allow the jury to reasonably infer that the marijuana was more than the amount usually kept for personal use, and was thus intended for distribution. Indeed, testimony at trial established that the marijuana found in the vehicle driven by the defendant was worth approximately $28,000 to $35,000. Moreover, the marijuana was contained in fifteen separate packages. See United States v. Gooding, 695 F.2d 78, 84 (4th Cir.1982) (approximately 25 grams of cocaine which was "packaged in a way typical ... of the packaging used by narcotics distributors" supported the inference of intent to distribute). Accordingly, sufficient evidence supported the jury's verdict that the defendant knowingly possessed the marijuana with intent to distribute it. [FN2]

B. Denial of Suppression Hearing

*3 The defendant argues the district court erred when it refused to conduct a suppression hearing even though the defendant waited until the morning of trial to raise the motion. The defendant was arraigned on May 8, 1990, and a pre-trial conference was held on June 29, 1990. The defendant failed to present the suppression motion at the pre-trial conference but instead moved for a suppression hearing for the first time on July 18, 1990, the first day of trial. The district court denied the defendant's motion for suppression hearing, ruling the motion to be untimely.

"A trial court has discretion when considering an untimely motion and a reviewing court may disturb the trial court's decision only for clear error." United States v. Hamm, 786 F.2d 804, 806 (7th Cir.1986) (citing United States v. Mangieri, 694 F.2d 1270, 1283 (D.C.Cir.1982)). Pursuant to Fed.R.Crim.P. 12(b)(3), a motion to suppress evidence must be raised before trial:

"Rule 12. Pleadings and Motions Before Trial

* * *

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

* * *

(3) Motions to suppress evidence...."

(Emphasis added). Absent an extension of time set by the court at arraignment for the filing of pretrial motions, the failure to file a motion to suppress by the date set shall constitute waiver of the opportunity to file the motion. See Fed.R.Crim.P. 12(f). Because the defendant did not file his motion to suppress until the morning of the trial, the issue is deemed waived.

Even if the trial judge had considered the motion on the merits, we are convinced that the motion to suppress the marijuana would have been denied because the defendant specifically consented to the search of the vehicle. Trooper Trautvetter testified at trial that he asked the defendant three separate times whether he could search the vehicle, and that each time the defendant replied, "Sure." Trautvetter also received the defendant's consent before removing the spare tires from their rims. Thus, we are of the opinion that Moralez voluntarily consented to the search of the vehicle. [FN3] See United States v. Talkington, 875 F.2d 591, 594 (7th Cir.1989) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct.2041 (1973)). The district court's denial of the defendant's motion to suppress the evidence as untimely was not clearly erroneous.

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C. Improper Argument

The defendant argues that the prosecutor's references in closing argument to "Mr. Moralez's vehicle," "Mr. Moralez's car," and "Mr. Moralez's Blazer" were improper because there was no evidence in the record that the defendant was the owner of the vehicle. As a result, the defendant contends that the improper argument influenced the jury's verdict and deprived him of a fair trial. Because the defendant failed to object to the ownership question during closing argument, the argument is waived. See United States v. Harty, 930 F.2d 1257, 1261 (7th Cir.1991). Nonetheless, we may consider arguments raised for the first time on appeal under the plain-error rule of Fed.R.Crim.P. 52(b). "The plain error rule, 52(b), is to be applied cautiously and only where it can be said that a fundamental error, so basic and prejudicial has occurred that justice cannot have been done, or where the error denies a fundamental right of the accused." United States v. Garcia, 897 F.2d 1413, 1422 (7th Cir.1990) (citing United States v. McCaskill, 676 F.2d 995, 1002 (4th Cir.1982)).

*4 This court follows a two-step analysis in considering a claim of improper argument by the prosecution:

"First, we determine whether, considered in isolation, the challenged remark was improper. If so, we reexamine the improper remark in light of the entire record to determine whether the remark deprived the defendant of a fair trial." United States v. Swiatek, 819 F.2d 721, 730 (7th Cir.), cert. denied, 484 U.S. 903 (1987). Even assuming the prosecutor's references to the defendant's ownership of the vehicle were improper, we do not believe the comments concerning the ownership of themselves deprived him of a fair trial. "[O]wnership of the property in which contraband is found is not essential to a finding of possession of the contraband." Garrett, 903 F.2d at 1112 n.8. Furthermore, as we demonstrated above, the evidence was sufficient to establish that Moralez was in possession of the marijuana, as he was driving the vehicle and his fingerprint was on one of the marijuana packages. Thus, the prosecutor's remarks about the ownership of the vehicle were not prejudicial, for ownership of the vehicle is irrelevant in determining whether the defendant was in possession of the marijuana. The prosecutor's brief references to the defendant's ownership of the vehicle without any objection on the part of defense counsel did not prejudice the defendant's rights.

D. Prior Convictions

The defendant contends that the application of the career offender provision of SENTENCING GUIDELINE 4B1.1 resulted in a double enhancement of his punishment. The defendant qualified as a career offender pursuant to s 4B1.1 because (1) he was at least 18 years of age at the time of the instant offense, (2) the instant offense is a felony, and (3) he had two prior felony convictions for controlled substance violations. [FN4] The defendant's current conviction was under 21 U.S.C. s 841, which carries a maximum penalty of five years for possession with the intent to distribute less than 50 kilograms of marijuana. 21 U.S.C. s 841(d)(1)(D). However, this statute carries a maximum term of ten years if the defendant commits such a violation after one or more prior controlled substance convictions. As a career offender with an offense level of 24, the defendant's GUIDELINE range was 100 to 125 months. He received the lowest sentence within the GUIDELINE range, 100 months. The defendant now argues that the "prior convictions enhanced his sentence twice;

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once to increase the Offense Statutory Maximum to 10 years and again to enhance the offense level and criminal history category under the career offender GUIDELINES."

Several courts have specifically rejected this contention. See United States v. Amis, 926 F.2d 328, 330 (3d Cir.1991); United States v. Sanchez-Lopez, 879 F.2d 541, 558 (9th Cir.1989). In a case factually similar to ours, the Ninth Circuit in Sanchez-Lopez discussed the issue of double enhancement:

"[The defendant] contends that because his two prior convictions enhanced the permissible punishment under section 841(b)(1)(B) from a range of 5 years to 40 years to a range of 10 years to life, and because the maximum punishment of life results in a higher offense level under the SENTENCING GUIDELINES, impermissible double enhancement occurs.

*5 "Multiple penalties for a single criminal transaction are not necessarily impermissible where Congress manifests its intent that enhancement of penalties is proper. United States v. Blocker, 802 F.2d 1102, 1105 (9th Cir.1986). In the instant matter, however, it does not appear that there was any double enhancement of penalties. The SENTENCING GUIDELINES are not a separate statutory provision of penalties. The SENTENCING GUIDELINES are intended to provide a narrow sentence range within the range authorized by the statute for the offense of conviction. See 28 U.S.C. s 994(b)(2) (1988 Supp.) (specifying the sentence range under the SENTENCING GUIDELINES); Mistretta [v. United States], 109 S.Ct. [647,] 656 [(1989)]; Commentary, Application Note # 10 to SENTENCING GUIDELINES s 2D1.1 ('The Commission has used the sentences provided in ... the statute (21 U.S.C. s 841(b)(1), as the primary basis for the GUIDELINE sentences.'). Indeed, the Commentary to s 5G1.1 of the SENTENCING GUIDELINES provides, 'If the statute requires imposition of a sentence other than that required by the GUIDELINES, the statute shall control. The sentence imposed should be consistent with the statute but as close as possible to the GUIDELINES.' Thus, the range of 30 years to life calculated under the SENTENCING GUIDELINES as applied to [the defendant] was within the statutory range of 10 years to life under section 841(b)(1)(B). The method the SENTENCING Commission used to calculate the sentence under the career offender provision is of no consequence in the instant matter where the sentence is sanctioned by Congress by statute.

"Moreover, Congress made it very clear that the SENTENCING Commission should ensure that individuals who were convicted of a controlled substance offense, who were over eighteen years of age, and who had two or more prior felonies for controlled substance offenses, should receive a sentence of imprisonment under the GUIDELINES that is at or near the maximum term authorized by statute. 28 U.S.C. s 994(h); accord Commentary to SENTENCING GUIDELINES s 4B1.1. The career offender provision, section 4B1.1, implements Congress' mandate. Mistretta, 109 S.Ct. at 657."

Sanchez-Lopez, 879 F.2d at 558-59 (emphasis added).

We agree with the reasoning in Sanchez-Lopez and hold that where a defendant with prior convictions is treated as a career offender under the SENTENCING GUIDELINES, there is no double enhancement of penalties. Congress expressed its desire that career offenders be sentenced "at or near the maximum term authorized" by statute. 28 U.S.C. s 994(h). Thus, the district court properly calculated defendant Moralez's sentence under the career offender

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provisions of the SENTENCING GUIDELINES. [FN5]

E. Ineffective Assistance of Counsel

Finally, the defendant argues that he received ineffective assistance of counsel at trial for two reasons: (1) his counsel failed to file the motion to suppress the marijuana in a timely fashion; and (2) counsel failed to object to references made by the prosecutor in closing argument regarding the defendant's ownership of the vehicle. We have previously noted the heavy burden a defendant bears in establishing an ineffective assistance of counsel claim:

*6 "To prevail on his claim of ineffective assistance of counsel, [the defendant] must show that his trial counsel's performance fell below an objective standard of reasonableness, and that counsel's deficiencies prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 688-92, 104 S.Ct.2052, 2064-67, 80 L.Ed.2d 674 (1984). We begin with a strong presumption that counsel rendered reasonably effective assistance, and consider counsel's effectiveness under the totality of the circumstances. United States v. Zylstra, 713 F.2d 1332, 1338 (7th Cir.), cert. denied, 464 U.S. 965, 104 S.Ct. 403, 78 L.Ed.2d 344 (1983). To overcome that presumption, [the defendant] must identify 'acts or omissions [of course] which were outside the range of professionally competent assistance.' Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. To satisfy the prejudice component of Strickland, [the defendant] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.' Id. at 695, 104 S.Ct. at 2068-69."

