2D1.1(b)(1)).

<sup>306</sup> *See also* USSG §2D1.11, comment. (n.3) (such convictions do not require “that the defendant have knowledge or an actual believe that the listed chemical was to be used to manufacture a controlled substance unlawfully”). *Compare, e.g.*, 21 U.S.C. § 841(c)(2) (criminalizing the knowing or intentional possession or distribution of “a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance”), *with id.* § 841(c)(1) (criminalizing the knowing or intentional possession of “a listed chemical with intent to manufacture a controlled substance”).

<sup>307</sup> *See also* USSG §2D1.11, comment. (n.4).

<sup>308</sup> *See* USSG §2D1.11, comment. (n.5); *see also supra* Part IV.B.6 (noting similar enhancement in §2D1.1(b)(7)).

- (5) A 2-level increase applies for defendants convicted under 21 U.S.C. § 865, which provides for enhanced penalties for anyone who smuggles methamphetamine precursors into the United States while using a “facilitated entry program.”<sup>309</sup>
- (6) A 2-level decrease applies for defendants who satisfy the requirements of the guideline safety valve at §5C1.2.<sup>310</sup>

Where the offence involves unlawfully manufacturing or attempting to manufacture a controlled substance, §2D1.1 applies if the resulting offense level would be greater than that determined under §2D1.11.<sup>311</sup> For this cross reference to apply, the defendant or a person for whom the defendant is accountable under the relevant conduct rules must have “completed the actions sufficient to constitute the offense of unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully.”<sup>312</sup>

A defendant may be convicted of both a listed chemical offense and a related offense involving substances covered by §2D1.1.<sup>313</sup> In such circumstances, the offense levels are determined separately under each guideline.<sup>314</sup> The final offense level then is determined after applying the multiple count grouping rules under §3D1.2(b).<sup>315</sup>

**E. SECTION 2D1.12 (UNLAWFUL POSSESSION, MANUFACTURE, DISTRIBUTION, TRANSPORTATION, EXPORTATION, OR IMPORTATION OF PROHIBITED FLASK, EQUIPMENT, CHEMICAL, PRODUCT, OR MATERIAL)**

For violations of 21 U.S.C. §§ 843(a)(6)–(7) and 864, including attempts and conspiracies,<sup>316</sup> Appendix A specifies the offense guideline at §2D1.12.<sup>317</sup> Section 2D1.12(a)

<sup>309</sup> See USSG §2D1.11, comment. (n.6) (setting forth instructions on how to divide up the sentence to satisfy the consecutive term of imprisonment mandated by 21 U.S.C. § 865).

<sup>310</sup> USSG §2D1.11(b).

<sup>311</sup> USSG §2D1.11(c)(1).

<sup>312</sup> USSG §2D1.11, comment. (n.8); see, e.g., *United States v. Swafford*, 639 F.3d 265, 267–68 (6th Cir. 2011) (upholding application of cross reference where the defendant “had a ‘criminal plan, scheme, endeavor, or enterprise’ with several of the methamphetamine cooks, it was ‘reasonably foreseeable’ that those customers would manufacture methamphetamine and [the defendant] sale of iodine was ‘in furtherance of the jointly undertaken criminal activity’ ”).

<sup>313</sup> USSG §2D1.11, comment. (n.9).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> 21 U.S.C. § 843(a)(6) and (7) criminalize the knowing or intentional possession, manufacture, distribution, or import/export of equipment or chemicals “knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance or listed chemical.” Section 864 criminalizes stealing or transporting stolen anhydrous ammonia “knowing, intending, or having reasonable cause to believe” that it “will be used to manufacture a controlled substance.”

<sup>317</sup> USSG App. A (Statutory Index).

sets forth two alternative base offense levels: 12, which applies where the defendant intended for or knew that a prohibited flask, equipment, or chemical was to be used to manufacture a controlled substance; or 9, which applies when the defendant only had “reasonable cause to believe” that the material would be so used.<sup>318</sup>

Section 2D1.12(b) provides four specific offense characteristics:

