Public Comment

Proposed Amendments

1995
VOLUME I

Updated 5/12/95

INDEX TO PUBLIC COMMENT

16	**FIREARMS (§2K2.1)**	
	(Citizens for the Rehabilitation of Errants)	45
	(Charles Thomson, Associate Director of Enforcement, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms)	117, 118
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	141
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	200
17	**FIREARMS (§2K2.1)**	
	(Citizens for the Rehabilitation of Errants)	45
	(Charles Thomson, Associate Director of Enforcement, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms)	119
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	142
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	200
	(Senator Margaret Tate, Retired, Mississippi State Senate, and constituents)	252
18	**FIREARMS (§2K2.4)**	
	(Citizens for the Rehabilitation of Errants)	45
	(Charles Thomson, Associate Director of Enforcement, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms)	120
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	143
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	200
19	**FIREARMS (§2K2.1)**	
	(Citizens for the Rehabilitation of Errants)	45
	(Charles Thomson, Associate Director of Enforcement, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms)	114
	(Fred Warren Bennett, Chairman, Practitioners' Advisory Group)	144
	(Carla G. Coopwood, Senior United States Probation Officer, Eastern District of Virginia)	200

001-95

FCDA FAMILY COUNCIL ON DRUG AWARENESS

PO Box 1005, Novato CA 94948 510-215-8326 • 213-969-1607

From: Mikki Norris

Date: January 20, 1995

To: United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Marijuana Plant Weight Amendment

Dear Ms./Sir:

It has been brought to our attention that in March of this year you will have an opportunity to make a change that will benefit the lives of thousands of American families with an adjustment of your sentencing standards. By simply changing the supposed weight of a mature, healthy marijuana plant from 1000 grams to 100 grams per plant, you will not only provide a more realistic assessment of the situation, but will enable families to be reunited sooner with the earlier release of their imprisoned loved ones. Thus, we encourage you to make this change and make it retroactive.

Our organization, the Family Council on Drug Awareness, is a research group that has compiled vast amounts of information and studies regarding the marijuana plant. We would be happy to provide you with assistance in developing your policies regarding marijuana offences. In our research, we have found marijuana to be safer than most drugs including alcohol and tobacco, and we believe that the laws regarding marijuana should be based on this fact rather than on the fiction of "reefer madness." As former President Jimmy Carter stated in his message to Congress, "Penalties against possession of a drug should not be more damaging to an individual than the use of the drug itself."

Although we recommend that marijuana be re-legalized, regulated and taxed for use by responsible adults with age limits and penalties for sales to minors, we feel that you can take an important first step toward a more sane policy by changing the weight of a marijuana plant down to 100 grams and reduce sentences accordingly. Taking it a step further, you should also consider that people do not smoke male flowers of the marijuana plant, and since an estimated fifty per cent of seedlings grow to be males, more weight should be dropped from the scales.

We hope that in light of the above, you will do the right thing and adjust the weight standards downward. This simple act will bring America closer to rectifying a situation that should not be happening in a free and just society.

Thank you for your consideration in this matter. Please contact us for any information that will be of assistance to the commission.

Sincerely,

Mikki Norris

Mikki Norris

002-95

BUSINESS ALLIANCE FOR COMMERCE IN HEMP

PO Box 71093, Los Angeles Cal. 90071-0093 USA

Director s voice mail: 213-969-1607 Hemp Hotline: 310-288-4152

From: Chris Conrad, Global Operations Director

Phone/fax: 510-215-8326

To: United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Marijuana Plant Weight Amendment

Date: January 20, 1995

Dear Commissioners,

I will not mince words; the Draconian penalties against marijuana are an egregious injustice and an affront to God, nature and humanity. Remember that Speaker Newt Gingrich, Supreme Court Justice Clarence Thomas and President Bill Clinton all smoked marijuana.

This March you have an opportunity to do something right for America by throwing out the sentencing guidelines altogether, or at least reducing the weight calculations for cannabis plants. Our organization wishes to testify at the next hearings on sentencing guidelines.

The current guideline that assumes a cannabis plant produces a kilogram of marijuana is an utter fraud that inflicts cruel injustice upon decent American citizens. Having studied legal growing operations in Holland, we know that a typical female plant only yields from 28 to 100 grams, and that half of all plants grown from seed are males which have no market value whatsoever. Since juries are told to judge the defendant based on fact, the actual weight of the flowering female product is the only honest way to gauge the amount of marijuana produced in any given garden. If any other standard should apply, it would be to discount half the plants as being male, and calculate the remainder at between 28 and 100 grams of product. Even this is an "optimistic" figure, but at least closer to actual fact.

BACH is firmly committed to the concept that capitalism is a good thing and that free enterprise is the best solution to the problems that plague society. The war on marijuana is a colossal failure that adds over $8 billion per year to our national debt. By relegalizing adult consumption of marijuana and regulating it like alcohol, we can add over $10 billion back to our economy. Such a policy could be designed to conform with international law, as I would be more than happy to explain. Please set aside a time for me at your hearing.

This is your opportunity to do something good for everyone. We hope that you will show the integrity and good sense to reduce or eliminate the sentencing guidelines.

Thank you once again.

Sincerely,

Chris Conrad

[2]

003-95

Sidney L. Moore, Jr., Attorney at Law

Trinity-Peachtree Building – 175 Trinity Avenue, S.W. – Atlanta, Georgia 30303

Sidney L. (Sid) Moore, Jr.
Attorney at Law

(404) 522-2588
Fax (404) 525-2373

January 17, 1995

Mr. Michael Courlander
Public Information Specialist
1 Columbus Circle NE
Suite 2-500
Washington, D.C. 20002

Re: Revision of Sentencing Guidelines

Dear Mr. Courlander:

I understand that you are the person through whom one might suggest revisions of the sentencing guidelines, or that you might be able to direct me to the proper person.

I have recently had an opportunity to review the guidelines in connection with a case I was handling in the United States District Court for the Northern District of Georgia. The name of the client is irrelevant for the purpose of this letter, as this comment is for general application.

In my case (see Exhibit D-1) quantities of methamphetamine (55% concentration) and cocaine (88% concentration) were seized by the DEA and went into the calculation of the Offense Level for the client. Based on the guidelines, the total "marijuana equivalent" of the substances seized from the Defendant was 139.69 kilograms, which with certain subtractions and additions (see exhibit) yielded an offense level of 25. This provided a sentencing range of 57 to 71 months, and the client in fact received a 60 month sentence.

Out of pure curiosity, I redid the calculation using 100% pure cocaine in the same quantities that were seized, and I was amazed to find that the calculation (see Exhibit D-2) yielded a marijuana equivalency of only 45.53 grams, with a resulting offense level (with the same additions and subtractions) of only 19. This offense level produced a guideline range of 30 to 37 months incarceration.

In other words, under the guidelines the sentence for a quantity of 55% methamphetamine is <u>double</u> that for 100% cocaine in the same quantity. This simply doesn't make sense. Cocaine, according to my clients and others I have discussed it with, is far more dangerous to take, and its distribution presents more violences and other societal risks than are involved in the distribution of methamphetamine. Additionally, cocaine trafficking far more often involves international smuggling, official corruption, and even violence against the judicial system itself.