United States v. Snyder, 872 F.2d 1351, 1358 (7th Cir.1989).

Initially, the defendant contends that the district court's denial of his motion to suppress as a result of his defense counsel waiting until the day of trial to file the motion resulted in prejudice to his case. However, as we explained supra, even if the judge had considered the motion on the merits, the motion to suppress the marijuana would likely have been denied, given that the defendant voluntarily consented to the search of the vehicle. Trooper Trautvetter asked the defendant on three separate occasions whether he had permission to search the vehicle, and each time the defendant replied, "Sure." Moreover, Trooper 'Hautvetter also asked for, and received, consent before removing the spare tires from their rims. Therefore, the defendant can demonstrate no prejudice as a result of his trial counsel waiting until the day of trial to file the motion to suppress the fruits of the search in light of the fact that the motion in all probability would have been denied.

Likewise, defense counsel's failure to object to the prosecutor's references regarding the defendant's ownership of the vehicle did not result in prejudice to the defendant. The government was required to prove beyond a reasonable doubt that the defendant possessed the marijuana, and it is irrelevant to the crime with which the defendant was charged whether the defendant owned the vehicle in which the marijuana was transported, for he was driving it and was thus in control and possession of it. The defendant is unable to cite any cases holding that ownership of a vehicle is germane to the determination of whether a defendant had possession of drugs. Therefore, the defendant is unable to demonstrate that he was prejudiced by defense counsel's failure to object to references regarding the defendant's ownership of the vehicle. Since the defendant has failed to demonstrate that his trial counsel's alleged errors

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prejudiced him, his ineffective assistance of counsel claim is without merit.

IV.

*7 For the reasons stated, the conviction and sentence of the defendant are AFFIRMED.

FN1. The district court granted Gilbert Moralez's motion for a judgment of acquittal at the close of the government's case.

FN2. The appellant further argues that the district court prejudiced his case through restricting cross-examination of the law-enforcement officers who investigated the case. The defense attorney was attempting to question the witnesses on whether they conducted a search of Moralez's home in Texas in order to challenge the government's assertion that Moralez intended to distribute the marijuana. The district judge stated that the issue of the scope of the government's investigation "doesn't seem very relevant to the elements charged in the indictment." On appeal, Moralez argues that "[t]he burden was upon the government to prove intent to distribute, and the questions were relevant to that intent." He asserts that since the government failed to prove that Moralez owned the vehicle, "the inference of intent to distribute rested solely on the doubtful evidence of Pablo Moralez's control over the marihuana [sic]." We agree with the district court that the government's failure to search Moralez's home in Texas was not probative of whether the defendant intended to distribute the nearly 30 pounds of marijuana in the vehicle he was driving. The district court did not abuse its discreetionin sustaining the government's objection to the cross-examination.

FN3. The appellant's argument that there was no probable cause for the search is irrelevant--for when consent is given, probable cause is unnecessary. Moralez cites no persuasive reason to support his assertion that he would not have been free to leave if he had refused to allow the search.

FN4. s 4B1.1 of the SENTENCING GUIDELINES provides:
"Career Offender
A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (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. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE

FN5. Indeed, a 100-month sentence out of a maximum of 120 months is only 83% of the maximum. That may well be short of being & tat or near the maximum term authorized...."

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(CITE AS: 1992 WL 105503, *7 (7TH CIR.(ILL.)))

C.A.7 (Ill.),1992.

UNITED STATES of America, Plaintiff-Appellee, v. Pablo C. MORALEZ, also known as "Paul", Defendant-Appellant.
--- F.2d ----, 1992 WL 105503 (7th Cir.(Ill.))
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Same ✓

Career offender
In terms of sent. pursuant, scheme, career offender refers to highest authorized

Citation | Rank(R) | Database | Mode
--- F.2d ---- | R 1 OF 39 | CTA | P
(CITE AS: 1992 WL 47329 (D.C.CIR.))

UNITED STATES OF AMERICA, Appellee
v.
Sammy L. GARRETT, Appellant
No. 90-3210
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
Argued November 25, 1991
Decided March 17, 1992

Appeal from the United States District Court for the District of Columbia

Samuel Edgar Wilhite (appointed by the Court) for appellant.

nLeslie Ann Wise, Assistant United States Attorney, with whom Jay B. Stephens, United States Attorney, and John R. Fisher and Roy W. McLeese, III, Assistant United States Attorneys, were on the brief, for appellee.

Before WALD, SILBERMAN, and HENDERSON, Circuit Judges.

KAREN LECRAFT HENDERSON, Circuit Judge:

*1 Sammy L. Garrett was convicted on one count of possession of cocaine base with intent to distribute and one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. s 841(a)(1). [FN1] Garrett challenges his convictions on the grounds that the trial court erred in (1) finding that the police had probable cause to search his car and (2) excluding evidence regarding the activities of a defense witness on the day Garrett was arrested. Garrett also challenges the legality of the career offender provision of the United States SENTENCING GUIDELINES (GUIDELINES) as it was applied to him. We conclude that the trial court committed no error and that the application of the GUIDELINES withstands Garrett's attack. We therefore affirm the convictions.

I

On January 30, 1990, at about 8:00 p.m., Metropolitan Police Officer Wayne T. Simpson set up an observation post in the area of Fifth Street and S Street, N.W., in Washington, D.C. Simpson had earlier received a citizen's complaint alleging that narcotics were being distributed in that neighborhood by someone driving a burgundy car with Maryland license plates " "WJB-787.' ' When Simpson arrived at 5th Street and S Street that evening, he saw a burgundy vehicle with Maryland license plates " "WJB-787' ' parked at the northeast corner of the intersection. Simpson then saw Garrett and codefendant Randolph Campbell walk over to the burgundy car where Campbell passed paper currency to Garrett. Garrett opened the car door and retrieved from inside a small object which he passed to Campbell. Aware that the area was a known " "high narcotic area' ' and based on his experience and the citizen's tip, Simpson concluded that a narcotics transaction had just taken place. Simpson further observed that as Garrett and Campbell walked away from the car they were joined by a third man, Levander Johnson. At this point, Simpson directed scout officers to stop all three men. As the officers approached, Campbell dropped a pouch on the ground. Simpson testified that the pouch was the same size as the item Garrett passed to Campbell. The police recovered the pouch. It contained 20

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packages of white powder which later tested positive for both heroin and cocaine. After they recovered the pouch, the police placed Campbell under arrest and detained Garrett and Johnson. Officer Gudger of the scout force then searched Garrett's car and discovered a black bag containing 13.26 grams of cocaine base and 26.41 grams of regular cocaine and a brown paper bag containing 6.3 grams of cocaine base. Garrett was placed under arrest and a search of his person produced $1067. Johnson was not arrested.

At the suppression hearing, Johnson testified that shortly before his encounter with the police he visited Virginia Brown's house to use her telephone. Her telephone was not working. When Johnson left Brown's house, he saw Garrett standing across the street. Knowing that Garrett had a portable telephone, Johnson asked to borrow it. Johnson claimed that he waited for Garrett near a parked pick-up truck and did not watch where Garrett went. He testified that it took Garrett three minutes to retrieve the phone and another three minutes to return it to his car after Johnson had finished using it. Johnson, who claimed not to know Campbell, further testified that five minutes after Garrett had returned the phone to his car, Campbell came around the corner and stood in front of them. According to Johnson, when he and Garrett began to walk up the street, Campbell walked along with them. Johnson also testified that when the police arrived, they threw him face down on the hood of a car and kept him there for twenty-five minutes during which time they searched him.

*2 The trial judge denied the defendants' motion to suppress, concluding that the police had reasonable suspicion to stop the three men. Their reasonable suspicion ripened into probable cause to arrest Campbell when the police discovered that the discarded pouch contained drugs. The trial judge further held that the police also had probable cause to search Garrett's car because it appeared that the drugs Garrett passed to Campbell had been removed from it.

Before trial, the government notified the court, in writing, that Garrett had two prior felony drug convictions. Garrett was eventually tried on an indictment charging him with one count of distribution of cocaine, one count of distribution of heroin, one count of possession of cocaine base with intent to distribute and one count of possession of cocaine with intent to distribute. A jury acquitted him on the two distribution counts but found him guilty on the two possession with intent to distribute counts. Garrett's motion for a new trial was denied on June 6, 1990. He was subsequently sentenced to two concurrent terms of 360 months each.

II

Garrett argues that the trial court should have granted his motion to suppress because the police lacked probable cause to search his car. The existence of probable cause for a warrantless search is a mixed question of law and fact. See Ker v. California, 374 U.S. 23, 33-34 (1963); see also United States v. Alfonso, 759 F.2d 728, 741 (9th Cir. 1985). We review the trial court's findings of fact under a clearly erroneous standard and its legal conclusions de novo. See Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982); Alfonso, 759 F.2d at 741.

Our analysis of the trial court's probable cause determination begins with the initial encounter between the police and the three suspects. Under the Supreme Court's decision in Terry v. Ohio, 392 U.S. 1 (1968), a police officer has the

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requisite reasonable suspicion to stop a suspect if he has observed conduct " "which leads him reasonably to conclude in light of his experience that criminal activity may be afoot....' ' Id. at 30; United States v. McKie, 951 F.2d 399, 401-02 (D.C. Cir. 1991). In view of Officer Simpson's nine years of experience in undercover narcotics investigations and in view of the facts that the officer observed the transaction in a " "high narcotic area' ' and that the color and license plate number of Garrett's car matched those given in the citizen's complaint, Simpson could have easily developed a reasonable suspicion of criminal activity when he witnessed Garrett pass a small object retrieved from inside his car to Campbell in exchange for money. We conclude therefore that the initial contact between the scout officers and Garrett, Campbell and Johnson constituted a valid Terry stop.