- (1) A 2-level increase applies if the defendant intended for or knew, believed, or had reasonable cause to believe that the flask, equipment, or chemical was to be used to manufacture methamphetamine.
- (2) A 2-level increase applies if the offense involved unlawful releases into the environment or unlawful transportation, treatment, storage, or disposal of hazardous waste.<sup>319</sup>
- (3) A 2-level increase applies if the defendant or a person for whom the defendant is accountable under the relevant conduct rules distributed any prohibited flask, equipment, or chemical through mass-marketing using an interactive computer service.<sup>320</sup>
- (4) A 2-level increase applies if the offense involved stealing or transporting stolen anhydrous ammonia.<sup>321</sup>

As with §2D1.11(c)(1), §2D1.1 applies where the offense involves unlawfully manufacturing or attempting to manufacture a controlled substance and the resulting offense level would be greater than that determined under §2D1.12.<sup>322</sup>

## F. SECTION 2D2.1 (UNLAWFUL POSSESSION; ATTEMPT OR CONSPIRACY)

Section 2D2.1 primarily applies to simple possession of a controlled substance in violation of 21 U.S.C. § 844(a)<sup>323</sup> and provides three alternative base offense levels: 8 for heroin, Schedule I and II opiates, and cocaine base; 6 for cocaine, flunitrazepam, LSD, and PCP; and 4 for any other controlled substance or List I chemical.<sup>324</sup> Distribution of “a small

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<sup>318</sup> USSG §2D1.12(a).

<sup>319</sup> See USSG §2D1.12, comment. (n.3) (enhancement applies to conduct that would violate federal environmental laws; describing circumstances in which an upward departure may be warranted); see, e.g., *United States v. Landmesser*, 378 F.3d 308, 313 (3d Cir. 2004) (discussing and applying Application Note 3).

<sup>320</sup> See USSG §2D1.12, comment. (n.4); see also *supra* Part IV.B.6 (noting similar enhancement in §2D1.1(b)(7)).

<sup>321</sup> USSG §2D1.12(b).

<sup>322</sup> USSG §2D1.12(c)(1); see USSG §2D1.12, comment. (n.2) (explaining how to apply cross reference).

<sup>323</sup> USSG App. A (Statutory Index).

<sup>324</sup> USSG §2D2.1(a).

amount of marijuana for no remuneration” in violation of 21 U.S.C. § 841(b)(4) is treated as simple possession and sentenced under §2D2.1.<sup>325</sup>

Section 2D2.1(b)(1) instructs the court to apply a cross reference to §2P1.2 (Providing or Possessing Contraband in Prison) for offenses involving possession of a controlled substance in a prison, correctional facility, or detention facility.

## VI. CAREER OFFENDER PROVISIONS

Because some federal drug offenses are “controlled substance offense[s]” as that term is defined in the guidelines,<sup>326</sup> a defendant convicted of such an offense may qualify as a career offender. The Career Offender guideline at §4B1.1 overrides several of the guideline calculation rules discussed above. Specifically, the defendant’s total offense level may increase, and the defendant is automatically placed in Criminal History Category VI. The career offender designation has several important requirements and calls for the application of the categorical approach.<sup>327</sup>

## VII. SUBSTANTIAL ASSISTANCE, SAFETY VALVES, AND USE OF INFORMATION PROVIDED TO THE GOVERNMENT

Two statutory provisions allow the court to sentence a defendant below a statutory minimum: the substantial assistance provision in 18 U.S.C. § 3553(e) and the safety valve provision in 18 U.S.C. § 3553(f). Defendants may receive other, more limited relief under the related guideline provisions in §§5K1.1 and 5C1.2, respectively.

### A. SUBSTANTIAL ASSISTANCE

#### 1. *Substantial Assistance Statute: 18 U.S.C. § 3553(e)*

Section 3553(e) provides:

Upon motion of the [g]overnment, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.<sup>328</sup>

<sup>325</sup> USSG §2D1.1, comment. (n.26).

<sup>326</sup> USSG §4B1.2(b).

<sup>327</sup> For a discussion of the career offender requirements, see generally U.S. SENT’G COMM’N, PRIMER ON CRIMINAL HISTORY 10–21 (2021), <https://www.ussc.gov/guidelines/primers/criminal-history>. For a discussion of the categorical approach, see generally U.S. SENT’G COMM’N, PRIMER ON CATEGORICAL APPROACH (2021), <https://www.ussc.gov/guidelines/primers/categorical-approach>.

<sup>328</sup> 18 U.S.C. § 3553(e).

Section 3553(e) may provide relief from any mandatory minimum sentence, unlike the criminal history safety valve in section 3553(f) (discussed below) which applies only to drug statutes.

