

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Elvis Basic, Petitioner

v.

United States of America, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX

APPENDIX A	Judgment of the United States District Court	APP 1
APPENDIX B	Opinion of the United States Court of Appeals for the Eighth Circuit	APP 9
APPENDIX C	Judgment of the United States Court of Appeals for the Eighth Circuit	APP 19
APPENDIX D	Order Denying Petition for Rehearing and for Rehearing En Banc	APP 20
APPENDIX E	Mandate of the United States Court of Appeals for the Eighth Circuit	APP 21
APPENDIX F	U.S.S.G. § 2D1.1	APP 22

UNITED STATES DISTRICT COURT

District of North Dakota

UNITED STATES OF AMERICA

v.

ELVIS BASIC

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:18-cr-125-01

USM Number: 15955-059

Bobbi L. Brown Weiler

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☒ was found guilty on count(s) Counts 1, 2 and 4 of Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC §§ 841(a)(1), 841(b)(1)(C) and 846 and 18 USC § 2	Conspiracy to Distribute and Possess with Intent to Distribute a Controlled Substance	August 2018	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 16, 2019

Date of Imposition of Judgment

Signature of Judge

Daniel L. Hovland

U.S. Chief District Judge

Name and Title of Judge

Date

May 16, 2019

APPENDIX A

APP 001

Local AO 245B (Rev. 2/18) Judgment in a Criminal Case
Sheet 1A

Judgment—Page 2 of 8

DEFENDANT: ELVIS BASIC
CASE NUMBER: 1:18-cr-125-01

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 USC §§ 841(a)(1) and 841(b)(1)(C) and 18 USC § 2	Distribution of a Controlled Substance	August 2018	2
21 USC §§ 841(a)(1) and 841(b)(1)(C) and 18 USC § 2	Distribution of a Controlled Substance	June 14, 2018	4

APPENDIX A

APP 002

DEFENDANT: **ELVIS BASIC**
CASE NUMBER: **1:18-cr-125-01**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

120 MONTHS, with credit for time served, on each of Counts 1, 2 and 4, all sentences to run concurrent with one another and with sentence of 21 MONTHS, with credit for time served, imposed in Case No. 1:16-cr-026-02.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the Defendant be placed as close as possible to North Dakota, to remain close to family, specifically FCI Sandstone in Sandstone, MN; FPC Duluth in Duluth, MN; or FPC Yankton in Yankton, SD.

In addition, the Court recommends that the Defendant be afforded the opportunity to participate in the Bureau of Prisons' 500-Hour Residential Drug Abuse Program (RDAP).

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

APPENDIX A

APP 003

DEFENDANT: **ELVIS BASIC**
CASE NUMBER: **1:18-cr-125-01**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of : _____
3 YEARS on each of Counts 1, 2 and 4, all terms to run concurrent with one another.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 2091, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: **ELVIS BASIC**
CASE NUMBER: **1:18-cr-125-01****STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: ELVIS BASIC
CASE NUMBER: 1:18-cr-125-01

SPECIAL CONDITIONS OF SUPERVISION

1. You must totally abstain from the use of alcohol and illegal drugs or the possession of a controlled substance, as defined in 21 U.S.C. § 802 or state statute, unless prescribed by a licensed medical practitioner; and any use of inhalants or psychoactive substances (e.g., synthetic marijuana, bath salts, etc.) that impair your physical or mental functioning.
2. You must submit to drug/alcohol screening at the direction of the United States Probation Officer to verify compliance. Failure or refusal to submit to testing can result in mandatory revocation. Tampering with the collection process or specimen may be considered the same as a positive test result.
3. You must participate in a drug/alcohol dependency treatment program as approved by the supervising probation officer.
4. You must participate in mental health treatment/counseling as directed by the supervising probation officer.
5. You must participate in a program aimed at addressing specific interpersonal or social areas, for example, anger management, parenting classes, domestic violence, or cognitive skills, at the direction of your supervising probation officer.
6. As directed by the Court, if during the period of supervised release the supervising probation officer determines you are in need of placement in a Residential Re-Entry Center (RRC), you must voluntarily report to such a facility as directed by the supervising probation officer, cooperate with all rules and regulations of the facility, participate in all recommended programming, and not withdraw from the facility without prior permission of the supervising probation officer. The Court retains and exercises ultimate responsibility in this delegation of authority to the probation officer.
7. You must submit your person, residence, workplace, vehicle, computer (including passwords), and/or possessions to a search conducted by a United States Probation Officer based upon reasonable suspicion of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation, additional criminal charges, and arrest. You must notify any other residents that the premises may be subject to searches pursuant to this condition.

DEFENDANT: **ELVIS BASIC**
CASE NUMBER: **1:18-cr-125-01****CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 300.00	\$	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	---------------------	----------------------------	-------------------------------

TOTALS	\$	<u>0.00</u>	\$	<u>0.00</u>
---------------	----	-------------	----	-------------

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **ELVIS BASIC**
CASE NUMBER: **1:18-cr-125-01****SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 300.00 due immediately, balance due
- ☐ not later than _____, or
- ☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 1193, Bismarck, North Dakota, 58502-1193.

While on probation, the Defendant shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT A assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

APPENDIX A**APP 008**

United States Court of Appeals
For the Eighth Circuit

No. 19-2109

United States of America

Plaintiff - Appellee

v.

Kinzey Shaw, also known as Kinzey Basic

Defendant - Appellant

No. 19-2165

United States of America

Plaintiff - Appellee

v.

Elvis Basic

Defendant - Appellant

Appeal from United States District Court
for the District of North Dakota - Bismarck

Submitted: June 16, 2020

Filed: July 20, 2020

APPENDIX B

APP 009

Before GRUENDER, WOLLMAN, and KOBES, Circuit Judges.

GRUENDER, Circuit Judge.

Kinzey Shaw and Elvis Basic were found jointly guilty of one count of conspiracy to distribute and possess with intent to distribute a controlled substance and one count of distribution of a controlled substance, in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(C), and 18 U.S.C. § 2. Shaw and Basic were also found guilty of one count each of distribution of a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 18 U.S.C. § 2. Basic appeals his conspiracy conviction and the district court's¹ drug-quantity determination. Shaw appeals the drug-quantity determination and an obstruction-of-justice enhancement applied to her sentence. We affirm.

The evidence presented at trial included testimony that Shaw began selling a fentanyl solution to Tawna Iron Shield in June 2018, while Iron Shield was living in a halfway house in North Dakota. On the first occasion, Shaw parked outside a Walmart and asked Iron Shield if she wanted to try some nasal spray. Iron Shield said yes and sprayed the solution two or three times into her nose, which made her feel “energetic.” Iron Shield later bought a bottle of nasal spray from Shaw, agreeing to a price of one hundred dollars. On a separate occasion, Iron Shield obtained another bottle of nasal spray from Shaw at Shaw’s mother’s apartment for forty dollars. She returned to Shaw’s mother’s apartment two or three times to refill the nasal spray bottle. Iron Shield told another resident in the halfway house, Jennifer Red Shirt, about her nasal spray bottle and offered to let Red Shirt try it. Red Shirt said that after she did “two squirts” of the solution she felt “high” and “sick.”

¹The Honorable Daniel L. Hovland, Chief Judge, United States District Court for the District of North Dakota.

Iron Shield and Red Shirt both failed routine urinalysis tests for drugs later that month and were arrested and jailed. A staff member at the halfway house confiscated Iron Shield's spray bottle and turned it over to law enforcement. An analysis revealed that the spray bottle held 11.69 grams of a liquid solution that contained cyclopropyl fentanyl.² Iron Shield was interviewed by a police detective and told him about Shaw's role in supplying the nasal spray.

