

Drug Primer



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

March 2012

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DRUG PRIMER

The purpose of this Primer is to provide a general overview of sentencing guidelines issues and case law arising from frequently asked questions regarding the application of the drug guidelines and relevant drug statutes.¹

I. Drug Statutes

A. The Statutory Scheme

Among the most commonly used drug statutes are the following:

21 U.S.C. § 841	Prohibits the manufacture and distribution of, and possession with intent to distribute, controlled substances
21 U.S.C. § 846	Prohibits attempts and conspiracies to manufacture, distribute or possess with intent to distribute controlled substances
21 U.S.C. § 952	Prohibits the importation of controlled substances
21 U.S.C. § 953	Prohibits the exportation of controlled substances
21 U.S.C. § 963	Prohibits attempts and conspiracies to import/export controlled substances

The penalty structures for these and other drug crimes are set out in 21 U.S.C. §§ 841(b) and 960(b). The minimum and maximum statutory penalties are driven by the type and the quantity of the drug involved, but may be increased if the offense involved death or serious bodily injury, or if the offender has a prior conviction for a felony drug offense. For example:

Pursuant to 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1), a statutory range of ten years to life applies to offenses involving at least:

- 1 kilogram of Heroin
- 5 kilograms of Cocaine (powder)
- 280 grams of Cocaine base
- 1,000 kilograms of Marijuana or 1,000 plants
- 50 grams of actual Methamphetamine or 500 grams of mixture or substance

¹ A detailed discussion on crack cocaine sentencing is presented in the Commission's subject matter primer *Crack Retroactivity: Procedural Issues*, available at <http://www.ussc.gov>.

Pursuant to 21 U.S.C. §§ 841(b)(1)(B) and 960(b)(2), a statutory range of 5 to 40 years applies to offenses involving at least:

- 100 grams of Heroin
- 500 grams of Cocaine (powder)
- 28 grams of Cocaine base
- 100 kilograms of Marijuana or 100 plants
- 5 grams of actual Methamphetamine or 50 grams of mixture or substance

Pursuant to 21 U.S.C. §§ 841(b)(1)(C) and 960(b)(3), a statutory range of zero to 20 years applies to offenses involving lesser quantities of drugs.

A statutory maximum of 5 years is provided for offenses involving less than 50 kilograms of marijuana and for certain other lesser offenses. *See* 21 U.S.C. §§ 841(b)(1)(D) and 960(b)(4).

B. Legal Issues

Aggregating Quantity. Drug amounts should not be aggregated to apply a higher statutory penalty range than any of the individual substantive counts would support. That is, where the defendant is convicted of separate substantive counts, the drug amounts are not added together to reach a mandatory minimum sentence. *United States v. Harrison*, 241 F.3d 289, 292 (2d Cir. 2001) (noting drug quantities from separate transactions are not aggregated for purposes of calculating a mandatory minimum, but the combined quantities are relevant under §2D1.1 to establish the base offense level); *United States v. Rettelle*, 165 F.3d 489, 492 (6th Cir. 1999) (holding that it was error to construe the statutory penalty as applying to aggregate amounts of drugs held manufactured on various separate occasions); *United States v. Winston*, 37 F.3d 235 (6th Cir. 1994) (holding that it was error to construe the statutory penalty as applying to aggregate amounts of drugs possessed on various separate occasions).

In a conspiracy conviction, however, the quantities of each single type of drug charged within the conspiracy are aggregated to establish statutory penalties. *See, e.g., United States v. Pressley*, 469 F.3d 63 (2d Cir. 2006); *United States v. Gori*, 324 F.3d 234, 237 (3d Cir. 2003). *Cf. Alaniz v. United States*, 351 F.3d 365, 368 (8th Cir. 2003) (in reviewing defendant's 28 U.S.C. § 2255 attack on his sentence for conspiracy to distribute marijuana, the court stated that "every 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." (Italics added.) (Internal citations omitted)).

Enhanced Penalties. Sections 841(b) and 960(b) include enhancement provisions based on the defendant's prior record, which are only applicable if the government provides notice pursuant to 21 U.S.C. § 851 (proceedings to establish previous convictions). A qualifying prior conviction increases a 5- to 40-year range to a range of 10 years to life. A qualifying prior conviction increases a 10-year mandatory minimum to a 20-year mandatory minimum (the

maximum remains life); a second qualifying prior conviction increases a 10-year mandatory minimum to mandatory life. *See, e.g., United States v. Thomas*, 398 F.3d 1058 (8th Cir. 2005) (imposition of a mandatory life sentence based upon sentencing court’s finding that the defendant had two prior drug trafficking convictions did not violate rule of *Apprendi*).

Higher penalty ranges also apply if death or serious bodily injury results from use of the controlled substance. *See* §§ 841(b) and 960(b).

Apprendi v. New Jersey, 530 U.S. 466 (2000), held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” The Court reaffirmed this holding in *United States v. Booker*, 543 U.S. 220, 244 (2005).²

The courts of appeal have uniformly held that *Apprendi* applies to facts (other than prior convictions) that increase the statutory maximum sentence under § 841(b); however, the circuits are split regarding whether this rule also applies to facts that increase the mandatory minimum. And recently a Supreme Court justice suggested in *dicta* that at least one of the Court’s current members may have changed positions on the issue and may, along with four other justices, likely view *Apprendi* as applicable to mandatory minimums. *See* discussion at Section VIII, Part A, pp. 44-47.

C. Lesser Offenses

Many other drug offenses have lower statutory penalty ranges and are often used for plea bargaining and/or presenting defenses of lesser included offenses. For example:

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

Section 843(a)(6) (possession of listed chemical with intent to manufacture a controlled substance) has a four-year maximum sentence. There are additional penalty provisions.

Section 843(b) (“phone count”) has a four-year maximum sentence. There is a “doubling” provision. There are additional penalty provisions.

Section 844 (simple possession) is a misdemeanor. There are enhancement provisions.

² In *Booker*, the Supreme Court also excised the two parts of the Sentencing Reform Act that rendered the mandatory guidelines system unconstitutional: the part in 18 U.S.C. § 3553(b)(1) making the guidelines result binding on the sentencing court; and the part in § 3742(e) requiring *de novo* review of sentences on appeal. *Booker*, 543 U.S. at 258.

Section 856 (maintaining drug-related premises) has a 20-year maximum sentence. There are no mandatory minimum or enhancement provisions.

II. Chapter Two Offense Guideline Sections

A. Applicable Offense Guideline Section is Driven by Offense of Conviction

The applicable Chapter Two offense guideline section is determined by looking up the **offense of conviction** in Appendix A (Statutory Index). See §1B1.2 (Applicable Guidelines). *For example, if a defendant was charged with distributing drugs near a school in violation of 21 U.S.C. § 860, but was convicted only of possession with intent to distribute drugs in violation of 21 U.S.C. § 841(a), (b)(1), apply §2D1.1 (applicable to 21 U.S.C. § 841(a), (b)(1)), not §2D1.2 (applicable to 21 U.S.C. § 860).*

The definition of “offense of conviction” has been obscured by *Apprendi*. (*Apprendi* is discussed, *infra*.) For purposes of determining which offense guideline section is applicable where the Statutory Index specifies the use of more than one section for the offense of conviction (e.g., 21 U.S.C. § 841(a) is sentenced under §2D1.1, whereas § 841(b)(4) is sentenced under §2D2.1), use the offense guideline section for the most specific definition of the offense of conviction. *For example, if the defendant was convicted of § 841(a), (b)(4), use §2D2.1, not §2D1.1.*

B. §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)

For the most widely used code sections in drug cases – 21 U.S.C. § 841(a), (b)(1) (and conspiracy under § 846 to violate § 841(a), (b)(1)) – Appendix A specifies offense guideline §2D1.1. Additionally, §2D1.1 is often used as a result of a cross reference from other Chapter Two sections. (e.g., §2K2.1(c)(1); §2S1.1(a)(1)).

1. **Determining the Base Offense Level.** Under §2D1.1, unless the defendant is convicted of an offense that establishes death or serious bodily injury, the type and amount of drugs for which the defendant is held responsible will be the most important factor in determining his sentence.
 - a. **Drug Quantity Table.** If the offense of conviction does not establish that death or serious bodily injury resulted from use of the substance, the base offense level specified in the Drug Quantity Table applies. See §2D1.1(a)(5), (c).
 - b. **Death or Serious Bodily Injury.** Sections 2D1.1(a)(1)-(4) provide for enhanced base offense levels (**43, 38, 30, and 26**,

respectively), if the defendant is convicted under certain statutes and “the offense of conviction establishes that the death or serious bodily injury resulted from the use of the substance.”

The Commission’s view is that the “offense of conviction” language limits the application of these offense levels to cases where death or serious bodily injury is proved beyond a reasonable doubt by plea or to the factfinder. *See* USSG App. C, amend. 123 (Effective: November 1, 1989) (“The purpose of this amendment [limiting the application of §§2D1.1(a)(1), (a)(2)] is to provide that subsections (a)(1) and (a)(2) apply only in the case of a conviction under circumstances specified in the statutes cited.”) But a circuit split of authority has arisen over whether the “offense of conviction” language limits the application of these enhancements to such cases or whether they may be applied after mere judicial factfinding. *Compare United States v. Greenough*, 2012 U.S. App. LEXIS 1958 (5th Cir. Feb. 2, 2012) (holding that §2D1.1(a)(2) applies only when “death or serious bodily injury results” is an element of the offense of conviction); *United States v. Rebmann*, 321 F.3d 540, 543-44 (6th Cir. 2003) (enhanced base offense level not triggered by judicial factfinding at sentencing); *United States v. Pressler*, 256 F.3d 144, 157 n.7 (3d Cir. 2001) (*dicta*) (same) *with United States v. Rodriguez*, 279 F.3d 947, 950 (11th Cir. 2002) (enhanced offense level applied after court made findings by a preponderance and sentence did not exceed statutory maximum for lesser offense); *United States v. McIntosh*, 236 F.3d 968, 975-76 (8th Cir. 2001) (same).

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

Note: The increased offense levels under §2D1.1(a)(1)-(4) apply, in part, if the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance. The definition

of “serious bodily injury” found in §1B1.1, comment. (n.1(L)) differs from the statutory definition under 21 U.S.C. § 802(25). Courts have not addressed whether the “serious bodily injury” enhancement under §2D1.1(a)(1)-(4) is triggered by the guidelines definition or the statutory definition. However, one court noted in an unpublished opinion that the Supreme Court has held a statutory definition should be given preference over a general guideline definition. *See United States v. Alvarez*, 165 F. App’x 707, 708-09 (11th Cir. 2006) (noting that the guidelines “must bow to the specific directives of Congress,” *quoting United States v. LaBonte*, 520 U.S. 751, 757 (1997), and “commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute,” *quoting Stinson v. United States*, 508 U.S. 36, 38 (1993)).

There are two cross reference provisions that may apply when violence is involved in the drug crime. *See* discussion of §2D1.1(d)(1) (murder cross reference) and (d)(2) (distribution of controlled substance with intent to commit a crime of violence cross reference) at Section II, Part D, (1) and (2), *infra*, at pp. 25-26.

- c. **Mitigating Role Reduction:** If the defendant receives a mitigating role adjustment under §3B1.2, the offense level determined by reference to the Drug Quantity Table is reduced. This section provides a graduated reduction (two- to four-levels) for offenders whose quantity level under §2D1.1 results in a base offense level of 32 or greater. *See* §2D1.1(a)(5). If the resulting offense level is greater than 32 and the defendant receives the four-level reduction at §3B1.2(a), the offense level is reduced to a maximum (“capped”) of 32. The eligible defendant receives the two- to four-level downward role adjustment in addition to the reduced base offense level. *See* §3B1.2(a)-(b) (Mitigating Role) and Application Note 6.
2. **Drug Type.** The type of controlled substance makes a significant difference in the offense level. For example, the question of whether a substance is crack cocaine is often litigated because that substance generates relatively greater penalties.

a. **Methods for Determining Drug Type**

- (i) Stipulation as to drug type by the parties in the plea agreement may be sufficient. See *United States v. Johnson*, 396 F.3d 902, 904 (7th Cir. 2005) (collecting cases as to enforceable stipulations, including drug type); *United States v. Roman*, 121 F.3d 136, 141 n.4 (3d Cir. 1997); Cf. *United States v. Kang*, 143 F.3d 379, 381 (8th Cir. 1998) (provision of plea agreement indicating that the “United States submits” that offense involved more than 50 grams of crack cocaine was not stipulation by the defendant that was binding at sentencing). A district court may also rely upon admissions to the court by a defendant during a guilty plea colloquy. See *United States v. Rosado-Perez*, 605 F.3d 48 (1st Cir. 2010) and *United States v. James*, 78 F.3d 851, 856 (3d Cir. 1996). See also *United States v. Faulks*, 143 F.3d 133 (3d Cir. 1998). But see *United States v. Garrett*, 189 F.3d 610, 612 (7th Cir. 1999) (stipulation and admission were insufficient).
- (ii) Where the controlled substance is available, identity can be determined through chemical analysis. See *United States v. Wilson*, 103 F.3d 1402, 1407 (8th Cir. 1997) (finding that chemist’s testimony identifying substance as cocaine base without referring to “crack” was sufficient to support the defendant’s sentence); *United States v. Alfeche*, 942 F.2d 697 (9th Cir. 1991) (court relied on unchallenged chemical analysis to determine identity of substance). Usually, a chemist will testify in terms of whether the substance is “cocaine base,” and lay witnesses will testify that the substance is “crack cocaine.” *United States v. Richardson*, 225 F.3d 46, 50 (1st Cir. 2000); *United States v. Waters*, 313 F.3d 151, 156 (3d Cir. 2002); *United States v. Dukes*, 139 F.3d 469, 474 (5th Cir. 1998); but see *United States v. Stephenson*, 557 F.3d 449, 452-53 (7th Cir. 2009) (suggesting that the testimony of “users, dealers, and law enforcement officers who specialize in narcotics crimes” is sufficient to identify crack).
- (iii) All of seized substance need not be analyzed to determine identity. District courts may rely on random sampling for identification purposes. See *United States v. Dent*, 149 F.3d 180, 191 (3d Cir. 1998); *United States v. Fitzgerald*,

89 F.3d 218, 223 n.5 (5th Cir. 1996) (random sampling is generally accepted as a method of identifying entire substance whose quantity has been measured); *United States v. Jackson*, 470 F.3d 299, 310-11 (6th Cir. 2006) (same); *United States v. Roach*, 28 F.3d 729, 735 (8th Cir. 1994) (same); *United States v. Madkour*, 930 F.2d 234 (2d Cir. 1991) (in determining identity, court properly relied on lab results of randomly sampled marijuana plants and testimony from an experienced agent that all of the plants were marijuana).

