Drug Fact Patterns

1 Based on a tip, police began investigating defendant Smith and his partner Jones in the manufacture of methamphetamine. Smith provided 100 grams of ephedrine to an undercover agent posing as a meth cook who agreed to manufacture for Smith. Smith and Jones were immediately arrested. Both defendants were convicted of one count of conspiracy to manufacture methamphetamine. Upon searching Smith's residence on the day of the arrest, agents discovered a meth lab in Smith's basement. In the lab are found 100 grams of pseudoephedrine, and 10 grams of meth mixture of 50 percent purity. It has been established that the pseudoephedrine was possessed with the intent to manufacture methamphetamine and that the methamphetamine mixture was the product of an earlier manufacture arranged by Smith and Jones as part of the conspiracy.

1.1 What is the quantity of drugs that will be used to determine the defendant's base offense level pursuant to §2D1.1(a)(5)?

Answer: The ephedrine, pseudoephedrine, and methamphetamine will all be used to calculate the defendant's base offense level. All drugs must be converted into their respective marijuana equivalents. 100 g ephedrine equals 1,000 kg of marijuana. 100 g pseudoephedrine equals 1,000 kg of marijuana. As for the marijuana equivalency for the methamphetamine, Note (B) to the Drug Quantity Table instructs that the greater of meth actual or meth mixture must be used.

Ten grams of methamphetamine mixture has a base offense level of 18, while 5 grams of meth actual has a base offense level of 26. In comparing marijuana equivalencies, 10 grams of meth mixture equals 20 kg of marijuana, and 5 grams of meth actual equals 100 kg of marijuana. Because it results in the greater offense level, meth actual should be used to calculate the defendant's offense level. All the drugs involved in the defendant's relevant conduct results in a marijuana equivalency of 2,100 kg of marijuana, which results in a base offense level of 32.

1.2 Upon further search of Smith's basement lab, agents discovered 5 pounds of 4-methylaminorex (Euphoria) stored in a freezer. It is unknown how long the Euphoria had been stored there. Agents also find approximately 100 bottles of chemicals in a concealed storage area of the basement. Agents testified that the lab

was capable of producing 100 grams of methamphetamine per month and that the chemicals found were consistent with several months' worth of meth manufacturing. The lab had been in operation for three months. The defendant's expert witness testifies that the lab was capable of producing no more than 50 grams of methamphetamine per month. According to informants, Smith is divorced, and his 15 year old son lived with him every other weekend. Smith renovated a space above the detached garage to use as his son's room so his son could have privacy when he invited his other teenage friends to hang out.

Should any additional methamphetamine quantities be added to the drug quantities used to determine the base offense level at §2D1.1(a)(3)? If so, how much? How would the base offense level be affected? How does the presence of the Euphoria change the calculation of the base offense level for Smith? Does it have the same effect on Jones's offense level?

Answer: If it is determined that Smith and Jones manufactured meth for three months and it was part of the same course of conduct, common scheme or plan as the offense of conviction, then the court would have to determine the quantity of meth to add to the calculation of the base offense level. This is a question of fact for the court to resolve.

If the court agreed with the government, then 300 grams of meth would be added to the calculation of the base offense level for Smith and Jones pursuant to §2D1.1(a)(3). Assuming that the 300 gms of methamphetamine is determined to be part of relevant conduct, the additional seized 100 gms. of pseudoephedrine will be factored in using the Drug Quantity Table. Additionally, if the court determines that the defendant was planning on manufacturing additional amounts of meth, then those quantities will also be used in the calculations. Note that if it is determined that the seized 100 grams of pseudoephedrine were to be used in that manufacturing, then that quantity will not be used in both the estimation of meth that could be produced as well as calculated on the Drug Equivalency Table.

If the court agreed with the defense that the lab was not capable of producing more than 50 grams of meth per month, then no more than 150 grams of meth would be added to the calculation of the base offense level pursuant to §2D1.1(a)(3).

Issues: Should the court use 300 grams of methamphetamine mixture or assume the meth had the same purity as the meth found in the defendant's residence?

Base offense level will vary depending on whether the court uses the methamphetamine mixture or actual.
As to the Euphoria, find 4-Methylaminorex on the drug equivalency table listed under "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)". Each gram of Euphoria is equal to 100 grams of marijuana for Smith's base offense level.

As to Jones, the Court must decide whether the manufacture or possession of Euphoria was part of Jones's relevant conduct under §1B1.3. Was the possession or manufacture of Euphoria part of the "reasonably foreseeable acts. . . of others in furtherance of the jointly undertaken criminal activity"?

Is either Smith or Jones subject to the 6-level enhancement in §2D1.1(b)(10)(D)?