This apparent anomaly should be corrected. I have no idea what the origin was, but it has been suggested to me that perhaps methamphetamine cases are rare in the federal system compared to cases involving cocaine and marijuana, and thus the sentencing results studied were not of sufficient number to be a valid sample. Or, perhaps the majority of the smaller methamphetamine cases are in State Court and this skews the sample. In any event, the resultant comparison between the sentence guideline ranges of 55% (or even 1%) methamphetamine and 100% pure cocaine is not justified by any known facts.

Please let me know your response to this problem. Surely it might be remedied by increasing the recommendation on cocaine, as by decreasing the recommendation on methamphetamine, but I would imagine that the cocaine cases, being far greater numbers, would be the firmer and truer reflection of actual court activity than the methamphetamine cases, and the correct way to solve the problem would be to adjust the methamphetamine guidelines downward.

If, on the other hand, you believe that 1% methamphetamine should be considered five times as bad at 100% cocaine of equal weight, I would appreciate knowing why.

Thank you for your attention to these comments, and I look forward to your reply.

Sincerely,

Sidney L. Moore Jr.

EXHIBIT D-1

CALCULATION OF OFFENSE LEVEL

			Marijuana Equivalent
Exhibit A	Methamphetamine (sold)	27.7 grams	27.7 kilograms
Exhibit B	Methamphetamine (sold)	83.6 grams	83.6 kilograms
Exhibit C	Methamphetamine (possessed)	3.8 grams	3.8 kilograms
Exhibit C	Methamphetamine (possessed)	2.6 grams	2.6 kilograms
Exhibit C	Cocaine (Possessed)	109.9 grams	21.98 kilograms
Exhibit D	Marijuana (possessed)	6.5 grams	.01 kilograms
		TOTAL	139.69 kilograms

139.69 kilograms of marijuana	=	LEVEL 26
ACCEPTANCE		-3
FIREARM		+2
TOTAL		LEVEL 25

LEVEL 25 = 57 to 71 months

EXHIBIT D-2

CALCULATION TREATING ALL METHAMPHETAMINE AND COCAINE AS IF IT WERE PURE COCAINE

			MARIJUANA EQUIVALENT
EXHIBIT A	Cocaine (100%)	27.7 grams	5.54 kilograms
EXHIBIT B	Cocaine (100%)	83.6 grams	16.72 kilograms
EXHIBIT C	Cocaine (100%)	3.8 grams	.76 kilograms
EXHIBIT C	COCAINE (100%)	2.6 grams	.52 kilograms
EXHIBIT C	COCAINE (100%)	109.9 grams	21.98 kilograms
EXHIBIT D	MARIJUANA	6.5 grams	.01 kilograms
		TOTAL	45.53 kilograms

45.53 kilograms of marijuana = LEVEL 20

ACCEPTANCE	- 3
FIREARM	+ 2
TOTAL	LEVEL 19

LEVEL 19 = 30 to 37 months

004-95

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
PROBATION OFFICE

JIM MCKINLEY
CHIEF PROBATION OFFICER

ROOM 234
FEDERAL BUILDING
167 N. MID-AMERICA MALL
MEMPHIS, TN 38103
901-544-3256

January 31, 1995

U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-5000, South Lobby
Washington, DC 20002-8002

ATTENTION: Public Information Office

Re: Proposed Amendments

Dear Commissioners:

I am writing in regard to proposed Amendment 5 of Chapter 5, Part D (supervised release).

I support the Judicial Conference's position for the abolition of supervised release. I find no evidence to support the belief that tacking on a period of supervised release to a term of imprisonment has any positive effect on the crime rate or, for that matter, the rehabilitation of the supervised releasee. Furthermore, the number of supervised release violations has increased so dramatically that the district courts will soon be spending as much time holding violation hearings as they are now holding sentencing hearings.

I find it unusual that the Congress abolished the federal parole system, only to re-establish it as "supervised release" within the federal judiciary.

In short, I believe that the maintenance of supervised release has absolutely no effect on the incidence of criminal behavior by those people on supervised release nor does it impact positively on their rehabilitation. Supervised release violations are devouring the precious time of the federal courts, particularly technical violations such as use of narcotics or failure to report for supervision. I would encourage the

[11]

Sentencing Commission to give the district judges the authority to decide whether any term of supervised release should be imposed.

Cordially,

Harry J. Jaffe, Deputy Chief
U.S. Probation Officer

HJJ/dlc

005-95

UNITED STATES DISTRICT COURT
Western District of Tennessee
SUITE 1107
FEDERAL BUILDING
MEMPHIS, TENNESSEE 38103

Jerome Turner
Judge

February 8, 1995

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-5000
South Lobby
Washington, D.C. 20002-8002

Attn: Public Information

Gentlemen:

I understand that the commission has invited comment on whether the supervised release guidelines should be amended. It has been my experience that an ever-increasing amount of judicial resources are being devoted to supervised release violations. The violation hearings are expanding rapidly both in time and number. The court has become somewhat of an unglorified parole board for a period of three to five years after incarceration. I do not believe in this time of increasing civil and criminal federal laws that the federal courts have the capacity to handle the required hearings (mini-trials) on supervised release violations.

Given that parole is no longer utilized in the federal system, I am somewhat doubtful that supervised release is necessary in any but those cases where the actual sentence of incarceration is short or has been reduced below the applicable guideline range by virtue of departure. Moreover, where a defendant on supervised release has been charged with felony violations of state law, I see no need for the federal courts to interpose themselves with a supervised release hearing long before the criminal trial will have been disposed of in state court. In those instances where state indictments are pending, mandatory supervised release hearings should not be required.

Sincerely yours,

Jerome Turner

JT:jmf

[13]

006-95

UNITED STATES DISTRICT COURT
PROBATION OFFICE
DISTRICT OF WYOMING

DANIEL J. FISHER
CHIEF U.S. PROBATION OFFICER
2120 CAPITOL AVE., ROOM 2141
P.O. BOX 847
CHEYENNE, WYOMING 82003
TELEPHONE #(307) 772-2318

111 SOUTH WOLCOTT, ROOM 138
CASPER, WYOMING 82601
TELEPHONE #(307) 261-5751

177 NORTH THIRD ST. 1ST FLOOR
P.O. BOX 369
LANDER, WY 82520
TELEPHONE #(307) 332-4891

REPLY TO: CHEYENNE

February 8, 1995

U.S. Sentencing Commission
One Columbus Circle, NE Suite 2-500
Washington, D.C. 20002-8002
Attn: Public Comment

RE: Proposed 1995 Guideline Amendments

Dear U.S. Sentencing Commission:

The U.S. Probation Office in the District of Wyoming would like to comment upon some of the proposed 1995 Guideline Amendments. You will receive feedback from our District regarding the proposed drug guideline amendments via our survey which was sent to Caryl A. Ricca, our 10th Circuit representative on the Probation Officers Advisory Group.

Regarding other proposed amendments, our District heartily approves amendment 44 dealing with money laundering. We would like to see this amendment made retroactive if possible, due to the sizable number of persons sentenced by this District in recent years for money laundering that were not involved in drug activity. The underlying offenses are almost always Wire Fraud or Mail Fraud, and the sentences that have resulted overrepresent actual offense conduct in many cases. We agree the proposed money laundering table should be used instead of the table in 2F1.1 if the case does not involve an underlying fraud.

Regarding paragraph 45, the only time the mandatory imposition of a term of supervised release becomes a problem is in dealing with deportable aliens. Few Districts are going to extradite an offender for illegal re-entry if the offender is arrested in another District. Otherwise, mandatory supervised release periods are beneficial to offenders and to the public. In rare cases, the Court can always depart and not impose TSR if for some reason TSR is not advisable.