- (iv) Government need not perform chemical analysis, but may rely on lay testimony and circumstantial evidence to establish identity. See *United States v. Gibbs*, 190 F.3d 188, 220 (3d Cir. 1999); see also *United States v. Bryce*, 208 F.3d 346, 353-54 (2d Cir. 1999) (circumstantial evidence sufficient to establish identity of substance involved in alleged narcotics transaction may include evidence of physical appearance of substance, evidence that substance produced expected effects when sampled by someone familiar with illicit drug, evidence that substance was used in same manner as illicit drug, testimony that high price was paid in cash for substance, evidence that transactions involving substance were carried on with secrecy or deviousness, and evidence that substance was called by name of illegal narcotic by defendant or others in his presence); *United States v. Dominguez*, 992 F.2d 678, 681 (7th Cir. 1993) (circumstantial evidence establishing identity of controlled substance may include sales price consistent with that of controlled substance; covert nature of sale; on-the-scene remarks by conspirator identifying substance as a drug; lay experience based on familiarity through prior use, trading, or law enforcement; and behavior characteristic of drug sales); *United States v. Brown*, 332 F.3d 363, 376 (6th Cir. 2003) (challenged sentence affirmed where sentencing court relied on trial testimony that cocaine purchased from defendant was cooked into crack cocaine, and that drugs seized from co-conspirators were crack cocaine); *United States v. Taylor*, 116 F.3d 269, 73-274 (7th Cir. 1997) (drug supplier, purchasers, and assistants testified that substance was crack); *United States v. Cantley*, 130 F.3d 1371, 1378-79 (10th Cir. 1997) (multiple police officers and lay witnesses

who purchased substance from, or sold substance to, defendant testified that substance was crack); *but see United States v. Roman*, 121 F.3d 136, 140-42 (3d Cir. 1997) (reviewing court affirmed sentence—barely—where the district court relied on task force officer’s testimony that the substance seized from the defendant was crack cocaine based upon his years of experience as a police officer); *United States v. Dent*, 149 F.3d 180, 189-90 (3d Cir. 1998) (same).

(v) It is not essential that crack cocaine contain sodium bicarbonate, even though the guidelines define “crack” cocaine as a form of cocaine base usually prepared by processing cocaine hydrochloride and sodium bicarbonate. See §2D1.1(c), Note (D) (definition of “crack” cocaine); *see also United States v. Diaz*, 176 F.3d 52, 119 (2d Cir. 1999); *United States v. Waters*, 313 F.3d 151, 156 (3d Cir. 2002); *United States v. Jones*, 159 F.3d 969, 982-83 (6th Cir. 1998); *United States v. Abdul*, 122 F.3d 477, 479 (7th Cir. 1997); *United States v. Stewart*, 122 F.3d 625, 628 (8th Cir. 1997); *United States v. Brooks*, 161 F.3d 1240, 1248 (10th Cir. 1998).³

b. **“Mixture or Substance.”** The specific drug types listed in the Drug Quantity Table correspond generally to those specifically listed in 21 U.S.C. § 841(b)(1), although the Drug Quantity Table lists more specific drug types.

In most circumstances, “mixture or substance” as used in the Drug Quantity Table has the same meaning as in section 841(b)(1). See §2D1.1, comment. (n.1). That is, a mixture need only contain a detectable amount of a controlled substance for the entire mixture to be considered that controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level. See Note (A) to Drug Quantity Table.

c. **Using the Drug Equivalency Table.** “Equivalent” is a guidelines term of art. Conversion ratios are not pharmacological equivalents. See §2D1.1, comment. (n.10(B)). References to “equivalents”

³ See also the discussion concerning the definition of “cocaine base” at Section II.E.1.(b.) *infra*.

within the Drug Quantity Table itself do not provide the correct base offense levels. For drugs not specifically listed in the Drug Quantity Table, you must convert to marijuana by referring to the Drug Equivalency Tables. Apply the base offense level for the resulting amount of marijuana, subject to the minimum base offense levels and maximum marijuana equivalencies provided in the tables. *See* §2D1.1, comment. (n.10). *For example, if a case involves opium (a Schedule II opiate)*⁴, ***do not*** apply the base offense level for heroin. *Instead, convert the opium to marijuana by use of the Drug Equivalency Table. Compare 1 gram of opium = 50 gm of marijuana, with 1 gram of heroin = 1 kg of marijuana.*

Analogues: If a drug is listed in neither the Drug Quantity Table or Drug Equivalency Table, apply the offense level for the most analogous drug. *Cf.* §2X5.1. In November 2004, the Commission added to Application Note 5, §2D1.1, a reference to controlled substance analogues. *See* USSG App. C, amend. 667. The note now allows courts to take potency into account in determining the appropriate sentence in an analogue case. The amendment also provides an application note regarding controlled substances not currently referenced in §2D1.1 to direct the use of the marijuana equivalency of the most analogous controlled substance.

The court properly determines the most analogous drug based on expert testimony. *See United States v. Marsh*, 894 F.2d 1035, 1041 (9th Cir. 1989).

- d. **List I Chemicals.** The List I Chemical Equivalency Table applies only in the limited circumstances where the defendant, or someone for whose conduct the defendant is accountable under the relevant conduct rules of §1B1.3(a), manufactured or attempted to manufacture a controlled substance. *Cf.* §2D1.11, comment. (n.2) (limiting the §2D1.11(c) cross reference).
- e. **Drug Equivalencies—More Than One Drug.** In addition to providing equivalencies for drugs that are not listed in the Drug Quantity Table, the Drug Equivalency Table also provides a means for combining different drugs. *See* §2D1.1, comment. (nn. 6, 10). Where an offense involves more than one drug, convert each drug

⁴ Schedules of controlled substances are revised regularly. *See* 21 U.S.C. § 812 (Schedules of controlled substances). Current schedules are published in the Code of Federal Regulations, Part 1308 of Title 21, Food and Drugs. *See also* <http://www.deadiversion.usdoj.gov/schedules/>.

to marijuana, add the marijuana weights, and look up the total marijuana weight in the Drug Quantity Table. See §2D1.1, comment. (n. 10(B)).

3. **Drug Quantity.** For most drug-related sentences, quantity is the most important consideration. Drug quantity determinations do not necessarily correspond to the amounts charged in the offense of conviction. A defendant will be held responsible for drug quantities involved in his “relevant conduct,” which may include a defendant’s own acts as well as the acts of others. See §1B1.3. The sentencing guidelines hold the defendant accountable for the “reasonably foreseeable acts and omissions of others” in furtherance of “jointly undertaken criminal activity,” which includes any “criminal plan, scheme, endeavor or enterprise undertaken by defendant in concert with others.” §1B1.3(a)(1)(B).

A defendant will be held responsible for all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. *Id.* In the case of controlled substances, the defendant is responsible for “all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.” §1B1.3, comment. (n.2). See *United States v. Laboy*, 351 F.3d 578, 582 (1st Cir. 2003).

- a. **Methods for Determining Quantity.** Issues of quantity may often be wholly dependent on co-conspirator testimony, the credibility of which is left to the district court. *United States v. Candie*, 974 F.2d 61, 64 (8th Cir. 1992) (noting that determination of drug quantity based on witness credibility is “virtually unreviewable on appeal,” including, as in this case, a co-conspirator); *United States v. Angel*, 355 F.3d 462, 474 (6th Cir. 2004) (same); *United States v. Milan*, 398 F.3d 445, 457 (6th Cir. 2005) (district court’s reliance on proffer statements of codefendants in calculating drug quantity attributable to defendant was not unreasonable when it was not obvious that statements were untruthful); *United States v. Sampson*, 140 F.3d 585, 592 (4th Cir. 1998) (direct or hearsay testimony of lay witnesses as to the amounts attributable to the defendant can provide sufficiently reliable evidence of quantity); *United States v. Fudge*, 325 F.3d 910, 922-23 (7th Cir. 2003) (court relied on co-conspirators’ testimony to determine quantity); *United States v. Mathews*, 168 F.3d 1234, 1247-48 (11th Cir. 1999) (same); *United States v. Rodriguez*, 398 F.3d 1291, 1297

(11th Cir. 2005) (calculation of drug amount which included co-conspirator's estimates of amount of times defendant transported methylenedioxyamphetamine and average amount of tablets transported each time was supported by a preponderance of the evidence). Where witnesses' estimates of drug amounts are uncertain, however, a district court is well advised to sentence at the low end of the range to which the witness testified. *See Sampson*, 140 F.3d at 592.

- (i) Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court should approximate the quantity to be used for sentencing. *See* §2D1.1, comment. (n.12). *See also United States v. Jeross*, 521 F.3d 562, 576-77 (6th Cir. 2008); *United States v. Betancourt*, 422 F.3d 240, 246-47 (5th Cir. 2005); *United States v. Lopes-Montes*, 165 F.3d 730, 732 (9th Cir. 1999); *United States v. Jarrett*, 133 F.3d 519, 529 (7th Cir. 1998); *United States v. Newton*, 31 F.3d 611, 614 (8th Cir. 1994).

- (ii) District courts have used a variety of methods to approximate quantity including: (a) determining the production capacity of a laboratory based on the amount of precursor drug found in a defendant's possession; (b) determining the production capacity of a laboratory based on the size and capability of the laboratory; (c) converting seized cash or drug notations into drug amounts; (d) extrapolating the volume of a defendant's drug trafficking from evidence of actual trafficking, etc. *See United States v. Mahaffey*, 53 F.3d 128, 132 (6th Cir. 1995) (court may approximate amount that laboratory could have produced based upon yields of similarly-situated defendants); *United States v. Shaffer*, 993 F.2d 625, 629 (7th Cir. 1993) (court may approximate amount that laboratory could have produced based upon DEA chemist's testimony regarding chemical operations and materials found at drug lab and production capacity of defendant's 12-liter flask when taking into account "sloppy" laboratory procedures); *United States v. Beshore*, 961 F.2d 1380, 1383 (8th Cir. 1992) (court may approximate amount that laboratory could have produced based upon quantity of precursor chemicals, size of laboratory, and recipes to "cook" methamphetamine seized); *United States v. Lopes-Montes*, 165 F.3d 730, 731-32 (9th Cir. 1999) (court reasonably calculated the amount of pure

methamphetamine that would have been delivered by defendant based on the purity of the delivered amount and the assumption that the negotiated remaining amount to be delivered would have the same purity); *United States v. Short*, 947 F.2d 1445, 1456-57 (10th Cir. 1991) (court may approximate amount that laboratory could have produced based upon testimony of DEA chemist and characteristics of laboratory equipment seized); *United States v. Carroll*, 6 F.3d 735, 743 (11th Cir. 1993) (court properly used expert testimony about the chemicals acquired for use in the lab to approximate the conspiracy's capacity for production of methamphetamine).

- (iii) The record should disclose evidence sufficient for a court to make a reasonable approximation of quantity. *United States v. Marrero-Ortiz*, 160 F.3d 768, 780 (1st Cir. 1998) (“[Without] particularized findings to support the assigned [base offense level], we have no principled choice but to vacate the sentence and remand for further findings and resentencing.”); *United States v. Carreon*, 11 F.3d 1225, 1231 (5th Cir. 1994) (remanding for findings where appellate court is “left to second-guess the basis for the district court’s calculation”); *United States v. Mahaffey*, 53 F.3d 128, 133 (6th Cir. 1995) (“[w]e have never approved a finding on the quantity of drugs attributable to a defendant when the record contains no evidence concerning the manner in which a precursor was converted to a controlled substance or the details of the laboratories involved”); *United States v. Hewitt*, 942 F.2d 1270, 1274 (8th Cir. 1991) (condemning use of “far reaching” averaging assumptions in estimating drug quantity); *United States v. Garcia*, 994 F.2d 1499, 1509 (10th Cir. 1993) (vacating sentence where the court based it on the average size shipment of all marijuana traffickers rather than the size of particular shipments of marijuana made by the defendants); *United States v. Butler*, 41 F.3d 1435, 1447-48 (11th Cir. 1995) (remanding because sentencing court failed to articulate “a reliable method of quantifying the amount of drugs attributable to each appellant”).
- (iv) A district court may rely on reasonable estimates and averages in arriving at its drug-quantity determinations, as long as the probable accuracy is founded on adequate indicia of reliability. See *United States v. Krasinski*, 545

F.3d 546, 552-53 (7th Cir. 2008) (no clear error to rely on estimation of drug quantity based on ranges admitted by defendant, despite the fact that a more conservative estimate would have resulted in a lower guideline range); *United States v. Dalton*, 409 F.3d 1247, 1251 (10th Cir. 2005) (upholding district court's drug quantity estimation based on the co-defendant's testimony and corroborating evidence); *United States v. Laboy*, 351 F.3d 578, 583 (1st Cir. 2003) (“[R]ote multiplication of quantities from a *single* exchange is, taken alone, an improper method for determining overall drug quantities. . . especially . . . where an estimate of quantity is multiplied by an estimate of frequency.”); *United States v. Rivera-Maldonado*, 194 F.3d 224, 229-31 (1st Cir. 1999) (sentence vacated where district court relied on testimony of agent regarding the number of sales in a two-hour period and 12 controlled buys to extrapolate the total amounts of three drugs attributable to the defendant for a six-month indictment period); *United States v. Sepulveda*, 15 F.3d 1161, 1198 (1st Cir. 1993) (sentence vacated where trial testimony of co-conspirator on number of trips and quantities was “averaged” and multiplied); *United States v. Rosacker*, 314 F.3d 422, 426 (9th Cir. 2002) (PSR and forensic lab report contained no evidentiary support for the drug quantities based on the capability of the laboratory); *United States v. Shonubi*, 998 F.2d 84, 89-90 (2d Cir. 1993) (vacating, in the absence of other evidentiary support, district court's drug quantity finding arrived at by rote multiplication of number of trips times quantity carried on one such trip); *United States v. Garcia*, 994 F.2d 1499, 1509 (10th Cir. 1993) (vacating defendant's sentence and holding that averages, when used to arrive at drug quantity findings, must be “more than a guess”).

Note: The Second Circuit requires “specific evidence,” *e.g.*, drug records, admissions or live testimony, to prove a relevant conduct quantity of drugs for sentencing purposes. The evidence may be circumstantial—such as sampling—but must point to a specific drug quantity for which the defendant is responsible. *United States v. Tran*, 519 F.3d 98, 106 (2d Cir. 2008), citing *United States v. Shonubi*, 998 F.2d 84, 89-90 (2d Cir. 1993).