When Campbell dropped the pouch, a pouch containing drugs and matching in size the object Simpson had seen Garrett removing from his car, and the officers opened it, probable cause arose to believe that the drugs in the pouch came from the car and that additional drugs might be found there. [FN2] See United States v. Caroline, 791 F.2d 197, 201 (D.C. Cir. 1986) (" "Probable cause for a search exists where "there is a fair probability that contraband or evidence of a crime will be found in a particular place.' ' ' (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983))). Once the officers had probable cause to believe that more drugs would be found in Garrett's car, they could properly conduct a search of the entire car and any containers found therein. [FN3] Id. at 202 (citing United States v. Ross, 456 U.S. 798, 823 (1982)). The trial court therefore properly denied Garrett's motion to suppress.

*3 Garrett also claims that the trial judge improperly excluded evidence that would have bolstered Johnson's testimony that he made a telephone call from Garrett's portable phone. Specifically, Garrett objects to the trial judge's exclusion of Virginia Brown's testimony and his exclusion of certain telephone records, both of which, he contends, would have supported Johnson's claim. Questions regarding the relevance or materiality of evidence generally rest within the discretion of the trial court. Hardy v. United States, 335 F.2d 288, 289 (D.C. Cir. 1964). Such rulings should not be disturbed except for grave abuse. Id. This is particularly true when the evidence is cumulative. United States v. Thornton, 746 F.2d 39, 49-50 (D.C. Cir. 1984) (" "[Where] defense was allowed to adduce substantial evidence that appellant was a gambler ... an in depth examination of the gambling investigation and of each piece of gambling material seized would have been redundant, time-consuming, and possibly confusing to the jury.' ').

At trial, the government did not contest the fact that Johnson used the portable telephone. Mrs. Brown's testimony and the telephone records would therefore have been cumulative. Under the circumstances, the trial court's exclusion of this evidence appears to have been proper and in any event does not amount to " "grave abuse.' '

III

As we noted earlier, Garrett was convicted of one count of possession of cocaine base with intent to distribute and one count of possession of cocaine with intent to distribute. For possession of more than five grams of cocaine base with intent to distribute, subsection 841(b)(1)(B)(iii) mandates a sentence ranging from five to forty years of imprisonment. For possession of cocaine with intent to distribute, subsection 841(b)(1)(C) requires a sentence

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of not more than twenty years' imprisonment. Both statutory provisions also contain a sentence enhancement for defendants with one or more prior drug convictions. For them, the sentencing range under subsection (b)(1)(B) is ten years to life and under subsection (b)(1)(C) the sentence cannot exceed thirty years. Id.

Determining the statutory punishment does not end the SENTENCING inquiry, however, because the punishment provided by statute must now be imposed in accordance with the GUIDELINES. The base offense level for a defendant convicted of possession with intent to distribute illegal drugs is calculated under section 2D1.1 of the GUIDELINES. In order to aggregate properly the sentences of a defendant convicted of possessing more than one type of drug; the GUIDELINES include " "drug equivalency tables' ' which allow a court to convert the different drugs to the equivalent amount of a single measuring drug (e.g., heroin). See U.S.S.G. s 2D1.1. The defendant is then sentenced according to the total amount of the measuring drug. Id. The tables prescribe that one gram of cocaine base is equivalent to one hundred grams of regular cocaine. Id. Based on his possession of 26.41 grams of cocaine and 19.56 grams of cocaine base, therefore, Garrett's base offense level would be 26. [FN4] Id. Under section 4A1.1 of the GUIDELINES, Garrett would have a criminal history category of V. The SENTENCING range for a defendant with a base offense level of 26 and a criminal history category of V is 110 to 137 months' imprisonment.

*4 Garrett was sentenced, however, under the Guidelines' career offender provision. U.S.S.G. s 4B1.1. According to this provision, a defendant who is at least eighteen years old at the time of the offense, is convicted of a felony that is either a crime of violence or a controlled substance offense and who has at least two prior felony convictions of either a crime of violence or a controlled substance offense is defined as a career offender. Id. The base offense level for a career offender is determined with reference to the " "Offense Statutory Maximum,' ' which is defined in the Guidelines as " "the maximum term of imprisonment authorized for the offense of conviction' '. Id. Where more than one count of conviction is based on a controlled substance offense, the offense that carries the greatest maximum term of imprisonment controls. Id. commentary, application note 2. The career offender provision also mandates that all career offenders be assigned a criminal history category of VI. Id. s 4B1.1.

In applying the career offender provision, the district court looked to subsection 841(b)(1)(B)(iii) to determine the Offense Statutory Maximum because possession with intent to distribute more than five grams of cocaine base (punishable under subsection 841(b)(1)(B)(iii)) carries a greater maximum term of imprisonment than possession with intent to distribute cocaine (punishable under subsection 841(b)(1)(C)). In determining the Offense Statutory Maximum under subsection 841(b)(1)(B)(iii), the district court considered Garrett's two prior felony drug convictions and concluded that life imprisonment was the maximum term. The trial judge then assigned Garrett a base offense level of 37, see U.S.S.G. s 4B1.1, and sentenced him to a term of imprisonment of 360 months on each count, to be served concurrently. Garrett objects to this calculation on several grounds.

He first contends that his thirty year sentence constitutes cruel and unusual punishment under the eighth amendment. Keeping in mind that the Supreme Court

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has held that a forty year sentence for possession with intent to distribute nine ounces of marijuana does not violate the eighth amendment, see Hutto v. Davis, 454 U.S. 370 (1982), we conclude that this claim lacks merit. See also Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (upholding constitutionality of mandatory life imprisonment without possibility of parole for possession of more than 650 grams of cocaine).

Garrett next asserts that using his earlier drug convictions to determine his current sentence subjects him to double jeopardy. The Supreme Court has held otherwise. In Gryger v. Burke, 334 U.S. 728 (1948), the Court held: " "The sentence as a ... habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.' ' Id. at 732; see also Oyler v. Boles, 368 U.S. 448, 451 (1962) (" "[T]he practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge....' ').

*5 Finally, Garrett claims that his earlier drug convictions were improperly used to calculate both his sentence under 21 U.S.C. s 841(b)(1)(B)(iii) and his base offense level and criminal history category under the Guidelines. Garrett asserts that under the career offender provision, " "the maximum term of imprisonment authorized for the offense of conviction' ' should be the maximum applied to a defendant with no prior convictions, here, forty years. In this way, his prior convictions would be considered only once in determining his sentence, that is, by considering him a career offender under the Guidelines but not using the increased statutory maximum for a repeat offender. According to Garrett's calculation, the district court would have assigned him a base offense level of 34 and a corresponding sentence of between 262 and 327 months. See U.S.S.G. s 4B1.1; Appellant's Brief at 20. Otherwise, Garrett argues, he is subjected to unauthorized multiple counting of his prior convictions. Appellant's Brief at 20.

At least two other circuits have rejected this argument. See United States v. Amis, 926 F.2d 328 (3d Cir. 1991); United States v. Sanchez-Lopez, 879 F.2d 541 (9th Cir. 1989). In United States v. Sanchez-Lopez, the Ninth Circuit held that application of the career offender provision to the increased statutory maximum for a defendant with prior drug convictions under subsection 841(b)(1)(B) does not result in multiple enhancement of his sentence. Concluding that the " "SENTENCING GUIDELINES are intended to provide a narrow sentence range within the range authorized by the statute for the offense of conviction ...,' ' id. at 559 (citations omitted), and emphasizing that Congress " "made it very clear that the SENTENCING Commission should ensure that [repeat drug offenders] should receive a sentence of imprisonment under the GUIDELINES that is at or near the maximum term authorized by statute,' ' id. (citing 28 U.S.C. s 994(h)), the court decided that the career offender provision does not result in multiple enhancement. Instead it simply " "produce[s] a sentence within the range authorized by statute for one criminal activity.' ' Id. at 560; see also Amis, 926 F.2d at 330.

We agree with the holdings in Sanchez-Lopez and Amis. We specifically reject Garrett's contention that the relevant maximum statutory sentence should be the maximum for a defendant with no prior drug convictions. Accord Amis, 926 F.2d at 329-30; cf. Sanchez-Lopez, 879 F.2d at 559. Subsection 841(b)(1)(B)(iii)

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contains different maximum terms for first offenders, for first offenders whose offense causes death or bodily injury, for repeat offenders and for repeat offenders whose offense causes death or bodily injury. To conclude that Congress, in approving the GUIDELINES, intended to erase the statutory distinctions among offenders based either on their past actions or on the circumstances of the offense, distinctions carefully set forth in subsection 841(b)(1)(B), would be senseless. On the contrary, under the career offender provision, Congress simply refined further the statutory sentence range so that the SENTENCING judge must impose a term of imprisonment nearer to the statutory maximum for a drug recidivist. The career offender provision merely narrows the trial judge's discretion in accordance with the GUIDELINES' overall goal of " "promoting SENTENCING within a narrower range than was previously applied.' ' Mistretta v. United States, 488 U.S. 361, 395 (1989). We note that Congress, fully aware that subsection 841(b)(1)(B) contained a tiered punishment scheme, approved the GUIDELINES after it enacted that subsection. There is no indication in the career offender provision that a statute containing a tiered punishment scheme is to be treated as in any way different from a statute prescribing a single punishment. Because the Offense Statutory Maximum for a statute prescribing a single punishment is interpreted as the maximum authorized term under the statute, and the maximum authorized term under a statute prescribing tiered punishments is that prescribed by the highest applicable tier, the GUIDELINES require us to define the Offense Statutory Maximum in this case as the maximum authorized term under the highest applicable tier of subsection 841(b)(1)(B)(iii). Accordingly, if we refused to uphold the application of the career offender provision to Garrett, we would thwart congressional intent. [FN5] See Sanchez-Lopez, 879 F.2d at 559. Application of the GUIDELINES' career offender provision to the statutorily heightened maximum sentence for Garrett does not add to the penalty authorized by Congress because it does not increase Garrett's sentence beyond the maximum authorized by subsection 841(b)(1)(B). We therefore conclude that the district court properly calculated Garrett's sentence.

