"THE FEDERAL CORNER"

Maintaining a Premises for the Purpose of Manufacturing
or Distributing a Controlled Substance

Buck Files

When I go to the doctor, I expect to get answers to my questions. What's wrong with me? What do you need to do to make me feel better? How long will that take?

I always assume that my doctor is going to order that some tests be run. When the results come in, he will be able to answer my questions and give me his diagnosis and prognosis. Then I will have a reasonably certain understanding of what my condition is and what needs to be done in the future to improve it. There are, of course, exceptions to these generalities; however, I am usually comfortable in knowing what to expect after talking with my doctor.

Not so in the federal criminal justice system. Take, for example, our client who has been indicted after law enforcement officers bought drugs from him at a place where he lived. The Government furnishes us with the discovery in the case and we find that the evidence against our client is overwhelming. We negotiate what we believe to be a favorable plea agreement on behalf of our client. The plea agreement usually contains language that puts us and our client on notice as to the uncertainty of the outcome of the case; *e.g.*,

> The defendant understands that the sentence in this case will be imposed by the Court after consideration of the U.S. Sentencing Guidelines Manual (U.S.S.G. or guidelines). *The guidelines are not binding on the Court, but are advisory only. The defendant has reviewed the guidelines with defense counsel, but understands that no one can predict with certainty the outcome of the Court's consideration of the guidelines in this case.* The defendant will not be allowed to withdraw the plea entered pursuant to this agreement if the sentence is higher than expected, so long as it is within the statutory maximum. *The defendant understands that the actual sentence to be imposed is solely in the discretion of the Court.*
>
> *The parties understand that the Court is not bound by these stipulations.* Furthermore, the parties specifically agree that other specific offense characteristics or guideline adjustments may increase or decrease the appropriate sentencing range.

Our client enters his plea of guilty and we wait for the Presentence Investigation Report to be completed. When we receive it, we review it with fear and trembling, knowing that some probation officers seem to delight in finding ways to increase a defendant's advisory Guideline level. And then we appear in front of a United States District Judge, wondering what his reaction will be to our plea agreement and the Presentence Investigation Report.

Many clients find it difficult to understand why we cannot predict – with certainty – what the outcome of their cases will be. In federal drug prosecutions, *where* the drug transaction

occurs or what is found there when a search warrant is executed can increase the advisory Guideline level by two levels. *See* United States Sentencing Guideline § 2D1.1(12) which reads as follows:

> If the defendant *maintained a premises* for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels. (emphasis added)

So what does "maintaining a premises" mean? On October 20, 2017, a panel of the United States Court of Appeals for the Seventh Circuit affirmed the convictions and sentences of Daniel Cantreras, holding that a two-level increase in each case for "maintaining a premises for the purpose of manufacturing or distributing a controlled substance was proper." *United States v. Contreras*, ___F.3d___, 2017 WL 4707506 (7th Cir. Oct. 20, 2017) [Panel: Circuit Judges Kanne, Rovner, and Sykes. Per Curiam] The Court's opinion gives us a good overview as to the analysis that is to be conducted in each case in order to determine whether a defendant has maintained such a premises.

[An Overview of the Opinion]

> Daniel Contreras pleaded guilty to various drug-trafficking offenses in three separately charged criminal cases assigned to three different district judges. When calculating the guidelines range at sentencing, each district judge applied an upward adjustment of two offense levels after finding that Contreras maintained a premises—his home—'for the purpose of manufacturing or distributing a controlled substance.' *See* U.S.S.G. § 2D1.1(b)(12). Contreras appeals his concurrent 87-month sentences, arguing that each judge erred by not comparing the frequency of legal activity to the frequency of illegal activity that occurred at his residence. We affirm the sentences because the eight drug transactions that Contreras conducted at his home support a finding that drug trafficking was a primary use of the residence, not an incidental or collateral one.

[The Indictments]

> On January 7, 2015, a grand jury returned three indictments against Contreras, charging him with drug trafficking offenses including distribution of cocaine, possession with intent to distribute cocaine, conspiracy, and unlawful use of a telephone to distribute drugs.
>
> * * *
>
> In summary, the government alleged that Contreras engaged in a total of seven drug transactions from his home in the two-month period of March and April 2013, and one more in the fall of that year.

