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DRUG PLEAS OUTLINE 2020

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I. SAFETY VALVE

18 USC 3553 (f)

(f) Limitation on Applicability of Statutory Minimums in Certain Cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the [Controlled Substances Act \(21 U.S.C. 841, 844, 846\)](#), section 1010 or 1013 of the [Controlled Substances Import and Export Act \(21 U.S.C. 960, 963\)](#), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under [section 994 of title 28](#) without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have—

(A)

more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B)

a prior 3-point offense, as determined under the sentencing guidelines; and

(C)

a prior 2-point [violent offense](#), as determined under the sentencing guidelines;

(2)

the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3)

the offense did not result in death or serious bodily injury to any person;

(4)

the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the [Controlled Substances Act](#); and

(5)

not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a [violent offense](#)

PRACTICE TIPS

1. Safety Valve or 5K are the only ways below a mandatory minimum sentence
2. A Safety Valve reduction is available for mandatory minimum cases and non-mandatory minimum cases
3. If the Client is facing mandatory minimum, nail down safety valve before plea
4. Does not require 5K1.1 type information
5. Most cases adjustment not granted if Government not in agreement
6. Document all efforts to satisfy the requirements for the adjustment. If the government denies the adjustment you can portray the Government as being unreasonable given your efforts. This approach has worked in all of the Courts.

The changes made to the First Step Act were statutory and did not make any changes to the current text of the sentencing guidelines. The safety valve criteria set out at USSG 5C1.2 is identical to that at 18 USC 3553(f). USSG section 2D1.1(b)(18) provides for a 2-level reduction for offenders who meet the safety valve criteria. The Court has authority to grant a similar 2-level reduction to newly eligible safety valve offenders not meeting the guideline criteria as a variance from the guidelines.

A defendant can have up to 4 criminal history points rather than only one, and 1-point offenses don't count for the 4 (but no 3-point offense, and no 2-point "violent offense").

A "violent offense" can only be "an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §16(a).

ii. **ROLE ADJUSTMENTS**

USSG §3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
- (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
- (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

USSG §3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
 - (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.
- In cases falling between (a) and (b), decrease by 3 levels.

PRACTICE TIPS

1. Minor role will NOT help you to obtain a sentence below mandatory minimum
2. Minor role is available whether the case is a mandatory minimum case or a non-mandatory minimum case
3. Minor role reduction will not change career offender guideline calculation
4. If your client is given an adjustment for an aggravating role, you will not qualify for safety valve
5. Imported Methamphetamine or Amphetamine

If NO Mitigating Role Adjustment—Two Level Upward Adjustment 2D1.1(b)(5)

6. Requirement of multiple participants – see 3B1.2 application note 2, keep this in mind when arguing this point—focus on client could not do this by himself

7. Minor role Caps

3B1.2 Application note 6 & 2D1.1(a) (5)

a. Client receives an adjustment under 3B1.2 for mitigating role

b. Offense level is 32 or above--the range is capped as follows:

level 32 - 2 = 30

level 34 - 3 = 31

level 36 - 3 = 33

level 38 - 4 = 34

EXAMPLE

Base offense level 32

Minor role objection granted

Typical result

Level 32 - 2 (2D1.1 (a) (5)) - 2 for mitigating role - 2 for safety valve - 3 for acceptance

FINAL adjusted base offense level 23

III. ENHANCEMENTS

21 USC Section 851. Proceedings to Establish Prior Convictions

1. (a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

Consequences

1. Increase statutory maximum if no mandatory minimum applies

Example —weight of marijuana 30 kg., statutory max 5 years, enhancement filed statutory max now 10 years

2. Increase mandatory minimum

Example—weight of marijuana 120 kg., mandatory minimum 5 years, enhancement filed-
mandatory min. 10 years

PRACTICE TIPS

1. Age of conviction does not matter
2. Possession conviction qualify for enhancement purposes
3. Quantity of drugs controls whether case is a mandatory minimum not enhancements
4. Judge must inquire of the person charged whether he affirms or denies the conviction
5. All challenges to the conviction must be made prior to the sentence being imposed
6. Must file a written response denying the conviction
7. The Court shall hold a hearing
8. The Government has the burden of proof of beyond a reasonable doubt on any issue of fact
9. If the client is claiming the conviction was obtained in violation of the Constitution, he bears the burden of proof on this issue of preponderance of the evidence

IV. CAREER OFFENDER

USSG §4B1.1. Career Offender

1. (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection C), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

CONSEQUENCES

1. Automatic Criminal History Category VI
2. Career Offender table will apply if offense level is greater than regular offense level —
Guideline 4B1.1(b)

<u>Offense Statutory Maximum</u>	<u>Offense Level*</u>
(1) Life	37
(2) 25 years or more	34
(3) 20 years or more, but less than 25 years	32
(4) 15 years or more, but less than 20 years	29
(5) 10 years or more, but less than 15 years	24
(6) 5 years or more, but less than 10 years	17
(7) More than 1 year, but less than 5 years	12.