Also, our District agrees with the proposed amendments to 5G1.3 listed in paragraph 46...

Thank you for allowing the opportunity to comment on these proposed guideline amendments.

Sincerely,

John D. Olive
Senior U.S. Probation Officer

jdo

[14]

007-95

Post-Conviction, Appellate & Sentencing Consultants

Miller, Shein and Associates

Reply to Post Office Box 677954, Orlando, Florida 32867-7954

Cloud H. Miller, III, * Ph.D., J.D., Criminologist
Post-Conviction, Sentencing & Appellate Consultant

Marcia G. Shein, M.S., J.D. Therapist
Sentencing, Appellate & Post Conviction Consultant

Joan Jackson
Administrator

Monica Tacon*
Paralegal

*Admitted to Georgia Bar Only

National Paging 1-800-759-8888 Enter 567-2988
National Watts 1-800-992-0832
Atlanta Office (404) 874-9553
Miami Office (305) 756-0403
Orlando Office (407) 366-2545
Habla Espanol (407) 366-2545
Fax (407) 359-7445

February 8, 1995

United States Sentencing Commission
One Columbus Circle N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8001

Dear Ms. Newton,

RE: Public Comment

I have reviewed the proposed guideline amendments, published January, 1995, CFR Vol.60 No.5, Part Two and share the following observations with you.

Amendments 39 - 43 are a significant contribution to the original goals of the Sentencing Reform Act of 1984, effective November, 1987. The various options/alternatives proposed bring thoughtful consideration for the development of a system of "criminal cohort justice". The amendments provide significant guidance for the application of fair and equitable judicial decision-making and thoughtfully "levels the playing field" with respect to relevant conduct from a defense and defendant's perspective. Of course, the actual application of these proposed amendments if adopted, may result in something other than that anticipated or desired, but they certainly are a vast improvement over the existing policies, procedures and guidelines.

With respect to Amendment 38, which addresses "powder" cocaine hydrochloride versus "crack" cocaine base ratio issue, I would strongly encourage your conscious consideration of equalizing the penalty provisions in terms of guideline accountability, particularly since significant research data suggest that the guideline differential between "crack" and cocaine hydrochloride

significantly over represents the prosecution and draconian sentences for racial minorities.

With respect to your amendments regarding the development of a policy to assess guideline accountability proportionate to the percentage of drug purity, please note the attached constructive criticism articulated by the Eleventh Circuit Court of Appeals (Atlanta) in **United States v. Carroll**, et.al 6 F.3d 735 (11th Cir. 1993).

Thank you in advance for your consideration in this matter.

Very truly yours,

Cloud H. Miller, III

.tation Database Mode
F.3d 735 FOUND DOCUMENT CTA Page
:ITE AS: 6 F.3D 735)

UNITED STATES of America, Plaintiff-Appellant,
v.
Larry Joe CARROLL, Defendant-Appellee;
UNITED STATES of America, Plaintiff-Appellant, Cross-Appellee,
v.
Thomas SPIKER, Dorlis Spiker, Larry Joe Carroll, Michael Spiker, Defendants-Appellees, Cross-Appellants,
Larry Jessee, Defendant-Appellant.
Nos. 91-3079, 91-3188.
United States Court of Appeals,
Eleventh Circuit.
Nov. 9, 1993.

Defendants were convicted in the United States District Court for the Middle District of Florida, No. 90-00158-Cr-T-15, James L. Watson, J., sitting by designation, of conspiracy to manufacture and possess with intent to distribute methamphetamine. On government's appeal of sentencing issues, the Court of Appeals, Carnes, Circuit Judge, held that: (1) defendants were not entitled to offense-level reduction for acceptance of responsibility; (2) drug quantity involved was properly calculated; and (3) "pure methamphetamine," as used in drug quantity table of Sentencing Guidelines for establishing offense levels for drug trafficking offenses, does not refer only to particular form of methamphetamine, but rather to relative purity of any methamphetamine compound.

Convictions affirmed; sentences reversed and remanded.

Bright, Senior Circuit Judge, sitting by designation, concurred in part, dissented in part and filed opinion.

[1] CRIMINAL LAW k1158(1)
110k1158(1)
District court's reduction of sentencing offense levels for acceptance of responsibility is reviewed for clear error. U.S.S.G. s 3E1.1(a), 18 U.S.C.A.App.

[2] CRIMINAL LAW k1252
110k1252
Finding that drug defendants had accepted responsibility for their crimes, and thus were entitled to offense level reductions, was clearly erroneous; defendants never admitted guilt or expressed any remorse for their offenses, and refusal to grant sentence reduction would not have penalized defendants for exercising their rights not to testify. U.S.C.A. Const.Amend. 5; U.S.S.G. s 3E1.1(a), 18 U.S.C.A.App.

[3] CRIMINAL LAW k1252
110k1252
Offense level reduction for acceptance of responsibility applies only to those defendants who affirmatively acknowledge their crime and express genuine remorse for harm caused by their actions; mere failure to disrupt court proceedings is insufficient. U.S.S.G. s 3E1.1(a), 18 U.S.C.A.App.

[4] CRIMINAL LAW k1252

110k1252
Sentencing Guidelines provision allowing two-level reduction for acceptance of responsibility does not allow for one-level reduction based on defendant's partial acceptance of responsibility. U.S.S.G. s 3E1.1(a), 18 U.S.C.A.App.

[5] CRIMINAL LAW k1252
110k1252
Defendant's confession that she had been in possession of methamphetamine and that she had drug use problem was insufficient to warrant offense-level reduction for acceptance of responsibility, in prosecution for conspiring to manufacture and possess with intent to distribute 100 grams or more of methamphetamine and possession with intent to distribute ten grams or more methamphetamine; despite defendant's acknowledgement of lesser included offense of mere possession, she did not accept responsibility for more serious crimes of which she was charged and convicted. U.S.S.G. s 3E1.1(a), 18 U.S.C.A.App.

[6] CRIMINAL LAW k1252
110k1252
Defendant who elects to go to trial does not, thereby, necessarily forfeit entitlement to offense-level reduction for acceptance of responsibility. U.S.S.G. s 3E1.1(a), 18 U.S.C.A.App.

[7] CRIMINAL LAW k1158(1)
110k1158(1)
Trial court's determination of quantity of drugs involved, used to establish base offense level for sentencing purposes, is reviewed under clearly erroneous standard.

[8] CONSPIRACY k51
91k51
Where only small amount of methamphetamine was actually seized, court could properly consider evidence offered at sentencing to establish amount of methamphetamine that could have been produced by defendants' conspiracy. U.S.S.G. s 2D1.4, comment. (n.2) (1992).

[9] CRIMINAL LAW k1139
110k1139
District court's reading of Sentencing Guidelines is subject to de novo review on appeal. U.S.S.G. s 1B1.1 et seq., 18 U.S.C.A.App.

[10] DRUGS AND NARCOTICS k133
138k133
"Pure methamphetamine," as used in drug quantity table of Sentencing Guidelines for establishing offense levels for drug trafficking offenses, does not refer only to particular form of methamphetamine, but rather to relative purity of any methamphetamine compound. U.S.S.G. s 2D1.1(c), 18 U.S.C.A.App.
See publication Words and Phrases for other judicial constructions and definitions.