- (v) A district court cannot quantify yield figures without regard for a particular defendant's capabilities when viewed in light of the drug laboratory. *United States v. Eschman*, 227 F.3d 886, 890-91 (7th Cir. 2000) (court should not rely on a theoretical yield analysis of 100 percent to extrapolate clandestine laboratory yield); *United States v. Rosacker*, 314 F.3d 422, 427-28 (9th Cir. 2002) (sentencing court should consider the defendant's ability to manufacture). *See also United States v. Cole*, 125 F.3d 654, 655 (8th Cir. 1997) (relevant inquiry is on what defendant, not "an average cook," is capable of yielding); *United States v. Hamilton*, 81 F.3d 652, 653-54 (6th Cir. 1996) (rejecting standardized drug conversion formulas in favor of individualized assessment of defendant's capabilities), *superseded by statute as stated in United States v. Martin*, 438 F.3d 621 (6th Cir. 2006); *United States v. Mahaffey*, 53 F.3d 128, 132-33 (6th Cir. 1995) (same); *United States v. Anderson*, 236 F.3d 427, 430 (8th Cir. 2001) (evidence must be based not on theoretical yield but on what the particular defendant could produce); (This case is already in this string cite) *United States v. Havens*, 910 F.2d 703, 706 (10th Cir. 1990) ("The factual question is what each specific defendant could have actually produced, not the theoretical maximum amount produceable from the chemicals involved."); *United States v. Higgins*, 282 F.3d 1261, 1279-82 (10th Cir. 2002) (an estimate by an agent of the quantity of seized controlled substances destroyed before trial is not sufficiently reliable for extrapolating clandestine laboratory yield).
- (vi) The production capacity of a laboratory may be based on the amount of precursor drug found in a defendant's possession. Some courts permit quantity to be approximated by calculating the amount of controlled substance that could be produced from the amount of precursor chemicals seized. *United States v. Basinger*, 60 F.3d 1400, 1409 (9th Cir. 1995). Some courts have also permitted a district court to rely on expert testimony that estimates production capability, even when the expert had to assume the availability of precursor chemicals that were not seized or were found in short supply. *United States v. Evans*, 891 F.2d 686, 687-88 (8th Cir. 1989) (same); *United States v. Becker*, 230 F.3d 1224, 1234-36 (10th Cir. 2000)

(same); *United States v. Smith*, 240 F.3d 927, 930-31 (11th Cir. 2001) (same).

- (vii) The production capacity of a laboratory may be determined by the size and capability of the laboratory. *United States v. Shaffer*, 993 F.2d 625, 626-29 (7th Cir. 1993) (court may approximate amount that laboratory could have produced based upon DEA chemist’s testimony regarding chemical operations and materials found at drug lab and production capacity of defendant’s 12-liter flask when taking into account “sloppy” laboratory procedures); *United States v. Beshore*, 961 F.2d 1380, 1383 (8th Cir. 1992) (court may approximate amount that laboratory could have produced based upon quantity of precursor chemicals, size of laboratory, and recipes to “cook” methamphetamine seized); *United States v. Short*, 947 F.2d 1445, 1456-57 (10th Cir. 1991) (court may approximate amount that laboratory could have produced based upon testimony of DEA chemist and characteristics of laboratory equipment seized); *United States v. Williams*, 989 F.2d 1061, 1072-74 (9th Cir. 1993) (court permitted to rely on expert testimony that estimated production capability based on lab equipment, even though expert had to assume availability of precursor chemicals that were not seized or were found in short supply); *United States v. Kessler*, 321 F.3d 699, 703-04 (8th Cir. 2003) (court relied on chemist’s testimony regarding analyzed samples from defendant’s residence and from the lab to approximate quantity).
- (viii) Courts may convert money into quantities of drugs. Where cash is seized and where either no drug is seized or the amount seized does not reflect the scale of offense, a sentencing court may estimate the quantity of drugs by converting cash into its drug equivalent, provided it finds by a preponderance that the cash was attributable to drug sales which are relevant conduct under §1B1.3. *See, e.g., United States v. Simmons*, 582 F.3d 730, 737 (7th Cir. 2009) (“When there is a sufficient basis to believe that cash found in a defendant's possession was derived from drug sales, a court properly includes the drug equivalent of that cash in the drug-quantity calculation.”); *United States v. Hinson*, 585 F.3d 1328 (10th Cir. 2009) (search of methamphetamine trafficker’s car yielded over \$40,000, which was converted to a methamphetamine-equivalent of

1.5 kilograms); *United States v. Jackson*, 3 F.3d 506, 511 (1st Cir. 1993)(“When drug traffickers possess large amounts of cash in ready proximity to their drug supply, a reasonable inference may be drawn that the money represents drug profits.”).

- (ix) Courts should be careful in their calculations to avoid double counting of both the proceeds and the narcotics themselves. See *United States v. Eisom*, 585 F.3d 552, 555 (1st Cir. 2009); *United States v. Sampson*, 140 F.3d 585, 592 (4th Cir. 1998).
- (x) Courts have extrapolated money in other situations to arrive at a drug quantity. See *United States v. Eke*, 117 F.3d 19, 22-24 (1st Cir. 1997) (court affirmed extrapolation of fees paid to couriers to reach a quantity); *United States v. Bashara*, 27 F.3d 1174, 1181-82 (6th Cir.1994) (amount of a wire transfer was converted into an equivalent amount of heroin), *overruled on other grounds as stated in United States v. Caseslorete*, 220 F.3d 727 (6th Cir. 2000).
- (xi) Courts may extrapolate the volume of a defendant’s drug trafficking from evidence of actual trafficking. *United States v. Lopes-Montes*, 165 F.3d 730, 731-32 (9th Cir. 1999) (court reasonably calculated the amount of pure methamphetamine that would have been delivered by defendant based on the purity of the delivered amount and the assumption that the negotiated remaining amount to be delivered would have the same purity). Courts have also used evidence such as drug ledgers or defendant’s admissions to determine the quantity attributable to a defendant. See e.g., *United States v. Spiller*, 261 F.3d 683, 691 (7th Cir. 2001) (defendant held responsible for dealing 28 kgs of crack cocaine as evidence by handwritten ledgers belonging to the defendant in which he recorded drug sales); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005) (district court properly made drug quantity estimate based on defendant’s post-arrest admissions to the police).

- b. **No Evidence to Refute Quantity.** Generally, where a defendant offers no evidence to refute the factual assertions in the presentence report as to the quantity of drugs attributable to him, whether because of his own acts or because such quantity falls within the scope of his jointly undertaken activity and was

reasonably foreseeable, the district court may adopt those facts without further inquiry as long as the assertions are supported by sufficient indicia of reliability. See *United States v. Cyr*, 337 F.3d 96, 100 (1st Cir. 2003); *United States v. Solis*, 299 F.3d 420, 456 (5th Cir. 2002); *United States v. Barnett*, 989 F.2d 546, 553, n.6 (1st Cir. 1993); *United States v. Holmes*, 961 F.2d 599, 603 (6th Cir. 1992); *United States v. Shelton*, 400 F.3d 1325, 1329-30 (11th Cir. 2005).

- c. **Entire Weight.** For most drugs, weight includes the entire weight of any mixture or substance containing a detectable amount of the controlled substance. See Note (A) to Drug Quantity Table. Therefore, in most cases, the base offense level will be set by this entire weight.
- d. **Actual Weight.** The purity of a controlled substance is relevant for guideline calculations in a limited number of circumstances; e.g., for offenses involving PCP, amphetamine, methamphetamine, and oxycodone. For offenses involving these controlled substances, the actual weight of the controlled substance is used to determine the base offense level. See Note (B) of the Drug Quantity Table.

Also, when applying the Drug Quantity Table, drug weight does not include materials that must be separated from the controlled substance before the controlled substance can be used. See §2D1.1, comment. (n.1). See also Section II, Part E for discussion of marijuana, methamphetamine, and LSD.

- e. **Methods for Determining Purity.** Generally, purity is determined by laboratory testing. See e.g., *United States v. Verdin-Garcia*, 516 F.3d 884, 896 (10th Cir. 2008) (“Laboratory test results are perhaps more persuasive evidence of amounts and purities than eyewitness testimony or wiretapped conversations, but they are not unreliable as a matter of law.”); *United States v. Contreras*, No. 01CR57, 2002 WL 31049842, *3 (N.D. Ill. Sept. 12, 2002) (mem.) (rejecting the defendant’s argument that the testing lab’s methods did not produce drug samples for analysis that were representative of the whole and holding that the testing methods employed by the lab relied on widely accepted scientific methods to determine purity). Substances that test atypically low in purity or include impurities are still accounted for at sentencing. See also *United States v. Eli*, 379 F.3d 1016, 1021 (D.C. Cir. 2004) (rejecting

defendant's argument that a substance was too impure to be considered crack and too contaminated to be usable).

- (i) When no drugs have been recovered, the government may prove the purity attributable to a defendant by circumstantial evidence. See §2D1.1, comment. (n.12). For example, a conspirator's reliable testimony that purchased methamphetamine was "undiluted, unadulterated . . . not cut . . . pure," was held to be sufficiently reliable evidence. *United States v. Cockerill*, 217 F.3d 841 (4th Cir. 2000) (unpublished table decision). Absent evidence to the contrary, a court may assume purity of unrecovered drugs from purity of recovered substances. *United States v. Newton*, 31 F.3d 611, 614 (8th Cir. 1994); *United States v. Lopes-Montes*, 165 F.3d 730, 731-32 (9th Cir. 1999); see also *United States v. Mosby*, 177 F.3d 1067, 1071 (8th Cir. 1999) (court relied on expert testimony from government witness that purity of methamphetamine produced in a lab is usually between 85 and 95 percent to extrapolate quantity of unrecovered drugs in conjunction with 88 percent purity of seized substance).

- (ii) Purity can also be relevant for departure purposes. Particularly when heroin is involved, courts may depart because an unusually high purity is indicative of a defendant's position or role in a drug distribution chain. See §2D1.1, comment. (n.9); see *United States v. Doe*, 149 F.3d 634, 640 (7th Cir. 1998); *United States v. Legarda*, 17 F.3d 496, 501-02 (1st Cir. 1994) (high purity of cocaine justified an upward departure). And some courts have held, however, that Application Note 9 does not authorize a court to depart based on the low purity of drugs. See, e.g., *United States v. Beltran*, 122 F.3d 1156, 1159-60 (8th Cir. 1997) (rejecting departure based on purity of methamphetamine); *United States v. Benish*, 5 F.3d 20, 27-28 (3d Cir. 1993) (court did not have discretion to depart downward based on age and sex of marijuana plants; guidelines focus exclusively on number of plants, indicating that Sentencing Commission considered and rejected all other factors). See generally, *United States v. Berrora-Medrano*, 303 F.3d 277, 280, n.3 (3rd Cir. 2002) ("Given the Sentencing Commission's omission of any discussion of a downward departure for low drug purity, some courts have decided that a downward departure is permissible while others have

disagreed” and *comparing United States v. Mikaelian*, 168 F.3d 380, 390 (9th Cir.1999)[“the low purity of heroin involved in a crime cannot be categorically excluded as a basis for a downward departure”] with *United States v. Upthegrove*, 974 F.2d 55, 56-57 (7th Cir.1992) [“downward departure based on the low quality of the relevant drug is improper” partly because the Application Notes contain “no corresponding provision suggesting a downward departure for low quality drugs”)].

C. Selected Specific Offense Characteristics⁵

1. **§2D1.1(b)(1) provides for a two-level enhancement if a dangerous weapon (including a firearm) was possessed.**
 - a. **Constructive Possession.** Circuit courts have upheld the weapons enhancement for possession of a weapon in connection with a drug offense, even if the possession was only constructive. *See United States v. Rea*, 621 F.3d 595, 606 (7th Cir. 2010) (“The defendant need not have actual possession of the weapon; constructive possession is sufficient.”(Internal citations omitted.)
 - b. **Relationship to Drug Offense.** Application of §2D1.1(b)(1) requires a showing of a temporal and spatial relationship between the weapon, the drug trafficking activity, and the defendant. *See United States v. Ruiz*, 621 F.3d 390, 396 (5th Cir. 2010) (“The Government bears the burden of proving by a preponderance of the evidence that the defendant possessed the weapon and may do so by showing ‘that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant,’ which suffices to establish that the defendant personally possessed the weapon.”) The enhancement applies if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. *See* §2D1.1, comment. (n.3). The enhancement applies if the weapon was present at any point in the offense or during relevant conduct for which the defendant is responsible. *See* §1B1.3(a)(1).
 - c. **Co-Conspirator’s Possession of a Firearm.** Pursuant to §1B1.3(a)(1)(B), it is also permissible to enhance a defendant’s

⁵ The specific offense characteristics at §2D1.1 are occasionally renumbered when the guideline is amended. As a result, the specific offense characteristic designations in case citations may reflect pre-amendment designations. The designations used in this Primer were in effect at the time of its publication.

sentence based on a co-conspirator's possession of a weapon in connection with the drug trafficking offense. *See United States v. Villarreal*, 613 F.3d 1344, 1359 (11th Cir. 2010) (“A co-conspirator's possession of a firearm may be attributed to the defendant for purposes of this enhancement if his possession of the firearm was reasonably foreseeable by the defendant, occurred while he was a member of the conspiracy, and was in furtherance of the conspiracy.”) It is not necessary to prove that defendant knew of co-conspirator's possession of the weapon, as long as co-conspirator's possession was reasonably foreseeable and was connected to the conspiracy. *United States v. Woods*, 604 F.3d 286, 290 (6th Cir. 2010) (“The government concedes that there is no evidence that defendant ever possessed a firearm himself or even was actually aware that the firearm was present. Under such circumstances, the possession of a firearm by a coconspirator must (1) be connected to the conspiracy and (2) be reasonably foreseeable.”) *See also* §1B1.3(a)(1)(B).

At least one circuit has found that, because firearms are tools of the trade in drug trafficking offenses, a co-conspirator's possession of such is usually reasonably foreseeable. *United States v. Mena-Robles*, 4 F.3d 1026, 1036 (1st Cir. 1993) (“[W]e often observe that firearms are common tools of the drug trade. Absent evidence of exceptional circumstances, we think it fairly inferable that a codefendant's possession of a dangerous weapon is foreseeable to a defendant with reason to believe that their collaborative criminal venture includes an exchange of controlled substances for a large amount of cash.”); *United States v. Bianco*, 922 F.2d 910, 911-12 (1st Cir. 1991)(accord).

- d. **Application of Safety Valve and Firearm Possession.** A defendant who receives the two-level firearm enhancement (§2D1.1(b)(1)) is *not* automatically ineligible for relief under §5C1.2, *see* discussion at Section VIII, Part B, *infra*.⁶ However, when a defendant receives a two-level enhancement under §2D1.1(b)(1) based on his own possession of a firearm, generally, he is ineligible for application of §5C1.2. *See United States v. Ruiz*,

⁶ Indeed, in the 10th Circuit a defendant is precluded from receiving “safety valve” only where he actively possessed a firearm. *See, e.g., United States v. Zavalza-Rodriguez*, 379 F.3d 1182, 1190 (10th Cir. 2004) (“[F]or purposes of § 5C1.2 we look to the defendant's own conduct in determining whether the defendant has established by a preponderance of the evidence that the weapon was not possessed ‘in connection with the offense.’”)

