

(actual yield) can vary from 0 percent to close to 100 percent of theoretical yield based on many factors, including the type of controlled substance being manufactured, the process used to manufacture the controlled substance, and the skill of the chemist.

The use of theoretical yield frequently will result in a higher offense level for someone who sets up a laboratory and does not produce any controlled substance than for someone who actually produces the controlled substance. This is because the theoretical yield frequently will substantially overestimate the actual (expected) yield. In order to minimize unwarranted disparity and, at the same time, prevent the need for inordinately complex factfinding, this amendment adds an application note (Note 22) to the Commentary to § 2D1.1 providing that 50 percent of the theoretical yield is to be used as a proxy for expected yield unless the government or defendant provides sufficient information to enable a more accurate estimate of the expected yield. In concept, this is similar to the proxy for tax loss used in § 2T1.1 (Tax Evasion). The Commission specifically invites comment on whether the percentage of theoretical yield used for such estimate should be a percentage higher or lower than 50 percent, whether different percentages should be developed for different controlled substances or manufacturing processes, and whether the estimate should be based on the most abundant precursor on hand, the least abundant precursor on hand, or some other method.

Tenth, the question has arisen as to how drug quantity is to be calculated under § 2D1.1 when part of the amount of the controlled substance possessed by the defendant is for sale and part is for the defendant's own use. In *United States v. Kipp* (9th Cir. No. 92-30302, March 4, 1993), the Ninth Circuit decided "drugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they are not 'part of the same course of conduct' or 'common scheme' as drugs intended for distribution." This issue seems likely to reoccur. Four options to address this issue seem possible: (1) adoption of the approach of the Ninth Circuit without stating a presumption; (2) adoption of the approach of the Ninth Circuit with a rebuttable presumption stating "when controlled substance is possessed with intent to distribute, there is a rebuttable presumption that all amounts possessed by the defendant are intended for distribution"; (3) requiring the inclusion of all amounts in the guideline

calculation, but authorizing a downward departure if the offense level determined overrepresents the seriousness of the offense because part of the amount possessed was intended for personal consumption; or (4) counting all the controlled substance and not authorize a downward departure. This amendment adds an application note (Note 23) that reflects the third option. Given that information pertaining to the intended use of the controlled substance is in the possession of the defendant, placing the burden on the defendant to demonstrate the amount not intended for distribution seems reasonable. It is noted, however, that even when it can be established the defendant possessed some portion for the defendant's own use, the actual amount likely will be somewhat uncertain. Even the defendant, at the time the defendant was arrested, may not have known how much of the controlled substance the defendant would have sold or used personally. Thus, making this factor a departure consideration, the third option, seems the preferable approach.

Eleventh, this amendment adds a departure instruction to the Commentary to § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy). The issue addressed in this amendment involves the situation in which controlled substances were sold at a "protected location," but the location of the drug transaction was determined by law enforcement authorities, rather than by the defendant, or otherwise does not create the enhanced risk of harm for those the guideline is designed to protect. The purpose of the amendment is to provide that, in such cases, the defendant is not penalized for the location of the sale. This issue has been noted by the Third Circuit in *United States v. Rodriguez*, 961 F.2d 1089 (3d Cir. 1992) (suggesting downward departure where the defendant technically qualifies for application of this section, but it is clear that the defendant's conduct did not create any increased risk for those whom the statute was intended to protect).

Twelfth, this amendment revises Application Note 1 of the Commentary to § 2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy). The word "trafficking" is added in the first sentence to prevent this restriction from applying solely because the defendant was a consumer of the controlled substance. The deletion of the portion of the second sentence pertaining to "arranging for the use of the premises for the purpose of

facilitating a drug transaction" is because this phrase is unclear and, in any event, unnecessary given the next sentence. The addition of "at the same time" prevents this restriction from applying to a defendant who, for example, let her boyfriend use her apartment to make drug transactions during a six month period but changed apartments during that time. The word "significantly" is added to modify "assisted" to prevent a defendant from being excluded from the application of subsection (a)(2) because the defendant took an occasional telephone message. The last sentence is deleted as inconsistent with the guideline itself as well as inconsistent with the general framework of the Guidelines (prior criminal conduct is addressed in Chapter Four).

*Proposed Amendment:* Section 2D1.1(c) is amended in the Notes following the Drug Quantity Table by adding the following additional notes at the end:

"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)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

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)(25)) and (ii) at least two of the following: cannabinol, 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."

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional paragraph at the end:

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

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 3 by deleting:

"The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For