After learning of Shaw's role in the drug transactions, North Dakota Bureau of Criminal Investigation Special Agent Alex Droske began surveillance of Basic's apartment building because he knew from "previous experience" that Shaw and Basic were associated. During this surveillance, Droske observed a man park next to Basic's vehicle in the apartment building parking lot, look inside Basic's vehicle, then enter the building. The man returned to the lot ten minutes later carrying a round, cylindrical object. Droske followed the man's car as he drove away and saw him shaking a nasal spray bottle in his hand as he drove. Droske initiated a traffic stop after observing the man's erratic driving and learned the man's name was Joseph Otremba. Otremba admitted that he had a nasal spray bottle in his car. This bottle was seized and later revealed to contain a solution that included cyclopropyl fentanyl.

Otremba later testified that he received nasal spray from Basic and Shaw on multiple occasions. When Otremba first used the substance, Basic sprayed it into Otremba's nose. Otremba testified that, at Basic's direction, he paid for a bottle of nasal spray by sending forty dollars to Shaw's PayPal account. He also testified that, during a trip to Fargo with Basic and Shaw, he used the substance multiple times. Shaw would remove the bottle from her purse and use the spray, then pass it to Basic to use, and then to Otremba.

²The parties do not dispute that cyclopropyl fentanyl is a fentanyl analogue. "A controlled substance analogue is a substance that is 'substantially similar' to a controlled substance in schedule I or II with respect to either its chemical structure or its 'stimulant, depressant, or hallucinogenic effect.'" *United States v. Wolfe*, 781 F. App'x 566, 568 (8th Cir. 2019) (per curiam) (citing 21 U.S.C. § 802(32)(A)).

After Droske stopped Otremba, Droske notified other law enforcement agents of the seizure of the nasal spray bottle. Ultimately, Shaw and Basic were arrested, and Shaw was placed into the same holding cell as Iron Shield and Red Shirt. While in that holding cell, Shaw told both Iron Shield and Red Shirt “not to tell on her.”

At Shaw’s sentencing hearing, the district court calculated a total offense level of 30 and a criminal history category of III, resulting in an advisory sentencing guidelines range of 121 to 151 months. Shaw’s offense level included a two-level enhancement for Shaw’s attempt to obstruct justice by telling Iron Shield and Red Shirt not to tell on her. The district court sentenced Shaw to 132 months’ imprisonment, followed by three years of supervised release.

At Basic’s sentencing hearing, the district court calculated a total offense level of 28 and a criminal history category of III, resulting in an advisory sentencing guidelines range of 97 to 121 months. It sentenced Basic to 120 months’ imprisonment. In calculating the sentences for both Shaw and Basic, the district court relied on the drug-quantity determination of seventy-seven grams contained in their presentence investigation reports.³

Shaw and Basic now appeal. Basic argues that there was insufficient evidence to establish that a conspiracy existed between him and Shaw and argues that the district court clearly erred in calculating a drug quantity of seventy-seven grams. Shaw also contests the drug-quantity determination and argues additionally that the

³Each presentence investigation report determined that there were seventy-seven grams of cyclopropyl fentanyl involved in the offenses, or 770 kilograms of converted drug weight. The sentencing guidelines provide that an amount ranging between seventy and one hundred grams of a fentanyl analogue, such as a mixture containing cyclopropyl fentanyl, equates to an amount between 700 and 1,000 kilograms of converted drug weight. U.S.S.G. § 2D1.1(c); § 2D1.1 cmt. n.8(D). And this drug quantity results in a base offense level of 28. *Id.*

two-level sentencing enhancement for obstruction was improper. We address each argument in turn.

We begin with Basic's sufficiency-of-the-evidence argument concerning his conspiracy conviction. "We review de novo the sufficiency of the evidence, examining the evidence in the light most favorable to the jury verdict and giving the verdict the benefit of all reasonable inferences." *United States v. Blaylock*, 421 F.3d 758, 772 (8th Cir. 2005). We will not disturb the jury's verdict unless "no reasonable construction of the evidence" will support it. *United States v. Hickman*, 764 F.3d 918, 924 (8th Cir. 2014).

To conclude that Basic was engaged in a conspiracy with Shaw, a jury must find that (1) Shaw and Basic reached an agreement to distribute or possess with intent to distribute a controlled substance, (2) Basic voluntarily and intentionally joined the agreement, and (3) at the time he joined the agreement, Basic knew its essential purpose. *See United States v. Walker*, 688 F.3d 416, 421 (8th Cir. 2012). "The government may prove an agreement wholly by circumstantial evidence or by inference from the actions of the parties." *United States v. Jimenez-Villasenor*, 270 F.3d 554, 558 (8th Cir. 2001). Granted, "proof of a buyer-seller relationship, without more, is inadequate to tie the buyer to a larger conspiracy" *United States v. Conway*, 754 F.3d 580, 591 (8th Cir. 2014). But a reasonable jury could find that Basic had more than a buyer-seller relationship with Shaw "if the evidence supports a finding that they shared a conspiratorial purpose to advance other transfers." *See id.* at 592.

The circumstantial evidence here is sufficient to establish that Basic voluntarily and intentionally reached an agreement with Shaw to distribute a controlled substance and, at the time of joining, knew the essential purpose of the agreement. For example, Otremba testified that he overheard multiple conversations between Shaw and Basic about their efforts to sell the fentanyl nasal spray. In addition, Otremba testified that Basic directed him to collect water bottles containing unidentified liquid from Shaw's mother's apartment and that Basic told him to send

money to Shaw's PayPal account in exchange for the fentanyl solution. Furthermore, Shaw and Basic jointly distributed fentanyl spray to Otremba multiple times. Once, while all three were shopping together, Otremba asked Basic for some nasal spray, Basic then asked Shaw for the spray, and Shaw retrieved it from her purse and handed it to Basic to give to Otremba. In view of this testimony, sufficient evidence supported the finding that Shaw and Basic were engaged in a conspiracy to distribute cyclopropyl fentanyl. *See United States v. Cooke*, 853 F.3d 464, 475 (8th Cir. 2017) (determining that circumstantial evidence established a conspiracy based on, *inter alia*, communications between two people about selling methamphetamine and payments between those people for controlled substances).

Next, Basic and Shaw both argue that the district court clearly erred in calculating a drug quantity of seventy-seven grams of fentanyl analogue. "The district court's drug quantity and identity determinations are factual findings, which we review for clear error, applying the preponderance-of-the-evidence standard." *Walker*, 688 F.3d at 420 (internal quotation marks omitted). We "will overturn a finding of drug quantity only if the entire record definitively and firmly convinces us that a mistake has been made." *United States v. Quintana*, 340 F.3d 700, 702 (8th Cir. 2003) (internal quotation marks omitted).

Before attributing to one defendant a quantity of drugs sold by a co-conspirator, a district court must "find by a preponderance of the evidence" that the transaction was (1) "in furtherance of the conspiracy" and (2) either known to the defendant "or reasonably foreseeable to him." *United States v. Alexander*, 408 F.3d 1003, 1009-10 (8th Cir. 2005); *see* U.S.S.G. § 1B1.3(a)(1)(B). In calculating this quantity, "the factfinder may consider drug amounts from transactions" that the defendant was not directly involved in, so long as those transactions were "part of the same course of conduct or scheme." *Id.* at 1010.

Basic argues that the quantities sold by Shaw to Iron Shield cannot be attributable to him because they were not reasonably foreseeable by him, were not within the scope of the conspiracy, and were not in furtherance of the conspiracy.

But Otremba testified that he heard multiple conversations between Basic and Shaw about selling the fentanyl nasal spray. Specifically, he heard Shaw tell Basic that she needed to “make money off of” selling the drug. Therefore, it would have been reasonably foreseeable to Basic that Shaw would attempt to increase sales by distributing the drug to others, even if Basic did not personally know Iron Shield or Red Shirt. *See United States v. Flores*, 73 F.3d 826, 834 (8th Cir. 1996) (finding that a codefendant was responsible for other drug quantities distributed by co-conspirators when there was no evidence to suggest that his “initial agreement to join, and subsequent involvement in, the joint criminal conduct was clearly defined . . . as limited to the specific criminal act(s)” in which the codefendant personally participated). Thus, the district court did not clearly err in holding that a preponderance of the evidence supported finding that Shaw’s fentanyl nasal spray transactions with Iron Shield were attributable to Basic.

