

Because (1) this issue arises frequently, (2) not all of the circuits have ruled on this issue, and (3) the definitions necessary for courts and probation officers to apply the guidelines should be included in the Guidelines Manual, this amendment adds an application note (Note 20) to the Commentary of § 2D1.1 setting forth the definition of a plant for guidelines purposes.

Fourth, this amendment provides equivalencies for two additional controlled substances: (1) khat, and (2) levo-alpha-acetylmethadol (LAAM) in Application Note 10 of the Commentary to § 2D1.1.

Fifth, this amendment deletes the distinction between d- and l-methamphetamine in the Drug Equivalency Table in Application Note 10 of the Commentary to § 2D1.1. L-methamphetamine, which is a rather weak form of methamphetamine, is rarely seen. The usual form of methamphetamine is d-methamphetamine. Moreover, l-methamphetamine is not made intentionally, but rather it is the result of a botched attempt to produce d-methamphetamine. Under this amendment, l-methamphetamine would be treated the same as d-methamphetamine (i.e., as if an attempt to manufacture or distribute d-methamphetamine). This revision will simplify guideline application. Currently, unless the methamphetamine is specifically tested to determine its form, litigation can result over whether the methamphetamine is l-methamphetamine or d-methamphetamine. In addition, there is another form of methamphetamine (dl-methamphetamine) that is composed of 50% d-methamphetamine and 50% l-methamphetamine. Dl-methamphetamine is not listed in the Drug Equivalency Table and has a potency halfway between l-methamphetamine and d-methamphetamine. This has led to litigation as to whether dl-methamphetamine should be treated as if it were all d-methamphetamine because it contains some d-methamphetamine, or whether it should be treated as 50 percent d-methamphetamine and 50 percent l-methamphetamine. In *United States v. Carroll*, 6 F.3d 735 (11th Cir. 1993), cert. denied, 114 S. Ct. 1234 (1994) a case in which the Eleventh Circuit held that dl-methamphetamine should be treated as d-methamphetamine, the majority and dissenting opinions clearly point out the complexity engendered by the current distinction between d- and l-methamphetamine.

Sixth, this amendment clarifies Application Note 3 in the Commentary of § 2D1.1 with respect to the weapon possession enhancement in § 2D1.1(b)(1). Currently, this commentary provides "The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." There is a circuit conflict with respect to the burden of persuasion for application of this enhancement. The First, Sixth, Seventh, Ninth, and Tenth circuits require the government to show possession during the commission of the offense; the defense then bears the burden of showing that the weapon was not connected with the offense. *United States v. Corcimiglia*, 967 F.2d 724 (1st Cir. 1992); *United States v. McGhee*, 882 F.2d 1095 (6th Cir. 1989); *United States v. Durrive*, 902 F.2d 1221 (7th Cir. 1990); *United States v. Restrepo*, 884 F.2d 1294 (9th Cir. 1989); *United States v. Roberts*, 980 F.2d 645 (10th Cir. 1992). In contrast, the Eighth Circuit has placed the burden of both presence and relationship to the offense on the government. *United States v. Turpin*, 920 F.2d 1377 (8th Cir. 1990), citing *United States v. Khang*, 904 F.2d 1219 (8th Cir. 1990). In addition, the phrase "unless it is clearly improbable" seems inconsistent with the preponderance of evidence standard that applies to other adjustments; i.e., can one find something to be clearly improbable by a preponderance of the evidence? This amendment resolves both issues by revising the Commentary to §§ 2D1.1 and 2D1.11 to state expressly that if a weapon is present, there shall be a rebuttable presumption that it is connected with the offense. Rebuttable presumptions currently are used in §§ 2B1.1 (Application Note 13) and 2T1.1 (Application Note 1).

Seventh, this amendment revises Application Note 12 in the Commentary to § 2D1.1 to provide that in a case involving negotiation for a quantity of a controlled substance, the negotiated quantity is used to determine the offense level unless the completed transaction establishes a larger quantity, or the defendant establishes that he or she was not reasonably capable of producing the negotiated amount or otherwise did not intend to produce that amount. Disputes about the interpretation about this application note have produced much litigation in the courts. See, e.g., *United States v. Bradley*, 917 F.2d 601 (1st Cir. 1990); *United States v. Rodriguez*, 975 F.2d 999 (3d Cir. 1992); *United States v. Richardson*, 939 F.2d 135 (4th Cir. 1991); *United States v. Christian*, 942

F.2d 363 (6th Cir. 1991); *United States v. Ruiz*, 932 F.2d 1174 (7th Cir. 1991); *United States v. Smiley*, 997 F.2d 475 (8th Cir. 1993); *United States v. Barnes*, 993 F.2d 680 (9th Cir. 1993); *United States v. Tillman*, Nos. 92-9198, etc. (11th Cir. Nov. 29, 1993).

Eighth, § 1B1.3 (Relevant Conduct) provides that a defendant is liable (1) for his or her own actions; and (2) for the actions of other participants that are both in furtherance of a conspiracy and reasonably foreseeable. In an unusual case, the type or quantity of a controlled substance that the defendant personally transported or stored may not have been known or reasonably foreseeable to the defendant. Assume, for example, that the defendant convinces the court (1) that he or she believed that he or she was transporting a small quantity of marijuana when, in fact, the substance was a large quantity of heroin and (2) that, in the circumstances, the fact that the substance was a large quantity of heroin was not reasonably foreseeable. In *United States v. Develasquez*, 28 F.3d 2 (2d Cir. 1994), cert. denied, (U.S. Dec. 12, 1994) (No. 94-6793), the Second Circuit held that in determining the offense level under § 1B1.3(a)(1) the defendant is accountable for the controlled substance he or she actually transported even if the type or quantity was not reasonably foreseeable. Whether or not a downward departure under the above noted circumstances may be warranted was not discussed. In *United States v. Ivonye*, No. 93-1720 (2d Cir. July 8, 1994), a similar case, the Second Circuit noted "It is certainly possible, of course, to imagine a situation where the gap between belief and actuality was so great as to make the guideline grossly unfair in application. In such cases, downward departure may be warranted." This amendment adds an application note (Note 21) to provide guidance with respect to this issue.

Ninth, this amendment addresses cases involving a clandestine laboratory in which the manufacture of a controlled substance has not been completed. In such cases, the court must estimate the amount of controlled substance that would have been manufactured in order to calculate the offense level under § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy). The Drug Enforcement Administration provides an estimate of theoretical yield based on precursor chemicals on hand (Clandestine Laboratory Report—DEA 500). Theoretical yield assumes a complete chemical reaction; i.e., that all molecules that could combine with all other molecules do so. In actuality, the amount that a laboratory can produce