621 F.3d 390, 397 (5th Cir. 2010); *United States v. Herrera*, 446 F.3d 283, 286 (2nd Cir. 2006) (“The district court did *not* assume that, because [defendant] incurred the two-level increase under § 2D1.1(b)(1), he was automatically ineligible for the safety valve.”). *Cf. United States v. Nelson*, 222 F.3d 545, 549-51 (9th Cir. 2000) (stating that to avoid an enhancement under §2D1.1(b)(1), the defendant must prove that it was clearly improbable he possessed a weapon in connection with the offense; however, he must only establish by a preponderance of the evidence that a weapon was not involved in order to receive the safety valve).

- e. **Co-conspirator’s Possession and §2D1.1(b)(16)**. In most circuits, a defendant who receives the two-level enhancement based on a co-defendant’s possession of the firearm is not rendered ineligible for relief under §5C1.2 and the two-level reduction under §2D1.1(b)(16). *See United States v. Delgado-Paz*, 506 F.3d 652, 655-56 (7th Cir. 2007) (“[T]he circuits are unanimous in holding that possession of a weapon by a defendant's co-conspirator does not render the defendant ineligible for safety-valve relief unless the government shows that the defendant induced the co-conspirator's possession.”) (collecting cases) *But see United States v. Johnson*, 344 F.3d 562, 565 (6th Cir. 2003) (defendant who received a two-level sentence enhancement for possession of a weapon based on co-defendant’s possession of the weapon would be ineligible for the safety valve reduction).
- f. **Burden of Proof**. Most circuits generally have held that once the government has shown by a preponderance of evidence possession of a weapon during the offense, the evidentiary standard shifts to the defendant to establish that it was clearly improbable that the weapon was connected to the offense. *See United States v. Anderson*, 452 F.3d 87, 90 (1st Cir. 2006) (“The government has the initial burden of establishing ‘that a firearm possessed by the defendant was present during the commission of the offense.’ Once the government has made that showing, ‘the burden shifts to the defendant to persuade the factfinder that a connection between the weapon and the crime is clearly improbable.’”)(Internal citations omitted.); *United States v. Davidson*, 409 F.3d 304, 312 (6th Cir. 2005); *United States v. Corral*, 324 F.3d 866, 872 (7th Cir. 2003).
- g. **Enhancement in 18 U.S.C. § 924(c) cases**. Section 2D1.1(b)(1) should not be applied when a defendant is also sentenced for a violation of 18 U.S.C. § 924(c) because the sentence imposed for the firearms conviction accounts for the conduct that would

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

2. **§2D1.1(b)(2) provides a two-level enhancement if the defendant used violence, made a credible threat to use violence, or directed the use of violence.** Application Note 3 explains that §2D1.1(b)(1) and (b)(2) may be applied cumulatively. However, in a case where the defendant possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct violence, subsection (b)(2) would not apply. Note also that a sentence under §2K2.4 accounts for conduct that would subject the defendant to an enhancement under (b)(2). *See* §2K2.4, comment. (n.4). In such a case, (b)(2) is not applicable.
3. **§2D1.1(b)(7) provides a two-level enhancement if the defendant, or a person for whose relevant conduct the defendant is accountable, distributed a controlled substance through mass marketing by means of an interactive computer service.** Application Note 23 defines “interactive computer service.”
4. **§2D1.1(b)(11) provides a two-level enhancement if the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of a drug trafficking offense.** Application Note 27 provides that subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant because such conduct is covered by §3C1.1.
5. **§2D1.1(b)(12) provides a two-level enhancement if the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance.** Application Note 28 provides that among the factors the court should consider in applying the enhancement are (A) whether the defendant held a possessory interest in (*e.g.*, owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.
6. **§2D1.1(b)(13) provides enhancements if manufacture of amphetamine or methamphetamine created a substantial risk of harm to a minor,**

human life, or the environment. Application Note 20 to §2D1.1 outlines factors to consider in determining whether an offense created a substantial risk of harm to human life or the environment. *See United States v. Chamness*, 435 F.3d 724, 728-29 (7th Cir. 2006) (methamphetamine laboratory in a trailer posed a substantial risk to human life or the environment, warranting imposition of the enhancement). *See also United States v. Florence*, 333 F.3d 1290, 1292-93 (11th Cir. 2003) (holding that the defendant’s activities created a substantial risk of harm to the life of minors who were staying at the hotel and that §2D1.1(b)(5)(C) does not require a district court to identify a specific minor at risk).

7. **§2D1.1(b)(14) provides a two-level aggravating role enhancement.** Section 2D1.1(b)(14) provides for a two-level enhancement if a defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved one or more of the super-aggravating factors listed at (b)(14)(A)-(E). Application Note 29 to §2D1.1, Application Note 2 to §3B1.4, and Application Note 7 to §3C1.1 provide guidance on the application of the enhancement at (b)(14).
8. **§2D1.1(b)(15) provides a two-level minimal participant reduction.** Section 2D1.1(b)(15) provides for a two-level reduction if the defendant receives the four-level reduction at §3B1.2(a) (“minimal participant”) and the offense involved all of the factors listed at (b)(14)(A)-(C).
9. **§2D1.1(b)(16) provides a two-level safety valve reduction.** Section 2D1.1(b)(16) provides for a two-level reduction if a defendant meets the requirements for the “safety valve” reduction set forth at §5C1.2(a)(1)-(5), *see* discussion at Section VIII, Part B, *infra*. *See. e.g., United States v. Ferrel*, 603 F.3d 758, 762 (10th Cir.), *cert. denied*, 131 S. Ct. 481 (2010). *Cf. United States v. Gonzalez-Mendoza*, 584 F.3d 726, 729 (7th Cir. 2009) (recognizing availability of “safety valve” adjustment under §§2D1.1(b)(11) and 5C1.2, generally, but noting its inapplicability to the defendant).

The two-level reduction applies regardless of whether defendant was convicted of a crime carrying a mandatory minimum sentence and irrespective of the minimum offense level provision of §5C1.2(b). *See* §2D1.1, comment. (n.21). A defendant may also qualify for the reduction under §2D1.1(b)(16) even if the defendant is convicted of a statute which is not listed at §5C1.2(a) and therefore, is excluded from operation of the statutory safety-valve reduction.

D. Cross References

1. **Murder.** Section 2D1.1(d)(1) provides a cross reference to §2A1.1 (First Degree Murder) and §2A1.2 (Second Degree Murder) if the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111.

18 U.S.C. § 1111 defines murder as “the unlawful killing of a human being with malice aforethought” and covers both first and second degree murder.

Distinguished from §§2D1.1(a)(1)-(4). To achieve the base offense levels under §2D1.1(a)(1)-(4), the offense of conviction, not just “circumstances” as in §2D1.1(d)(1), must establish that death or serious bodily injury occurred, *see* discussion above at Section II, Part B, *supra*, but no malice aforethought need be proved.⁷

2. **Crime of Violence.** Section 2D1.1(d)(2) provides for a cross reference to §2X1.1 (Attempt, Solicitation, or Conspiracy) if the defendant was convicted of 21 U.S.C. § 841(b)(7) (distribution of a controlled substance with intent to commit crime of violence). The higher offense level, as determined under §2D1.1 or §2X1.1, applies.

Crime of violence is defined in 18 U.S.C. § 16 and section 841(b)(7) specifically includes rape.

To be convicted of § 841(b)(7), the victim must have been unaware that a substance with the ability to impair his or her judgment was administered. Therefore, if the victim of the assault had knowingly taken the drug, the cross reference cannot be applied.⁸

⁷ As discussed at Section II.B.1.(b.), *supra*, notwithstanding the Commission’s view that these enhancements apply where “death” or ‘serious bodily’ injury have been found by a jury (or confessed by the defendant), *see* USSG App. C, amend. 123 (eff. Nov 1., 1989), the circuits are split on the question whether the enhancements may be applied after mere judicial factfinding. *Compare United States v. Rebmann*, 321 F.3d 540, 543-44 (6th Cir. 2003) (enhanced base offense level not triggered by judicial factfinding at sentencing); *United States v. Pressler*, 256 F.3d 144, 157 n.7 (3d. Cir. 2001) (*dicta*) (same) with *United States v. Rodriguez*, 279 F.3d 947, 950 (11th Cir. 2002) (enhanced offense level applied after court made findings by a preponderance and sentence did not exceed statutory maximum for lesser offense); *United States v. Cathey*, 259 F.3d 365, 368 & n.12 (5th Cir. 2001) (same); *United States v. McIntosh*, 236 F.3d 968, 975-76 (8th Cir. 2001) (same).

⁸ This cross reference is limited to cases involving a conviction under 21 U.S.C. § 841(b)(7). Amendment 667, which became effective on November 1, 2004, provided a special instruction in §2D1.1(e) that requires application of the vulnerable victim adjustment in §3A1.1(b)(1) if the defendant commits a sexual offense by distributing a controlled substance to another individual, with or without that individual’s knowledge.

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

E. Application Issues for Specific Drugs

1. Cocaine

a. **Powder Cocaine v. Cocaine Base or “Crack.”** The Fair Sentencing Act of 2010 sets an 18:1 ratio between powder cocaine and cocaine base, or “crack.” In other words, it takes 18 times the quantity of powder cocaine to trigger the same statutory punishment as crack cocaine. See *United States v. Gomes*, 621F.3d 1343, 1346 (11th Cir. 2010) (“The FSA [Fair Sentencing Act]...changes . . . the crack-to-powder ratio...to about 18:1. The Act amends the sentencing provisions in 21 U.S.C. § 841(b)(1) by raising from 50 grams to 280 grams the amount of crack necessary to trigger the 10-year mandatory minimum sentence, and raising the amount from 5 to 28 grams necessary to trigger the 5-year minimum.”) (internal citations omitted). See also 21 U.S.C. §§ 841(b)(1)(A)(ii),(iii). A court may consider the crack/powder cocaine disparity when imposing sentence. *Spears v. United States*, 555 U.S. 261, 264-66 (2009); *Kimbrough v. United States*, 552 U.S. 85 (2007).

b. **Definition of “Cocaine Base.”** Section 2D1.1 defines cocaine base as “crack,” which is in turn defined as “the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.” See Note (D) to Drug Quantity Table.

In *DePierre v. United States*, 131 S. Ct. 2225, 2230-32 (2011), the Court considered whether the term “cocaine base” at 21 U.S.C. § 841 referred to any form of cocaine that is chemically classified as a base (*i.e.*, $C_{17}H_{21}NO_4$, the molecule found in crack cocaine, freebase, and coca paste) or is instead limited to just crack cocaine. The crack cocaine at issue in *DePierre* did not contain a detectable amount of sodium bicarbonate, a component specified in the definition of “cocaine base” at §2D1.1(c), Note (D). The Court held that the most natural reading of the term “cocaine base” means cocaine in its base form and reaches more broadly than just crack cocaine. The Court’s decision resolved the deep circuit split on this question.

2. Marijuana

- a. **Dry Weight.** As an exception to the general rule that drug weight includes the entire weight of any mixture or substance, *see* discussion Section II, Part B, p. 18, the moisture in marijuana is not counted. The weight of marijuana is its weight when dry enough to consume. *See* §2D1.1, comment. (n.1).
- b. **Marijuana Plants.** A marijuana plant is defined as “an organism having leaves and a readily observable root formation.” *See* §2D1.1, comment. (n.17). *See also United States v. Foree*, 43 F.3d 1572, 1581 (11th Cir. 1995) (a cutting or seedling from a marijuana plant is not considered a plant until the cutting or seedling develops roots of its own). Neither the statute nor the Drug Quantity Table differentiates between male and female plants. *See* Note (E) to Drug Quantity Table (“regardless of sex”); *see also United States v. Proyect*, 989 F.2d 84, 88 (2d Cir. 1993) (upholding constitutionality of failure to differentiate).

Under §2D1.1, one marijuana plant is treated as equivalent to 100 grams of marijuana. *See* Note (E) to Drug Quantity Table. The Guidelines make an exception to this equivalency if the actual dry weight of harvested marijuana is greater, in which case the court should use the actual dry weight of the harvested marijuana. *See id.* Courts have generally applied the equivalency even if the actual weight of harvested marijuana plants is lower than 100 grams per plant. *See United States v. Olsen*, 537 F.3d 660, 665 n.2 (6th Cir. 2008) (collecting cases). The Sixth Circuit has limited this rule to manufacturing cases and has held that a sentence for possession or distribution should be based on the actual weight of the harvested plants. *Id.* at 663.

Note: One marijuana plant is treated as equivalent to 1 kilogram (not 100 grams) of marijuana for purpose of setting the statutory penalty range. *See* 21 U.S.C. §§ 841(b)(1)(A)(vii), (B)(vii), (D).

3. Methamphetamine

- a. **Purity.** The Drug Quantity Table treats methamphetamine (actual) separately from a mixture or substance containing a detectable amount of methamphetamine, and directs that whichever method results in the greater offense level applies. *See* Note (B) to Drug Quantity Table.

In addition, the Drug Quantity Table treats “Ice,” which is defined there as a mixture or substance that is at least 80 percent pure d-methamphetamine, the same as methamphetamine (actual). See Note (C) to Drug Quantity Table.

- b. **Waste Water (and other Mixture Substances).** As an exception to the general rule that drug weight includes the entire weight of any mixture or substance, see discussion Section II, Part B, *supra*, for guideline purposes, methamphetamine weight does not include the weight of “wash” or waste water. See §2D1.1, comment. (n.1).

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

- c. **Precursor Chemicals.** Under §2D1.1 (if the defendant was convicted of a drug offense, as opposed to a listed chemical offense), methamphetamine precursors are only considered in determining the base offense level if the defendant, or someone for whose conduct the defendant is responsible under the relevant conduct rules of §1B1.3(a), manufactured or attempted to manufacture methamphetamine.

If the above condition is met, and the precursor is listed in the List I Chemical Equivalency Table, see §2D1.1, comment. (n.10), convert the precursor (List I Chemical) to marijuana as discussed at Section II, Part B, *supra*. The equivalency established in the equivalency table presumes a 50 percent yield.

If the above condition is met, and the precursor is not listed in the List I Chemical Equivalency Table, the court may estimate the probable yield. Any such estimate, however, must be based on sufficiently reliable evidence as to probable yield based on the particular defendant’s capabilities viewed in light of the drug laboratory involved. See, e.g., *United States v. Rosacker*, 314 F.3d 422, 426 (9th Cir. 2002) (holding that district court erred in relying on a forensic laboratory report that was based on unsupported assumptions); *United States v. Eschman*, 227 F.3d 886, 890-91 (7th Cir. 2000) (reversing district court’s use of one-to-one conversion from pseudoephedrine to methamphetamine based on

theoretical 100 percent yield where expert testimony established lower practical yields).

Note: If the defendant was convicted of a listed chemical offense, as opposed to a drug offense, apply §2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical; Attempt or Conspiracy). See discussion at Section III, Part D, *infra*.