In addition, turning to the drug quantity calculated, the trial evidence was sufficient for the district court to “approximate [a] quantity” that amounted to at least seventy-seven grams of fentanyl analogue. *See Walker*, 688 F.3d at 421. To determine properly the applicable drug quantity in a conspiracy, a sentencing court “shall approximate the quantity of the controlled substance[s]” for sentencing purposes if the amount of drugs seized does not reflect the scale of the offense. *Id.* In so doing, “[t]he court may make a specific numeric determination of quantity based on imprecise evidence” and without regard to the admissibility of the evidence. *United States v. Roach*, 164 F.3d 403, 413-14 (8th Cir. 1998). In making these determinations, the sentencing court has wide discretion as to the kind of information it may consider or its source, including trial evidence. *United States v. Lawrence*, 854 F.3d 462, 467 (8th Cir. 2017).

The nasal spray bottle confiscated from Iron Shield at the halfway house was found to contain 11.69 grams of a solution containing cyclopropyl fentanyl. Because testimony established that several of Shaw’s and Basic’s other transactions involved nasal spray bottles, it was reasonable for the district court to “approximate the quantity” of those other nasal spray bottles as 11.69 grams. *See Walker*, 688 F.3d at

421. Iron Shield testified that she received multiple nasal spray bottles from Shaw and refilled them at Shaw's apartment "two or three times," amounting to roughly four nasal-spray-bottle-sized amounts. Otremba also testified that the same day that Droske stopped him, Basic had filled a spray bottle belonging to Otremba with a fentanyl solution. On another occasion, Otremba paid forty dollars for a separate quantity of fentanyl solution that Basic poured from a bottle belonging to Shaw into Otremba's spray bottle. In addition to these incidents involving nasal spray bottle-sized quantities, Otremba testified that he retrieved a water bottle containing approximately two inches of liquid from Shaw's apartment. Otremba then brought the bottle to Basic at his apartment, later testifying that Basic usually obtained the fentanyl from Shaw and that he and Basic would refer to the nasal spray as "water bottle" or "Dasani water" when they were talking in code. Furthermore, Iron Shield and Otremba both testified to receiving several sprays of the fentanyl solution from Shaw and Basic on multiple occasions. Therefore, there were likely at least six nasal-spray-bottle quantities, two inches of solution in a water bottle, and various individual sprays involved in Shaw and Basic's transactions. In light of this testimony, seventy-seven grams is a reasonable approximation of the drug quantity. *See United States v. Robertson*, 883 F.3d 1080, 1083 (8th Cir. 2018) (noting that, where not all the drugs have been seized, the district court's measurements need not be precise if the record reflects a basis for the court's approximation). Thus, the district court did not clearly err in calculating the drug quantity.

Lastly, Shaw argues that the district court's decision to apply a two-level sentencing enhancement for obstruction of justice was not supported by the trial evidence. "The district court must find the predicate facts supporting an enhancement for obstruction of justice by a preponderance of the evidence, and we review those findings for clear error." *United States v. Yarrington*, 634 F.3d 440, 452 (8th Cir. 2011). "We give great deference to a district court's decision to impose an obstruction of justice enhancement, reversing only when the district court's findings are insufficient." *Id.*

A district court may apply an obstruction-of-justice enhancement to a defendant's base offense level if "the defendant willfully obstructed . . . or attempted to obstruct . . . the administration of justice" with respect to the investigation or prosecution "of the instant offense of conviction" and the obstruction related to the "defendant's offense of conviction and any relevant conduct." U.S.S.G. § 3C1.1. The commentary to § 3C1.1 defines obstruction to include "unlawfully influencing" a witness. *Id.* at cmt. n.4(A). Therefore, attempts to prevent others from communicating evidence of wrongdoing to law enforcement officers can constitute obstruction of justice. *See United States v. Gaye*, 902 F.3d 780, 788 (8th Cir. 2018) (noting that attempts to discourage a witness from testifying implicate the federal witness tampering statute, 18 U.S.C. § 1512(b)(1), which forbids persuading another person with an intent to delay or prevent testimony, and therefore can amount to obstruction for purposes of the enhancement).

The district court did not clearly err in finding by a preponderance of the evidence that Shaw attempted to obstruct justice. Iron Shield and Red Shirt both testified that Shaw told them "not to tell on her" while they were in a holding cell together after drugs had been discovered at the halfway house. In a similar case, we found that a defendant obstructed justice when he told a witness that her statements relating to a domestic assault charge "need[ed] to go away." *United States v. Sanders*, 956 F.3d 534, 540-41 (8th Cir. 2020) (noting that the defendant's argument that the comment was "too ambiguous" to warrant an obstruction enhancement was insufficient to overcome deference to the district court). Shaw's comment to Iron Shield and Red Shirt is distinguishable from cases where the enhancement was not applied because a defendant's statements were "somewhat ambiguous," such as when a defendant asked a witness to "stay strong" and "be quiet." *See United States v. Emmert*, 9 F.3d 699, 704-05 (8th Cir. 1993). Shaw's statement is closer to that in *Sanders* because it is a direct attempt to stifle incriminating testimony. *See* 956 F.3d at 540-41. Thus, the district court did not clearly err in applying the obstruction-of-justice enhancement to Shaw's offense level.

For the foregoing reasons, we affirm.⁴

⁴On March 26, 2020, Basic filed a *pro se* letter addressed to this court raising various issues. “It is Eighth Circuit policy not to address issues raised by a defendant in *pro se* filings with this Court when he is represented by counsel.” *United States v. Carr*, 895 F.3d 1083, 1090 (8th Cir. 2018). We therefore decline to address Basic’s *pro se* arguments.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 19-2109

United States of America

Plaintiff - Appellee

v.

Kinzey Shaw, also known as Kinzey Basic

Defendant - Appellant

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:18-cr-00125-DLH-2)

CORRECTED JUDGMENT

Before GRUENDER, WOLLMAN and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

July 21, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 19-2109

United States of America

Appellee

v.

Kinzey Shaw, also known as Kinzey Basic

Appellant

No: 19-2165

United States of America

Appellee

v.

Elvis Basic

Appellant

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:18-cr-00125-DLH-2)

ORDER

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Judge Erickson did not participate in the consideration or decision of this matter.

August 25, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D

APP 020

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 19-2109

United States of America

Appellee

v.

Kinzey Shaw, also known as Kinzey Basic

Appellant

No: 19-2165

United States of America

Appellee

v.

Elvis Basic

Appellant

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:18-cr-00125-DLH-2)

MANDATE

In accordance with the opinion and judgment of 07/20/2020, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

September 01, 2020

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Limited on Constitutional Grounds by U.S. v. Booker, U.S., Jan. 12, 2005

United States Code Annotated

Federal Sentencing Guidelines (Refs & Annos)

Chapter Two. Offense Conduct (Refs & Annos)

Part D. Offenses Involving Drugs and Narco-Terrorism (Refs & Annos)

1. Unlawful Manufacturing, Importing, Exporting, Trafficking, or Possession; Continuing Criminal Enterprise

USSG, § 2D1.1, 18 U.S.C.A.