For a defendant to benefit from section 3553(e), the government must exercise its discretion to file a motion “requesting or authorizing a departure below the statutory minimum.”<sup>329</sup> Absent a commitment set forth in a plea agreement, which may allow the court to undertake a more “searching” review for compliance with the terms of the agreement,<sup>330</sup> the government’s decision to withhold a section 3553(e) motion is subject only to extremely limited review for an “unconstitutional motive,” such as a defendant’s race or religion, or where “the prosecutors refusal to move [for relief is] not rationally related to any legitimate Government end.”<sup>331</sup> Where a plea agreement provides the government with discretion to evaluate the defendant’s assistance and decide whether to file such a motion, certain courts evaluate the exercise of that discretion for “good faith,” which “demands only that the government have ‘honest dissatisfaction with the defendant’s efforts.’”<sup>332</sup> As a general matter, however, section 3553(e) gives “the [g]overnment a power, not a duty, to file a motion when a defendant has substantially assisted.”<sup>333</sup>

Any sentence below the statutory minimum should “reflect” factors pertaining to the defendant’s substantial assistance.<sup>334</sup>

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<sup>329</sup> *Melendez v. United States*, 518 U.S. 120, 130 (1996).

<sup>330</sup> *United States v. Trimm*, 999 F.3d 119, 129 (2d Cir. 2021).

<sup>331</sup> *Wade v. United States*, 504 U.S. 181, 187 (1992).

<sup>332</sup> *United States v. Roe*, 445 F.3d 202, 207–08 (2d Cir. 2006); *see, e.g., Trimm*, 999 F.3d at 129 (“[T]he fact that [the defendant] upheld her end of the bargain by testifying is not enough to suggest bad faith in the context of an agreement that expressly lays out that such cooperation might—but might not—warrant a § 3553(e) motion.”). *But cf. United States v. Moore*, 225 F.3d 637, 641 (6th Cir. 2000) (“While some circuits have ruled that courts may conduct a bad faith review of the government’s refusal to file a substantial assistance motion, this Circuit has expressly ruled that when a plea agreement allocates complete discretion to the government to consider whether a substantial assistance motion should be filed, we may only review the government’s decision for unconstitutional motives. On the other hand, when the government bargains away its discretion and agrees to a plea agreement in which it promises to file a substantial assistance motion, we may ascertain whether the government complied with the terms of the agreement.”).

<sup>333</sup> *Wade*, 504 U.S. at 185; *see, e.g., United States v. Billings*, 546 F.3d 472, 476–77 (7th Cir. 2008) (“[U]nder section 3553(e), the government gets to decide whether a defendant’s cooperation merits a substantial assistance motion.”).

<sup>334</sup> *See Koons v. United States*, 138 S. Ct. 1783, 1789–90 & n.3 (2018) (the district court “permissibly considered only factors related to petitioners’ substantial assistance” in setting a sentence under section 3553(e) and observing (while expressing “no view” on the issue) that “[m]any courts have held that § 3553(e) prohibits consideration of the advisory [g]uidelines ranges in determining how far to depart downward”).

## 2. Substantial Assistance Guideline: Section 5K1.1

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Separate from the mandatory-minimum departure authority set forth in section 3553(e), §5K1.1 (Substantial Assistance to Authorities (Policy Statement)) also independently permits the government to move the court to depart from the guidelines based upon the defendant's substantial assistance in the investigation or prosecution of another offender.<sup>335</sup> Section 5K1.1 sets forth factors for the court to consider in evaluating a defendant's substantial assistance. These factors include, but are not limited to:

- (a) the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
- (b) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (c) the nature and extent of the defendant's assistance;
- (d) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; and
- (e) the timeliness of the defendant's assistance.<sup>336</sup>

Though driven by similar considerations as discussed above, section 3553(e) and §5K1.1 are separate mechanisms with distinct consequences for the defendant's sentence.<sup>337</sup> Section 3553(e) allows courts to impose a sentence below a statutory minimum penalty. By contrast, §5K1.1 only allows a court to depart from the applicable guidelines range; it does not permit a court to go below a statutory minimum sentence. Therefore, the government may elect to file a motion under §5K1.1 while simultaneously withholding a motion under section 3553(e), leaving the defendant subject to any applicable mandatory minimums.<sup>338</sup>

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<sup>335</sup> USSG §5K1.1.