3. A minor role reduction will not change the offense level. However, a reduction for acceptance of responsibility will change the offense level.

EXAMPLE

Meets career offender requirements

Weight of marijuana in new case = 55 kg (50 kg or more Statutory Maximum 20 years)

Assume 6 criminal history points

Regular guidelines NO career offender

----Criminal History Category III, Base Offense Level 20 (41-51)

Career Offender guidelines

--- Automatic Criminal History Category VI, Career Offender Chart Base Offense Level 32 (210-262)

PRACTICE TIPS

1. Prior convictions must be FELONY convictions
2. Make sure prior convictions meet the crime of violence or controlled substance definition at 4B1.2 (a) (b).
3. Make sure client meets the two prior convictions definition at 4B1.2(c)
4. Controlled substance offense must be a trafficking offense — simple possession will not qualify
5. Priors MUST count for criminal history points to apply career offender guidelines
6. Stipulation on weight of drugs could help reduce career offender adjustment

Example

-Marijuana drug weight 55 kg—Statutory Maximum 20 years

-Career Offender Base Offense Level 32

Marijuana drug weight 49 kg-Statutory Maximum 5 years

-Career Offender Base Offense Level 17

V. MANDATORY MINIMUM SENTENCE CHANGES FOR DRUG OFFENSES

(STATUTE: 21 U.S.C. §§ 841, 960 / § 401 OF THE ACT)

- ✓ if Defendant has no priors, still 10 years-life depending on drug type & quantity
- ✓ if drug was but/for cause of death or serious bodily injury, 20 years-life
- ✓ if Defendant has 1 prior conviction for a ~~“felony drug offense,”~~ 20 years to life **“serious drug felony” or “serious violent felony,”** 15 years to life
- ✓ if Defendant has 2 or more prior convictions for a ~~“felony drug offense”~~ **“serious drug felony”** or **“serious violent felony,”** ~~life~~ 25 years to life
- ✓ Life if one prior conviction for ~~“felony drug offense”~~ **“serious drug felony”** or **“serious violent felony”** + drug was but/for cause of death or serious bodily injury

A prior drug conviction only counts if it is a “serious drug felony” (18 U.S.C. §924(e)(2)):

(1) offender served more than 12 months, (2) was released within 15 years of commission of instant offense, and (3) max term of 10 years or more

OR

A “serious violent felony”:

(1) an offense in 18 U.S.C. §3559(c)(2)—enumerated offenses or force element with max term of 10 years or more—for which served more than 12 months, or
(2) any offense that would violate 18 U.S.C. §113 if committed in special maritime and territorial jx of US for which offender served more than 12 months

Applies now to offenses committed before
12/21/18 if a ✓ sentence hasn't yet been imposed

- ✓ Research whether a prior offense is truly a **“serious drug felony”** or a **“serious violent felony”**

VI. SUBSTANTIAL ASSISTANCE

USSG §5K1.1. Substantial Assistance to Authorities (Policy Statement)

1 . Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

PRACTICE POINTS

1. 5K1.1 and Safety Valve only way below mandatory minimum
2. 5K1.1 with a 18 U.S.C §3553(f) is the ONLY way below mandatory minimum if Safety Valve is denied
3. Amount of Variance does not matter to receive a sentence below mandatory minimum 1 level is sufficient
4. Motion from Government Required for Adjustment below mandatory minimum
5. Judge determines amount of variance
6. Cooperate fully and Government could STILL decide to not file a motion to reduce your client's sentence.
7. A variance and or departure is still possible under substantial assistance which can lower your sentence, but unless a motion is filed by the Government, the Judge may not depart or vary below a mandatory minimum sentence.