Answer: See Application Note 20 regarding factors for courts to consider in determining whether the defendant created a substantial risk of harm to a minor through the manufacture of amphetamine and methamphetamine.

1.3 Agents learn through further investigation that Smith has no prior criminal history and was employed by the state's environmental protection department. Smith has an undergraduate degree in chemistry, and established a fraudulent chemical company that enabled him to order chemicals from wholesale suppliers and have them shipped directly to his home. Jones never completed his college degree, but took courses in biology and chemistry as part of a pre-med curriculum in junior college. According to informants, Jones and Smith met at the workplace, and Jones had assisted Smith in Smith's lab for three months. Smith directed Jones to help Smith steal chemicals from their employer**.**

What, if any, additional enhancements apply to Smith? What, if any, additional enhancements apply to Jones?

Answer: The Court must determine whether Smith and Jones abused a position of trust or used a special skill "in a manner that significantly facilitated the commission or concealment of the offense" under §3B1.3. If the court makes that finding as to each defendant, a two-level increase applies.

2 Brown and Williams are each convicted of one count of conspiracy to distribute methamphetamine. On each of five occasions, Brown and Williams sold a five

ounce bag of 30 percent pure methamphetamine to a confidential informant. On the sixth occasion, Brown and Williams knowingly sold a five ounce bag of methylsuphonylmethane (MSM - a material commonly used to "cut" methamphetamine) to the confidential informant.

Is the weight of the MSM used to determine the defendants' base offense level pursuant to §2D1.1(a)(5)?

Answer: See §2D1.1, application note 12. The weight of the MSM should be excluded from the calculation if it is determined that the amount of meth delivered (zero) more accurately reflects the scale of the offense, or if the defendants established that they did not intend to provide the agreed upon quantity of meth.

Issue: Note (A) to the drug quantity table states that "the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Can the MSM be added to the calculation of drug quantity for the purpose of determining the base offense level for these defendants?

What if, on the sixth occasion, Brown and Williams were simply making the delivery and thought that the bag actually contained meth? Does your answer change?

3 Defendant Carter pled guilty to one count of conspiracy to distribute 5 kilograms of cocaine and one kilogram of heroin. Carter's involvement in the conspiracy was that on one occasion for a $1500.00 payment she drove a pickup truck containing the cocaine and heroin from one location to another. No weapons or violence of any kind were involved in this conspiracy. Carter was arrested immediately after arriving at her final destination. Carter cooperated fully with authorities and provided all information to the government in a timely fashion. She has no criminal history.

What is the quantity of drugs that will be used to determine Carter's base offense level pursuant to §2D1.1(a)(5)?

Answer: All drugs must be converted into their respective marijuana equivalents. 1 gram of heroin = 1 kg of marijuana; 1 gm of cocaine = 200 gm of marijuana; 1 kilogram of heroin = 1000 kilograms of marijuana; and 5 kilograms of cocaine

= 1000 kilograms of marijuana. All the drugs involved in the defendant's relevant conduct add up to a marijuana equivalency of 2,000 kg of marijuana, which results in a base offense level of 32.

Assume Carter made the delivery at 3:30 in the afternoon, immediately after picking up her 9 year old daughter from school. An unindicted informant gave a statement to law enforcement alleging that Carter said she would bring her daughter with her because she felt he daughter's presence would reduce suspicion. Carter denied this in a debriefing during which she told agents that she had no control over the time she was to make the delivery, and that she had no choice but to bring her daughter with her. Should Carter receive an enhancement for use of a minor, under §3B1.4?

Answer: Ultimately, this is a question of fact for the Court to decide. The enhancement applies if the defendant "used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense."

Should Carter receive a 2-level reduction pursuant to §2D1.1(b)(9)? If so, what is the defendant's offense level?

Answer: Carter is eligible for the two-level reduction pursuant to §2D1.1(b)(11), which provides that "[i]f the defendant meets the criteria set forth in subdivisions (1) to (5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels." The criteria listed in §5C1.2 (a) are (1) the defendant does not have more than 1 criminal history point; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.

If the government argues that Carter is ineligible because she was not truthful during her debriefing about her alleged statement to the informant regarding her

daughter, the court would have to resolve the factual dispute about whether she truthfully debriefed.

Assume that Carter's boyfriend and co-defendant, Long, possessed a firearm during the conspiracy discussed above. Carter neither possessed the weapon nor encouraged Long to possess the weapon. Is Carter still eligible to receive a 2-level reduction pursuant to §2D1.1(b)(9)?