<sup>336</sup> USSG §5K1.1(a).

<sup>337</sup> See, e.g., *United States v. Trimm*, 999 F.3d 119, 129 (2d Cir. 2021) (explaining that *United States v. Melendez*, 518 U.S. 120, 125 (1996), “interpreted § 3553(e) and § 5K1.1 to establish a binary motion system, ‘which permits the Government to authorize a departure from the Guidelines range while withholding from the court the authority to depart below a lower statutory minimum’ ”).

<sup>338</sup> See, e.g., *id.* (emphasis omitted) (reversing district court's finding of bad faith and decision to treat the government's §5K1.1 motion as a section 3553(e) motion because “the [g]overnment may in its discretion conclude in good faith that a defendant is entitled to a § 5K1.1 motion on the basis of cooperation, but that the value of this cooperation was not so great as to merit a § 3553(e) motion”).

### 3. Use of Information Provided to the Government

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Defendants regularly are offered “assurances that [the prosecutor] will not use what the defendant reveals” while cooperating with the government.<sup>339</sup> Section 1B1.8 limits the use of such information where a defendant enters into cooperation agreements relating to the “provision of information concerning the unlawful activities of others,” such as part of an offer of substantial assistance under 18 U.S.C. § 3553(e) or §5K1.1.<sup>340</sup> To apply, the agreement must provide that self-incriminating information will not be used against the defendant.<sup>341</sup> Where §1B1.8 applies, any information the defendant provides “shall not be used in determining the applicable guideline range”<sup>342</sup> or to support an upward departure.<sup>343</sup>

This restriction does not apply, however, “to the extent provided in the agreement”<sup>344</sup> or to: (1) information known to the government prior to entering into the cooperation agreement; (2) the existence of prior convictions and sentences required to determine a defendant’s criminal history category or career offender status; (3) in a prosecution for perjury or giving a false statement; (4) where the defendant breaches the agreement; or (5) to determine whether or to what extent a downward departure is warranted pursuant to a government motion under §5K1.1.<sup>345</sup> Where a defendant attempts to cooperate but fails to reach an agreement, the use of the information is restricted by Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410.<sup>346</sup>

### 4. Timing of Motion

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As provided in Federal Rule of Criminal Procedure 35(b)(1), the government may move for a substantial assistance reduction, including a reduction below a mandatory

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<sup>339</sup> United States v. Melvin, 730 F.3d 29, 32 (1st Cir. 2013).

<sup>340</sup> USSG §1B1.8, comment. (n.6).

<sup>341</sup> USSG §1B1.8(a).

<sup>342</sup> *Id.*

<sup>343</sup> USSG §1B1.8, comment. (n.1).

<sup>344</sup> USSG §1B1.8(a); *cf., e.g.,* United States v. Jackson, 635 F.3d 205, 209 (6th Cir. 2011) (“Here, the plain language of USSG §1B1.8 specifically and unequivocally protects proffer statements from use ‘in determining the applicable guideline range.’ But the text also appears to be similarly unequivocal in its lack of any further protection for proffer statements.”). Courts generally interpret cooperation agreements as “contracts between defendants and the [g]overnment ‘according to general contractual principles.’” United States v. Perry, 640 F.3d 805, 811 (8th Cir. 2011) (internal quotation omitted) (also finding “no basis in the text or the commentary of §1B1.8 that either requires or permits us to depart from those settled principles of interpretation in the present instance.”); United States v. Lopez, 219 F.3d 343, 346 (4th Cir. 2000) (same).

<sup>345</sup> USSG §1B1.8(b).

<sup>346</sup> USSG §1B1.8, comment. (n.3). These rules provide, with limited exceptions, that a statement made during plea discussions is not admissible “if the discussions did not result in a guilty plea.” Fed. R. Evid. 410(a)(4); *see also* Fed. R. Crim. P. 11(f).

minimum, within one year of sentencing.<sup>347</sup> Rule 35(b)(2) allows the government to file such a motion beyond one year under limited circumstances.<sup>348</sup>

## B. SAFETY VALVE

### 1. Statutory Safety Valve: 18 U.S.C. § 3553(f)

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The statutory “safety valve” allows courts to sentence certain drug defendants with minimal criminal histories “without regard to any statutory minimum sentence.”<sup>349</sup> The First Step Act of 2018 expanded the safety valve in two ways.<sup>350</sup> First, it added maritime drug offenses (46 U.S.C. §§ 70503 and 70506) to the prior list of offenses (21 U.S.C. §§ 841, 844, 846, 960, and 963) to which section 3553(f) applies.