*6 For the reasons set forth above, the judgment and sentence of the trial court are

Affirmed.

FN1. Although the indictment also charged violations of subsections 841(b)(1)(B)(iii) and 841(b)(1)(C), we note that these subsections are penalty provisions and not components of any substantive offense. See United States v. Patrick, No. 90-3178, slip op. at 6 n.5 (D.C. Cir. Mar. 17, 1992).

FN2. Garrett does not challenge the admissibility of the drugs found in the pouch. As the trial court correctly noted, he would not have standing to assert such a challenge. See Rawlings v. Kentucky, 448 U.S. 98, 104-05 (1980).

FN3. Garrett claims that the search was unconstitutional because the police went beyond permissible limits in executing the initial Terry stop. Specifically, he points to Johnson's claim that he was thrown against the hood of a car and searched. Assuming arguendo Johnson's testimony is

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accurate, it has no bearing on the legality of the search of Garrett's car. Garrett's car was searched after Campbell discarded the pouch and as a result of the discovery of the drugs in the pouch. The search in no way hinged on the police officers' initial treatment of Johnson.

FN4. The 19.56 grams of cocaine base and 26.41 grams of cocaine found in Garrett's car are equivalent to 396.482 grams of heroin according to the drug equivalency tables. U.S.S.G. s 2D1.1. Under the Guidelines, a defendant convicted of possession with intent to distribute between 100 and 400 grams of heroin receives a base offense level of 26. Id. s 2D1.1(c)(9). The probation officer who prepared Garrett's presentence report, however, included the drugs found in Campbell's pouch in determining Garrett's base offense level. The additional 3.131 grams of heroin would not have had any effect on Garrett's base offense level because the aggregate equivalent amount of heroin would remain between 100 and 400 grams. Id.

FN5. Garrett also challenges the validity of the Guidelines' drug equivalency tables. See U.S.S.G. s 2D1.1 commentary, application note 10. Specifically, he objects to the conversion ratio between cocaine base and regular cocaine. Because we hold that Garrett was properly sentenced under the Guidelines' career offender provision based solely on his possession with intent to distribute cocaine base, we need not address the validity of the drug equivalency tables. We do note, however, that the Eighth Circuit has upheld the ratio. United States v. Buckner, 894 F.2d 975, 978-79 n.9 (8th Cir. 1990); cf. United States v. Cyrus, 890 F.2d 1245, 1248 (D.C. Cir. 1989) (holding differential treatment of cocaine base and regular cocaine does not violate equal protection principles and does not result in cruel and unusual punishment).

C.A.D.C.,1992.
UNITED STATES OF AMERICA, Appellee v. Sammy L. GARRETT, Appellant
--- F.2d ----, 1992 WL 47329 (D.C.Cir.)
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U. S. Department of Justice
Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

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April 22, 1994

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Wilkins:

The purpose of this letter is to reconfirm the Department of Justice's objections to three of the sentencing guidelines amendments adopted on April 14, 1994.

1. Career Offenders

Amendment 13(B) provides that a career offender should only be sentenced on the basis of the statutory maximum applicable in the absence of any prior criminal record, but not on the basis of a statutory maximum itself enhanced because of a prior conviction. This amendment is in our view inconsistent with the statutory requirement that the Commission establish a career offender imprisonment guideline "at or near the maximum term authorized" for a person 18 years old or older convicted of a felony crime of violence or drug-trafficking offense who has "previously been convicted of two or more prior [such] felonies...". 28 U.S.C. §994(h).

While some might argue that the statute is overly broad and may lead in some instances to sentences that are too severe, those arguments should be addressed to Congress. Significantly, all courts of appeals that have considered the issue have held that the statutory language requires imposition of a sentence at or near the maximum authorized by an enhancement resulting from a prior conviction. *See, e.g., United States v. Garrett,* 959 F.2d 1005, 1009-11 (D.C. Cir. 1992); *United States v. Amis,* 926 F.2d 328, 329-30 (3rd Cir. 1991); *United States v. Sanchez,* 988 F.2d 1384, 1395-96 (5th Cir. 1993); *United States v. Saunders,* 973 F.2d 1354, 1364 (7th Cir. 1992), *cert. denied,* 113 S. Ct. 1026 (1993); *United States v. Sanchez-Lopez,* 879 F.2d 541, 558-60 (9th Cir. 1989); *United States v. Smith,* 984 F.2d 1084, 1086-87 (10th Cir. 1993).

2. Departures in Extraordinary Circumstances and for Combinations of Characteristics

Amendment 14 adopted by the Commission would add new language to §5K2.0 (Grounds for Departure) intended to make explicit that the phrase "not ordinarily relevant" to a departure determination does not foreclose the possibility of departure in an extraordinary circumstance. While we do not object to clarification of the phrase "not ordinarily relevant", we strongly oppose inclusion in the amendment of the "combination of such characteristics and circumstances" language. This amendment has the potential to undermine the sentencing guidelines system and lead to inconsistency in sentencing. The sweeping language would permit courts to combine characteristics as the basis for departure which individually are discouraged factors for departure under the guidelines and which do not exist individually to a sufficient extent to justify departure. We share the Commission's desire to provide guidance and achieve consistency with respect to departures, but believe a much narrower amendment is preferable to the one adopted by the Commission.

3. Reduction of Drug Sentences Based on Quantity

Amendment 8 as adopted would change the drug-trafficking guideline, §2D1.1, to reduce the upper limit of the Drug Quantity Table from level 42 to 38. Although this amendment is intended to provide less harsh sentences for some first offenders, we are troubled by its potential overall effect in lowering sentences for the most serious offenders involved with the largest quantities of drugs. We believe any reduction of the Drug Quantity Table should be limited to first offenders who do not qualify for an enhancement based on a leadership role in a drug organization.

Thank you for your continued consideration of these matters.

Sincerely,

Jo Ann Harris
Assistant Attorney General

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June 13, 1994

MEMORANDUM

TO: Chairman Wilkins
Commissioners

FROM: John Steer

SUBJECT: Revised Upward Departure Commentary

Attached for your review and consideration at the June 27 Commission meeting are two new options for proposed commentary inviting upward departure from offense level 38 based on large drug quantity.

Also attached for your ready reference are the two options considered by the Commission at the May meeting, along with Margaret Smith's caselaw memorandum.

Attachments

KEP 13 b 0006 DLP

Option 1

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

* * *

Commentary

* * *

19. If the offense involved an extraordinarily large quantity of controlled substance (i.e., at least 10 times the minimum quantity required for level 38), an upward departure [of up to 2 levels] may be warranted.

* * *

Reason for Amendment: This amendment authorizes an upward departure [of up to 2 levels] where the quantity of controlled substance is extraordinarily large, i.e., a quantity beyond the "heartland" for offense level 38. To avoid litigation and potential circuit conflicts as to the minimum amount required to warrant an upward departure, a quantity of at least 10 times the minimum for level 38 is specified. (Note that this is the quantity that was associated with former level 42, the highest offense level in the former Drug Quantity Table.) [Language is also included to provide guidance as to the extent of departure authorized for this factor.]

Option 2

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

* * *

Commentary

* * *

19. 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 [of up to 2 levels] on the basis of an extraordinarily large quantity of controlled substance may be warranted where the quantity is at least 10 times the minimum quantity required for level 38.

* * *

M E M O R A N D U M

DATE: June 10, 1994

TO: John Steer

FROM: Margaret Smith

RE: Proposed Note 19 to §2D1.1

As you know from my April 22, 1994 memorandum, I believe the Commission should not add any upward departure commentary to 2D1.1 unless and until we know there is an intolerable degree of disparity in application of the amended guideline vis a vis quantity based upward departures.

Given that, I favor Option 1 for the reasons stated in my previous memorandum. This language provides an objective standard to guide discretion and provide for, to some degree, national uniformity. Another benefit of this approach is reduced litigation. I also favor the second sentence of Peter Ossorio's proposal for these same reasons.

Option 2 is troublesome. There is ambiguity in the "involved in the offense" language. It's not clear this is limited to offenses of conviction and relevant conduct.[1] Could option 2 be interpreted, in the context of upward departures, as allowing courts to consider additional quantities, beyond the relevant conduct amount, that is otherwise "involved in the offense?" The additional quantities might be those attributed to co-defendants or co-conspirators that do not come within a strict reading of relevant conduct.

Regarding Peter's memorandum, you are correct. The quantities at level 38 are 300 times the amounts specified in 21 U.S.C. §841(b)(1)(b).

---

[1]1B1.1(1)(l) defines "offense" to include offense of conviction or relevant conduct, unless another meaning is made clear from the context.

MEMORANDUM

TO: John Steer ✓ CC: AP;PH;VV;MS

FROM: Peter Ossorio

RE: Proposed §2D1.1, Note 19

DATE: 9 June 1994

You asked for my reaction to the two options for adding Application Note 19 to §2D1.1 to address the possibility of upward departures based solely on drug quantity, where the amount of drugs is far in excess of the new cap at level 38 (i.e. greater than 30 kg of heroin, 150 kg of cocaine or 5 kg of cocaine base.)