- d. **Grouping Offenses from §§2D1.1 and 2D1.11.** Cases involving convictions for precursor chemicals (sentenced under §2D1.11) and offenses related to convictions for methamphetamine (sentenced under §2D1.1) group under §3D1.2(b). See §2D1.11, comment. (n.3). Determine the adjusted offense level for the count of conviction under §2D1.1 (which will include the precursor chemicals as relevant conduct if the defendant is accountable for using them to manufacture the methamphetamine) and the adjusted offense level for the count of conviction under §2D1.11 and apply the higher of the two. See §3D1.3(a).

4. **LSD**

- a. **Carrier Medium.** As an exception to the general rule that drug weight includes the entire weight of any mixture or substance, see discussion at Section II, Part B, p. 18, *supra*. §2D1.1(c) establishes a dosage unit of 0.4 milligrams for the purposes of the Drug Quantity table. See Note (G) to Drug Quantity Table.

Note: This rule does not apply for purpose of setting the statutory penalty range; the carrier medium is included in the weight for statutory purposes. See *Neal v. United States*, 516 U.S. 284, 294 (1996) (guidelines treatment does not override statute).

- b. **Liquid Solution.** If the LSD is contained in a liquid solution, the weight of the pure LSD alone should be used in determining the base offense level under the guidelines. *United States v. Morgan*, 292 F.3d 460, 463-64 (5th Cir. 2002); *United States v. Camacho*, 261 F.3d 1071, 1074 (11th Cir. 2001); *United States v. Ingram*, 67 F.3d 126, 128 (6th Cir. 1995); *United States v. Turner*, 59 F.3d 481, 485 (4th Cir. 1995). For purposes of applicability of mandatory statutory minimums, however, the sentencing court must consider total weight of liquid solution containing LSD. *Chapman v. United States*, 500 U.S. 453, 456 (1991) (for

determining statutory minimum sentence, weight of carrier medium included in the weight of LSD); *Morgan*, 292 F.3d at 465.

III. Other Offense Guideline Sections

A. §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy)

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

Base Offense Level. Apply two plus the offense level from §2D1.1⁹ for the quantity of controlled substances directly involving a protected location or underage or pregnant individual; or, alternatively, one plus the offense level from §2D1.1 for the quantity of controlled substances involved in the offense. *See* §2D1.2 (a)(1) and (2). Otherwise, the base offense level would be 26, if the offense involved a person less than 18 years; or 13, in all other cases. *See* §2D1.2(a)(3) and (4).

B. §2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy)

Section 2D1.8 applies the offense levels set forth in §2D1.1 unless “the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises,” in which case the defendant receives a four-level reduction but is ineligible for a role reduction under Chapter 3. *See* §§2D1.8(a)(2), (b)(1).

There is a circuit split as to who has the burden of proving participation in the underlying controlled substance offense. The Tenth Circuit held that the defendant had the burden of proving that he did not participate in the underlying trafficking offense, *United States v. Dickerson*, 195 F.3d 1183, 1189–90 (10th Cir. 1999), but other circuits have since held that the government must affirmatively prove that the defendant participated in the underlying drug trafficking in order to justify the higher sentence. *See, e.g., United States v. Leasure*, 319 F.3d 1092, 1098 (9th Cir. 2003); *In re Sealed Case*, 552 F.3d 841, 846 (D.C. Cir. 2009).

⁹ Application of the offense level from §2D1.1 refers to the entire offense guideline (*i.e.*, base offense level and applicable specific offense characteristics. *See* §1B1.5, comment. (n.1).

C. §2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy)

Where the defendant is convicted of endangering human life while illegally manufacturing a controlled substance, a violation of 21 U.S.C. § 858, Appendix A, specifies offense guideline §2D1.10.

1. **Base Offense Level:** Apply three plus the base offense level from the Drug Quantity Table in §2D1.1; or 20 otherwise. *See* §2D1.10 (a)(1) and (2).
2. **Selected Specific Offense Characteristics under §2D1.10.** Section 2D1.10(b)(1) provides a three-level enhancement if the offense involved the manufacture of amphetamine or methamphetamine; and a six-level enhancement if the offense also created a substantial risk of harm to the life of a minor or an incompetent. *See* discussion of a similar enhancement under §2D1.1(b)(13) at Section II, Part C, p. 24, *supra*.

D. §2D1.11 (Unlawfully Distributing, Importing or Possessing a Listed Chemical; Attempt or Conspiracy)

Where the defendant is convicted of a listed chemical offense, usually 21 U.S.C. §§ 841(c)(1), (2), Appendix A specifies guideline §2D1.11. To be convicted, the defendant must have knowingly committed the offense with reasonable cause to believe that a controlled substance was being manufactured. It is not required, however, that the defendant himself was involved in the manufacturing. *Cf.* 21 U.S.C. § 841(c)(2) (Any person who...possesses or distributes a listed chemical knowing, or having reasonable cause to believe, [it]...will be used to manufacture a controlled substance... .”)

1. **Base Offense Level.** Apply the base offense level specified in the Chemical Quantity Table. *See* §2D1.11(a), (d), (e).
2. **Selected Specific Offense Characteristics under §2D1.11**
 - a. Section 2D1.11(b)(1) provides a two-level enhancement if a dangerous weapon (including a firearm) was possessed. But unlike the analog provision in §2D1.1, this provision allows a defendant to avoid the enhancement on a lesser evidentiary showing. *Compare* §2D1.1, comment. (n.3) (“unless it is *clearly improbable* that the weapon was connected with the offense”) *with* §2D1.11, comment. (n.1) (“unless it is *improbable* that the weapon was connected with the offense”)(italics added).

- b. Section 2D1.11(b)(2) provides a three-level reduction for certain convictions, unless the defendant “knew or believed” that the listed chemical was to be used to manufacture a controlled substance unlawfully. To be convicted under 21 U.S.C. § 841(c)(2), the defendant need only have had “reasonable cause to believe” that the listed chemical was to be used to manufacture a controlled substance unlawfully; 21 U.S.C. §§ 841(f)(1) and 960(d)(2) do not require any level of knowledge or belief. This reduction reflects that defendants who possess or distribute listed chemicals without knowing or believing they would be used to manufacture a controlled substance unlawfully are less culpable. *See* § 2D1.11, comment. (n.5).
 - c. Section 2D1.11(b)(4) provides a two-level enhancement for distribution of a controlled substance, listed chemical, or prohibited equipment, through the use of an interactive computer service. *See* discussion of similar enhancement under §2D1.1(b)(7), *supra*.
 - d. In contrast to §2D1.1(b)(16), there is no two-level reduction for meeting the safety valve criteria at 18 U.S.C. § 3553(f)(1)-(5) and §5C1.2(a)(1)-(5).
3. **Cross Reference.** Section 2D1.11(c) provides a cross reference to §2D1.1, but only if the defendant (or a person for whose conduct the defendant is accountable under the relevant conduct rules) completed the actions sufficient to constitute the offense of manufacturing or attempting to manufacture a controlled substance unlawfully. *See* §2D1.11(c).

As the scope of relevant conduct is not as broad as the scope of criminal conspiracy, *see* §1B1.3, comment. (n.2), note carefully whether the manufacture of a controlled substance is both in furtherance of jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity. *For example, if a defendant was arrested selling pseudoephedrine to undercover agents, the cross reference would not apply because the defendant was not involved in the manufacture of a controlled substance or accountable for someone else manufacturing a controlled substance.*

To constitute an attempt, the defendant (or a person for whose conduct the defendant is accountable as relevant conduct) must have intended to manufacture unlawfully and have taken a substantial step toward completing that objective. *See, e.g., United States v. Jessup*, 305 F.3d 300, 302-03 (5th Cir. 2002) (“In order to show that the defendant attempted to manufacture methamphetamine, the government must show that the

defendant (1) acted with the required criminal intent, and (2) engaged in conduct constituting a ‘substantial step’ toward commission of the substantive offense.”(Internal citations omitted)).

E. §2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy)

1. Base Offense Level: **12** if the defendant either intended to manufacture a controlled substance or knew or believed that the prohibited flask, equipment, chemical product, or material was to be used to manufacture a controlled substance, or **9** otherwise. *See* §2D1.12(a)(1) and (2).
2. Selected Specific Offense Characteristics
 - a. §2D1.12(b)(3) adds a two-level enhancement for distribution of a controlled substance, listed chemical, or prohibited equipment, through the use of an interactive computer service; with a corresponding application note providing a definition of interactive computer service. *See* §2D1.12, comment. (n.4).
 - b. §2D1.12(b)(4) provides a six-level enhancement if the offense involved stealing anhydrous ammonia or transporting stolen anhydrous ammonia.

F. §2D2.1 (Unlawful Possession; Attempt or Conspiracy)

Simple possession of a controlled substance in violation of 21 U.S.C. § 844 is sentenced under §2D2.1, which provides a flat base offense level that is set based on the type of controlled substance.

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

IV. Selected Relevant Conduct Issues Specific to Drug Cases

A. Reasonable Foreseeability and Relevant Conduct

In the case of a jointly undertaken criminal activity, a defendant is accountable for “reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.” §1B1.3, comment. (n.2). A “jointly undertaken criminal activity” is a “criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.” *Id.* Proof of “reasonable foreseeability requires more than just subjective awareness.” *United States v. Fox*, 548 F.3d 523, 532 (7th Cir. 2008).

In addition, a defendant is responsible for all acts and omissions part of “the same course of conduct or common scheme or plan as the offense of conviction.” §1B1.3(a)(2). For offenses to be considered part of a common scheme or plan under the relevant conduct rules, “they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*.” See §1B1.3, comment. (n.9(A)). Of course, “the relevant conduct must be unlawful.” *United States v. Chube II*, 538 F.3d 693, 702-03 (7th Cir. 2008) (holding that relevant conduct did not include distribution of prescription medications that was “the result of mistake or inadvertence” and not “necessarily criminal”).

Separate incidents of possession with intent to distribute can be included within the scope of relevant conduct for the purpose of determining drug quantity when they qualify as part of a “common scheme or plan” or constitute the “same course of conduct” under §1B1.3. See *United States v. Hill*, 79 F.3d 1477, 1481-85 (6th Cir. 1996) (finding that a discrete incident of possession separated in time by over one year from the offense of conviction could not be part of a common scheme or course of conduct). To find that separate events are related in this fashion, the *Guidelines Manual* requires courts to balance three factors: “the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses.” *Id.* at 1482 (quoting §1B1.3, comment. (n.9(B))). See also *United States v. Gill*, 348 F.3d 147, 155 (6th Cir. 2003).

B. Prior Convictions and Relevant Conduct

Section 4A1.2(a)(1) defines “prior sentence” for purposes of criminal history computation and specifically excludes a “sentence for conduct that is part of the instant offense.” Application Note 1 explains that conduct that is part of the instant offense means relevant conduct. Accordingly, if drug amounts attributable to a prior conviction are included as relevant conduct for a defendant’s offense level computation in a later case, that prior conviction should not also be counted in the criminal history calculations required by Chapter Four. See, e.g., *United States v. Weiland*, 284 F.3d 878, 881 (8th Cir. 2002). The district court’s determination about whether a prior conviction for drug trafficking was relevant conduct also may impact how the prior conviction would count for purposes of §5G1.3(b), (c). See, e.g., *United States v. Johnson*, 324 F.3d 875 (7th Cir. 2003) (prior state cocaine conspiracy conviction was not relevant to defendant’s federal cocaine base distribution conviction, resulting in a portion of his federal sentence running consecutive to his state sentence). See also §1B1.3, comment. (n.8).

C. Drug Quantity and Base Offense Levels if Death Results

Section 2D1.1(a)(1)-(4) provide base offense levels for offenses that involve death or serious bodily injury from the use of a controlled substance. Each of these four provisions contains a requirement that, among other things, “the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance....” See USSG §2D1.1(a)(1-4). The Sentencing Commission’s view is that this “offense of conviction” language, which tracks the statutory language verbatim, see 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(E), 960(b)(1), (3), and (5), limits the application of these offense levels to cases where death or serious bodily injury is

proved beyond a reasonable doubt by plea or to the factfinder. *See* USSG App. C, amend. 123 (eff. Nov 1., 1989) (“The purpose of this amendment [limiting the application of §§2D1.1(a)(1), (a)(2)] is to provide that subsections (a)(1) and (a)(2) apply only in the case of a conviction under the circumstances specified in the statutes cited.”)

But a circuit split of authority has arisen over whether the “offense of conviction” language limits the application of these enhancements to such cases or whether they may be applied after mere judicial factfinding. *Compare United States v. Rebmann*, 321 F.3d 540, 543-44 (6th Cir. 2003) (enhanced base offense level not triggered by judicial factfinding at sentencing); *United States v. Pressler*, 256 F.3d 144, 157 n.7 (3d Cir. 2001) (*dicta*) (same) *with United States v. Rodriguez*, 279 F.3d 947, 950 (11th Cir. 2002) (enhanced offense level applied after court made findings by a preponderance and sentence did not exceed statutory maximum for lesser offense); *United States v. Cathey*, 259 F.3d 365, 368 & n.12 (5th Cir. 2001) (same); *United States v. McIntosh*, 236 F.3d 968, 975-76 (8th Cir. 2001) (same).

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

D. Personal Use Quantities and Relevant Conduct

Because simple possession of a controlled substance is an offense using a Chapter Two guideline which is excluded from grouping at §3D1.2(d), the guidelines instruct that the act of simple possession and the corresponding drug amounts should not be included as part of the same course of conduct or common scheme or plan (*see* §1B1.3(a)(2)) in the calculation of the base offense level for drug trafficking offenses. Whether such acts and amounts can be otherwise included in the calculation of a conspiracy or substantive count for drug trafficking has, however, been the subject of case law.

Whether a defendant should be held accountable under the relevant conduct rules for drugs possessed for personal use varies depending upon the offense charged. Personal use amounts are not included in drug amounts used to compute the base offense level when the charge is possession with intent to distribute. *See United States v. Gill*, 348 F.3d 147, 151-53 (6th Cir. 2003) (because defendant’s possession of drugs for personal use was not an act that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, it could not be considered relevant conduct); *United States v. Olson*, 408 F.3d 366, 374 (7th Cir. 2005) (“On the one hand, [defendant] possessed a small amount of marijuana...suggesting that [he] held the drugs for his own personal use. If so, then the underlying conduct would be considered mere possession of a controlled substance, and would therefore not constitute relevant conduct to the instant offense of possession with intent to distribute. On the other hand, the subdivision of those

two ounces of marijuana in six smaller baggies might suggest that [he] did intend to distribute the drugs, in which case the prior conviction would have been for relevant conduct.”).