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

Currentness

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

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

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

(5) The offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under § 3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels. If the resulting offense level is greater than level 32 and the defendant receives the 4-level ("minimal participant") reduction in § 3B1.2(a), decrease to level 32.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

APPENDIX F

- (2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by 2 levels.
- (3) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.
- (4) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.
- (5) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.
- (6) If the defendant is convicted under 21 U.S.C. § 865, increase by 2 levels.
- (7) If the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by 2 levels.
- (8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.
- (9) If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels.
- (10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by 2 levels.
- (11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by 2 levels.
- (12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels.
- (13) If the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by 4 levels.
- (14) (Apply the greatest):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(C) If--

(i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

(D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

(15) If (A) the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land; and (B) the defendant receives an adjustment under § 3B1.1 (Aggravating Role), increase by 2 levels.

(16) If the defendant receives an adjustment under § 3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

(A)(i) The defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;

(B) The defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;

(C) The defendant was directly involved in the importation of a controlled substance;

(D) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) The defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,
increase by 2 levels.

(17) If the defendant receives the 4-level (“minimal participant”) reduction in § 3B1.2(a) and the offense involved all of the following factors:

(A) The defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

(B) The defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

(C) The defendant had minimal knowledge of the scope and structure of the enterprise,
decrease by 2 levels.

(18) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

(c) DRUG QUANTITY TABLE

	<i>Controlled Substances and Quantity*</i>	<i>Base Offense Level</i>
(1)	• 90 KG or more of Heroin; • 450 KG or more of Cocaine; • 25.2 KG or more of Cocaine Base; • 90 KG or more of PCP, or 9 KG or more of PCP (actual); • 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of “Ice”; • 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual); • 900 G or more of LSD; • 36 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); • 9 KG or more of a Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide Analogue; • 90,000 KG or more of Marihuana; • 18,000 KG or more of Hashish;	Level 38

- 1,800 KG or more of Hashish Oil;
 - 90,000,000 units or more of Ketamine;
 - 90,000,000 units or more of Schedule I or II Depressants;
 - 5,625,000 units or more of Flunitrazepam;
 - 90,000 KG or more of *Converted Drug Weight*.
- (2) • At least 30 KG but less than 90 KG of Heroin; **Level 36**
- At least 150 KG but less than 450 KG of Cocaine;
- At least 8.4 KG but less than 25.2 KG of Cocaine Base;
- At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual);
- At least 15 KG but less than 45 KG of Methamphetamine, or at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or at least 1.5 KG but less than 4.5 KG of “Ice”;
- At least 15 KG but less than 45 KG of Amphetamine, or at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);
- At least 300 G but less than 900 G of LSD;
- At least 12 KG but less than 36 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 3 KG but less than 9 KG of a Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) Analogue;
- At least 30,000 KG but less than 90,000 KG of Marihuana;
- At least 6,000 KG but less than 18,000 KG of Hashish;
- At least 600 KG but less than 1,800 KG of Hashish Oil;
- At least 30,000,000 units but less than 90,000,000 units of Ketamine;
- At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;
- At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam;
- At least 30,000 KG but less than 90,000 KG of *Converted Drug Weight*.
- (3) • At least 10 KG but less than 30 KG of Heroin; **Level 34**
- At least 50 KG but less than 150 KG of Cocaine;
- At least 2.8 KG but less than 8.4 KG of Cocaine Base;
- At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);

- At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of “Ice”;
- At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);
- At least 100 G but less than 300 G of LSD;
- At least 4 KG but less than 12 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 1 KG but less than 3 KG of a Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Ketamine;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam;
- At least 10,000 KG but less than 30,000 KG of *Converted Drug Weight*.

(4)

- At least 3 KG but less than 10 KG of Heroin;
- At least 15 KG but less than 50 KG of Cocaine;
- At least 840 G but less than 2.8 KG of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
- At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of “Ice”;
- At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);
- At least 30 G but less than 100 G of LSD;
- At least 1.2 KG but less than 4 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 300 G but less than 1 KG of a Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Ketamine;

Level 32

- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
 - At least 187,500 but less than 625,000 units of Flunitrazepam;
 - At least 3,000 KG but less than 10,000 KG of *Converted Drug Weight*.
- (5) Level 30
- At least 1 KG but less than 3 KG of Heroin;
 - At least 5 KG but less than 15 KG of Cocaine;
 - At least 280 G but less than 840 G of Cocaine Base;
 - At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
 - At least 500 G but less than 1.5 KG of Methamphetamine, at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
 - At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
 - At least 10 G but less than 30 G of LSD;
 - At least 400 G but less than 1.2 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 100 G but less than 300 G of a Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) Analogue;
 - At least 1,000 KG but less than 3,000 KG of Marihuana;
 - At least 200 KG but less than 600 KG of Hashish;
 - At least 20 KG but less than 60 KG of Hashish Oil;
 - At least 1,000,000 but less than 3,000,000 units of Ketamine;
 - At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
 - At least 62,500 but less than 187,500 units of Flunitrazepam;
 - At least 1,000 KG but less than 3,000 KG of *Converted Drug Weight*.
- (6) Level 28
- At least 700 G but less than 1 KG of Heroin;
 - At least 3.5 KG but less than 5 KG of Cocaine;
 - At least 196 G but less than 280 G of Cocaine Base;
 - At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
 - At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";
 - At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);

- At least 7 G but less than 10 G of LSD;
 - At least 280 G but less than 400 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 70 G but less than 100 G of a Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) Analogue;
 - At least 700 KG but less than 1,000 KG of Marihuana;
 - At least 140 KG but less than 200 KG of Hashish;
 - At least 14 KG but less than 20 KG of Hashish Oil;
 - At least 700,000 but less than 1,000,000 units of Ketamine;
 - At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
 - At least 43,750 but less than 62,500 units of Flunitrazepam;
 - At least 700 KG but less than 1,000 KG of **Converted Drug Weight**.
- (7) • At least 400 G but less than 700 G of Heroin; **Level 26**
- At least 2 KG but less than 3.5 KG of Cocaine;
 - At least 112 G but less than 196 G of Cocaine Base;
 - At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
 - At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";
 - At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
 - At least 4 G but less than 7 G of LSD;
 - At least 160 G but less than 280 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 40 G but less than 70 G of a Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) Analogue;
 - At least 400 KG but less than 700 KG of Marihuana;
 - At least 80 KG but less than 140 KG of Hashish;
 - At least 8 KG but less than 14 KG of Hashish Oil;
 - At least 400,000 but less than 700,000 units of Ketamine;
 - At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
 - At least 25,000 but less than 43,750 units of Flunitrazepam;

- At least 400 KG but less than 700 KG of *Converted Drug Weight*.
- (8) Level 24
- At least 100 G but less than 400 G of Heroin;
 - At least 500 G but less than 2 KG of Cocaine;
 - At least 28 G but less than 112 G of Cocaine Base;
 - At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
 - At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
 - At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
 - At least 1 G but less than 4 G of LSD;
 - At least 40 G but less than 160 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 10 G but less than 40 G of a Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) Analogue;
 - At least 100 KG but less than 400 KG of Marihuana;
 - At least 20 KG but less than 80 KG of Hashish;
 - At least 2 KG but less than 8 KG of Hashish Oil;
 - At least 100,000 but less than 400,000 units of Ketamine;
 - At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
 - At least 6,250 but less than 25,000 units of Flunitrazepam;
 - At least 100 KG but less than 400 KG of *Converted Drug Weight*.
- (9) Level 22
- At least 80 G but less than 100 G of Heroin;
 - At least 400 G but less than 500 G of Cocaine;
 - At least 22.4 G but less than 28 G of Cocaine Base;
 - At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
 - At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
 - At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
 - At least 800 MG but less than 1 G of LSD;
 - At least 32 G but less than 40 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);