*737 John H. Bothwell, III, Tampa, FL, for Dorlis Spiker.

Jack T. Edmund, Ft. Meade, FL, for Thomas Spiker.
Nestor Castillo, Jr., Tampa, FL, for Larry Joe Carroll.
Philip E. Kuhn, Lakeland, FL, for Michael Spiker.
Shawn A. Burklin, Clearwater, FL, for Larry Jesse.
Tamra Phipps, Edmund W. Searby, James C. Preston, Asst. U.S. Attys., Tampa, FL, for U.S.
Appeals from the United States District Court for the Middle District of Florida.

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and BRIGHT [FN*], Senior Circuit Judge.

FN* Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

CARNES, Circuit Judge:
This case involves convictions arising out of a conspiracy to manufacture and possess with intent to distribute methamphetamine. A jury convicted the defendants on various counts of a multicount indictment. The Government has appealed from the district court's entry of a judgment of acquittal on the conspiracy conviction of one defendant and the court's imposition of sentence for all the defendants, and the defendants have cross-appealed their convictions and sentences. [FN1] Of the many issues raised in the appeal and cross-appeals, we find that only three, all sentencing issues, warrant discussion. For reasons we will explain, we reverse the district court's decision to credit Dorlis Spiker, Michael Spiker, and Thomas Spiker with reductions for acceptance of responsibility; we affirm the court's determination of the drug quantity involved in this conspiracy for purposes of sentencing; and we reverse the court's determination that "Pure Methamphetamine" as used in the Sentencing Guidelines refers only to D-methamphetamine. In all other respects, the convictions and sentences are due to be affirmed.

FN1. In addition to the Government's sentencing challenges addressed in our opinion, the Government appeals from the district court's entry of a judgment of acquittal on the conspiracy conviction of Larry Joe Carroll for insufficient evidence. We find this challenge to be without merit. The defendants also raise the following issues that we find to be meritless: sufficiency of the evidence to convict the defendants of knowing participation in the charged conspiracy and of possession with intent to distribute; the sentencing of Thomas Spiker as an organizer or leader; alleged errors in the district court's instructions to the jury; the constitutionality of the sentences imposed under the Sentencing Guidelines; alleged perjury by the Government's expert witness; alleged discovery violations by the Government; the Government's alleged use of perjured testimony; allegedly prejudicial comments by the prosecutor; the district court's reservation of its rulings on motions for judgments of acquittal; the district court's refusal to sever the distribution charge in Count Two; and the district court's allowance of two opening statements by the Government following inadvertently erroneous statements by the

prosecutor.

I. BACKGROUND

In November 1989, representatives of the Eastman Kodak Company ("Kodak") notified the Drug Enforcement Agency ("DEA") that Kodak had received a suspicious order for chemicals from a company called "All American Labs" in Winter Haven, Florida. An investigation revealed that there was no such company at the address listed on the purchase order presented to Kodak; rather, at that location was a store called "Spiker's All American 4x4," which sold automotive parts and accessories. Michael Spiker, Larry Jessee, and Larry Joe Carroll all worked at the store, Spiker as manager.

The DEA began an investigation of "Spiker's All American 4x4," which included surveillance of the store and of three different *738 deliveries of chemicals by Kodak to "All American Labs" at the address of "Spiker's All American 4x4" from November 1989 to May 1990. These orders were placed under a false name, using purchase order forms from "Spiker's All American 4x4" that had been altered to read "All American Labs." The chemicals ordered by the bogus "All American Labs" included phenylacetic acid, acetic anhydride, and sodium acetate, which when properly combined create phenylacetone, or "P-2-P," a Schedule II controlled substance and an immediate precursor to methamphetamine. See 21 C.F.R. s 1308.12(g)(1)(i). The DEA's investigation and surveillance of the defendants included court-ordered electronic tracking devices placed in the drums of chemicals delivered by Kodak, and both still and video photography. At trial, the Government introduced photographic evidence of Michael Spiker, Larry Joe Carroll, and Larry Jessee unloading and loading the chemicals. The altered purchase orders instructed that deliveries were to be made to the attention of "Michael/Larry." The Government introduced evidence to show that these chemicals were not part of the retail business conducted by "Spiker's All American 4x4," were not typical of the deliveries received at the store, and once received were placed in a storage shed at the rear of the store which was not used for store inventory. In addition, the Government's evidence showed that Thomas Spiker, who was not an employee of the store at the time, was allowed to remove the chemicals from the store soon after their delivery. Furthermore, the evidence established that Thomas Spiker and Dorlis Spiker recruited John Booth to be their "cook," or "chemist," and to help them in the manufacture of methamphetamine with the chemicals that had been ordered and delivered. [FN2] Booth helped Thomas Spiker determine which chemicals to order and in what quantities to order them. Booth set up a clandestine laboratory in a trailer in a remote area and, using the chemicals provided by Thomas Spiker, produced approximately 31 grams of DL-methamphetamine.

FN2. Booth was originally indicted as a co-conspirator in this case, but subsequently entered a plea of guilty and agreed to cooperate as a Government witness during the defendants' trial.

On May 24, 1990, Thomas and Dorlis Spiker were followed by DEA agents to Booth's home, where Booth delivered to them approximately 28 grams of the methamphetamine he had produced. Thomas and Dorlis Spiker were arrested upon leaving Booth's home, and the methamphetamine was found in Dorlis's purse.

Booth was arrested in his home later that evening, and a search of his home, pursuant to a warrant, led to the seizure of several drums of chemicals, including one in which the DEA had placed a tracking device prior to its delivery by Kodak. The following day, the DEA searched a mobile home where Thomas Spiker had previously stored the chemicals and recovered business cards printed with "All American Labs" and the "Spiker's All American 4x4" address; copies of purchase order forms sent to Kodak; a laboratory products catalog with Thomas Spiker's handwriting on the front; and a list of chemicals needed for the manufacture of methamphetamine written by John Booth.

The DEA's investigation led to a seven-count indictment charging the defendants and others who are not parties to this appeal with conspiring to manufacture and possess with intent to distribute 100 grams or more of methamphetamine in violation of 21 U.S.C. ss 841(a)(1) and 846, and other crimes. [FN3]

FN3. Count One of the indictment in this case charged each defendant with conspiring to manufacture and to possess with intent to distribute 100 grams or more of methamphetamine; Count Two charged only Larry Joe Carroll with distribution and possession with intent to distribute 10 grams or more of methamphetamine; Count Three charged each defendant with possession with intent to distribute 10 grams or more of methamphetamine; Counts Four and Five charged simple possession of methamphetamine and marijuana by a defendant who is not a party to this appeal; Count Six charged Michael Spiker and Larry Joe Carroll with possession of cocaine; Count Seven charged only Michael Spiker with possession of marijuana.

II. DISCUSSION

Reduction for Acceptance of Responsibility

[1] The Government has appealed the district court's action at sentencing in crediting *739 Thomas Spiker, Michael Spiker, and Dorlis Spiker each with a reduction of their offense levels for acceptance of responsibility under U.S.S.G. s 3E1.1(a). That Guidelines section provides that a defendant who "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct" may receive a two-level decrease in his offense level. U.S.S.G. s 3E1.1(a) (November 1, 1990). [FN4] We review the district court's determination under s 3E1.1(a) for clear error. United States v. Query, 928 F.2d 383, 386 (11th Cir.1991). We have stated numerous times that "[t]he district court is in a unique position to evaluate whether a defendant has accepted responsibility for his acts, and this determination is entitled to great deference on review." United States v. Pritchett, 908 F.2d 816, 824 (11th Cir.1990). Nonetheless, in this case we conclude that the district court's determination that these defendants had clearly demonstrated acceptance of responsibility for their crimes is without foundation and, therefore, must be reversed. See United States v. Marin, 916 F.2d 1536, 1538 (11th Cir.1990) (district court's s 3E1.1 determination not disturbed unless without foundation).