If the case includes a conspiracy count, personal use amounts may or may not be included in the base offense level computation. *Compare United States v. Ault*, 598 F.3d 1039, 1041 (8th Cir. 2010), quoting *United States v. Davidson*, 195 F.3d 402, 409 (8th Cir. 1999) (“Simple possession of an amount of methamphetamine consistent with personal use is not in itself preparation or furtherance of a conspiracy to distribute methamphetamine.”) with *United States v. Asch*, 207 F.3d 1238, 1240 (10th Cir. 2000) (where a member of a conspiracy to distribute drugs handles drugs both for personal consumption and distribution in the course of the conspiracy, the entire quantity of drugs handled is relevant conduct for purposes of calculating the base offense level pursuant to the guidelines). *See also United States v. Fregoso*, 60 F.3d 1314, 1328-29 (8th Cir.1995); *United States v. Snook*, 60 F.3d 394, 395-96 (7th Cir. 1995); *United States v. Innamorati*, 996 F.2d 456, 492 (1st Cir. 1993); *cf. United States v. Antonietti*, 86 F.3d 206, 209-10 (11th Cir. 1996) (holding that drugs possessed for personal use were relevant to offenses of manufacturing, possessing with intent to distribute, and conspiring to manufacture and possess with intent to distribute, without recognizing the distinctions among the offenses).

V. Sentencing Entrapment

Entrapment, a complete defense to a crime, occurs when the government induces a defendant who was not predisposed to engage in criminal conduct to commit a crime. Many courts recognize that analogous “sentencing entrapment”—when the government induces a defendant to commit a crime more serious than he was predisposed to commit—would require sentencing the defendant for the crime he was predisposed to commit rather than the crime he did commit. However, few courts have found that defendants have proved sentencing entrapment.

A. Remedies for Sentencing Manipulation

Notes 12 and 14 to §2D1.1 provide for specific remedies for sentencing manipulation by the government, either by excluding amounts from the base offense level or by departure.

1. Note 12 provides in pertinent part that, where an offense involves an agreement to sell a controlled substance, the base offense level is based on the agreed-upon quantity, *unless* the defendant establishes that he did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity. This note was amended in November 2004, to clarify that it includes not only a seller but also a defendant-buyer in a reverse sting operation.
2. Note 14 states that the court may depart downward if it finds that the government agent in a reverse sting sets a price for the controlled substance that is substantially below the market value, thereby leading the defendant to purchase a significantly greater quantity than he would otherwise have been able to purchase.

Section §2D1.1, Application Note 14 has been interpreted in different ways by the courts. The courts may look at the government's intention to increase a sentence or the defendant's predisposition to buy drugs. Many factors are taken into consideration in determining whether a defendant participated in a drug buy or is capable of purchasing certain drug quantities. In addition to the price offered by the government in a reverse sting, other factors, such as credit terms, initial down payment and repayment plans have also been examined.

In the District of Columbia Circuit, the court applied a two-part test to make this determination: (1) whether the government offered overgenerous terms or inducements and; (2) whether the overgenerous terms led the defendant to purchase a greater quantity of drugs than his resources otherwise would have allowed. *See e.g., United States v. Gaviria*, 116 F.3d 1498, 1527 (D.C. Cir. 1997) (denying application of Note 14, where defendant presented no evidence that agreed upon price was substantially below the market price). The Eighth Circuit added a third consideration: whether defendant is predisposed to buying drugs. *See United States v. Searcy*, 233 F.3d 1096, 1099-1102 (8th Cir. 2000) (court remanded for reconsideration in light of fact defendant never dealt in crack cocaine before government agent coaxed him to do so.). The Ninth Circuit used a different test by looking to the government's intent: whether the government lowered the price with the intention that an increase in the defendant's sentence would be the result. *See United States v. Naranjo*, 52 F.3d 245, 251 (9th Cir. 1995) (finding strong evidence DEA agents were trying to increase the quantity of drugs purchased by offering to buy back unsold quantities).

Application of Note 14 is primarily factor-driven. *See United States v. Lora*, 129 F. Supp. 2d 77, 91 (D. Mass. 2001) (where drug quantity was used to measure a defendant's culpability, the quantity at issue must be a product of the defendant's proclivity and not the government's effort to ratchet up the sentence); *United States v. Goodwin*, 317 F.3d 293, 297-98 (D.C. Cir. 2003) (denying defendant's motion for downward departure where it found quantity discounts and minimal down payments for drugs were a common occurrence in the illicit drug trade.). *But see United States v. Panduro*, 38 F. App'x 36, 37-38 (2d Cir. 2002) (holding Note 14 is applicable where government agents offered drugs on a nearly 50 percent consignment basis). The transaction need not be monetary based. *See United States v. Cambrelen*, 29 F. Supp. 2d 120, 126 (E.D.N.Y. 1998) (granting the sentence reduction where court found government agent's influence led defendant to steal drugs from a warehouse).

B. Other Sentencing Manipulation/Entrapment

Courts have also recognized other forms of sentencing manipulation and/or entrapment by the government. For example, the Ninth Circuit has held that drugs should be excluded from consideration where the defendant was pressured (or entrapped) to sell more or more serious drugs. *See, e.g., United States v. Stauffer*, 38 F.3d 1103, 1108 (9th Cir. 1994); *United States v. Searcy*, 233 F.3d 1096, 1100 (8th Cir. 2000). Some courts have also held that excluding amounts of drugs based on sentencing manipulation or entrapment may reduce the sentence below the mandatory minimum. *See, e.g., United States v. Castaneda*, 94 F.3d 592, 595 (9th Cir. 1996); *United States v. Montoya*, 62 F.3d 1, 3 (1st Cir. 1995).

C. Limits on Sentencing Manipulation/Entrapment

Some courts have limited sentencing entrapment to those cases where the government has engaged in outrageous conduct. *See, e.g., United States v. Scull*, 321 F.3d 1270, 1278 (10th Cir. 2003). The Sixth and Eleventh Circuits have rejected “sentencing entrapment” as a ground for departure. *See United States v. Watkins*, 179 F.3d 489, 503 n.14 (6th Cir. 1999), *abrogated on other grounds as recognized in United States v. Camacho-Arellano*, 614 F.3d 244 (6th Cir. 2010); *United States v. Guest*, 564 F.3d 777, 781 (6th Cir. 2009); *United States v. Williams*, 954 F.2d 668, 673 (11th Cir. 1992).

VI. Chapter Three: Adjustments

A. Role Adjustments

Defendants sentenced under §2D1.1 and §2D1.11 who receive a mitigating role adjustment under §3B1.2 receive a graduated reduction in the applicable offense level where the quantity level under §2D1.1 and §2D1.11 results in a base level of 32 or greater. *See* discussion of §2D1.1(a)(5) at Section II, Part B, and discussion of §2D1.11 at Section III, Part D. Furthermore, defendants who receive a §3B1.2(a) “minimal participant” role reduction may also receive an additional 2-level reduction pursuant to §2D1.1(15). These mitigating role reductions set the base offense level; specific offense characteristics, Chapter Three adjustments, and Chapter Five departures follow from this starting point.

B. Abuse of Position of Trust or Use of a Special Skill

Application Note 8 of §2D1.1 provides that an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) ordinarily would apply in cases where the defendant used a position of trust or special skills in the commission of an offense. For example, an adjustment under §3B1.3 would ordinarily apply in the case of a defendant who used his or her position as a coach to influence an athlete to use an anabolic steroid. Likewise, an adjustment under §3B1.3 ordinarily would apply in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility. *See* 21 U.S.C. § 822(g).

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

C. Using a Minor to Commit a Crime

1. **§3B1.4 – "Use" of Minor to Commit Crime.** This enhancement does not apply in cases where the Chapter Two offense guideline incorporates this factor. *See* §3B1.4, comment. (n. 2) For example, if a defendant receives a §2D1.1(b)(14)(B) enhancement for involving a person less than 18 years of age in the offense. *See id.* Another issue is whether a two-level upward adjustment for using a minor to commit an offense requires evidence that the defendant acted affirmatively to involve the minor in the crime, beyond merely acting as his partner. Two circuits have held that is it not enough if the defendant and the minor are equal participants in a crime. *United States v. Butler*, 207 F.3d 839, 847 (6th Cir. 2000) (no §3B1.4 adjustment because defendant and minor possessed equal authority in their commission of crime and "use" of a minor requires more affirmative action on the part of the defendant); *United States v. Parker*, 241 F.3d 1114, 1120-21 (9th Cir. 2001) (no §3B1.4 adjustment because Note 1 defines "used" as "directly commanding, encouraging, intimidating, counseling, training, procuring, recruiting or soliciting" and defendant merely "participated" in an armed bank robbery with minor). *But see United States v. Ramsey*, 237 F.3d 853, 859-60 (7th Cir. 2001) (inquiry under §3B1.4 is whether the defendant affirmatively involved a minor in the commission of an offense, regardless of whether the minor is a partner in the offense or is in a subordinate position). Courts have applied the adjustment in instances where the minor was not actively involved in the crime. *See, e.g., United States v. Gaskin*, 364 F.3d 438, 464-65 (2d Cir. 2004) (adjustment was warranted where the defendant drove son to the parking lot where the defendant took delivery of an RV containing

marijuana so that the son could drive the defendant's car); *United States v. Castro-Hernandez*, 258 F.3d 1057, 1059-60 (9th Cir. 2001) (adjustment was warranted where the defendant was transporting his three year old son as a passenger in his truck at the same time he was smuggling drugs); *United States v. Warner*, 204 F.3d 799, 801 n.2 (8th Cir. 2000) (upholding adjustment where the defendant offered to leave his eight year old daughter with drug purchasers as collateral for payment money they entrusted to him).

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

VII. Chapter Four: Criminal History, Career Offender, and Armed Career Criminal (ACCA)

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

While circuit courts may often treat these terms interchangeably where portions of the Career Offender and ACCA provisions are materially similar, they also recognize that the differing definitions may lead to a prior conviction qualifying for one enhancement but not the

other. Compare *United States v. Harrison*, 558 F.3d 1280, 1291-92 (11th Cir. 2009) (Career Offender’s residual clause language materially identical to ACCA’s residual clause), *abrogated on other grounds by Sykes v. United States*, 131 S. Ct. 2267 (2011) with *United States v. Ross*, 613 F.3d 805, 809-10 (8th Cir. 2010) (Career Offender and ACCA provisions are the same in some respects but their express differences may lead to different results in a given case). See also *United States v. Hawkins*, 554 F.3d 615, 617-18 (6th Cir. 2009) (collecting cases and recognizing that while possession of a sawed-off shotgun did not qualify as a “violent felony” for ACCA enhancement, it did qualify as a “crime of violence” for Career Offender enhancement.)

While the Career Offender and ACCA provisions are not identical, courts do apply the same “categorical” and “modified categorical” legal analyses when determining whether a predicate offense qualifies for the Career Offender (§4B1.1) or ACCA (§ 924(e) and Guideline §4B1.4) sentencing enhancement. See *Taylor v. United States*, 495 U.S. 575, 600 (1990), *Johnson v. United States*, ___ U.S. ___, 130 S.Ct. 1265, 1273-74 (2010), and *Shepard v. United States*, 544 U.S. 13, 19-20 (2005) (respectively explaining the “categorical” and “modified categorical approach” analyses and what evidence may be considered in that analysis). See also *Chambers v. United States*, 555 U.S. 122 (2009) (failure-to-report offense was not a “violent felony” under ACCA); *Begay v. United States*, 553 U.S. 137 (2008) (DUI offense was not a “violent felony” under ACCA); *James v. United States*, 550 U.S. 192 (2007) (attempted burglary qualified as a “violent felony” under ACCA).

The Supreme Court has spoken infrequently about “controlled substance offenses” and “serious drug offenses” for purposes of Career Offender or ACCA enhancement. See e.g., *United States v. Rodriguez*, 553 U.S. 377 (2008) (ACCA’s “serious drug offense” definition--a state offense involving manufacturing, distributing, or possessing with intent to distribute, a controlled substance for which a maximum term of imprisonment of ten years or more is prescribed by law--includes reference to state recidivist provisions). But the circuit courts have unremarkably observed that sentencing courts must apply the categorical analyses when determining whether a state drug offense qualifies as a Career Offender or ACCA predicate offense. See, e.g., *United States v. Robinson*, 583 F.3d 1292, 1295 (11th Cir. 2009) (Determinations whether a particular conviction qualifies as a serious drug offense under ACCA proceeds under “a formal categorical approach.”).

Enhancement Provisions

	Career Offender	Armed Career Criminal	“Three Strikes”
Sources of Law	USSG §§4B1.1, 4B1.2 28 U.S.C. § 994(h)	USSG §4B1.4 18 U.S.C. § 924(e)	No guideline yet. 18 U.S.C. § 3559(c)
Requirements	(1) Defendant at least 18 at offense; (2) instant offense is felony conviction for “crime of violence” or “controlled substance offense”; and (3) two prior convictions for “crimes of violence” or “controlled substance offenses” (or one of each).	(1) Violation of § 922(g) (possession of a firearm by prohibited person); and (2) has three prior convictions for “violent felonies” or “serious drug offenses” committed on different occasions.	(1) Instant offense must be “serious violent felony” (2) 2 prior convictions for “serious violent felonies” <u>or</u> “serious violent felony” +1 prior “serious drug offense”
Offense Definitions for Instant and Predicate Offenses	<p>“Crime of violence” = any felony (1) with an element of the use or threatened use of force against another, or (2) involving conduct that presents a serious risk of physical injury to another. <i>See</i> §4B1.2(a).</p> <p>“Controlled substance offense” = any state or federal offense involving manufacture, distribution, or intent to distribute and punishable by a term exceeding one year. <i>See</i> §4B1.2(b).</p>	<p>“Violent felony” = any felony involving the use or carrying of a firearm, knife, or destructive device (1) with an element of the use or threatened use of force against another, or (2) involving conduct that presents a serious risk of physical injury to another. <i>See</i> § 924(e)(2).</p> <p>“Serious drug offense” = federal drug offense punishable by a max. term of 10 years or more or state drug offense involving manufacture or distribution punishable by a max. term of 10 years or more. <i>See</i> § 924(e)(2).</p>	<p>“Serious violent felony” = murder, sex crimes, kidnaping, extortion, arson, firearms use, attempts and conspiracies thereof, or any other offense with an element of the use or threatened use of force or which, by its nature, involves substantial risk of physical force being used against another and is punishable by a max. term of 10 years or more</p> <p>“Serious drug offense” = anything punishable under 21 U.S.C. §§ 841(b)(1)(A) or 960(b)(1)(A) (e.g., 1K heroin, 5K cocaine, 50g crack, etc).</p>
Result	Criminal history category becomes VI. Offense level is raised to near statutory max.	Criminal history becomes at least IV. Offense level is raised to 33 or 34. Under § 924(e), 15-year mandatory minimum.	Mandatory life imprisonment. Note that 18 U.S.C. § 3582(c) may provide relief to defendants over 70 who have done at least 30 years.
Notes	5, 10, or 15 year limits on priors which must be separately countable in guidelines calculation. <i>See</i> §4A1.2(d), (e). No notice required before trial/plea.	No time limit on priors. No notice required before trial/plea.	No time limit on priors. Priors must occur after previous prior conviction (conduct→conviction→conduct...) Gov’t. must give written notice before trial/plea under 21 U.S.C. § 851(a). Robberies do not count as S.V.F.’s if defendant proves that no one was hurt and no dangerous weapon was used/threatened. A similar exception exists for arson.