[The Guilty Pleas and the Presentence Investigation Reports]

> Contreras pleaded guilty to all counts in each of his three cases, with the exception of one count of distributing 500 grams or more of cocaine, which was dismissed… The probation officer who prepared the presentence investigation

reports concluded (and both sides agreed) that Contreras's base offense level in each case was 30, and proposed in each case to add two levels under U.S.S.G. § 2D1.1(b)(12) because Contreras had 'maintained a premises for the purpose of manufacturing or distributing a controlled substance.' In his objections to the presentence reports and at his sentencing hearings, Contreras consistently argued that the two-level adjustment did not apply.

[The Sentences Imposed]

Judge St. Eve, the first to sentence Contreras, concluded that the two-level adjustment should be added to Contreras's offense level. Based upon the eight transactions involving wholesale quantities of cocaine that occurred at Contreras's residence, she found the sale of drugs at the premises to be more than incidental; in fact, she said, the residence was 'integral' to the transactions. At the next sentencing hearing, Judge Leinenweber explained that the adjustment applied because the drug activity was 'almost...regular,' not occasional. At the final sentencing hearing Judge Zagel also applied the two-level increase, adopting the same rationale as the other two judges, without elaboration. The defendant and his attorney (the same for each case) were present at each hearing.

After crediting Contreras with a three-level reduction for acceptance of responsibility, each judge found the total offense level to be 29. Contreras's criminal history category of I resulted in a guidelines range of 87-108 months' imprisonment in each case. All three judges imposed 87-month sentences, each to run concurrently with the others.

* * *

[The Defendant's Argument on Appeal]

On appeal Contreras contends that each district judge improperly applied the two-level increase to his offense level for maintaining premises for drug distribution. He primarily argues that the judges failed to expressly compare the legal uses of his premises with the unlawful uses. Contreras relies upon Comment 17 to section 2D1.1 of the sentencing guidelines, which states that judges 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.' Relying on a different part of the same comment, Contreras contends that drug trafficking was not a 'primary or principal' use of the premises, but rather an incidental use of the home by 'an ordinary drug dealer' (his term). Finally, Contreras argues that the adjustment does not apply because there were no 'tools of the trade' found at his residence. None of these related arguments carries the day.

[The Court's Response]

Contreras is correct that, for § 2D1.1(b)(12) to apply, manufacturing or distributing a controlled substance must be a 'primary or principal' use for the

premises. U.S.S.G. § 2D1.1 cmt. n. 17. But drug distribution does not need to be the sole use of a premises in order for it to constitute a 'primary' use; it simply must be 'more than incidental or collateral.' *United States v. Acasio Sanchez*, 810 F.3d 494, 497 (7th Cir. 2016); *see United States v. Evans*, 826 F.3d 934, 938 (7th Cir. 2016). Although Contreras cites this language, his analysis seems to mistakenly equate 'primary' use with 'most frequent.'

[Unlawful Purpose v. Lawful Purpose]

And contrary to Contreras's argument, to determine whether drug distribution was a primary or incidental use, the district courts are not required to apply a simple balancing test that compares the frequency of unlawful activity at the residence with the frequency of lawful uses. As we have noted, applying such a test would immunize every family home that is also used for drug distribution from being deemed an illegally maintained 'premises'; the amount of lawful activity in a home is all but certain to exceed the amount of illegal activity. *United States v. Flores-Olague*, 717 F.3d 526, 533 (7th Cir. 2013) ('Congress in enacting [21 U.S.C.] § 856 and in directing the Commission to adopt § 2D1.1(b)(12) surely intended to deter the manufacture and distribution of illegal drugs in 'crack houses' where children are being raised.') (quoting *United States v. Miller*, 698 F.3d 699, 707 (8th Cir. 2012)). Instead of merely weighing the amount of legal activity against the illegal activity, the sentencing court should focus on both the frequency and significance of the illicit activities, including factors such as quantities dealt, customer interactions, keeping 'tools of the trade' and business records, and accepting payment. *Flores-Olague*, 717 F.3d at 533; *United States v. Edwin Sanchez*, 710 F.3d 724, 732 (7th Cir. 2013), *vacated on other grounds*, *Sanchez v. United States*, —— U.S. ——, 134 S.Ct. 146, 187 L.Ed.2d 2 (2013).

In these cases each judge considered both the frequency and significance of illicit activities in determining that the two-level increase applied.

* * *

[Applying the Law to the Facts]

In this case, the applicability of § 2D1.1(b)(12) turns on whether drug-dealing was a primary use of the home—whether it was frequent and significant enough. It was.