FN4. Section 3E1.1 was amended following sentencing in this case to allow an additional one-level reduction in circumstances that are not relevant here. U.S.S.G. App. C, amend. 459 (November 1, 1992).

1. The Reductions for Thomas and Michael Spiker

[redacted] At sentencing, the district court explained its two-point acceptance of responsibility reductions for both Thomas Spiker and Michael Spiker in the same way, stating:

[A]lthough defendant has exercised his Fifth Amendment rights to not incriminate himself, he has otherwise co-operated fully at all phases of the trial and sentencing process, including meeting all conditions of pre-trial release and voluntarily surrendering to the U.S. Marshal as ordered. Defendant has never denied his participation in this offense other than through his entry of the Not Guilty plea and this Court is of the opinion that to penalize him for failure to waive his Fifth Amendment rights would result in a denial of fundamental constitutional rights.

The Government objected to the reductions for Thomas and Michael Spiker in the district court and argues on appeal that the court's action was "tantamount to rewarding them for not disrupting court proceedings." We agree. The relevant Sentencing Guidelines commentary provides that "[t]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. s 3E1.1, comment. (n. 2). In this case, Thomas and Michael Spiker never admitted guilt nor expressed any remorse for their offenses, and the district court's reliance on concerns for their Fifth Amendment rights for its award of s 3E1.1 reductions was clear error.

In United States v. Henry, 883 F.2d 1010, 1011 (11th Cir.1989), this Court held that conditioning sentence reductions on a defendant's acceptance of responsibility does not violate the Fifth Amendment merely because such reductions likely will be unavailable to defendants who choose to exercise their Fifth Amendment rights. Henry appealed his sentence contending that because he had chosen to testify to his innocence at trial, in order to receive a lower sentence, he was faced with the necessity of having to build a perjury case against himself by confessing at the sentencing hearing to that which he had denied under oath at trial. Henry argued that "because a defendant, believing in his innocence but fearing conviction, might reasonably forego taking the stand to take advantage of the acceptance of responsibility provision without subjecting himself to a perjury charge[,] ... [s 3E1.1] chills the right of a defendant to defend himself." Henry, 883 F.2d at 1011. This Court rejected Henry's argument:

Section 3E1.1 may well affect how criminal defendants choose to exercise their constitutional rights. But "not every burden on the exercise of a constitutional right and not every encouragement to waive such a right is invalid." Corbitt v. New Jersey, *740 439 U.S. 212, 219, 99 S.Ct. 492, 493-497, 58 L.Ed.2d 466 (1978). Persons involved in the criminal law process are faced with a variety of choices. Some of the alternatives may lead to unpleasant consequences. For example, to choose to go to trial may result in greater punishment.... Section 3E1.1 may add to the dilemmas facing criminal defendants, but no good reason exists to believe that 3E1.1 was intended to punish anyone for exercising rights. We are unprepared to equate the possibility of leniency with impermissible punishment.

Id. (footnotes omitted). But see United States v. Frierson, 945

F.2d 650, 659-60 (3d Cir.1991) (holding that denial of reduction for acceptance of responsibility was a "penalty" which could not be imposed for defendant's assertion of Fifth Amendment privilege), cert. denied, --- U.S. ----, 112 S.Ct. 1515, 117 L.Ed.2d 651 (1992).

As with the defendant's decision to testify in Henry, Thomas and Michael Spiker's decisions to exercise their Fifth Amendment rights and not testify would not be unconstitutionally burdened by a refusal to award them leniency at sentencing for acceptance of responsibility. Section 3E1.1(a) is not a punishment; rather, the reduction for acceptance of responsibility is a reward for those defendants who express genuine remorse for their criminal conduct. E.g., Henry, 883 F.2d at 1011-12 & n. 6. It was clear error for the district court in this case to grant the s 3E1.1 reduction based on the conclusion that to refuse would be to "penalize" the defendants for exercising their rights not to testify.

[3] The other factors enumerated by the district court as support for its action also fail to demonstrate these two defendants' acceptance of responsibility. A defendant must do more than sit quietly and take his medicine. Section 3E1.1 is intended to reward those defendants who affirmatively acknowledge their crimes and express genuine remorse for the harm caused by their actions. United States v. Scroggins, 880 F.2d 1204, 1215 (11th Cir.1989), cert. denied, 494 U.S. 1083, 110 S.Ct. 1816, 108 L.Ed.2d 946 (1990). The district court cited no evidence that Thomas and Michael Spiker did, in fact, accept responsibility for their crimes. When given the opportunity at oral argument, counsel for the defendants could point this Court to no such evidence. Under these circumstances, it was clear error for the district court to grant Thomas and Michael Spiker two-point reductions for acceptance of responsibility under s 3E1.1(a).

2. The Reduction for Dorlis Spiker

Dorlis Spiker was convicted on Count One of conspiring to manufacture and possess with intent to distribute 100 grams or more of methamphetamine and on Count Three of possession with intent to distribute 100 grams or more of methamphetamine. At sentencing, the district court awarded Dorlis Spiker a one-level reduction of her offense level for acceptance of responsibility, explaining, "The Court finds this defendant clearly demonstrated a recognition and affirmative acceptance of personal responsibility as to the criminal conduct charged in Count 3 and therefore is entitled to a 1 point reduction." In a Solomonic attempt to split the baby, the court apparently gave Dorlis Spiker "half credit" under s 3E1.1(a), because through counsel she admitted to one of the elements of one of the two crimes with which she was charged, i.e., she admitted to a lesser included offense to one of the charges.

In closing argument, Dorlis Spiker's counsel conceded that she had been in possession of methamphetamine and that she had a drug use problem, arguing that she was a truck driver and that everyone knows truck drivers frequently use methamphetamine. However, neither Dorlis Spiker nor her counsel ever conceded the other elements of the higher charges she faced, which were conspiracy to manufacture and intent to distribute methamphetamine. Because there is no provision in the Guidelines for such a one-point reduction for acceptance of responsibility, and because the facts in this case did not support any adjustment for acceptance of responsibility, we reverse.