First it should be noted that the Annual Reports for 1992 and 1993 show only a small percentage of drug cases exceeded level 38 (2.8%, from Table 33; undetermined, but no more than about 5%, from Table 61, respectively).

Secondly, a decent respect for the intent of Congress, embodied in 21 U.S.C. § 848(b)(2)(A)(mandatory life for CCE defendants involved with "at least 300 times the quantity . . . described in 841(b)(1)(B)"), requires acknowledging that Congress attached particular significance to amounts of drugs which correspond to the recently eliminated level 40 (i.e. the threshold for level 40 is 300 times the amounts specified in §841(b)(1)(B)).

Thirdly, regardless of policy issues, I think that Option 2 is more likely to generate litigation than Option 1. Option 1 merely calls the court's attention to a possible basis for upward departure. Option 2, by stressing a departure "based solely" on the extremely large quantity seems to invite the court to find some "fig leaf" reason in addition to drug quantity as a rational for departing upward.

Fourthly, both options contemplate possible upward departures without putting any limits on or giving guidance regarding the amount of departure. Only implicitly do they suggest that because the Commission abolished levels 40 and 42, departures for old level 42 amounts of drugs should not equal level 42. Andy has suggested limiting the upward departure to two levels. This would, in effect, establish a new level 40 whose quantities would correspond to old level 42. Although I do not favor this position as a matter of policy, I think that, in practice, limiting the amount of upward departure might reduce litigation and the likelihood of unwarranted disparity.

Because of §848(b)(2)(A), I think that any amount of drugs which equals 300 times the minimum amounts in §841(b)(1)(B) is presumptively worthy of consideration for upward departure. However, if the upward departure is based solely on the drug quantity it should not exceed the old guidelines corresponding to that amount. As Andy says, there is no point in reinstating levels 40 and 42. Therefore, my suggested Application Note 19 is as follows:

Proposed §2D1.1, Note 19 (Continued)

19. If the offense involved a quantity of controlled substance at least 300 times the quantity of a substance described in 21 U.S.C. § 841(b)(1)(B) (i.e., a quantity threshold formerly equivalent to level 40), an upward departure may be warranted. An upward departure based solely on the quantity of controlled substance involved in the offense shall not exceed 2 levels.

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May 2, 1994

MEMORANDUM

TO: Chairman Wilkins
Commissioners
Senior Staff

FROM: Phyllis J. Newton
Staff Director

SUBJECT: Alternative Draft Commentary to §2D1.1

Attached for your consideration at tomorrow's Commission meeting is an alternative option for proposed commentary to accompany the amendment to §2D1.1.

Attachment

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

* * *

Commentary

* * *

19. If the offense involved a quantity of controlled substance substantially greater than the minimum quantity required for offense level 38, an upward departure may be warranted.

* * *

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April 26, 1994

Memorandum

To: Chairman Wilkins
Commissioners

From: Phyllis J. Newton
Staff Director

Subject: Commentary to accompany amendment to §2D1.1

As requested by Commissioners, attached for consideration at the May 3 Commission meeting is proposed draft commentary addressing the issue of upward departures for drug quantities in excess of that for offense level 38.

Margaret Smith (Visiting Defender) has prepared a legal memorandum discussing case law relevant to the issue. Her memorandum is appended for your review.

Attachment

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

* * *

Commentary

* * *

19. If the offense involved a quantity of controlled substance at least 10 times the minimum quantity required for offense level 38, an upward departure may be warranted.

* * *

MEMORANDUM

To: John Steer

From: Margaret Smith MMS

Re: Upward Departures Based on Amount of Drugs

Date: April 22, 1994

Issue Presented

You requested a summary of the caselaw analyzing 2D1.1 and upward departures based upon the amount of drugs involved.

Brief Answer

Not surprisingly, the case law is sparse. Presently, of course, there is virtually no need for amount based upward departures. The maximum offense level under the current version of 2D1.1 is 42 which provides, in all criminal history categories, for a range of 360 to life. However, prior to November 1, 1989, the 2D1.1 drug quantity table had a maximum of level 36 for "10 kg heroin... 50 kg cocaine... 500 g of cocaine base...(or more of any of the above)". There are a handful of appellate cases analyzing this version of 2D1.1 and upward departures based on amounts beyond those listed at level 36. The cases go both ways. The 9th Circuit, relying on the "or more of any of the above" language, found that the Commission had taken into account drug quantities in excess of the listed maximums, thereby precluding an upward departure on that basis. The 7th Circuit disagreed and allowed an upward departure where the amount was far in excess of the maximum amount listed

under level 36.

Cases involving other guideline sections are also relevant. In the 1987 version of the guidelines, the continuing criminal enterprise guideline, 2D1.5, provided for a flat offense level of 36 regardless of the quantity of drugs sold or the size of the organization. However, application note 2 invited an upward departure based on these factors and the appellate courts affirmed such departures. Similarly, the telephone count (use of communication facility in committing drug offense) guideline, 2D1.6, previously did not link the offense level with drug quantity. Instead it provided for a flat base offense level of 12. There are a number of cases allowing upward departures in phone count cases based on excessive quantities involved. The same is true in simple possession cases involving large quantities, as the controlling guideline, 2D2.1, does not make a distinction based on the amount possessed.

Relevant Guideline Sections

The drug quantity table in the 1987 version of 2D1.1 provided for a maximum offense level of 36 for the following amounts:

> 10 kg Heroin or equivalent Schedule I or II Opiates, 50 kg Cocaine or equivalent Schedule I or II Stimulants, 550 g Cocaine Base, 10 kg PCP or 1 kg Pure PCP, 1 g LSD or equivalent Schedule I or II Hallucinogens, 4 kg Fentanyl Analogue, 10,000 kg Marihuana, 100,000 Marihuana Plants, 2000 kg Hashish, 200 kg Hashish Oil (or more of any of the above)

The 1993 Amendment to 2D1.1 drug quantity table, effective November 1, 1994, provides for a maximum offense level of

38 for the following amounts:

> 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); 150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); 1.5 KG or more of Cocaine Base; 30 KG or more of PCP, or 3 KG or more of PCP (actual); 30 KG or more of Methamphetamine, or 3 KG or more of Methamphetamine (actual), or 3 KG or more of "Ice"; 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); 12 KG or more of Fentanyl; 3 KG or more of Fentanyl Analogue; 30,000 KG or more of Marihuana; 6000 KG or more of Hashish; 600 KG or more of Hashish Oil.

Discussion

A. Departures in Trafficking Cases

As a general proposition, an upward departure from the base offense level based on drug amount alone is impermissible if it duplicates a base offense level determination. The amount has already been taken into account by the Commission in setting the range and, under 18 U.S.C. §3553(b) can not be a basis to depart. For instance, in United States v. Fuller, 897 F.2d 1217, 1221-22 (1st Cir. 1990) the district court correctly set the offense level at 26. However, the district court departed upward by two levels because Mr. Fuller "was engaged in distributing large quantities of marijuana." The circuit court reversed the departure, ruling that the quantity of marijuana involved had already been taken into account in determining the base offense level. Fuller, 897 F.2d at 1222. The circuit court also called this impermissible "double counting"-- counting the amount once for base offense level and once more for departure. Fuller, 897 F.2d at 1222.

The 5th Circuit addressed a similar issue in United States v. Barbontin, 907 F.2d 1494, 1498-99 (5th Cir. 1990). There the defendant was convicted of trafficking in cocaine. The district court correctly set the base offense level at 24 based on 273.3 ounces of cocaine. The district court departed upward two levels because, by San Antonio, Texas standards, 273 ounces was a significant amount of drugs being brought into the community. On appeal the 5th Circuit reversed. The circuit court was persuaded that because the Commission had delimited a degree of culpability for trafficking in 273 ounces of cocaine - base offense level 24 - it was not permissible to depart upward based on the fact 273 ounces was an excessive quantity as measured by community standards. Barbontin, 907 F.2d at 1499. The amount of drugs had been taken into account in setting the range, thereby precluding an amount based departure.

A different case is presented where a court wishes to depart upward from the maximum offense level in the drug quantity table. Because the current drug quantity table goes up to level 42, which mandates a range of 360 to life in all criminal history categories, this has not been an issue. However, the drug quantity table in the 1987 guidelines, in effect until November 1, 1989, had a maximum of offense level 36. Thus the issue was addressed by two circuit courts.[1]

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[1] It is not surprising that only a few cases reached the circuit courts given that the 1988 and 1989 annual reports, based on a 25 percent random sample of all cases sentenced, identify only 15 upward departures based on drug quantity.

In United States v. Martinez, 946 F.2nd 100 (9th Cir. 1991) the defendant was convicted of conspiracy to distribute and possession with intent to distribute cocaine, approximately 530 kg. The 1987 guidelines applied. This was in excess of 10 times the amount specified at level 36 (50 kg). The district court departed upward and the 9th Circuit reversed. 946 F.2d at 101-102. The circuit court reviewed 18 U.S.C. §3553(b) which provides that departures are allowed only when there exists a factor not adequately taken into consideration by the Commission in setting the guideline range. The 9th Circuit then observed that the drug quantity table provided for base offense level 36 for "50 kg Cocaine or equivalent...(or more of any of the above)". Martinez, 956 F.2d at 102. The circuit court reasoned that the "or more" language indicated the Commission did in fact consider quantities beyond the maximums for level 36 and "concluded that the level was to be the same regardless of how much more than fifty kilograms of cocaine was involved." 946 F.2d at 102. Because amounts in excess of those listed at level 36 had been taken into account, the circuit court ruled that §3553(b) precluded a departure. Id.