* * *

[Seventh Circuit Precedent]

Furthermore, our conclusion in *Sanchez* that, on the facts of that case, warehousing drugs was more than an 'incidental' use of the home does not amount to a rule that storing drugs in the home is a prerequisite for applying § 2D1.1(b)(12), although Contreras would have it that way. Courts look to all the relevant facts of a particular case in determining whether a primary purpose of a dwelling is drug trafficking. *See Flores-Olague*, 717 F.3d at 533. Similarly,

> although Contreras emphasizes the absence of scales, baggies, firearms, or other equipment associated with drug trafficking, there is no rule that 'tools of the trade' must be found in the residence for it to be considered a premises maintained for the purpose of distributing drugs. Indeed we rejected an identical argument in *Sanchez*, concluding that 'tools of the trade' may suggest that drug trafficking was a principal use of the premises, but that is 'not the only relevant inquiry.' *Sanchez*, 810 F.3d at 497 (citing *Flores-Olague*, 717 F.3d at 533).
>
> And even if Contreras could successfully differentiate his case from *Sanchez*, he would still run up against our recent decision in *United States v. Winfield*, 846 F.3d 241. In *Winfield*, the defendant argued that evidence of four drug sales in a twelve-week period was insufficient to demonstrate that drug distribution was a primary purpose of his home. We concluded otherwise, and upheld the application of the adjustment over the defendant's argument that his case was not 'the sort of multi-kilogram, long-going storage case that supports a premises enhancement.' Here the government presented evidence of a greater number of transactions (seven) occurring at his home in a shorter period of time (two months). It follows that Contreras's cases are at least as likely to warrant the adjustment.

The case law in the United States Court of Appeals for the Fifth Circuit is consistent with the Seventh Circuit's opinion in *Contreras*; *e.g., See United States v. Haines*, 803 F.3d 713 (5th Cir. 2015) [Panel: Circuit Judges King, Smith and Elrod. Opinion by Judge Elrod. Affirmed in part, vacated in part, and remanded.]

[The Defendant's Position on Appeal]

> …Iturres–Bonilla argues that the district court erred in applying a two-level sentencing enhancement because Iturres–Bonilla '*maintained a premises* for the purpose of manufacturing or distributing a controlled substance.' USSG § 2D1.1(b)(12). Iturres–Bonilla objected to the imposition of this enhancement. The district court overruled the objection, finding that Iturres–Bonilla had maintained 'the spot' for the purpose of making heroin transactions, as evidenced by Berry's trips there to receive heroin and the lack of food, clothes, and personal items found when officers searched 'the spot.' The thrust of Iturres–Bonilla's argument on appeal is that 'the spot' was not just for drug transactions, but was more generally maintained to be a safe meeting place. He does not appear to be challenging the conclusion that he *maintained the premises*. (emphasis added)

[The Court's Response]

> A district court's application of § 2D1.1(b)(12) is a factual finding reviewed for clear error. *See United States v. Barragan–Malfabon*, 537 Fed.Appx. 483, 484–85 (5th Cir.2013), *cert. denied*, —— U.S. ——, 134 S.Ct. 716, 187 L.Ed.2d 574 (2013) (district court did not clearly err in determining that a primary use of the home was the storage of controlled substances for distribution purposes); *United*

States v. Chagoya, 510 Fed.Appx. 327, 328 (5th Cir.2013) ('[Defendant–Appellant] has not shown that the district court clearly erred in assessing him an increase in offense level under § 2D1.1(b)(12).'). The district court did not err. The Sentencing Guidelines specify that '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.' USSG § 2D1.1 cmt. n. 17. The district court made factual findings, supported by the record, showing that one of the main purposes for the apartment was drug distribution. Iturres–Bonilla has not shown how the district court's decision was erroneous. His sentence is affirmed.

[My Thoughts]

- In *Contreras*, the Court refers to Application Note 17 to the Commentary on United States Sentencing Guideline § 2D1.1 and notes that "…the district courts are not required to apply a simple balancing test that compares the frequency of unlawful activity at the residence with the frequency of lawful activity." This is important for us – and our client – to understand.
- Whether a defendant has *maintained a premises* is going to be determined on a case-by-case basis. Perhaps my cynicism is showing, but I believe that it is safe to say that there will be a two-level upward adjustment if *enough* drugs were found on the premises or if *enough* drug transactions took place at the premises. What's *enough*? That's what each case is about.
- The lesson from these cases is simple: Always warn your client of the possibility of an upward adjustment if drugs are found at a premises that he maintains. Then he won't be surprised when he reviews the Presentence Investigation Report.