Second, the First Step Act modified the criminal history requirements for safety valve relief. As amended, to qualify for a sentence below the statutory minimum under section 3553(f), a defendant must satisfy criteria set forth in five paragraphs by a preponderance of the evidence<sup>351</sup>:

Paragraph (1) requires that the defendant does not have—

- (a) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
- (b) a prior 3-point offense, as determined under the sentencing guidelines; and
- (c) a prior 2-point violent offense, as determined under the sentencing guidelines.

The circuits are split over whether the recently amended criminal history requirements set forth in paragraph (1) are disjunctive (such that meeting any one of the three criminal history criteria would render a defendant ineligible) or conjunctive (such that a defendant is ineligible only if all three criteria are met). The Eleventh Circuit held that the statutory context dictates a disjunctive reading.<sup>352</sup> The Ninth Circuit reached the

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<sup>347</sup> Fed. R. Crim. P. 35(b)(1), (4).

<sup>348</sup> Specifically, the government may file a motion beyond the one-year threshold where the substantial assistance involves information not previously known to the defendant, information that had not previously been useful to the government, or information that was promptly provided to the government once its usefulness became reasonably apparent to the defendant. Fed. R. Crim. P. 35(b)(2).

<sup>349</sup> 18 U.S.C. § 3553(f).

<sup>350</sup> Pub. L. No. 115-391, § 402, 132 Stat. 5194, 5221.

<sup>351</sup> *United States v. Lopez*, 998 F.3d 431, 432–33 n.1 (9th Cir. 2021) (setting forth preponderance standard); *United States v. Barron*, 940 F.3d 903, 914 (6th Cir. 2019) (same).

<sup>352</sup> *United States v. Garcon*, 997 F.3d 1301, 1304–06 (11th Cir. 2021).



opposite conclusion based on the plain text of the statute, holding that a defendant who does not meet all three criminal history criteria still may be eligible for relief.<sup>353</sup> The other circuits have yet to address the issue.

Paragraph (2) requires that the “defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense.”<sup>354</sup> The focus of this provision is on the “defendant’s own conduct”<sup>355</sup>; “possession of a firearm by a co-conspirator does not render a defendant ineligible for relief under the safety valve.”<sup>356</sup> Further, because the preponderance burden of proof under section 3553(f) differs from the defendant’s burden in §2D1.1(b)(1) to show that it is clearly improbable that any weapon was connected with the offense, a defendant may receive both the 2-level weapon enhancement and the benefit of the safety valve.<sup>357</sup>

Paragraph (3) requires that the offense not result in death or serious bodily injury to any person.<sup>358</sup> Death or serious bodily injury “results from” the use of the substance if the use was a “but-for cause of the death or injury.”<sup>359</sup>

Paragraph (4) requires that the defendant not receive the aggravating role adjustment (for being “an organizer, leader, manager, or supervisor”) set forth in §3B1.1 or have engaged in a continuing criminal enterprise.<sup>360</sup>

Paragraph (5) requires the defendant to “truthfully provide[] to the Government” everything the defendant knows about the “offenses that were part of the same course of

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<sup>353</sup> *Lopez*, 998 F.3d at 435–44.

<sup>354</sup> 18 U.S.C. § 3553(f)(2). The Eighth Circuit held that the term “offense” in paragraphs (2)–(4) refers only to “the offense of conviction” without, as provided in Application Note 3 to §5C1.2, including relevant conduct. *United States v. Hodgkiss*, 960 F.3d 1110, 1112 (8th Cir. 2020). To satisfy paragraph (5), the First Circuit held that a defendant must provide all information concerning “the offense and all relevant conduct” consistent with the “expansive” statutory text. *United States v. Martinez*, 9 F.4th 24, 38 (1st Cir. 2021).

<sup>355</sup> *United States v. Hargrove*, 911 F.3d 1306, 1330 (10th Cir. 2019) (internal quotation and emphasis omitted).

<sup>356</sup> *United States v. Barron*, 940 F.3d 903, 914 & n.2 (6th Cir. 2019) (collecting cases).