VIII. Chapter Five: Determining the Sentence

A. Statutory Penalty Ranges Revisited: *Apprendi*

1. Statutory Maximum Sentence

- a. ***Apprendi v. New Jersey, 530 U.S. 466 (2000)***. In *Apprendi*, the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490. Before *Apprendi*, the usual practice had been for the district court to treat drug quantity and other penalty-enhancing facts as sentencing factors that it determined at sentencing by a preponderance of the evidence. After *Apprendi*, the courts of appeal have uniformly held that the rule announced there applies to facts—such as drug type, drug quantity, death or serious bodily injury—that increase the statutory maximum sentence. *For example, if a defendant is convicted of possession with intent to sell an unspecified amount of cocaine, the statutory maximum sentence is 20 years, pursuant to 21 U.S.C. § 841(b)(1)(C), even if the government proves at sentencing that the amount of cocaine involved would trigger an enhanced penalty.*
- b. **Statutory Maximum Trumps Guideline Range**. Under §5G1.1(a), (c)(1), the statutory maximum sentence trumps the otherwise applicable guideline range. Therefore, after *Apprendi*, the absolute maximum sentence is determined by what triggering facts were pled and proved to the guilt-phase factfinder, by competent evidence, beyond a reasonable doubt. *For example, if a defendant is convicted of possession with intent to sell an unspecified amount of cocaine (20-year statutory maximum), and the otherwise applicable guideline range is 292-365 months, the guideline sentence is 240 months (20 years).*
- c. **Stacking of Multiple Convictions**. When a defendant sustains multiple convictions, §5G1.2(d) advises courts to run sentences consecutively to the extent necessary to achieve the guideline range. As noted by the Tenth Circuit, “in multiple-count cases to which *Booker* applies, § 5G1.2(d) ‘is no longer mandatory, but a sentence consistent with it carries a badge of reasonableness we are bound to consider.’” *United States v. Hollis*, 552 F.3d 1191, 1195 (10th. Cir. 2009), citing *United States v. Eversole*, 487 F.3d 1024, 1033 (6th Cir. 2007).

2. Statutory Mandatory Minimum Sentences¹⁰

- a. ***Harris v. United States, 536 U.S. 545 (2002)***. In *Harris*, the Supreme Court held that *Apprendi* did not preclude judicial fact finding that increased a mandatory minimum sentence. *Harris*, 536 U.S. at 565. *Harris* reviewed 18 U.S.C. § 924(c)(1)(A)(ii), which increases the minimum term for a defendant who carries a firearm in relation to a drug trafficking offense from five years to seven years if the defendant “brandished” the firearm. A judicial finding that the defendant brandished the firearm increases the minimum term but does not alter the maximum term, which is life. But while some courts have read *Harris* to say that *Apprendi* does not apply to mandatory minimum terms, others have not gone so far. Compare *United States v. Goodine*, 326 F.3d 26, 31-32 (1st Cir. 2003) (drug quantity for purposes of § 841 is a sentencing factor that may be determined by a preponderance); *United States v. Copeland*, 321 F.3d 582, 603 (6th Cir. 2003) (defendant subject to a higher range of punishment under §§ 841(b)(1)(A) and (B) but sentenced under § 841(b)(1)(C) suffers no *Apprendi* harm); *United States v. Solis*, 299 F.3d 420, 454 (5th Cir. 2002) (contention that *Apprendi* applies to mandatory minimums is meritless under *Harris*) with *United States v. Velasco-Heredia*, 319 F.3d 1080, 1085 (9th Cir. 2003) (drug quantity that triggers a mandatory minimum sentence must be proved beyond a reasonable doubt where quantity also raised potential maximum sentence); *United States v. Graham*, 317 F.3d 262, 275 (D.C. Cir. 2003) (remand where jury verdict did not support imposition of five-year mandatory minimum term of supervised release pursuant to § 841(b)(1)(A), although same term could have been imposed under § 841(b)(1)(C)).

Note: In May 2010, the Supreme Court held in *United States v. O'Brien*, ___ U.S. ___, 130 S.Ct. 2169, 2180 (2010), that the “machine gun provision” in 18 U.S.C. § 924(c)(1)(B)(ii) was an element of an offense and not a sentencing factor. The opinion also suggested, through a concurring opinion, that a current member of the (October Term 2010) Court—one of whom was an *Apprendi* dissenter—may now support *Apprendi*’s application to mandatory minimum sentences. See 130 S.Ct. 2183 (Stevens, J, concurring and noting Justice Breyer’s evolving viewpoint).

¹⁰ A detailed discussion on statutory mandatory minimum sentencing is presented in the Commission’s *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, available at <http://www.ussc.gov>.

- b. **Statutory Minimum Trumps Guideline Range.** Under §5G1.1(b), (c)(2), the statutory minimum sentence trumps the otherwise applicable guideline range. *See, e.g., United States v. Padilla*, 618 F.3d 643, 644 (7th Cir. 2010) (Under §5G1.1(b), advisory range of 155-188 months yielded to statutory minimum 240 months to establish 240-month Guideline sentence), *cert. denied*, 131 S. Ct. 962 (2011); *United States v. Brehm*, 442 F.3d 1291, 1296 (11th Cir. 2006) (Under §5G1.1(c), advisory range of 108-135 months yielded to statutory minimum of 120 months to establish 120-135-month advisory guideline range).
- c. **Drug Quantity Under Guidelines Does not Necessarily Equal Drug Quantity Under the Statute.** In some cases, the drug quantity used for calculating the guidelines will not be the same as the drug quantity used to calculate the statutory minimum. One court has stated: “[S]tatutory minimums do not hinge on the particular defendant’s relevant conduct. In a drug conspiracy, the amount of drugs attributable to any one codefendant as ‘relevant conduct’ for guidelines purposes is limited to the reasonably foreseeable transactions in furtherance of that codefendant’s ‘jointly undertaken criminal activity,’ §1B1.3(a)(1)(B), but when it comes to the statutory penalties, every coconspirator is liable for the sometimes broader set of transactions that were reasonably foreseeable acts in furtherance of the entire conspiracy.” *United States v. Easter*, 553 F.3d 519, 523 (7th Cir. 2009) (citing cases), *cert. denied*, 130 S.Ct. 1281 (2010). Said another way, conspiratorial liability is broader than the scope of relevant conduct.
3. **Definition of “Offense of Conviction” Obscured.** Under *Apprendi*, a defendant’s *maximum* sentence is based on pleaded facts or facts proved to a factfinder beyond a reasonable doubt. But in some jurisdictions, notwithstanding what the government charges, a defendant’s statutory *minimum* sentence is based on sentencing facts found by a preponderance of the evidence. *For example, if a defendant is indicted for--and convicted of--possession with intent to distribute an unspecified amount of cocaine, under Apprendi, the applicable statutory range is 0-20 years. (See 21 U.S.C. § 841(b)(1)(C)). But were the sentencing court to find, for example, that more than 5 kilograms of cocaine were involved in that same offense, in some jurisdictions the applicable statutory penalty range would be 10-to-20-years (based on 21 U.S.C. § 841(b)(1)(A) and (C)) (boldface added).* Thus, while *Apprendi* serves to restrict the statutory *maximum* sentence applicable in a case, the statutory *minima* are not so constrained. *See, e.g., United States v. Pineda-Buenaventura*, 622 F.3d 761, 773-74 (7th Cir. 2010) (“Judges may determine drug amounts by a

preponderance of the evidence that subject a defendant to a statutory mandatory minimum...[T]he amount of drugs a defendant possessed is not an element of a § 841 offense and the sentencing judge can find facts that trigger a mandatory minimum sentence. Amount findings need be determined beyond a reasonable doubt only when they implicate a statutory maximum prison term, which is not the case here.” (Internal citations omitted).

B. Relief from Mandatory Minimum Sentences: the “Safety Valve”

18 U.S.C. § 3553(f): For violations of 21 U.S.C. §§ 841, 844, 846, 960, and 963, the “safety valve” provision directs courts to impose sentences “without regard to any statutory minimum sentence” if the five conditions listed at section 3553(f)(1)-(5) are met. This means that if the five statutory conditions are met, there is no mandatory minimum term. The five statutory conditions are listed nearly verbatim at §5C1.2(a)(1)-(5). The defendant bears the burden of proving by a preponderance of evidence that all five conditions are met. *See, e.g., United States v. Zakharov*, 468 F.3d 1171, 1181 (9th Cir. 2006) (“The defendant holds the burden of demonstrating by a preponderance of the evidence that he qualifies for...safety valve treatment.”); *United States v. Johnson*, 375 F.3d 1300, 1302 (11th Cir. 2004) (“The burden is on the defendant to show that he has met all of the safety valve factors.”) Once the court finds that the conditions are met, the court has no discretion but to apply the guidelines without regard to the mandatory minimum. *See, e.g., United States v. Myers*, 106 F.3d 936, 941 (10th Cir. 1997); *United States v. Real-Hernandez*, 90 F.3d 356, 361-62 (9th Cir. 1996).

1. The Statutory and Guideline Conditions

- a. **No more than one criminal history point.** This criterion is met only if the defendant, by a straight application of §4A1.1, has no more than one criminal history point. That is, even if a court departs, pursuant to §4A1.3, down to one criminal history point, the defendant has not met this criterion. *See e.g., United States v. Hernandez-Castro*, 473 F.3d 1004, 1005-06 (9th Cir. 2007) (Post-Booker, “courts have no authority to adjust criminal history points for the purpose of granting safety valve relief....”); *accord, United States v. McKoy*, 452 F.3d 234, 239 (3d Cir. 2006); *United States v. Brehm*, 442 F.3d 1291, 1300 (11th Cir. 2006); *United States v. Barrero*, 425 F.3d 154, 157-58 (2d Cir. 2005); *United States v. Bermudez*, 407 F.3d 536, 544-45 (1st Cir. 2005).
- b. **No violence or weapon.** This criterion is met if *the defendant* did not possess a firearm in connection with the offense.
 - (i) The term “offense” as used in subsections (a)(2)-(4) and “offense or offenses” as used in subsection (a)(5) mean the offense of conviction and all relevant conduct. *See* §5C1.2,

comment. (n.3). But for purposes of determining whether a defendant used violence or possessed a firearm (or induced another to do so), “defendant” as used in subsection (a)(2) limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or wilfully caused. See §5C1.2, comment. (n.4). For example, even if a defendant’s offense level is increased pursuant to §2D1.1(b)(1) based on a co-conspirator’s possession of a weapon, this increase does not preclude defendant from meeting this safety-valve criterion. See, e.g., *United States v. Figueroa-Encarnacion*, 343 F.3d 23, 34-35 (1st Cir. 2003) (collecting cases); *United States v. Pena-Sarabia*, 297 F.3d 983, 987-89 & n.2 (10th Cir. 2002) (overruling prior circuit authority to the contrary). Cf. *United States v. Matias*, 465 F.3d 169, 173-74 (5th Cir. 2006) (While a defendant may still qualify for the safety-valve if his co-conspirator possessed a firearm, his own constructive possession of a firearm would prevent application of safety-valve.); accord, *United States v. Jackson*, 552 F.3d 908, 909-10 (8th Cir. 2009) (collecting cases) (“[T]here is no reason to distinguish between actual, physical possession and constructive possession when defining what constitutes ‘possession’ for purposes of § 5C1.2. Accordingly, we hold that constructive possession is sufficient to preclude a defendant from receiving safety valve relief under § 5C1.2.”)

- (ii) In addition, the defendant might meet this criterion even if his or her offense level is increased pursuant to §2D1.1(b)(1) based on his or her own possession of a weapon. This result is possible because of the different standards of proof for application of §2D1.1(b)(1) (if weapon was present, defendant bears burden of proving it was “clearly improbable” that the weapon was connected with the offense) and §5C1.2(a)(2) (defendant bears burden of proving by preponderance of evidence that weapon was not connected with offense). See *United States v. Zavalza-Rodriguez*, 379 F.3d 1182, 1187 (10th Cir. 2004) (“[T]here is a difference in evidentiary standards when applying the two provisions [§2D1.1 and §5C1.2].”); *United States v. Nelson*, 222 F.3d 545, 549-50 (9th Cir. 2000). But see *United States v. Vasquez*, 161 F.3d 909, 911-12 (5th Cir. 1998) (“despite any difference in semantics between §§2D1.1(b)(1) and 5C1.2(2), the two provisions should be

analyzed analogously”); *United States v. Coleman*, 148 F.3d 897, 903-04 (8th Cir. 1998) (applying same test for weapon possession enhancement and safety valve decrease).

- c. **No death or serious bodily injury.** To determine whether this criterion is met, look beyond the offense of conviction to relevant conduct, *see* §5C1.2, comment. (n.3); the inquiry is not limited to the defendant’s own conduct. *Compare* §5C1.2, comment. (n.4).

- d. **No leadership role adjustment**
 - (i) This criterion is not met if defendant is subject to an aggravating role adjustment under §3B1.1. *See* §5C1.2, comment. (n.5). *See e.g.*, *United States v. Doe*, 613 F.3d 681, 690 (7th Cir. 2010) (“Because we find that [defendant’s]...sentence was properly enhanced under § 3B1.1 for his aggravating role, he is ineligible for application of the safety-valve provision... .”)

 - (ii) In addition, this criterion is not met if defendant was engaged in a continuing criminal enterprise. However, as Application Note 6 explains, a defendant engaged in a continuing criminal enterprise will not be eligible for other reasons: (1) safety valve does not apply to convictions under 21 U.S.C. § 848; and (2) by definition, a defendant engaged in a continuing criminal enterprise convicted of a covered offense will receive an aggravating role adjustment, *compare* 21 U.S.C. § 848(c)(2)(A) *with* §3B1.1, and thus be ineligible for the reduction.

- e. **Full disclosure.** The final criterion is that the defendant make full, truthful disclosure to the government no later than sentencing. Disclosure need not come by way of a private debriefing with the government. *See, e.g.*, *United States v. De La Torre*, 599 F.3d 1198, 1207 (10th Cir. 2010) (“Though undoubtedly rare, there are circumstances in which trial testimony could be sufficiently thorough so as to constitute adequate compliance with this requirement. The language of USSG § 5C1.2(a)(5) and 18 U.S.C. § 3553(f)(5) does not require the defendant to consent to a private de-briefing with the Government.” It is important to note that §5C1.2(a)(5) specifically provides that “the fact that the defendant has no useful information to provide or that the Government is already aware of the information” does not preclude the defendant from meeting this criterion. But nor does this provision permit a

defendant “to withhold information on the ground that the government has secured it from another source.” *United States v. Pena*, 598 F.3d 289, 293 (6th Cir. 2010).