VII. ACCEPTANCE

USSG §3E1.1. Acceptance of Responsibility

I . (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

(PRACTICE POINT ----CLIENT QUALIFIES FOR THIRD LEVEL ONLY IF OFFENSE LEVEL IS 16 OR GREATER AND GOVERNMENT MOVES FOR THIRD POINT)

ACCEPTANCE PROBLEMS

1. Client denies responsibility for the offense

Deliberate ignorance is a way around client fully admitting knowledge

2. Missed Court's deadline to announce plea argue the following:

Important discovery received after plea deadline

Ongoing negotiations with the Government

Client location

3. Missed Government's deadline to announce plea argue the following:

Important discovery received after plea

Ongoing negotiations with the Government

Client location

VIII. METHAMPHETAMINE SPECIAL ISSUES

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

USSG § 2D1.1(b) Specific Offense Characteristics

(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.

(14) (Apply the greatest):

(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.

*Notes to Drug Quantity Table:

(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.

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

IX. RELEVANT CONDUCT

1. Relevant conduct must be established by a preponderance of the evidence. U.S.S.G. § 6A1.3 Commentary (“The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.”)
2. *United States v. Wright*, 496 F.3d 371, 380 (5th Cir. 2007)(“Only after the government has met its burden of establishing, by a preponderance of the evidence, a sufficient nexus between the [extraneous] conduct and the offense of conviction, may the sentencing court, in its sound discretion, make a relevant conduct adjustment.” (Internal quotation marks omitted)).
3. A preponderance of the evidence means that a fact has been established “more likely than not.” *Bourjaily v. United States*, 483 U.S. 171,
4. As a matter of due process, factual matters may be considered as a basis for sentence only if they have some minimal indicium of reliability.” *United States v. Hernandez*, 634 F.3d 317, at *1 n.7 (5th Cir. Feb. 22, 2011).
5. *United States v. Jimenez Martinez*, 83 F.3d 488, 494-95 (1st Cir. 1996) (finding error in district court's denial of defendant's motion for evidentiary hearing given questionable reliability of affidavit on which the district court relied at sentencing)
6. *United States v. Roberts*, 14 F.3d 502, 521(10th Cir. 1993) (remanding because district court did not hold evidentiary hearing to address defendants' objections to drug quantity determination or make requisite findings of fact regarding drug quantity)

PRACTICE TIPS

Usual fact pattern. Client is arrested at the bridge with 50 kilos of marijuana. During the post-arrest interview the client admits to crossing the vehicle he was arrested in 3 times prior to his arrest in his case under the same circumstances. Probation of course will count his drug quantity as 50 x 4.

Possible solutions

1. Non-Binding Sentencing Recommendation

The parties also agree pursuant to Fed. R. Crim. P. Section 11(c)(1)(B) (non-binding sentencing recommendation) as part of this Plea Agreement to make a non-binding recommendation to the Court on Sentencing. Pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure, the parties agree to recommend that the Defendant's base offense level is 18. The parties further agree that no further adjustments apply under USSG §§ 1B1.3 (Relevant Conduct) and 2D1.1 (Drug Offenses).

The parties agree not to advocate the imposition of any base offense level different than the base offense level recommended herein. The Defendant understands that he will also be subject to a term of imprisonment, fine, term of supervised release, and special assessment as determined by the Court. It is understood by the parties that the final determination to accept a plea pursuant to Rule 11(c)(1)(B) ultimately remains in the Court's discretion.

The Defendant understands that this Non-Binding Sentencing Recommendation is only a recommendation by the parties and the Court is not required to follow said recommendation. Finally, the Defendant also understands and agrees that this agreement confers no right to challenge the agreement and confers no remedy upon the Defendant in the event the Court elects not to follow the parties' Non-Binding Sentencing Recommendation.

2. No Relevant Conduct in the Factual Basis

Inspection of the vehicle revealed 99 tape-wrapped bundles containing a green-leafy substance with the characteristics of marijuana. A sample was field-tested using a MobileDetect CBD-THC test, which showed positive results for a THC concentration greater than 0.3 percent. The bundles were concealed under the floor. The approximate gross weight of the bundles was 50.78 kilograms.

After being advised of his *Miranda* rights in Spanish and agreeing to answer questions without the presence of an attorney, client stated, in substance and in part, the following:

Client admitted that he knew he was smuggling narcotics concealed in the van, but indicated that he did not know if he was smuggling marijuana or another drug.

Client now admits that on or about March 6, 2020, in the Western District of Texas, he knowingly and intentionally imported a controlled substance into the United States from Mexico. He further admits that the substance was in fact marijuana.

3. Stipulated weight in Addendum

Additional Facts Concerning Sentencing:

The stipulated net weight of the marijuana seized from the vehicle was approximately 45 kilograms.