[4] This Circuit has never decided whether s 3E1.1 authorizes less than a

two-level reduction for a "partial" acceptance of responsibility. *741 Because this is an issue of Guidelines interpretation, we review de novo the district court's decision to grant a one-level reduction for Dorlis Spiker's partial acceptance of responsibility. United States v. Worthy, 915 F.2d 1514, 1516 (11th Cir.1990). We are persuaded by the plain language of s 3E1.1 to follow the Fifth Circuit's decision in United States v. Valencia, 957 F.2d 153 (5th Cir.1992), and hold that s 3E1.1 does not provide for such a reduction. In Valencia, the district court expressly found that the defendant had partially accepted responsibility and, therefore, was entitled to a one-point reduction, rather than the two-point reduction provided for in s 3E1.1(a). The Fifth Circuit reversed, holding that "U.S.S.G. s 3E1.1 does not contemplate either a defendant's mere partial acceptance of responsibility or a district court's being halfway convinced that a defendant accepted responsibility." Id. at 156; see also United States v. Farrier, 948 F.2d 1125, 1127 (9th Cir.1991) (holding that the Guidelines do not provide for an acceptance of responsibility reduction other than by two levels, therefore, reversing four-level reduction). We agree with the Fifth Circuit's reasoning and, therefore, hold that the district court's decision to grant Dorlis Spiker a one-level reduction for acceptance of responsibility was based on an erroneous interpretation of the Guidelines. Dorlis Spiker was entitled to either a two-level reduction or none, and the burden was on her clearly to demonstrate an acceptance of responsibility for her criminal conduct in order to justify a two-level reduction. See United States v. Paslay, 971 F.2d 667, 675 (11th Cir.1992) (burden of proof under s 3E1.1 on defendant). If the facts of this case were such that the district court could properly award Dorlis Spiker a two-level reduction for acceptance of responsibility, we would remand to allow the court to decide whether to do so. Because we decide that it would be error to grant such a reduction, however, we decline to remand the matter for further consideration.

[5][6] In United States v. Jones, 899 F.2d 1097, 1101 (11th Cir.), cert. denied, 498 U.S. 906, 111 S.Ct. 275, 112 L.Ed.2d 230 (1990), and overruled on other grounds, United States v. Morrill, 984 F.2d 1136 (11th Cir.1993), this Court upheld as not clearly erroneous a district court's conclusion that the defendant's acknowledgment of a lesser-included offense was a "trial tactic" and did not amount to acceptance of responsibility under s 3E1.1. In this case, the issue is whether a tactical admission of guilt to a lesser-included offense could ever be sufficient, standing alone, to warrant a two-level reduction for acceptance of responsibility. We begin our analysis of this question by acknowledging that a defendant who elects to go to trial does not, thereby, necessarily forfeit entitlement to a s 3E1.1 reduction. As the Guidelines commentary says, "Conviction by trial ... does not automatically preclude a defendant from consideration for such a reduction." U.S.S.G. s 3E1.1, comment. (n. 2). The commentary goes on to point out, however, the infrequent nature of circumstances where the reduction might still be available after a defendant has elected to put the government to its proof:

> In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a

challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct. Id. No such rare circumstances were present in this case. While counsel for Dorlis Spiker acknowledged Dorlis's guilt for the lesser-included offense of simple possession of methamphetamine, Dorlis did not accept responsibility for the more serious crimes of which she was charged and convicted: conspiracy to manufacture and possess with intent to distribute, and possession with intent to distribute.

We find persuasive the reasoning of the Fourth Circuit in United States v. Gordon, 895 F.2d 932 (4th Cir.), cert. denied, 498 U.S. 846, 111 S.Ct. 131, 112 L.Ed.2d 98 (1990), which involved facts somewhat similar to this *742 case. Gordon was convicted after a jury trial of possession with intent to distribute cocaine. At sentencing, Gordon admitted that he was guilty of simple possession and requested a reduction for acceptance of responsibility under s 3E1.1. The district court denied Gordon's request and he appealed, arguing that forcing him to admit an intent to distribute in order to receive the reduction required him to sacrifice his right to preserve his appeal in exchange for a reduction in sentence. Noting the district court's finding that Gordon had done nothing else to indicate his acceptance of responsibility, the Fourth Circuit stated, "Indeed, Gordon's claim that he was entitled to this mitigating factor while at the same time denying the criminal conduct for which he was convicted by a jury borders on the frivolous." Gordon, 895 F.2d at 937. Dorlis Spiker's claim is not frivolous, but it is without merit. Absent some other factual foundation to support the finding that Dorlis Spiker demonstrated acceptance of responsibility for her crimes of conviction, the district court's reliance for its s 3E1.1(a) reduction on a tactical confession of guilt to a lesser-included offense was clear error.

The Sentencing Court's Finding with Respect to Drug Quantity and Purity

1. The Drug Quantity for Sentencing

[7] The defendants challenge the district court's determination of the drug quantity for purposes of sentencing, alleging that the court failed to set out sufficiently the factual findings on which its determination was based. "This court reviews the trial court's determination of the quantity of drugs used to establish a base offense level for sentencing purposes under the clearly erroneous standard." United States v. Robinson, 935 F.2d 201, 205 (11th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 885, 116 L.Ed.2d 789 (1992). We conclude that the district court did not clearly err in its drug quantity calculation, and that its finding should be affirmed.

[8] Because only a small amount of methamphetamine was actually seized in this case, the district court considered, consistent with the Guidelines, evidence offered at sentencing to establish the amount of methamphetamine that could have been produced by the defendants' conspiracy. The relevant Guidelines commentary provides:

> Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory

involved.
U.S.S.G. s 2D1.4, comment. (n. 2) (November 1, 1990) (emphasis added). [FN5]

FN5. Effective November 1, 1992, Guidelines s 2D1.4, dealing with attempts and conspiracies for drug crimes, was deleted and consolidated with the substantive offense section at s 2D1.1. Application Note 2 was added to the commentary of the substantive offense guideline in s 2D1.1 as Note 12. U.S.S.G. App. C, amend. 447 (November 1, 1992). Those amendments were enacted for purposes of simplification and resulted in no substantive change.

1-2% yield

The district court heard testimony from two expert witnesses, Dr. Terrence Owen for the defense and DEA chemist Harold Hanel for the Government. Owen testified that based on an estimated yield of 60%, 1.5 kilograms of methamphetamine could have been produced from the chemicals seized in this case, but that the process used by the conspirator's chemist, John Booth, would likely have produced only 150 grams. Hanel testified that 150 grams was a yield of only 1.5%-2% and that based on a 100% theoretical (and admittedly unattainable) yield, 6.1 kilograms could have been produced from the least abundant chemical precursor in Booth's clandestine lab, and 19.1 kilograms from the most abundant chemical. Based on all of the chemicals actually ordered, Hanel testified that a minimum of 18 kilograms and a maximum of 72.5 kilograms could be produced. Hanel also testified, however, that 50%-75% was a more realistic yield, which would reduce his estimates by as much as one-half. In light of this evidence, the district court concluded as follows:

The Court finds as a result of hearing the testimony of the expert chemical witnesses *743 the quantity of methamphetamine which could have been produced in the lab using all chemicals known to have been received during the course of this conspiracy is 1.8 kilograms.

Thus, the district court was presented with a range of estimates based on the chemicals received during the course of the conspiracy. At the low end were Dr. Owen's estimates of 150 grams producible using John Booth's methods or 1.5 kilograms using a more productive method, and at the high end were DEA chemist Hanel's estimates of 19.1 kilograms at 100% yield and 9.55 kilograms at 50% yield. The court placed the amount of methamphetamine for purposes of sentencing at 1.8 kilograms. The court properly used expert testimony about the chemicals acquired for use in the conspirators' clandestine lab to approximate the conspiracy's capacity for production of methamphetamine. United States v. Hyde, 977 F.2d 1436, 1440 (11th Cir.1992) (applying rule of approximation in context of offense of possession of listed chemicals for production of controlled substance), cert. denied, --- U.S. ----, 113 S.Ct. 1948, 123 L.Ed.2d 653 (1993). There being no clear error, we affirm the district court's finding with respect to the quantity of methamphetamine producible by this conspiracy.