- At least 8 G but less than 10 G of a Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) Analogue;
 - At least 80 KG but less than 100 KG of Marihuana;
 - At least 16 KG but less than 20 KG of Hashish;
 - At least 1.6 KG but less than 2 KG of Hashish Oil;
 - At least 80,000 but less than 100,000 units of Ketamine;
 - At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
 - At least 5,000 but less than 6,250 units of Flunitrazepam;
 - At least 80 KG but less than 100 KG of *Converted Drug Weight*.
- (10) • At least 60 G but less than 80 G of Heroin; **Level 20**
- At least 300 G but less than 400 G of Cocaine;
 - At least 16.8 G but less than 22.4 G of Cocaine Base;
 - At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
 - At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";
 - At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
 - At least 600 MG but less than 800 MG of LSD;
 - At least 24 G but less than 32 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 6 G but less than 8 G of a Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) Analogue;
 - At least 60 KG but less than 80 KG of Marihuana;
 - At least 12 KG but less than 16 KG of Hashish;
 - At least 1.2 KG but less than 1.6 KG of Hashish Oil;
 - At least 60,000 but less than 80,000 units of Ketamine;
 - At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
 - 60,000 units or more of Schedule III substances (except Ketamine);
 - At least 3,750 but less than 5,000 units of Flunitrazepam;
 - At least 60 KG but less than 80 KG of *Converted Drug Weight*.
- (11) • At least 40 G but less than 60 G of Heroin; **Level 18**
- At least 200 G but less than 300 G of Cocaine;

- At least 11.2 G but less than 16.8 G of Cocaine Base;
 - At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
 - At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of “Ice”;
 - At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
 - At least 400 MG but less than 600 MG of LSD;
 - At least 16 G but less than 24 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 4 G but less than 6 G of a Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) Analogue;
 - At least 40 KG but less than 60 KG of Marihuana;
 - At least 8 KG but less than 12 KG of Hashish;
 - At least 800 G but less than 1.2 KG of Hashish Oil;
 - At least 40,000 but less than 60,000 units of Ketamine;
 - At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
 - At least 40,000 but less than 60,000 units of Schedule III substances (except Ketamine);
 - At least 2,500 but less than 3,750 units of Flunitrazepam;
 - At least 40 KG but less than 60 KG of *Converted Drug Weight*.
- (12) • At least 20 G but less than 40 G of Heroin; Level 16
- At least 100 G but less than 200 G of Cocaine;
 - At least 5.6 G but less than 11.2 G of Cocaine Base;
 - At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
 - At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of “Ice”;
 - At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
 - At least 200 MG but less than 400 MG of LSD;
 - At least 8 G but less than 16 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 2 G but less than 4 G of a Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) Analogue;
 - At least 20 KG but less than 40 KG of Marihuana;

- At least 5 KG but less than 8 KG of Hashish;
 - At least 500 G but less than 800 G of Hashish Oil;
 - At least 20,000 but less than 40,000 units of Ketamine;
 - At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
 - At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine);
 - At least 1,250 but less than 2,500 units of Flunitrazepam;
 - At least 20 KG but less than 40 KG of *Converted Drug Weight*.
- (13) Level 14
- At least 10 G but less than 20 G of Heroin;
 - At least 50 G but less than 100 G of Cocaine;
 - At least 2.8 G but less than 5.6 G of Cocaine Base;
 - At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
 - At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice";
 - At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
 - At least 100 MG but less than 200 MG of LSD;
 - At least 4 G but less than 8 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 1 G but less than 2 G of a Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) Analogue;
 - At least 10 KG but less than 20 KG of Marihuana;
 - At least 2 KG but less than 5 KG of Hashish;
 - At least 200 G but less than 500 G of Hashish Oil;
 - At least 10,000 but less than 20,000 units of Ketamine;
 - At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
 - At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine);
 - At least 625 but less than 1,250 units of Flunitrazepam;
 - At least 10 KG but less than 20 KG of *Converted Drug Weight*.
- (14) Level 12
- Less than 10 G of Heroin;
 - Less than 50 G of Cocaine;
 - Less than 2.8 G of Cocaine Base;

- Less than 10 G of PCP, or less than 1 G of PCP (actual);
 - Less than 5 G of Methamphetamine, or less than 500 MG of Methamphetamine (actual), or less than 500 MG of “Ice”;
 - Less than 5 G of Amphetamine, or less than 500 MG of Amphetamine (actual);
 - Less than 100 MG of LSD;
 - Less than 4 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - Less than 1 G of a Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) Analogue;
 - At least 5 KG but less than 10 KG of Marihuana;
 - At least 1 KG but less than 2 KG of Hashish;
 - At least 100 G but less than 200 G of Hashish Oil;
 - At least 5,000 but less than 10,000 units of Ketamine;
 - At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
 - At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine);
 - At least 312 but less than 625 units of Flunitrazepam;
 - 80,000 units or more of Schedule IV substances (except Flunitrazepam);
 - At least 5 KG but less than 10 KG of *Converted Drug Weight*.
- (15) • At least 2.5 KG but less than 5 KG of Marihuana; Level 10
- At least 500 G but less than 1 KG of Hashish;
- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Ketamine;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine);
- At least 156 but less than 312 units of Flunitrazepam;
- At least 40,000 but less than 80,000 units of Schedule IV substances (except Flunitrazepam);
- At least 2.5 KG but less than 5 KG of *Converted Drug Weight*.
- (16) • At least 1 KG but less than 2.5 KG of Marihuana; Level 8
- At least 200 G but less than 500 G of Hashish;
- At least 20 G but less than 50 G of Hashish Oil;

	• At least 1,000 units but less than 2,500 units of Ketamine; • At least 1,000 but less than 2,500 units of Schedule I or II Depressants; • At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine); • Less than 156 units of Flunitrazepam; • At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam); • 160,000 units or more of Schedule V substances; • At least 1 KG but less than 2.5 KG of <i>Converted Drug Weight</i>.	
(17)	• Less than 1 KG of Marihuana; • Less than 200 G of Hashish; • Less than 20 G of Hashish Oil; • Less than 1,000 units of Ketamine; • Less than 1,000 units of Schedule I or II Depressants; • Less than 1,000 units of Schedule III substances (except Ketamine); • Less than 16,000 units of Schedule IV substances (except Flunitrazepam); • Less than 160,000 units of Schedule V substances; • Less than 1 KG of <i>Converted Drug Weight</i>.	Level 6

***Notes to Drug Quantity Table:**

(A) Unless otherwise specified, 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. 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.

(B) The terms “PCP (actual)”, “Amphetamine (actual)”, and “Methamphetamine (actual)” refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The terms “Hydrocodone (actual)” and “Oxycodone (actual)” refer to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

(C) “Ice,” for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.

(D) “Cocaine base,” for the purposes of this guideline, means “crack.” “Crack” is 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.

(E) In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 grams of marihuana. *Provided*, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

(F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one “unit” means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one “unit” means 0.5 milliliters. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (e.g., patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 milligrams of an anabolic steroid is one “unit”.

(G) In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 milligrams of LSD for the purposes of the Drug Quantity Table.

(H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabinal, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

(I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabinal, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

(J) Fentanyl analogue, for the purposes of this guideline, means any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).

(K) The term “Converted Drug Weight,” for purposes of this guideline, refers to a nominal reference designation that is used as a conversion factor in the Drug Conversion Tables set forth in the Commentary below, to determine the offense level for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances.

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder) or § 2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply § 2X1.1 (Attempt, Solicitation or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under § 3A1.1(b)(1) shall apply.

CREDIT(S)

(Effective November 1, 1987; amended effective January 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 1, 1992; November 1, 1993; September 23, 1994; November 1, 1994; November 1, 1995; November 1, 1997; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; November 1, 2003; November 1, 2004; November 1, 2005; March 27, 2006; November 1, 2006; November 1, 2007; May 1, 2008; November 1, 2009; November 1, 2010; November 1, 2011; November 1, 2012; November 1, 2013; November 1, 2014; November 1, 2015; November 1, 2018.)