A subsequent unpublished 9th Circuit case affirmed this analysis, United States v. Ponce, 1993 WL 94703 (9th Cir. 1993). In Ponce, the defendant was convicted of conspiracy to possess and possession with intent to distribute 21 tons (19,000 kilograms) of cocaine. The sentencing was held on October 2, 1989. The opinion does not specify, but, presumably either the 1987 or 1988 guidelines applied. The district court departed upward "because of

the extraordinary quantity of drugs involved in this case." Id. The 9th Circuit, relying on Martinez, rejected the upward departure because the "or more" language indicated the Commission, in formulating the offense level, considered amounts of cocaine beyond fifty kilograms. This language, according to the 9th Circuit, "does not invite a distinction based on quantity." Id.

In United States v. Vasquez, 909 F.2d 235 (7th Cir. 1990) the 7th Circuit reached a different result. The defendant was convicted of possession with intent to distribute 112 kg of heroin and 57 kg of cocaine. The 1987 guidelines applied. The district court applied the maximum offense level of 36. The range was calculated at 188-235. The district court departed up to 300 months based on the extraordinary amount of heroin involved, noting this was not a situation "where we're talking about five kilos or ten kilos beyond what the guidelines are." Vasquez, 909 F.2d at 241.

On appeal the 7th Circuit affirmed. It began the analysis by noting the general rule requiring a court to sentence within the range unless there exists an aggravating factor of a kind or to a degree not taken into account by the Commission. Id. The Court then reviewed the departure power specifically addressed by the Commission in Ch.1 Pt.A 4(b), the introductory section of the guidelines:

> 'The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline

describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.'

Vasquez, 909 F.2d at 241 (emphasis in original).

The 7th Circuit applied this language and found the case at bar to be atypical as the actual quantity of heroin involved was more than 11 times the amount listed for the maximum offense level. Id. The circuit court also noted that, "[d]isregarding the heroin, the fifty-seven kilograms of cocaine Vasquez possessed would have placed him at a base offense level of 36." Vasquez, 909 F.2d at 241.[2]

The circuit court also rejected the argument that the Commission had "recognized the diminishing utility of quantity as a distinguishing factor" in setting the maximum offense level at 36. The circuit court first noted the 1989 amendment extending the drug quantity table out to level 42, thereby indicating the Commission's view that drug quantity was a valid distinguishing factor. Vasquez, 909 F.2d at 241-42. Next, the circuit court drew attention to the "heartland" and "atypical" language as indications of the Commissions support for upward departures based on excessive drug amounts. Vasquez, 909 F.2d at 242. Finally, the circuit court rejected Vasquez's argument that because the fraud guideline

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[2] In analyzing the departure issue, neither the district or circuit courts stated the total combined amount of drugs involved based on 2D1.1 n.6 and the conversion table. By my calculations, the 57 kilograms of cocaine would convert to 11.4 kilograms of heroin for a combined total of 123.4 kilograms of heroin.

(2F1.1) application notes explicitly allowed an upward departure based on the amount of money stolen and the drug trafficking guideline application notes did not similarly invite quantity based upward departures, the Commission must have considered and rejected such departures. Instead, the circuit court noted that the Commission, in 5K2.0, made clear that its failure to include a factor in one guideline section, while including it in another guideline section, does not mean that factor may not be a basis for a departure for the former guideline section. Vasquez, 909 F.2d at 242.

For all of these reasons, the circuit court rejected the notion that "drug quantity may not serve as the basis for departure from the applicable guideline range when the particular guideline does not adequately consider an atypical amount of drugs." Id.

B. Other Relevant Cases

The 1987 version of the continuing criminal enterprise guideline, 2D1.5, provided for a flat offense level of 36 regardless of the quantity of drugs sold or the size of the organization. However, application note 2 invited an upward departure if "the quantity of drugs substantially exceeds that required for level 36 in the drug quantity table, or if the number of persons managed by the defendant is extremely large..."

The 2nd Circuit affirmed such a departure in United States v. Rodriguez, 968 F.2d 130 (2nd Cir. 1992). The defendant was convicted of conducting a continuing criminal enterprise. The 1987 guidelines applied. The district court departed upward by six

levels on the basis the crack cocaine involved was more than 100 times in excess of the amount listed at offense level 36 in the drug quantity table. The 2nd Circuit affirmed, noting the commentary invited an upward departure. Rodriguez, 958 F.2d at 140. As to the amount of departure, the district court looked to the amended drug quantity table as "[t]he best guide for the degree of departure." That table provided base offense level 42 for 15 kg of crack cocaine. The 2nd Circuit agreed with this approach. Id. A similar result was reached in an unpublished decision from the 9th Circuit applying the guidelines to a continuing criminal enterprise conviction, United States v. Daniels, 1991 WL 268903 (9th Cir. 1991).

The 1987-1989 versions of the telephone count guideline (use of communication facility in committing drug offense), 2D1.6, did not link the offense level with quantity. Instead, the guidelines provided for a flat base offense level of 12. There are a number of cases allowing upward departures in phone count cases based on excessive quantities involved. E.g. United States v. Bennett, 900 F.2d 204, 205-06 (9th Cir. 1990.).

In Bennett, the defendant was charged with possession with intent to distribute cocaine and with using a telephone to facilitate distribution of cocaine. He pleaded guilty to the telephone count and the trafficking count was dismissed. Under the old guidelines his base offense level was 11 and the range was 8-14 months. The district court departed upward to 24 months because Mr. Bennett "had committed the offense while trying to purchase 3

kilograms of cocaine." Bennett, 900 F.2d at 205. On appeal Bennett argued that the Commission considered and rejected the amount of drugs as a distinguishing factor in phone count cases because it failed to link offense level with quantity in the controlling guideline, 2D1.6, while adopting that approach in the trafficking guideline, 2D1.1. The circuit court disagreed:

> One of [the] policy statements cautions that the Commission's failure to include a sentencing factor in the guideline for one offense, while including it in the guidelines for others, does not indicate that that factor may not be a ground for departure from the former. See U.S.S.G. § 5K2.0.

Bennett, 900 F.2d at 206. The 9th Circuit affirmed the departure and agreed that 3 kilograms was an exceptional amount, "substantially larger than what the Commission is likely to have had in mind when setting the score for Bennett's offense." Bennett, 900 F.2d at 206. Accord United States v. Citro, 938 F.2d 1431 (1st Cir. 1991); United States v. Feekes, 929 F.2d 334 (7th Cir. 1991); United States v. Asseff, 917 F.2d 502 (11th Cir. 1990); United States v. Correa-Vargas, 860 F.2d 35 (2nd Cir. 1988).

In simple possession cases, the controlling guideline, 2D2.1, does not link the base offense level with the drug amount possessed. Upward departures based on excessive amounts have been upheld. In United States v. Ryan, 866 F.2d 604 (3rd Cir. 1989), Mr. Ryan was acquitted of possession with intent to deliver crack but convicted of simple possession. The amount involved was 10.32 grams. The district court departed upward from the 0-6 month range, based in part on amount. The 3rd Circuit affirmed. It reasoned such departures are allowable where the atypical case,

outside the heartland, is presented. The circuit court also rejected Ryan's argument that "the Commission's express references to quantity and purity of drugs in the context of other drug-related offenses indicates an intent to exclude those factors from consideration in sentencing for simple possession..." Ryan, 886 F.2d at 607. The circuit court noted the Commission's view that a factor listed under one guideline may be relevant to sentencing under another guideline which doesn't reference the factor, and, failure to specifically reject a factor was done to permit departure based on that factor, not foreclose it. Ryan, 866 F.2d at 607-08. Accord United States v. Crawford, 883 F.2d 963 (11th Cir. 1989).

MEMORANDUM

To: John Steer

From: Margaret Smith

Re: Upward Departures Based on Amount of Drugs

Date: April 22, 1994

Issue Presented

You requested a summary of the caselaw analyzing 2D1.1 and upward departures based upon the amount of drugs involved.

Brief Answer

Not surprisingly, the case law is sparse. Presently, of course, there is virtually no need for amount based upward departures. The maximum offense level under the current version of 2D1.1 is 42 which provides, in all criminal history categories, for a range of 360 to life. However, prior to November 1, 1989, the 2D1.1 drug quantity table had a maximum of level 36 for "10 kg heroin... 50 kg cocaine... 500 g of cocaine base...(or more of any of the above)". There are a handful of appellate cases analyzing this version of 2D1.1 and upward departures based on amounts beyond those listed at level 36. The cases go both ways. The 9th Circuit, relying on the "or more of any of the above" language, found that the Commission had taken into account drug quantities in excess of the listed maximums, thereby precluding an upward departure on that basis. The 7th Circuit disagreed and allowed an upward departure where the amount was far in excess of the maximum amount listed

under level 36.

Cases involving other guideline sections are also relevant. In the 1987 version of the guidelines, the continuing criminal enterprise guideline, 2D1.5, provided for a flat offense level of 36 regardless of the quantity of drugs sold or the size of the organization. However, application note 2 invited an upward departure based on these factors and the appellate courts affirmed such departures. Similarly, the telephone count (use of communication facility in committing drug offense) guideline, 2D1.6, previously did not link the offense level with drug quantity. Instead it provided for a flat base offense level of 12. There are a number of cases allowing upward departures in phone count cases based on excessive quantities involved. The same is true in simple possession cases involving large quantities, as the controlling guideline, 2D2.1, does not make a distinction based on the amount possessed.

Relevant Guideline Sections

The drug quantity table in the 1987 version of 2D1.1 provided for a maximum offense level of 36 for the following amounts:

> 10 kg Heroin or equivalent Schedule I or II Opiates, 50 kg Cocaine or equivalent Schedule I or II Stimulants, 550 g Cocaine Base, 10 kg PCP or 1 kg Pure PCP, 1 g LSD or equivalent Schedule I or II Hallucinogens, 4 kg Fentanyl Analogue, 10,000 kg Marihuana, 100,000 Marihuana Plants, 2000 kg Hashish, 200 kg Hashish Oil (or more of any of the above)

The 1993 Amendment to 2D1.1 drug quantity table, effective November 1, 1994, provides for a maximum offense level of

38 for the following amounts:

> 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); 150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); 1.5 KG or more of Cocaine Base; 30 KG or more of PCP, or 3 KG or more of PCP (actual); 30 KG or more of Methamphetamine, or 3 KG or more of Methamphetamine (actual), or 3 KG or more of "Ice"; 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); 12 KG or more of Fentanyl; 3 KG or more of Fentanyl Analogue; 30,000 KG or more of Marihuana; 6000 KG or more of Hashish; 600 KG or more of Hashish Oil.