2. Finding that "Pure Methamphetamine" Under the Guidelines Referred Only to "D-methamphetamine"

[9][10] The Government contends that the district court erred when it declined to find that the quantity of methamphetamine intended for production by the conspiracy was "Pure Methamphetamine" as used in Guidelines s 2D1.1(c). Under s 2D1.1(c), the base offense level for a quantity of "Pure

Methamphetamine" is higher than that for an equal amount of "Methamphetamine" and, thus, will yield a higher sentence. "Because the interpretation of the United States Sentencing Guidelines is similar to statutory interpretation, the district court's reading of the Guidelines is subject to de novo review on appeal." United States v. Worthy, 915 F.2d 1514, 1516 (11th Cir.1990). We conclude that the district court's decision was based on an erroneous interpretation of the Sentencing Guidelines and that its finding that the substance in this case could not be considered "Pure Methamphetamine" should be reversed. In reaching our decision, we first discuss the facts established at sentencing relating to the controlled substance the defendants sought to produce. We then examine Guidelines s 2D1.1 and its commentary in light of those facts. Finally, we draw on the decisions of other courts interpreting analogous language in 21 U.S.C. s 841, as well as recent clarifying amendments to s 2D1.1 and its commentary.

The experts who testified in this case agreed that there are three different methamphetamine forms: L-methamphetamine, which was described as an inert form with little or no physiological effects; D-methamphetamine, which has the active physiological effects characteristic of this drug; and DL-methamphetamine, which is composed of 50% L-methamphetamine and 50% D-methamphetamine. The conspiracy at issue in this case involved the manufacture of DL-methamphetamine. The district court determined, however, that "pure methamphetamine as used in the Drug Quantity Table refers to D-methamphetamine and thus ha[d] no application in this case." The district court apparently based its decision about the meaning of "Pure Methamphetamine" on the distinction between the inert L-methamphetamine and the more physiologically active D-methamphetamine, concluding that the more active form was "pure." We find that the district court erred in its conclusion that "Pure Methamphetamine" refers only to D-methamphetamine, a conclusion not supported by the Guidelines.

The Drug Quantity Table, U.S.S.G. s 2D1.1(c), [FN6] establishes base offense levels for drug trafficking offenses using a graduated *744 scale that increases the offense level for each incremental increase in the quantity of drugs involved. An explanatory footnote to s 2D1.1(c) provides, "In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater." U.S.S.G. s 2D1.1(c), n.* (November 1, 1990). [FN7] Thus, unlike other controlled substances listed in s 2D1.1(c), methamphetamine and PCP are to be quantified for sentencing using either the weight of a mixture or substance containing the drug, or the weight of the pure drug itself, whichever yields the greater offense level. The mixture to purity ratio at each level of the Drug Quantity Table is ten to one; therefore, it takes one-tenth the quantity of pure methamphetamine to yield the same offense level as a mixture or substance containing methamphetamine. See generally United States v. Brown, 921 F.2d 785, 789 & n. 2 (8th Cir.1990) (discussing Drug Quantity Table's approach to methamphetamine).

FN6. At the time of the defendants' sentencing, the relevant offense conduct section for drug trafficking conspiracies, s 2D1.4, provided that the base offense level should be set "as if the object of the

conspiracy ... had been completed." U.S.S.G. s 2D1.4 (November 1, 1990); see id. App. C, amend. 447 (November 1, 1992). Thus, s 2D1.1, applicable to drug trafficking offenses, applied to the defendants.

FN7. After the February 1991 sentencing in this case, the Guidelines were amended to replace references in the Drug Quantity Table to "Pure PCP" and "Pure Methamphetamine" with "PCP (actual)" and "Methamphetamine (actual)." U.S.S.G. App. C, amend. 395 (November 1, 1991). Because we apply the Guidelines in effect at the time of sentencing, United States v. Marin, 916 F.2d 1536, 1538 (11th Cir.1990), we will use terminology consistent with that used in the sentencing proceedings in the district court and will refer to pure methamphetamine.

We have never before addressed the Guidelines' use of "Pure Methamphetamine," but based on our reading of s 2D1.1 and its commentary, as well as the drug trafficking offense statute at 21 U.S.C. s 841, we hold that the distinction between methamphetamine and pure methamphetamine refers to the relative purity of any methamphetamine compound; it does not refer to a particular form of methamphetamine. As discussed above, the Drug Quantity Table in the Guidelines themselves distinguishes between "Methamphetamine" and "Pure Methamphetamine," but does not distinguish between any chemical forms of methamphetamine. Only in the commentary to s 2D1.1 do we find any reference to different chemical forms of methamphetamine. The commentary's Drug Equivalency Tables do distinguish "L-methamphetamine" from "Methamphetamine" and "Methamphetamine (pure)". For example, 1 gram of methamphetamine and 1 gram of methamphetamine (pure) equal 5 and 50 grams of cocaine, respectively, but 1 gram of L-methamphetamine equals only 0.2 grams of cocaine. U.S.S.G. s 2D1.1, comment. (n. 10) (November 1, 1990). [FN8] The lesser equivalency of the L-form in the commentary is consistent with the expert testimony in this case establishing that L-methamphetamine has far fewer physiological effects. At the time of sentencing in this case, the Guidelines made no further distinctions with respect to the various chemical forms of methamphetamine.

FN8. An amendment effective November 1, 1991, amended the equivalency table by providing for conversions to marijuana instead of cocaine and heroin. U.S.S.G. App. C, amend. 396 (November 1, 1991). In addition, "Methamphetamine (pure)" was replaced by "Methamphetamine (actual)," which is consistent with the use of methamphetamine (actual) in the Drug Quantity Table itself.

We recently addressed the less severe sentences under the Guidelines for the L- form of methamphetamine in United States v. Patrick, 983 F.2d 206, 208 (11th Cir.1993), where the defendant appealed his sentence claiming that the district court should have determined his offense level based on the less potent L-methamphetamine. Because the Government's evidence established only that the drug involved was "methamphetamine" and did not specify which form, we reversed Patrick's sentence and remanded for a determination by the district court of the specific form of methamphetamine. Id. at 209-10. However, in Patrick we did not decide the definition of "Pure Methamphetamine" as that term is used in the Guidelines. And while our decision appears to have assumed

that if the methamphetamine at issue there was not L-methamphetamine, it was D-methamphetamine, that assumption was not necessary to the Court's disposition of Patrick's appeal. The district court in Patrick did not specify which form of the drug was at issue: *745 L-, D-, or DL-. Patrick claimed it was L-, and the Government claimed it was D-. We remanded for a factfinding by the district court on the form of methamphetamine actually involved. If Patrick's contention was correct, he should have received a lower sentence based on the lower potency of L-methamphetamine as established by the Drug Equivalency Table and, therefore, the sentencing court could not simply assume the drug involved was the form that would yield the harsher sentence. Id. at 209. Because Patrick did not decide any issue related to purity or to the definition of "Pure Methamphetamine," however, that decision is not dispositive of this case.

Based on the express provisions of s 2D1.1, there is no support for the district court's determination that "Pure Methamphetamine" means only D-methamphetamine. The commentary to s 2D1.1 states that "[a]ny reference to a particular controlled substance in these guidelines includes all salts, isomers, and all salts of isomers." Id. s 2D1.1, comment. (n. 5). Except to the extent a particular molecular form of methamphetamine is treated separately by the Guidelines, then, we must read references to "Methamphetamine" as encompassing all forms of that substance. Moreover, the Sentencing Commission demonstrated that it knew how to distinguish the chemical forms of methamphetamine when it singled out L-methamphetamine for different treatment in the equivalency tables. See United States v. Koonce, 991 F.2d 693, 698 (11th Cir.1993) (relying on the well-established principle of statutory construction that the inclusion of one implies the exclusion of others to interpret Guidelines).