- (i) Full disclosure. Section 5C1.2(a)(5) requires disclosure of “all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.” This includes information about other participants, regardless of whether defendant was convicted of conspiracy. *See, e.g., United States v. Stephenson*, 452 F.3d 1173, 1180 (10th Cir. 2006) (“When the offense involves conspiracy or a jointly undertaken criminal venture, we require the defendant to disclose not only everything he knows about his own actions, but also everything he knows about his co-conspirators.”); *United States v. Tinajero*, 469 F.3d 722, 725 (8th Cir. 2006) (Defendant convicted of aiding and abetting amphetamine distribution denied safety-valve for minimizing his role); *United States v. Woods*, 210 F.3d 70, 76 (1st Cir. 2000).
- (ii) Truthful disclosure. The courts are split as to whether, despite prior lies and omissions to the Government, a defendant can still be eligible for the safety valve so long as the defendant makes a complete and truthful proffer not later than the commencement of the sentencing hearing. *Compare United States v. Mejia-Pimental*, 477 F.3d 1100, 1105 (9th Cir. 2007) (“‘[L]ies and obstruction’ before sentencing do not preclude safety valve eligibility”). *Accord, United States v. Madrigal*, 327 F.3d 738, 743-44 (8th Cir. 2003) *with United States v. Fletcher*, 74 F.3d 49, 56 (4th Cir. 1996) (Noting the lower court’s finding of defendant’s perjury at trial, “[I]t is not illogical to assume that the judge similarly determined that Fletcher failed to comply with the fifth condition in 18 U.S.C. § 3553(f).” *Accord, United States v. Edwards*, 65 F.3d 430, 433 (5th Cir. 1995).

The courts are also split as to whether information provided to the government for purposes of the safety valve must be both objectively and subjectively truthful. *Compare United States v. Thompson*, 76 F.3d 166, 170-71 (7th Cir. 1996) (defendant qualified for safety valve where she was “forthright within the range of her ability,” given that she had low level of cognitive functioning, an elevated need for

approval from others, and a limited ability to question and analyze her surrounding circumstances); *United States v. Sherpa*, 110 F.3d 656, 659-63 (9th Cir. 1996) (affirming application of safety valve where jury convicted defendant, but judge held that defendant was being truthful in denying knowledge that he was carrying drugs), *with United States v. Reynoso*, 239 F.3d 143, 144 &150 (2d Cir. 2000) (requirement not satisfied where defendant, who suffers from organic memory impairment, provided information that she subjectively believed to be truthful but was objectively untruthful).

- (iii) Disclosure to the Government. Courts have interpreted the “government” to mean the prosecutorial authority, *see United States v. Jimenez-Martinez*, 83 F.3d 488, 495-96 (1st Cir. 1996), or the government’s attorney, *see United States v. Contreras*, 136 F.3d 1245, 1246 (9th Cir. 1998). Therefore, disclosure to a probation officer does not satisfy the requirement. *United States v. Cervantes*, 519 F.3d 1254, 1257 (10th Cir. 2008) (“We agree with our sister circuits and hold that a defendant does not meet the requirements of the ‘safety valve’ provision merely by meeting with a probation officer during the presentence investigation.”) (collecting cases).

Note: However, a defendant is not required to give information to a specific government attorney. *See United States v. Real-Hernandez*, 90 F.3d 356, 361 (9th Cir. 1996).

- (iv) Disclosure not later than sentencing. Courts are split as to whether “not later than the time of the sentencing hearing” means before the commencement of the first sentencing hearing or before the hearing at which the defendant is sentenced. *Compare United States v. Madrigal*, 327 F.3d 738, 747 (8th Cir. 2003) (holding that continued sentencing hearing did not deprive district court of jurisdiction to grant safety valve relief), *with United States v. Marin*, 144 F.3d 1085, 1094-95 (7th Cir. 1998) (reversing where district court continued sentencing hearing numerous times to “coax the truth out of” the defendant).

3. **§5C1.2(b)**. If a defendant meets the criteria and his statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two and Three cannot be less than level 17.

4. **Safety Valve and §2D1.1(b)(16).** If the district court finds that the defendant failed to disclose everything he knew concerning his offense and relevant conduct, it may deny the two-level “safety valve” reduction under §2D1.1(b)(16). *United States v. Virgen-Chavarin*, 350 F.3d 1122, 1130 (10th Cir. 2003). The two-level reduction applies regardless of whether defendant was convicted of a crime carrying a mandatory minimum sentence and irrespective of the minimum offense level provision of §5C1.2(b). *See* §2D1.1, comment. (n.21). A defendant may also qualify for the reduction under §2D1.1(b)(16) even if the defendant is convicted of a statute which is not listed at §5C1.2(a) and excluded from operation of the statutory safety valve reduction. *See id.*
5. **Departures or variances below the mandatory minimum sentence are permissible when the safety valve is applied, including a downward departure under §5K1.1 (Substantial Assistance).**

C. Downward Departures for Substantial Assistance to Authorities

1. A district court may depart below a guideline minimum sentence where the government has filed a substantial assistance motion pursuant to §5K1.1 based on the defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.
2. A substantial assistance reduction below a statutory mandatory minimum requires a government motion pursuant to 18 U.S.C. § 3553(e) specifically requesting or authorizing the district court to impose a sentence below a level established by statute as minimum sentence before the court may impose such a sentence. *Melendez v. United States*, 518 U.S. 120, 122 (1996). Otherwise, the court may only depart down from the guideline range to the statutory minimum sentence. *Id.* at 130-31.
3. When the guideline range falls below the statutory mandatory minimum sentence, and the government files a motion pursuant to 18 U.S.C. § 3553(e), the appropriate starting point for the downward departure is the statutory mandatory minimum sentence. *United States v. Li*, 206 F.3d 78, 89 (1st Cir. 2000); *United States v. Cordero*, 313 F.3d 161, 165 (3rd Cir. 2002); *United States v. Hayes*, 5 F.3d 292, 294-95 (7th Cir. 1993); *United States v. Schaffer*, 110 F.3d 530, 533-34 (8th Cir. 1997); *United States v. Head*, 178 F.3d 1205, 1207-08 (11th Cir. 1999)

IX. Chapter Six: Sentencing Procedures and Plea Agreements

A. Plea Agreement Considerations

Because of the potential impact of a plea agreement in a drug case, there are several considerations that should be taken into account: (1) the type of plea agreement; (2) whether it is a binding agreement; and (3) whether and how a plea agreement limits the consideration of the defendant's conduct or of certain relevant conduct.

1. **Agreement to Not Pursue Further Charges.** A plea agreement may specify that the prosecutor will not bring, or will move to dismiss, other charges. *See* Fed. R. Crim. P. 11(c)(1)(A). The court may accept, reject or defer a decision regarding such an agreement until after the review of the presentence report. *See* Fed. R. Crim. P. 11(c)(3)(A).
2. **Agreement as to Sentence Recommendation.** A plea agreement may specify that the prosecutor recommends, or agrees not to oppose, a defendant's request that a particular sentence or sentencing range is appropriate, or that a particular sentencing factor or guideline applies or does not apply in the case. *See* Fed. R. Crim. P. 11(c)(1)(B). Such a recommendation is not binding on the court and the defendant should be advised that if the court does not follow the recommendation the defendant has no right to withdraw the plea. *See* Fed. R. Crim. P. 11(c)(3)(B).
3. **Agreement as to Sentence to be Imposed.** A plea agreement may include an agreement between the parties that a specific sentence or range is the appropriate disposition of the case, or that a particular sentencing provision or factor does or does not apply in the case. *See* Fed. R. Crim. P. 11(c)(1)(C). The court may accept, reject or defer a decision regarding such an agreement until after review of the presentence report. *See* Fed. R. Crim. P. 11(c)(3)(A). Once the court has accepted such an agreement, the sentencing stipulations reflected in the agreement are binding on the court. Fed. R. Crim. P. 11(c)(4).
Fed. R. Crim. P. 11(c)(4).
4. **Withdrawal of Plea.** If the court rejects a plea agreement that contains provisions of the type specified in Fed. R. Crim. P. 11(c)(1)(A) or (C), the court must give the defendant an opportunity to withdraw the plea. *See* Fed. R. Crim. P. 11(c)(5)(B).

B. The Guidelines' Treatment of Plea Agreements

1. **Policy Statements.** Chapter Six of the guidelines sets forth standards for the courts' consideration of plea agreements.

2. **§6B1.1.** This guideline parallels the procedural requirements of Fed. R. Crim. P. 11(c). In the commentary to this section, the Commission recommends that the court defer acceptance of plea agreements of the types specified in Fed. R. Crim. P. 11(c)(1)(A) or (C) until the court has reviewed the presentence report.
3. **Guideline standards for accepting plea agreement.** Chapter Six of the guidelines provides standards to guide courts in their decisions about plea agreements. These standards go beyond the requirements imposed by Rule 11.
 - a. In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges (Rule 11(c)(1)(A)), the court may accept the agreement, for reasons stated on the record, if the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines. *See* §6B1.2(a). However, conduct underlying dismissed charges or charges not proved may be considered relevant conduct in connection with the count(s) of which the defendant is convicted. *See id.*; *United States v. Grissom*, 525 F.3d 691, 697 (9th Cir. 2008). In addition, the court may consider conduct underlying charges dismissed pursuant to a plea agreement in determining whether to depart from the sentencing guidelines. *See* §5K2.21.
 - b. In the case of a plea agreement that includes a nonbinding recommendation or sentence (Rule 11(c)(1)(B)) or an agreement for a specific sentence (Rule 11(c)(1)(C)), the court may accept the recommendation if the court is satisfied either that: (1) the recommended or agreed upon sentence is within the applicable guideline range; or (2) the recommended or agreed upon sentence departs from the applicable guideline range for justifiable reasons, and those reasons are set forth in writing in the statement of reasons or judgment and commitment order. *See* §§6B1.2(b),(c).

C. §1B1.8 (Use of Certain Information)

There are limitations on using information provided in the course of a defendant's cooperation in calculating his guideline range. Section 1B1.8 provides that "where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement" and under other circumstances listed in §1B1.8. *See, e.g., United*

States v. Hodge, 469 F.3d 749, 757 (8th Cir. 2006) (“While a § 1B1.8 agreement precludes the Government from using the self-incriminating information in the calculation of the proper Guidelines range, absent such an agreement, self-incriminating information is properly considered in calculating the advisory Guidelines range.”); *United States v. Shorteeth*, 887 F.2d 253, 255 (10th Cir. 1989); *United States v. Jarman*, 144 F.3d 912, 914-15 (6th Cir. 1998) (§1B1.8 “unquestionably forbids the government to influence the sentencing range by disclosing revelations made by a defendant in the course of cooperation required by a plea agreement”).

Thus, a court may not, in calculating the guideline range, use information disclosed by a defendant in the course of cooperating pursuant to §1B1.8. Consequently, information, such as additional drug transactions in which the defendant has participated, may not be used to determine drug quantity if that information was provided by the defendant under the circumstances set forth in §1B1.8. *See, e.g., United States v. Gonzalez*, 309 F.3d 882, 887 (5th Cir. 2002) (prosecutor improperly used information gained under §1B1.8 to support its argument for a leadership role enhancement); *United States v. Thornton*, 306 F.3d 1355, 1357-58 (3d Cir. 2002) (although sentence affirmed on other grounds, §1B1.8 violated where defendant’s admissions confirming presence of guns in house was basis for firearm enhancement). *But see United States v. Milan*, 398 F.3d 445, 456 (6th Cir. 2005) (sentencing guidelines permit district court to consider proffer statements of codefendant in determining defendant’s sentence).

The defendant must be providing information concerning the criminal activities of “others” in order to qualify under §1B1.8. *See* §1B1.8, comment. (n.6).

The government must have agreed that the self-incriminating information provided pursuant to the cooperation agreement will not be used against the defendant. *See* §1B1.8; *see also United States v. Cruz*, 156 F.3d 366, 370-71 (2d Cir. 1998) (§1B1.8 does not cover proffer agreements); *United States v. Baird*, 218 F.3d 221, 228-29 (3d Cir. 2000) (the agreement need not cite to §1B1.8 to fall within its purview); *United States v. Ykema*, 887 F.2d 697, 699 (6th Cir. 1989) (concluding that mere promise that “no additional charges” would be brought did not preclude sentence based on drug quantity higher than that stipulated in plea agreement).

Section 1B1.8 does not prohibit disclosure of information provided in a plea agreement to the sentencing court, but rather, it prohibits this information from being used to determine the applicable guideline range. §1B1.8, comment. (n.1); *United States v. Gonzalez*, 309 F.3d 882, 886-87 (5th Cir. 2002).

Section 1B1.8 does not restrict the use of all information that a defendant may disclose in the course of his cooperation: information (1) known to the government prior to entering into the cooperation agreement, *see United States v. Wilson*, 106 F.3d 1140, 1144, n.5 (3d Cir. 1997); (2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender); (3) in a prosecution for perjury or giving a false statement; (4) in the event there is a breach of the cooperation agreement by the defendant, *United States v. Bradbury*, 189 F.3d 200, 206 (2d Cir. 1999); or (5) relevant in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a

government motion under §5K1.1 (Substantial Assistance to Authorities), may be used in determining a defendant's sentencing range. *See* §1B1.8.

Because the defendant gets “use” immunity, and not “transactional” immunity, information independently obtained from other sources, such as codefendants, may be considered, *see United States v. Pham*, 463 F.3d 1239, 1244 (11th Cir. 2006) (“[S]o long as the information is obtained from independent sources or separately gleaned from codefendants, it may be used at sentencing without violating § 1B1.8.”) and *United States v. Baird*, 218 F.3d 221, 231 (3d Cir. 2000); *United States v. Boyd*, 901 F.2d 842, 845 (10th Cir. 1990), unless the information was elicited solely as a result of, or prompted by, the defendant's cooperation. *See United States v. Gibson*, 48 F.3d 876, 879 (5th Cir. 1995); *United States v. Davis*, 912 F.2d 1210, 1213 (10th Cir. 1990). The government bears the burden of establishing that the evidence it wants to use was derived from a legitimate source independent of the defendant. *See, e.g., United States v. Taylor*, 277 F.3d 721, 725 (5th Cir. 2001).

The information may be used to determine whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under §5K1.1. *See United States v. Mills*, 329 F.3d 24, 28-29 (1st Cir. 2003); *United States v. McFarlane*, 309 F.3d 510, 515 (8th Cir. 2002). For example, a court may refuse to depart downward on the basis of such information, but should not use the information to depart upward. §1B1.8, comment. (n.1).