Discussion

A. Departures in Trafficking Cases

As a general proposition, an upward departure from the base offense level based on drug amount alone is impermissible if it duplicates a base offense level determination. The amount has already been taken into account by the Commission in setting the range and, under 18 U.S.C. §3553(b) can not be a basis to depart. For instance, in United States v. Fuller, 897 F.2d 1217, 1221-22 (1st Cir. 1990) the district court correctly set the offense level at 26. However, the district court departed upward by two levels because Mr. Fuller "was engaged in distributing large quantities of marijuana." The circuit court reversed the departure, ruling that the quantity of marijuana involved had already been taken into account in determining the base offense level. Fuller, 897 F.2d at 1222. The circuit court also called this impermissible "double counting"-- counting the amount once for base offense level and once more for departure. Fuller, 897 F.2d at 1222.

The 5th Circuit addressed a similar issue in United States v. Barbontin, 907 F.2d 1494, 1498-99 (5th Cir. 1990). There the defendant was convicted of trafficking in cocaine. The district court correctly set the base offense level at 24 based on 273.3 ounces of cocaine. The district court departed upward two levels because, by San Antonio, Texas standards, 273 ounces was a significant amount of drugs being brought into the community. On appeal the 5th Circuit reversed. The circuit court was persuaded that because the Commission had delimited a degree of culpability for trafficking in 273 ounces of cocaine - base offense level 24 - it was not permissible to depart upward based on the fact 273 ounces was an excessive quantity as measured by community standards. Barbontin, 907 F.2d at 1499. The amount of drugs had been taken into account in setting the range, thereby precluding an amount based departure.

A different case is presented where a court wishes to depart upward from the maximum offense level in the drug quantity table. Because the current drug quantity table goes up to level 42, which mandates a range of 360 to life in all criminal history categories, this has not been an issue. However, the drug quantity table in the 1987 guidelines, in effect until November 1, 1989, had a maximum of offense level 36. Thus the issue was addressed by two circuit courts.[1]

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[1] It is not surprising that only a few cases reached the circuit courts given that the 1988 and 1989 annual reports, based on a 25 percent random sample of all cases sentenced, identify only 15 upward departures based on drug quantity.

In United States v. Martinez, 946 F.2nd 100 (9th Cir. 1991) the defendant was convicted of conspiracy to distribute and possession with intent to distribute cocaine, approximately 530 kg. The 1987 guidelines applied. This was in excess of 10 times the amount specified at level 36 (50 kg). The district court departed upward and the 9th Circuit reversed. 946 F.2d at 101-102. The circuit court reviewed 18 U.S.C. §3553(b) which provides that departures are allowed only when there exists a factor not adequately taken into consideration by the Commission in setting the guideline range. The 9th Circuit then observed that the drug quantity table provided for base offense level 36 for "50 kg Cocaine or equivalent...(or more of any of the above)". Martinez, 956 F.2d at 102. The circuit court reasoned that the "or more" language indicated the Commission did in fact consider quantities beyond the maximums for level 36 and "concluded that the level was to be the same regardless of how much more than fifty kilograms of cocaine was involved." 946 F.2d at 102. Because amounts in excess of those listed at level 36 had been taken into account, the circuit court ruled that §3553(b) precluded a departure. Id.

A subsequent unpublished 9th Circuit case affirmed this analysis, United States v. Ponce, 1993 WL 94703 (9th Cir. 1993). In Ponce, the defendant was convicted of conspiracy to possess and possession with intent to distribute 21 tons (19,000 kilograms) of cocaine. The sentencing was held on October 2, 1989. The opinion does not specify, but, presumably either the 1987 or 1988 guidelines applied. The district court departed upward "because of

the extraordinary quantity of drugs involved in this case." Id. The 9th Circuit, relying on Martinez, rejected the upward departure because the "or more" language indicated the Commission, in formulating the offense level, considered amounts of cocaine beyond fifty kilograms. This language, according to the 9th Circuit, "does not invite a distinction based on quantity." Id.

In United States v. Vasquez, 909 F.2d 235 (7th Cir. 1990) the 7th Circuit reached a different result. The defendant was convicted of possession with intent to distribute 112 kg of heroin and 57 kg of cocaine. The 1987 guidelines applied. The district court applied the maximum offense level of 36. The range was calculated at 188-235. The district court departed up to 300 months based on the extraordinary amount of heroin involved, noting this was not a situation "where we're talking about five kilos or ten kilos beyond what the guidelines are." Vasquez, 909 F.2d at 241.

On appeal the 7th Circuit affirmed. It began the analysis by noting the general rule requiring a court to sentence within the range unless there exists an aggravating factor of a kind or to a degree not taken into account by the Commission. Id. The Court then reviewed the departure power specifically addressed by the Commission in Ch.1 Pt.A 4(b), the introductory section of the guidelines:

> 'The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline

describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.'

Vasquez, 909 F.2d at 241 (emphasis in original).

The 7th Circuit applied this language and found the case at bar to be atypical as the actual quantity of heroin involved was more than 11 times the amount listed for the maximum offense level. Id. The circuit court also noted that, "[d]isregarding the heroin, the fifty-seven kilograms of cocaine Vasquez possessed would have placed him at a base offense level of 36." Vasquez, 909 F.2d at 241.[2]

The circuit court also rejected the argument that the Commission had "recognized the diminishing utility of quantity as a distinguishing factor" in setting the maximum offense level at 36. The circuit court first noted the 1989 amendment extending the drug quantity table out to level 42, thereby indicating the Commission's view that drug quantity was a valid distinguishing factor. Vasquez, 909 F.2d at 241-42. Next, the circuit court drew attention to the "heartland" and "atypical" language as indications of the Commissions support for upward departures based on excessive drug amounts. Vasquez, 909 F.2d at 242. Finally, the circuit court rejected Vasquez's argument that because the fraud guideline

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[2] In analyzing the departure issue, neither the district or circuit courts stated the total combined amount of drugs involved based on 2D1.1 n.6 and the conversion table. By my calculations, the 57 kilograms of cocaine would convert to 11.4 kilograms of heroin for a combined total of 123.4 kilograms of heroin.

(2F1.1) application notes explicitly allowed an upward departure based on the amount of money stolen and the drug trafficking guideline application notes did not similarly invite quantity based upward departures, the Commission must have considered and rejected such departures. Instead, the circuit court noted that the Commission, in 5K2.0, made clear that its failure to include a factor in one guideline section, while including it in another guideline section, does not mean that factor may not be a basis for a departure for the former guideline section. Vasquez, 909 F.2d at 242.

For all of these reasons, the circuit court rejected the notion that "drug quantity may not serve as the basis for departure from the applicable guideline range when the particular guideline does not adequately consider an atypical amount of drugs." Id.

B. Other Relevant Cases

The 1987 version of the continuing criminal enterprise guideline, 2D1.5, provided for a flat offense level of 36 regardless of the quantity of drugs sold or the size of the organization. However, application note 2 invited an upward departure if "the quantity of drugs substantially exceeds that required for level 36 in the drug quantity table, or if the number of persons managed by the defendant is extremely large..."

The 2nd Circuit affirmed such a departure in United States v. Rodriguez, 968 F.2d 130 (2nd Cir. 1992). The defendant was convicted of conducting a continuing criminal enterprise. The 1987 guidelines applied. The district court departed upward by six

levels on the basis the crack cocaine involved was more than 100 times in excess of the amount listed at offense level 36 in the drug quantity table. The 2nd Circuit affirmed, noting the commentary invited an upward departure. Rodriguez, 958 F.2d at 140. As to the amount of departure, the district court looked to the amended drug quantity table as "[t]he best guide for the degree of departure." That table provided base offense level 42 for 15 kg of crack cocaine. The 2nd Circuit agreed with this approach. Id. A similar result was reached in an unpublished decision from the 9th Circuit applying the guidelines to a continuing criminal enterprise conviction, United States v. Daniels, 1991 WL 268903 (9th Cir. 1991).

The 1987-1989 versions of the telephone count guideline (use of communication facility in committing drug offense), 2D1.6, did not link the offense level with quantity. Instead, the guidelines provided for a flat base offense level of 12. There are a number of cases allowing upward departures in phone count cases based on excessive quantities involved. E.g. United States v. Bennett, 900 F.2d 204, 205-06 (9th Cir. 1990.).

In Bennett, the defendant was charged with possession with intent to distribute cocaine and with using a telephone to facilitate distribution of cocaine. He pleaded guilty to the telephone count and the trafficking count was dismissed. Under the old guidelines his base offense level was 11 and the range was 8-14 months. The district court departed upward to 24 months because Mr. Bennett "had committed the offense while trying to purchase 3

kilograms of cocaine." Bennett, 900 F.2d at 205. On appeal Bennett argued that the Commission considered and rejected the amount of drugs as a distinguishing factor in phone count cases because it failed to link offense level with quantity in the controlling guideline, 2D1.6, while adopting that approach in the trafficking guideline, 2D1.1. The circuit court disagreed:

> One of [the] policy statements cautions that the Commission's failure to include a sentencing factor in the guideline for one offense, while including it in the guidelines for others, does not indicate that that factor may not be a ground for departure from the former. See U.S.S.G. § 5K2.0.