CONGRESSIONAL ACTION

<Pub.L. 104-38, § 1, Oct. 30, 1995, 109 Stat. 334, disapproved proposed amendments numbered 5 and 18 of the “Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary” lowering sentences for crack, money laundering, and transactions in property derived from unlawful activity, submitted by the United States Sentencing Commission to Congress on May 1, 1995.>

COMMENTARY

<**Statutory Provisions:** 21 U.S.C. §§ 841(a), (b)(1)-(3), (7), (g), 860a, 865, 960(a), (b); 49 U.S.C. § 46317(b). For additional statutory provision(s), see Appendix A (Statutory Index).>

<Application Notes:>

<1. **“Mixture or Substance”**.--“Mixture or substance” as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.>

<An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.>

<Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.>

<2. **“Plant”**.--For purposes of the guidelines, a “plant” is an organism having leaves and a readily observable root formation (e.g., a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).>

<3. Classification of Controlled Substances.--Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13-15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13-15 is the appropriate classification.>

<4. Applicability to “Counterfeit” Substances.--The statute and guideline also apply to “counterfeit” substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.>

<5. Determining Drug Types and Drug Quantities.--Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See § 1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.>

<If the offense involved both a substantive drug offense and an attempt or conspiracy (e.g., sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.>

<In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance--actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.>

<6. Analogues and Controlled Substances Not Referenced in this Guideline.--Except as otherwise provided, any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. Unless otherwise specified, “analogue,” for purposes of this guideline, has the meaning given the term “controlled substance analogue” in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue.>

<In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the converted drug weight of the most closely related controlled substance referenced in this guideline. See Application Note 8. In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:>

<(A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.>

<(B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.>

<(C) Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.>

<7. **Multiple Transactions or Multiple Drug Types.**--Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.>

<8. **Use of Drug Conversion Tables.**-->

<(A) **Controlled Substances Not Referenced in Drug Quantity Table.**--The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:>

<(i) Use the Drug Conversion Tables to find the converted drug weight of the controlled substance involved in the offense.>

<(ii) Find the corresponding converted drug weight in the Drug Quantity Table.>

<(iii) Use the offense level that corresponds to the converted drug weight determined above as the base offense level for the controlled substance involved in the offense.>

<(See also Application Note 6.) For example, in the Drug Conversion Tables set forth in this Note, 1 gram of a substance containing oxymorphone, a Schedule I opiate, converts to 5 kilograms of converted drug weight. In a case involving 100 grams of oxymorphone, the converted drug weight would be 500 kilograms, which corresponds to a base offense level of 26 in the Drug Quantity Table.>

<(B) **Combining Differing Controlled Substances.**--The Drug Conversion Tables also provide a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its converted drug weight, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level.>

<For certain types of controlled substances, the converted drug weights assigned in the Drug Conversion Tables are "capped" at specified amounts (e.g., the combined converted weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of converted drug weight). Where there are controlled substances from more than one schedule (e.g., a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the converted drug weight for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the converted drug weights to determine the combined converted drug weight (subject to the cap, if any, applicable to the combined amounts).>

<**Note:** Because of the statutory equivalences, the ratios in the Drug Conversion Tables do not necessarily reflect dosages based on pharmacological equivalents.>

<(C) **Examples for Combining Differing Controlled Substances.**-->

<(i) The defendant is convicted of selling 70 grams of a substance containing PCP (Level 20) and 250 milligrams of a substance containing LSD (Level 16). The PCP converts to 70 kilograms of converted drug weight; the LSD converts to 25 kilograms of converted drug weight. The total therefore converts to 95 kilograms of converted drug weight, for which the Drug Quantity Table provides an offense level of 22.>

<(ii) The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The marihuana converts to 500 grams of converted drug weight. The diazepam, a Schedule IV drug, converts to 625 grams of converted drug weight. The total, 1.125 kilograms of converted drug weight, has an offense level of 8 in the Drug Quantity Table.>

<(iii) The defendant is convicted of selling 80 grams of cocaine (Level 14) and 2 grams of cocaine base (Level 12). The cocaine converts to 16 kilograms of converted drug weight, and the cocaine base converts to 7.142 kilograms of converted drug weight. The total therefore converts to 23.142 kilograms of converted drug weight, which has an offense level of 16 in the Drug Quantity Table.>

<(iv) The defendant is convicted of selling 76,000 units of a Schedule III substance, 200,000 units of a Schedule IV substance, and 600,000 units of a Schedule V substance. The converted drug weight for the Schedule III substance is 76 kilograms (below the cap of 79.99 kilograms of converted drug weight set forth as the maximum converted weight for Schedule III substances). The converted drug weight for the Schedule IV substance is subject to a cap of 9.99 kilograms set forth as the maximum converted weight for Schedule IV substances (without the cap it would have been 12.5 kilograms). The converted drug weight for the Schedule V substance is subject to the cap of 2.49 kilograms set forth as the maximum converted weight for Schedule V substances (without the cap it would have been 3.75 kilograms). The combined converted weight, determined by adding together above amounts, is subject to the cap of 79.99 kilograms of converted drug weight set forth as the maximum combined converted weight for Schedule III, IV, and V substances. Without the cap, the combined converted weight would have been 88.48 (76 + 9.99 + 2.49) kilograms.>

(D) Drug Conversion Tables.--

Schedule I or II Opiates* Converted Drug Weight

1 gm of Heroin = 1 kg

1 gm of Dextromoramide = 670 gm

1 gm of Dipipanone = 250 gm

1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP = 700 gm

1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP = 700 gm

1 gm of Alphaprodine = 100 gm

1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) = 2.5 kg

1 gm of a Fentanyl Analogue = 10 kg

1 gm of Hydromorphone/Dihydromorphenone = 2.5 kg

1 gm of Levorphanol = 2.5 kg

1 gm of Meperidine/Pethidine = 50 gm

1 gm of Methadone = 500 gm

1 gm of 6-Monoacetylmorphine = 1 kg

1 gm of Morphine = 500 gm

1 gm of Oxycodone (actual) = 6700 gm

1 gm of Oxymorphone = 5 kg of marihuana

1 gm of Racemorphan = 800 gm

1 gm of Codeine = 80 gm

1 gm of Dextropropoxyphene/Propoxyphene-Bulk = 50 gm

1 gm of Ethylmorphine = 165 gm

1 gm of Hydrocodone (actual) = 6700 gm

1 gm of Mixed Alkaloids of Opium/Papaveretum = 250 gm

1 gm of Opium = 50 gm

1 gm of Levo-alpha-acetylmethadol (LAAM) = 3 kg

* Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)* Converted Drug Weight

1 gm of Cocaine = 200 gm

1 gm of N-Ethylamphetamine = 80 gm

1 gm of Fenethylamine = 40 gm

1 gm of Amphetamine = 2 kg

1 gm of Amphetamine (Actual) = 20 kg

1 gm of Methamphetamine = 2 kg

1 gm of Methamphetamine (Actual) = 20 kg

1 gm of "Ice" = 20 kg

1 gm of Khat = .01 gm

1 gm of 4-Methylaminorex ("Euphoria") = 100 gm

1 gm of Methylphenidate (Ritalin) = 100 gm

1 gm of Phenmetrazine = 80 gm

1 gm of Phenylacetone/P₂P (when possessed for the purpose of manufacturing methamphetamine) = 416 gm

1 gm of Phenylacetone/P₂P (in any other case) = 75 gm

1 gm Cocaine Base ("Crack") = 3,571 gm

1 gm of Aminorex = 100 gm

1 gm of N-N-Dimethylamphetamine = 40 gm.