Answer: On these facts, Carter qualifies for the reduction. §5C1.2(a)(2) discusses the defendant's possession of a firearm or other dangerous weapon (or inducement of another participant to do so) in connection with the offense. Although Carter might receive a two-level increase in her offense level for her co-defendant's possession of the weapon, see §2D1.1(b)(1)("If a dangerous weapon was possessed, increase by 2 levels"), this would not automatically preclude her from receiving the safety-valve reduction. Critical to the answer here is that, to meet the safety-valve criteria, the defendant herself must not have possessed a dangerous weapon. She is still eligible if a co-defendant possessed a weapon, as long as she did not induce a co-defendant to do so. The facts indicate that Carter did not induce her boyfriend to possess a weapon.

Would your answer change if Carter were convicted of 18 U.S.C. § 924(c), under the *Pinkerton* theory of liability?

Answer: Ultimately this is a question of fact for the court to decide. The analysis is the same, however. In Pinkerton v. United States, 327 U.S. 640 (1946), the Supreme Court held that where there was evidence that substantive offenses were in fact committed by one conspirator in furtherance of a conspiracy existing between two co-conspirators, and the evidence to implicate the second conspirator in the conspiracy was sufficient for the jury, the evidence was sufficient to sustain the conviction of that conspirator for commission of the substantive offense though there was no evidence of his direct participation therein, in absence of affirmative action to establish his withdrawal from conspiracy.

Under this theory of liability, the defendant's conviction under 18 U.S.C. §924(c) did not require that she personally possess the weapon or induce another to do so. Accordingly, her conviction of this offense is not an automatic bar to safety-valve relief.

4 Defendant Smalls has been convicted of conspiracy to distribute 50 grams of

cocaine. The conspiracy involved hand-to-hand sales of cocaine in the vicinity of a school. In a separate indictment, Smalls was charged in a conspiracy to distribute analogues via the Internet. His co-defendant is a corporation that he owns and one other officer of the corporation. Smalls has entered a guilty plea to the second charge and the government has agreed to consolidate the two cases for sentencing.

How would you compute the guidelines in this case?

Answer: All drugs must be converted into their respective marijuana equivalents in order to compute the base offense level. See §2D1.1, application note 5, regarding computing the marijuana equivalency for analogues.

Once the marijuana equivalencies are determined, the amounts from each case are added together to come up with a combined total. Use the combined total to ascertain to the base offense level. Then apply any applicable specific offense characteristics to determine the adjusted offense level.

These offenses are grouped pursuant to §3D1.2(d). Accordingly, the fact that the offenses were charged in different indictments with different co-defendants, and involved different types of drugs does not change the methodology for computing the base offense level.

4.1 Assume Smalls was convicted of possession with intent to distribute 2800 ml. of testosterone, an anabolic steroid. He targeted college athletes as customers. He also distributed masking agents to the athletes.

If Smalls committed this offense on November 2, 2005 and was sentenced on April 15, 2010, what would his base offense level be?

Answer: §1B1.11 requires the court to use the Guidelines Manual in effect on the date of sentencing unless the use of that Manual would violate the ex post facto clause of the U.S. Constitution. On March 27, 2006, the Commission amended §2D1.1, to increase the penalties for anabolic steroids. Accordingly, the court should apply the Guideline Manual in effect on the date the offense was committed, not the Manual in effect on the date of sentencing.

10 ml of anabolic steroids = 1 unit
2800 ml of anabolic steroids = 280 units.
280 units of a Schedule III substance would result in a base offense level of 8.

If Smalls's distribution of testosterone continued past March, 2006, would the base offense level change?

Answer: Yes, Smalls would be sentenced under the current version of §2D1.1, which increased penalties for anabolic steroids. ½ ml of anabolic steroids = 1 unit so 2800 ml of anabolic steroids = 5600 units. 5600 units of a Schedule III substance would result in a base offense level of 14.

The amendment also added two new specific offense characteristics relating to the distribution of anabolic steroids: (b)(7) increases the offense level by two levels if the offense involved distribution of an anabolic steroid and a masking agent; and (b)(8) increases the offense level by two levels if the defendant distributed an anabolic steroid to an athlete. Addition of these increases would result in an adjusted offense level of 18.

Is Smalls subject to an additional enhancement under §3A1.1 (Hate Crime Motivation or Vulnerable Victim)?

Answer: An enhancement for vulnerable victim could apply if the victim is "unusually vulnerable" and the defendant knew or should have known about this unusual vulnerability. However, the enhancement does not apply "if the factor that makes the person a vulnerable victim is incorporated in the offense guideline." Thus the court would have to decide whether the college athletes to whom Smalls marketed were especially vulnerable in some way other than being college athletes, and whether Smalls knew or should have known of their unique vulnerability.