Bennett, 900 F.2d at 206. The 9th Circuit affirmed the departure and agreed that 3 kilograms was an exceptional amount, "substantially larger than what the Commission is likely to have had in mind when setting the score for Bennett's offense." Bennett, 900 F.2d at 206. Accord United States v. Citro, 938 F.2d 1431 (1st Cir. 1991); United States v. Feekes, 929 F.2d 334 (7th Cir. 1991); United States v. Asseff, 917 F.2d 502 (11th Cir. 1990); United States v. Correa-Vargas, 860 F.2d 35 (2nd Cir. 1988).

In simple possession cases, the controlling guideline, 2D2.1, does not link the base offense level with the drug amount possessed. Upward departures based on excessive amounts have been upheld. In United States v. Ryan, 866 F.2d 604 (3rd Cir. 1989), Mr. Ryan was acquitted of possession with intent to deliver crack but convicted of simple possession. The amount involved was 10.32 grams. The district court departed upward from the 0-6 month range, based in part on amount. The 3rd Circuit affirmed. It reasoned such departures are allowable where the atypical case,

outside the heartland, is presented. The circuit court also rejected Ryan's argument that "the Commission's express references to quantity and purity of drugs in the context of other drug-related offenses indicates an intent to exclude those factors from consideration in sentencing for simple possession..." Ryan, 886 F.2d at 607. The circuit court noted the Commission's view that a factor listed under one guideline may be relevant to sentencing under another guideline which doesn't reference the factor, and, failure to specifically reject a factor was done to permit departure based on that factor, not foreclose it. Ryan, 866 F.2d at 607-08. Accord United States v. Crawford, 883 F.2d 963 (11th Cir. 1989).

C. Recommendation for Commentary Language

Of the alternatives you proposed, I advise the Commission to include commentary specifically providing that an upward departure based on quantity **alone** is not appropriate. Limiting the language to quantity alone leaves courts free to make upward adjustments or departures for other reasons. Absent that language, the caselaw suggests some courts would depart upward based solely on drug amount and other courts would not. This result completely undermines the congressionally mandated fundamental purpose of the guidelines: to impose national uniformity in sentencing. If courts are allowed to depart based solely on amount we will see similarly situated defendants--defendants who are equally culpable--treated very differently depending upon a myriad of factors which will vary from case to case, from region to region, from judge to judge, etc.

If the Commission wishes to allow but not encourage departures based on excessive amounts, I suggest the commentary either remain silent altogether or include the most restrictive proposal, the "at least 10 times the minimum quantity" language. As to remaining silent, the statistics from the 1988 and 1989 annual reports suggest there were not many upward departures based on drug quantity. Thus, it appears there was not a problem with departures, from a uniformity and disparate treatment standpoint, when the maximum offense level was 36. The same may very well prove to be true when the maximum offense level is 38. Until we know there is a problem, the Commission should sit back and see what happens. Courts have now had several years of experience working with the guidelines and the basic philosophy of uniformity. Thus, it would be reasonable to rely upon our judges to determine when such extraordinary amounts of drugs warrant a departure, and do so in a fairly uniform way. If that does not prove true, the Commission can address any uniformity problems that arise in the caselaw by amending the commentary at that point.

Turning next to the alternative of including "at least 10 times the minimum quantity required for offense level 38..." This language provides an objective standard which will guide the departure discretion to the greatest degree possible. See U.S.S.G. Ch.1 Pt.A 4(b). The drug amounts at level 42 are 10 times that of level 38. This proposed language would therefore facilitate upward departures from level 38 to level 42, but not to level 40 as the drug amounts there are only 3 times the amounts for level 38. This

language would provide for more national uniformity as the standard is objective and very clear. Moreover, the pool of potential departure cases would also be smaller if limited by this language.

If the Commission wishes to both invite and encourage departures for amounts in excess of those listed at level 38, it should include the "substantially in excess of the minimum quantity" language. This is the least restrictive language proposed and would clearly signal the propriety of an upward departure. However, this language allows for the most unguided discretion which will likely result in disparate treatment. Some courts will find the drug amount at current level 40, which is 3 times that of level 38, to be "substantially in excess" and will depart upwards and some courts will interpret that language more narrowly and will not depart under those circumstances. Certainly level 42 amounts would qualify.

In summary adding language in the commentary which invites departure creates the exception which swallows the rule. This approach will facilitate disparate treatment across the country -- judges who disagree with the amendment reducing the maximum base offense level will use the discretion to depart upwards and judges who agree with the amendment will not. If this Commission agrees that the ranges at level 38, combined with the particular criminal history category, are sufficient punishment based on amount alone, not taking into account other factors such as leader/organizer, obstruction, etc, the Commission should then specifically instruct courts to not depart based on amount alone. If there is not

agreement, either remaining silent or adopting the most restrictive language is advisable. Our past experience with amount based departures suggests silence may be prudent until such time it is clear there is a problem with disparate treatment which must be corrected. The most restrictive language, "at least 10 times the minimum quantity," is meritorious as it provides an objective standard, thereby guiding the courts' discretion and furthering national uniformity.

STATE OF TEXAS)
) SS
COUNTY OF Dallas)

I, Julie D. Davis, make this voluntary statement to Robert Vincent who has identified himself as a Postal Inspector.

On November 7 or 9 of 1993 someone broke into our locked mail box and stole a box of checks. For the next seven days the person wrote 29 forged checks on our account. We didn't discover the problem until we got home from vacation to find a stack of returned check notices. Calling the police and DA's office did nothing... they refused to take a statement because we hadn't been harmed. After closing the account and opening a new one, my husband and I have spent the last 3 months dealing with check collection companies, the bank, the Dallas County Sheriff's office and the postal inspector. Besides the monetary loss and expense of each forged check, my husband and I have spent over 100 hours trying to rectify all the problems it's caused. The most infuriating thing of all

STATE OF TEXAS)
) SS
COUNTY OF _____)

I, _____, make this voluntary statement to _____ who has identified himself as a Postal Inspector.

all is the Class C Misdemeanor now on my husbands record because one of the checks was turned over to the police. In all of this, the only person to help us try to catch the person [redacted] has been David McDermot at the Postal Inspector's office. The only reason we're even close to catching him is because David has pursued the case and put me in touch with another victim.

Julie Davies Davis

Sworn to and Subscribed to me this 27th day of January, 1994 at Dallas, TX.

R. E. Sims
Postal Inspector

STATE of TEXAS)
)SS
COUNTY of Dallas)

I, Julie D. Davis, make this voluntary statement to Robert Vincent who has identified himself as a Postal Inspector.

On November 8 or 9 of 1993 someone broke into our locked mail box and stole a box of checks. For the next seven days the person wrote 29 forged checks on our account. We didn't discover the problem until we got home from vacation to find a stack of returned check notices. Calling the police and DA's office did nothing ... they refused to take a statement because we hadn't been harmed. After closing the account and opening a new one, my husband and I have spent the last 2 months dealing with check collection companies, the bank, the Dallas County Sheriff's office and the postal inspector. Besides the monetary loss and expense of each forged check, my husband and I have spend over 100 hours trying to rectify all the problem it's caused. The most infuriating thing of all is the Class C Misdemeanor now on my husbands record because one of the checks was turned over to the police. In all of this, the only person to help us try to catch the person has been David McDermot at the Postal Inspector's office. The only reason we're even close to catching him is because David has pursued the case and put me in touch with another victim.

Julie Davus Davis

Sworn to and subscribed to me this 27th day of January, 1994 at Dallas, TX.

R. E. Vincent
Postal Inspector

John, 7/15

This is the district-based distribution cases that might qualify for retroactivity consideration (re: Amendment #505). -S.K.

United States District Court

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

ORIGINAL

UNITED STATES OF AMERICA

v.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

Case Number: 4:93-CR-075-Y (1)

LELAND STEWART ANDERSON

Bill Lane, Defendant's Attorney

THE DEFENDANT pleaded guilty to count 3 of the Indictment. Accordingly, the defendant is adjudged guilty of such count, which involves the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC §1708	Unlawful Possession of Stolen Mail, Class D Felony	03-13-93	3

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Counts 1 and 2 are dismissed on the motion of the United States.

It is ordered that the defendant shall pay a special assessment of $50.00, for count 3 of the Indictment, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within thirty (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.

Defendant's Soc. Sec. No.: [redacted]
Defendant's Date of Birth: [redacted]

Defendant's Mailing Address:

[redacted]

January 24, 1994
Date of Imposition of Sentence

TR Means
TERRY R. MEANS
U.S. DISTRICT JUDGE

Defendant's Residence Address:

same
same

February 1, 1994
DATE

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
FEB - 2 1994
NANCY DOHERTY, CLERK
By _____ Deputy

[160]

Defendant: LELAND STEWART ANDERSON
Case Number: 4:93-CR-075-Y (1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 24 months on count 3 of the Indictment and ordered to pay a restitution in the amount of $15,996.71.

The Court makes the following recommendations to the Bureau of Prisons: the defendant be incarcerated at a facility located in the Los Angeles County, California area or a facility close to his home.

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

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

BY _____
Deputy Marshal

Defendant: LELAND STEWART ANDERSON
Case Number: 4:93-CR-075-Y (1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years on count 1 of the Indictment.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this Court (set forth below). This judgment imposes a restitution obligation and, it shall be a condition of supervised release that the defendant pay such restitution as set out below in the terms of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.

The defendant shall not possess a firearm or destructive device.

The defendant shall participate in a mental health treatment program as approved and directed by the probation officer.

The defendant shall pay any remaining balance of the restitution in the total amount of $15,996.71, payable to U.S. District Clerk at the rate of at least $450.00 per month, beginning 60 days after the defendant's release from confinement.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. The defendant shall not leave the judicial district without the permission of the Court or probation officer;
2. The defendant shall report to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five (5) days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer within seventy-two (72) hours of any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.