1 gm of N-Benzylpiperazine = 100 gm

* Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

Synthetic Cathinones (except Schedule III, IV, and V Substances)* Converted Drug Weight

1 gm of a synthetic cathinone

(except a Schedule III, IV, or V substance) = 380 gm

* *Provided, that the minimum offense level from the Drug Quantity Table for any synthetic cathinone (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)* Converted Drug Weight

1 gm of Bufotenine = 70 gm

1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD = 100 kg

1 gm of Diethyltryptamine/DET = 80 gm

1 gm of Dimethyltryptamine/DMT = 100 gm

1 gm of Mescaline = 10 gm

1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) = 1 gm

1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) = 0.1 gm

1 gm of Peyote (Dry) = 0.5 gm

1 gm of Peyote (Wet) = 0.05 gm

1 gm of Phencyclidine/PCP = 1 kg

1 gm of Phencyclidine (actual)/PCP (actual) = 10 kg

1 gm of Psilocin = 500 gm

1 gm of Psilocybin = 500 gm

1 gm of Pyrrolidine Analog of Phencyclidine/PHP = 1 kg

1 gm of Thiophene Analog of Phencyclidine/TCP = 1 kg

1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB = 2.5 kg

1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM = 1.67 kg

1 gm of 3,4-Methylenedioxyamphetamine/MDA = 500 gm

1 gm of 3,4-Methylenedioxymethamphetamine/MDMA = 500 gm

1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA = 500 gm

1 gm of Paramethoxymethamphetamine/PMA = 500 gm

1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC = 680 gm

1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) = 1 kg

* Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

Schedule I Marihuana Converted Drug Weight

1 gm of Marihuana/Cannabis, granulated, powdered, etc. = 1 gm

1 gm of Hashish Oil = 50 gm

1 gm of Cannabis Resin or Hashish = 5 gm

1 gm of Tetrahydrocannabinol, Organic = 167 gm

1 gm of Tetrahydrocannabinol, Synthetic = 167 gm

Synthetic Cannabinoids (except Schedule III, IV, and V Substances)* Converted Drug Weight

1 gm of a synthetic cannabinoid

(except a Schedule III, IV, or V substance) = 167 gm

*Provided, that the minimum offense level from the Drug Quantity Table for any synthetic cannabinoid (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.

"Synthetic cannabinoid," for purposes of this guideline, means any synthetic substance (other than synthetic tetrahydrocannabinol) that binds to and activates type 1 cannabinoid receptors (CB₁ receptors).

Flunitrazepam** Converted Drug Weight

1 unit of Flunitrazepam = 16 gm

**Provided, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

Schedule I or II Depressants (except gamma-hydroxybutyric acid) Converted Drug Weight

1 unit of a Schedule I or II Depressant (except gamma-hydroxybutyric acid) = 1 gm.

Gamma-hydroxybutyric Acid Converted Drug Weight

1 ml of gamma-hydroxybutyric acid = 8.8 gm

Schedule III Substances (except ketamine) Converted Drug Weight'***

1 unit of a Schedule III Substance = 1 gm

*** Provided, that the combined converted weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 79.99 kilograms of converted drug weight.

Ketamine Converted Drug Weight

1 unit of ketamine = 1 gm

Schedule IV Substances (except flunitrazepam)* Converted Drug Weight***

1 unit of a Schedule IV Substance (except flunitrazepam) = 0.0625 gm

****Provided, that the combined converted weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of converted drug weight.

Schedule V Substances** Converted Drug Weight***

1 unit of a Schedule V Substance = 0.00625 gm

*****Provided, that the combined converted weight of Schedule V substances shall not exceed 2.49 kilograms of converted drug weight.

List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)** Converted Drug Weight***

1 gm of Ephedrine = 10 kg

1 gm of Phenylpropanolamine = 10 kg

1 gm of Pseudoephedrine = 10 kg

***** Provided, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

Date Rape Drugs (except flunitrazepam, GHB, or ketamine) Converted Drug Weight

1 ml of 1,4-butanediol = 8.8 gm

1 ml of gamma butyrolactone = 8.8 gm

<To facilitate conversions to converted drug weight, the following table is provided:>

1 oz = 28.35 gm

1 lb = 453.6 gm

1 lb = 0.4536 kg

1 gal = 3.785 liters

1 qt = 0.946 liters

1 gm = 1 ml (liquid)

1 liter = 1,000 ml

1 kg = 1,000 gm

1 gm = 1,000 mg

1 grain = 64.8 mg.

<9. Determining Quantity Based on Doses, Pills, or Capsules. --If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (e.g., 100 doses of Mescaline at 500 milligrams per dose = 50 grams of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.>

<TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE>

<i>MDA</i>	250 mg
<i>MDMA</i>	250 mg
<i>Mescaline</i>	500 mg
<i>PCP *</i>	5 mg
<i>Peyote (dry)</i>	12 gm
<i>Peyote (wet)</i>	120 gm
<i>Psilocin *</i>	10 mg
<i>Psilocybe mushrooms (dry)</i>	5 gm
<i>Psilocybe mushrooms (wet)</i>	50 gm
<i>Psilocybin *</i>	10 mg
<i>2,5-Dimethoxy-4-methylamphetamine (STP, DOM) *</i>	3 mg
<i>1 marihuana cigarette</i>	0.5 gm
<i>Amphetamine *</i>	10 mg
<i>Methamphetamine *</i>	5 mg
<i>Phenmetrazine (Preludin) *</i>	75 mg

* For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.

<10. Determining Quantity of LSD.--LSD on a blotter paper carrier medium typically is marked so that the number of doses ("hits") per sheet readily can be determined. When this is not the case, it is to be presumed that each ¼ inch by ¼ inch section of the blotter paper is equal to one dose.>

<In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.>

<11. Application of Subsections (b)(1) and (b)(2).-->

<(A) Application of Subsection (b)(1).--Definitions of “firearm” and “dangerous weapon” are found in the Commentary to § 1B1.1 (Application Instructions). The enhancement for weapon possession in subsection (b) (1) reflects the increased danger of violence when drug traffickers possess weapons. The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at the defendant's residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to § 2D1.1; see §§ 2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), and 2D1.12(c)(1).>

<(B) Interaction of Subsections (b)(1) and (b)(2).--The enhancements in subsections (b)(1) and (b)(2) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. *See* § 1B1.1 (Application Instructions), Application Note 4(A). However, in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply.>

<12. Application of Subsection (b)(5).--If the offense involved importation of amphetamine or methamphetamine, and an adjustment from subsection (b)(3) applies, do not apply subsection (b)(5).>

<13. Application of Subsection (b)(7).--For purposes of subsection (b)(7), “mass-marketing by means of an interactive computer service” means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(7) would apply to a defendant who operated a web site to promote the sale of Gamma-hydroxybutyric Acid (GHB) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. “Interactive computer service”, for purposes of subsection (b)(7) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).>

<14. Application of Subsection (b)(8).--For purposes of subsection (b)(8), “masking agent” means a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual's body.>

<15. Application of Subsection (b)(9).--For purposes of subsection (b)(9), “athlete” means an individual who participates in an athletic activity conducted by (A) an intercollegiate athletic association or interscholastic athletic association; (B) a professional athletic association; or (C) an amateur athletic organization.>

<16. Application of Subsection (b)(11).--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. Such conduct is covered by § 3C1.1 (Obstructing or Impeding the Administration of Justice) and, if applicable, § 2D1.1(b)(16)(D).>

<17. Application of Subsection (b)(12).--Subsection (b)(12) applies to a defendant who knowingly maintains a premises (i.e., a building, room, or enclosure) for the purpose of manufacturing or distributing a controlled substance, including storage of a controlled substance for the purpose of distribution.>

<Among the factors the court should consider in determining whether the defendant “maintained” the premises 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.>

<Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.>

<18. Application of Subsection (b)(14).-->

<(A) Hazardous or Toxic Substances (Subsection (b)(14)(A)).--Subsection (b)(14)(A) applies if the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(14)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under § 5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§ 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. See 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).>

<(B) Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine (Subsection (b)(14)(C)-(D)).-->

<(i) Factors to Consider.--In determining, for purposes of subsection (b)(14)(C)(ii) or (D), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:>

<(I) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, and the manner in which the chemicals or substances were stored.>

<(II) The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.>

<(III) The duration of the offense, and the extent of the manufacturing operation.>