<sup>357</sup> *See, e.g., United States v. Stamps*, 983 F.3d 945, 949–50 (7th Cir. 2020) (remanding where district court found that §2D1.1(b)(1) applied but did not determine whether the defendant established by a preponderance of the evidence that he did not possess a firearm); *United States v. Bolton*, 858 F.3d 905, 914 (4th Cir. 2017) (collecting cases) (“Whereas a defendant may be unable to show that any connection between a firearm and an offense is ‘clearly improbable,’ the same defendant might be able to prove ‘by a preponderance of the evidence’ that the firearm was not connected with the offense to satisfy § 5C1.2(a)(2).”).

<sup>358</sup> 18 U.S.C. § 3553(f)(3).

<sup>359</sup> *Burrage v. United States*, 571 U.S. 204, 210–11, 219 (2014).

<sup>360</sup> 18 U.S.C. § 3553(f)(4); *see* USSG §3B1.1.

conduct” of “common scheme or plan.”<sup>361</sup> Importantly, however, a defendant remains eligible even if he has no useful information to provide or the Government already is aware of any information he had to offer.<sup>362</sup>

The defendant must provide a “truthful” and “complete” disclosure; courts have “had little difficulty affirming the denial of safety-valve relief when the opposite is true—*i.e.*, when a defendant provided only limited information to the Government or lied about or even denied his involvement in the offense.”<sup>363</sup> Some courts have characterized “completeness” as requiring “an affirmative act” of disclosure by the defendant, who “may have to do more than merely answer all questions posed by the government.”<sup>364</sup> Prior false statements or obstructive conduct do not preclude a defendant from satisfying paragraph (5) as long as the defendant subsequently provides a truthful and complete disclosure.<sup>365</sup> Ultimately, the court must determine whether the defendant has met his burden of demonstrating a true and complete disclosure, without deference to the government’s view.<sup>366</sup>

The defendant’s disclosure often comes in the form of a “safety valve proffer,” but no specific format is required as long as the complete disclosure occurs before the “time of the

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<sup>361</sup> 18 U.S.C. § 3553(f)(5).

<sup>362</sup> *Id.*

<sup>363</sup> *United States v. Collins*, 924 F.3d 436, 444 n.14 (7th Cir. 2019) (collecting cases where the denial of relief was affirmed, such as where the “defendant gave limited information” about his offense, “kept altering his version of events,” and “continued to cling to a false version of events and dispute their own culpability”); *see, e.g., United States v. Valquier*, 934 F.3d 780, 783 (8th Cir. 2019) (“Here, the government’s evidence suggests that Carlos had a larger role in the drug conspiracy than he admitted to, and Carlos failed to establish that he did in fact provide complete information.”); *United States v. Aidoo*, 670 F.3d 600, 610 (4th Cir. 2012) (“The district court is obligated to determine for itself whether the defendant has truthfully provided the government with all the relevant information that he knows, and the court is free to consider any lies the defendant may have told when evaluating the defendant’s truthfulness.”); *United States v. Jeffers*, 329 F.3d 94, 99–100 (2d Cir. 2003) (“[A] sentencing court may not disqualify a defendant at the threshold from eligibility for safety valve relief based solely on his commission of perjury at trial, where the defendant otherwise fulfills the statutory criteria . . . . A court may, of course, consider the relevance of the prior perjury or other obstructive behavior in making a factual finding as to whether the defendant has made a complete and truthful proffer . . . .”); *United States v. Fletcher*, 74 F.3d 49, 56 (4th Cir. 1996) (fabricated alibi at trial supported adverse finding under paragraph (5)).

<sup>364</sup> *United States v. Barron*, 940 F.3d 903, 917 (6th Cir. 2019) (internal quotations and alterations omitted); *cf., e.g., United States v. Rios*, 995 F.3d 654, 658 (8th Cir. 2021) (per curiam) (“A defendant must prove through affirmative conduct, that he or she gave the [g]overnment truthful information and evidence about the relevant crimes before sentencing.”).

<sup>365</sup> *See, e.g., United States v. Brownlee*, 204 F.3d 1302, 1304 (11th Cir. 2000) (collecting cases) (“Nothing in the statute suggests that a defendant who previously lied or withheld information from the government is automatically disqualified from safety-valve relief.”).