<(IV) The location of the laboratory (e.g., whether the laboratory is located in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm.>

<(ii) **Definitions.**--For purposes of subsection (b)(14)(D): “Incompetent” means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.>

<“Minor” has the meaning given that term in Application Note 1 of the Commentary to § 2A3.1 (Criminal Sexual Abuse).>

<**19. Application of Subsection (b)(15).**--Subsection (b)(15) applies to offenses that involve the cultivation of marihuana on state or federal land or while trespassing on tribal or private land. Such offenses interfere with the ability of others to safely access and use the area and also pose or risk a range of other harms, such as harms to the environment.>

<The enhancements in subsection (b)(14)(A) and (b)(15) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. See § 1B1.1 (Application Instructions), Application Note 4(A).>

<**20. Application of Subsection (b)(16).**-->

<(A) **Distributing to a Specified Individual or Involving Such an Individual in the Offense (Subsection (b)(16)(B)).**--If the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(16)(B), the individual is not a “vulnerable victim” for purposes of § 3A1.1(b).>

<(B) **Directly Involved in the Importation of a Controlled Substance (Subsection (b)(16)(C)).**--Subsection (b)(16)(C) applies if the defendant is accountable for the importation of a controlled substance under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), i.e., the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance.>

<If subsection (b)(3) or (b)(5) applies, do not apply subsection (b)(16)(C).>

<(C) **Pattern of Criminal Conduct Engaged in as a Livelihood (Subsection (b)(16)(E)).**--For purposes of subsection (b)(16)(E), “pattern of criminal conduct” and “engaged in as a livelihood” have the meaning given such terms in § 4B1.3 (Criminal Livelihood).>

<**21. Applicability of Subsection (b)(18).**--The applicability of subsection (b)(18) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section 5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(18) applies.>

<**22. Application of Subsection (e)(1).**-->

<(A) **Definition.**--For purposes of this guideline, “sexual offense” means a “sexual act” or “sexual contact” as those terms are defined in 18 U.S.C. § 2246(2) and (3), respectively.>

<(B) **Upward Departure Provision.**--If the defendant committed a sexual offense against more than one individual, an upward departure would be warranted.>

<**23. Interaction with § 3B1.3.**--A defendant who used special skills in the commission of the offense may be subject to an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy

essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. Additionally, an enhancement under § 3B1.3 ordinarily would apply in a case in which the defendant 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).>

<Note, however, that if an adjustment from subsection (b)(3)(C) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).>

<24. Cases Involving Mandatory Minimum Penalties.--Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be “waived” and a lower sentence imposed (including a downward departure), as provided in 28 U.S.C. § 994(n), by reason of a defendant’s “substantial assistance in the investigation or prosecution of another person who has committed an offense”. See § 5K1.1 (Substantial Assistance to Authorities). In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).>

<25. Imposition of Consecutive Sentence for 21 U.S.C. § 860a or § 865.--Sections 860a and 865 of title 21, United States Code, require the imposition of a mandatory consecutive term of imprisonment of not more than 20 years and 15 years, respectively. In order to comply with the relevant statute, the court should determine the appropriate “total punishment” and divide the sentence on the judgment form between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 860a or § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 860a or § 865. For example, if the applicable adjusted guideline range is 151-188 months and the court determines a “total punishment” of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 860a or § 865 would achieve the “total punishment” in a manner that satisfies the statutory requirement of a consecutive sentence.>

<26. Cases Involving “Small Amount of Marihuana for No Remuneration”.--Distribution of “a small amount of marihuana for no remuneration”, 21 U.S.C. § 841(b)(4), is treated as simple possession, to which § 2D2.1 applies.>

<27. Departure Considerations.-->

<(A) Downward Departure Based on Drug Quantity in Certain Reverse Sting Operations.--If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant’s purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.>

<(B) Upward Departure Based on Drug Quantity.--In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38, an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.>

<(C) Upward Departure Based on Unusually High Purity.--Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine,

methamphetamine, hydrocodone, or oxycodone for which the guideline itself provides for the consideration of purity (see the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.>

<(D) Departure Based on Potency of Synthetic Cathinones.--In addition to providing converted drug weights for specific controlled substances and groups of substances, the Drug Conversion Tables provide converted drug weights for certain classes of controlled substances, such as synthetic cathinones. In the case of a synthetic cathinone that is not specifically referenced in this guideline, the converted drug weight for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially lesser or greater quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class, such as methcathinone or alpha-PVP. In such a case, a departure may be warranted. For example, an upward departure may be warranted in cases involving MDPV, a substance of which a lesser quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone. In contrast, a downward departure may be warranted in cases involving methylone, a substance of which a greater quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone.>

<(E) Departures for Certain Cases involving Synthetic Cannabinoids.-->

<(i) Departure Based on Concentration of Synthetic Cannabinoids.--Synthetic cannabinoids are manufactured as powder or crystalline substances. The concentrated substance is then usually sprayed on or soaked into a plant or other base material, and trafficked as part of a mixture. Nonetheless, there may be cases in which the substance involved in the offense is a synthetic cannabinoid not combined with any other substance. In such a case, an upward departure would be warranted.>

<There also may be cases in which the substance involved in the offense is a mixture containing a synthetic cannabinoid diluted with an unusually high quantity of base material. In such a case, a downward departure may be warranted.>

<(ii) Downward Departure Based on Potency of Synthetic Cannabinoids.--In the case of a synthetic cannabinoid that is not specifically referenced in this guideline, the converted drug weight for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially greater quantity of a synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class, such as JWH-018 or AM-2201. In such a case, a downward departure may be warranted.>

<Background: *Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense.>*

<The base offense levels in § 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 30 and 24 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions,

the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.>

<The base offense levels at levels 24 and 30 establish guideline ranges such that the statutory minimum falls within the range; e.g., level 30 ranges from 97 to 121 months, where the statutory minimum term is ten years or 120 months.>

<For marihuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana. In controlled substance offenses, an attempt is assigned the same offense level as the object of the attempt. Consequently, the Commission adopted the policy that each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana, except where the actual weight of the usable marihuana is greater.>

<Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.>

<The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in *Chapman v. United States*, 500 U.S. 453 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence (see *Chapman*; § 5G1.1(b)).>

<Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).>

<The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111-220.>

<Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111-220.>

<Subsection (b)(3) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.>

<Subsection (b)(11) implements the directive to the Commission in section 6(1) of Public Law 111-220.>

<Subsection (b)(12) implements the directive to the Commission in section 6(2) of Public Law 111-220.>

<Subsection (b)(14)(A) implements the instruction to the Commission in section 303 of Public Law 103-237.>

<Subsections (b)(14)(C)(ii) and (D) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106-310.>

<Subsection (b)(16) implements the directive to the Commission in section 6(3) of Public Law 111-220.>

<Subsection (b)(17) implements the directive to the Commission in section 7(2) of Public Law 111-220.>

<The Drug Conversion Tables set forth in Application Note 8 were previously called the Drug Equivalency Tables. In the original 1987 *Guidelines Manual*, the Drug Equivalency Tables provided four conversion factors (or ‘equivalents’) for determining the base offense level in cases involving either a controlled substance not referenced in the Drug Quantity Table or multiple controlled substances: heroin, cocaine, PCP, and marihuana. In 1991, the Commission amended the Drug Equivalency Tables to provide for one substance, marihuana, as the single conversion factor in § 2D1.1. *See* USSG App. C, Amendment 396 (effective November 1, 1991). In 2018, the Commission amended § 2D1.1 to replace marihuana as the conversion factor with the new term “converted drug weight” and to change the title of the Drug Equivalency Tables to the “Drug Conversion Tables.”>

Notes of Decisions (1376)

Federal Sentencing Guidelines, § 2D1.1, 18 U.S.C.A., FSG § 2D1.1

As amended to 10-14-20

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.