<sup>366</sup> *See, e.g., United States v. Lima-Rivero*, 971 F.3d 518, 521 (5th Cir. 2020) (the government’s view of the defendant’s truthfulness does not bind the court and the court’s assessment may not rest solely on “a case agent’s mere speculation” as to the same).

sentencing hearing.”<sup>367</sup> The circuits are divided over whether this means “before sentencing proceedings begin,” as the Seventh Circuit has held,<sup>368</sup> or before sentence is imposed such that a defendant may make a disclosure during a continuance of the sentencing hearing, as the Eighth Circuit has held.<sup>369</sup>

## 2. Guideline Safety Valve: Section 5C1.2

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Separately, where a defendant satisfies the five criteria enumerated in §5C1.2(a), the defendant may benefit from a 2-level reduction under the specific offense characteristics at §§2D1.1(b)(18) or 2D1.11(b)(6). No particular offense of conviction is required for these specific offense characteristics to apply.<sup>370</sup> For example, a defendant may be convicted of wire fraud and thereafter be directed to apply §2D1.1 pursuant to the cross reference at §2B1.1(c)(1). Such a defendant then could benefit from §2D1.1(b)(18) much like any other defendant to whom §2D1.1 would apply.

The guideline safety valve in §5C1.2 has not yet been amended since the First Step Act amended section 3553(f). Therefore, though paragraphs (2) through (5) of §5C1.2(a) mirror those in 18 U.S.C. § 3553(f), the criminal history requirement in §5C1.2(a)(1) remains far more stringent: a defendant with more than 1 criminal history point is ineligible.<sup>371</sup>

## 3. Use of Information Provided to the Government

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As amended by the First Step Act, section 3553(f) protects “[i]nformation disclosed by a defendant under” the statutory safety valve provision.<sup>372</sup> Specifically, such information

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<sup>367</sup> 18 U.S.C. § 3553(f)(5); *see, e.g.*, *United States v. Cota-Luna*, 891 F.3d 639, 649 (6th Cir. 2018) (“[T]he Safety Valve guideline does not explicitly require an in-person meeting, this Court has never suggested that such a requirement is implicit, and other Circuits have held that the Safety Valve guideline does not specify any particular form that a defendant’s communication must take.” (internal citations omitted)).

<sup>368</sup> *See, e.g.*, *United States v. Alvarado*, 326 F.3d 857, 862 (7th Cir. 2003) (collecting cases).

<sup>369</sup> *United States v. Madrigal*, 327 F.3d 738, 744–48 (8th Cir. 2003).

<sup>370</sup> USSG §§2D1.1(b)(18), 2D1.11(b)(6).

<sup>371</sup> USSG §5C1.2(a)(1). However, courts may choose to vary below the guidelines where a defendant meets the amended statutory safety valve criteria. Relatedly, in unpublished opinions applying plain error review, two courts of appeals have suggested that defendants may not borrow from the amended criminal history requirements in section 3553(f)(1) to satisfy the unchanged requirements in §5C1.2(a)(1). *See, e.g.*, *United States v. Leri*, 849 F. App’x 898, 900 (11th Cir. 2021) (“[A]s Leri does not satisfy the criteria in § 5C1.2 and it is not plain that the amended criteria in § 3553(f) are incorporated into § 5C1.2, the district court did not plainly err by not concluding that Leri satisfied the safety-valve criteria.”); *cf., e.g.*, *United States v. Goudy*, 837 F. App’x 566, 567 (9th Cir. 2021) (rejecting the defendant’s argument that the district court plainly erred in calculating the applicable range for his revocation sentence because “[t]he [g]uidelines have not been amended to reflect the changes adopted in the First Step Act”).

<sup>372</sup> 18 U.S.C. § 3553(f).

“may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.”<sup>373</sup>

The guidelines do not provide any similar protection for information provided under the guideline safety valve.<sup>374</sup> For example, the restrictions on using information disclosed by the defendant to enhance his sentence would not apply to a defendant who is convicted for an offense not enumerated in section 3553(f) and who seeks a 2-level under §2D1.1(b)(18) reduction for complying with §5C1.2, such as where §2D1.1 applies via a cross reference from another guideline.

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<sup>373</sup> *Id.*

<sup>374</sup> *Cf.* USSG §1B1.8, comment. (n.6) (§1B1.8 does not apply to “an agreement by the defendant simply to detail the extent of his own unlawful activities”).