The expert testimony at sentencing in this case established that the form of methamphetamine that could be produced with the chemicals obtained by the defendants and the methods used in Booth's clandestine lab was DL-methamphetamine, not D-methamphetamine and not L-methamphetamine. The Government's expert stated that the distinction between D-methamphetamine and DL-methamphetamine did not involve issues of purity as the district court's finding in this case suggests; rather, DL-methamphetamine was simply a combination of methamphetamine's "enantiomers," the D- and L- forms. Enantiomers are like the right and left hand forms of the same compound. Thus, D-methamphetamine, rather than representing the "pure" form of methamphetamine, is merely one form of that chemical compound. It follows that 100% D-methamphetamine, like 100% DL-methamphetamine, would constitute 100% "Pure Methamphetamine" for purposes of sentencing under Guidelines s 2D1.1. (It is only because the Commission chose to distinguish L-methamphetamine from "Methamphetamine" and "Pure Methamphetamine" that 100% L-methamphetamine would not likewise constitute 100% "Pure Methamphetamine.")

While we find no case authority defining "Pure Methamphetamine" as used in the Guidelines, analogous cases dealing with the drug trafficking statute's mandatory minimum sentence provisions support our conclusion that the adjective "pure" is intended only to mean the relative purity of the methamphetamine compound itself, in whichever form. In fact, these cases rely in part for their holdings on the same Guidelines Commentary that supports our decision. In United States v. Stoner, 927 F.2d 45 (1st Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 129, 116 L.Ed.2d 96 (1991), the defendant

challenged the district court's imposition of a minimum mandatory 5-year sentence for conspiracy and distribution of methamphetamine. The district court sentenced Stoner under 21 U.S.C. s 841(b)(1)(B)(viii), which provides for a mandatory 5-year minimum sentence for offenses involving "10 grams or more of methamphetamine ... or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine." (emphasis added). Stoner argued that the statute's use of the word "or" to distinguish between methamphetamine and mixtures containing methamphetamine meant that the sentencing court could not remove the actual amount of methamphetamine from the mixture and sentence on the basis of the percentage of the mixture that was methamphetamine. Stoner, 927 F.2d at 46. In other words, Stoner argued that because he had a mixture and not pure methamphetamine, he could only be subject to the mandatory sentence *746 if he possessed more than 100 grams, regardless of the purity or concentration of methamphetamine in that mixture. The First Circuit rejected that argument, holding that the mandatory penalty could be triggered by either the net quantity of pure methamphetamine or the gross quantity of a mixture or substance containing any detectable amount of methamphetamine. Id.

Relying in part on Stoner, the Fourth Circuit rejected a similar argument involving application of the mandatory sentencing provisions to the defendants in United States v. Rusher, 966 F.2d 868 (4th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 351, 121 L.Ed.2d 266 (1992). In Rusher, the court also found support in the Guidelines, drawing a direct parallel between the alternative sentencing routes in the mandatory sentencing provisions of s 841 and the similar net purity or gross quantity alternatives for determining base offense levels for methamphetamine and PCP as explained in the footnote to the Drug Quantity Table. Rusher, 966 F.2d at 880 (quoting U.S.S.G. s 2D1.1(c), n. *). The Rusher defendants claimed that the 5-year mandatory minimum sentence provisions of the drug trafficking statute distinguished between "pure" methamphetamine and a mixture containing methamphetamine in such a way that, absent 100% purity in the drugs, the sentencing court could only sentence based on the 100 gram threshold for mixtures. Thus, because the defendants possessed only 72 grams of a "mixture" containing methamphetamine at between 86% and 91% purity, the district court had erred when it imposed the 5-year minimum. The Fourth Circuit rejected that argument and affirmed the district court's imposition of the minimum sentence concluding, "The only way to conduct this analysis is to multiply the purity of the drug times its quantity to obtain the amount of pure methamphetamine." Id.; see also United States v. Alfeche, 942 F.2d 697, 698-99 (9th Cir.1991) (relying on Guidelines' treatment of PCP and methamphetamine to hold 10-year minimum sentencing provision of s 841 applies to offenses involving either a net amount of 100 grams of methamphetamine or 1000 grams of a mixture containing methamphetamine). Likewise, we conclude that the only way to calculate the quantity of "Pure Methamphetamine" in determining a defendant's base offense level under s 2D1.1(c) is to multiple the purity of the mixture or substance times the weight of the mixture or substance.

A subsequent clarifying amendment to s 2D1.1 confirms the correctness of our reading of the Guidelines. That amendment replaced "Pure Methamphetamine" with "Methamphetamine (actual)" and added the following explanation: "The term [ ] 'Methamphetamine (actual)' refer[s] to the weight of the controlled

substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing [Methamphetamine] at 50% purity contains 5 grams of [Methamphetamine (actual)]." U.S.S.G. App. C, amend. 395 (November 1, 1991). While this clarification was not available to the district court, it supports our reading of the language of s 2D1.1(c) in effect at the time of sentencing. In addition, further amendments effective November 1, 1991, included an addition to the footnote after s 2D1.1(c) that defined the term "Ice" as a mixture or substance containing D-methamphetamine. U.S.S.G. App. C, amend. 370. This, the Guidelines' first express reference to the D- form of methamphetamine, offers additional support for our conclusion that, when the Sentencing Commission intends to distinguish D-methamphetamine from "Methamphetamine" or "Pure Methamphetamine," it can and will do so expressly. We have held previously that clarifying amendments to the Guidelines' commentary

> constitute strongly persuasive evidence of how the Sentencing Commission originally envisioned that the courts would apply the affected guideline [and, thus,] ... courts should consider such clarifying amendments to the guidelines' commentary in interpreting the guidelines, even with regard to offenders convicted of offenses occurring before the effective date of the amendments.

United States v. Scroggins, 880 F.2d 1204, 1215 (11th Cir.1989). [FN9] For all of these reasons, *747 we conclude that the district court misinterpreted the Guidelines when it refused to consider for sentencing purposes the percentage of "Pure Methamphetamine" that would be present in the 1.8 kilograms of DL-methamphetamine it found could be produced by the conspiracy.

FN9. We recently noted in United States v. Wilson, 993 F.2d 214, 216 (11th Cir.1993), that in light of the Supreme Court's decision in Stinson v. United States, --- U.S. ----, ----, 113 S.Ct. 1913, 1919, 123 L.Ed.2d 598 (1993), application of an intervening Guidelines interpretation by commentary promulgated after the offense could run afoul of the Ex Post Facto Clause. In this case, however, the Commission's clarifying amendments did not overrule any prior constructions of s 2D1.1 but, rather, confirmed our reading of that section in the first instance. Therefore, this use of these clarifying amendments to the Guidelines commentary raises no ex post facto concerns.

III. CONCLUSION

Michael Spiker, Thomas Spiker, and Dorlis Spiker were not entitled to reductions for acceptance of responsibility. The district court correctly determined the quantity of methamphetamine the conspiracy could produce, but the court erred in not considering the purity of that substance at sentencing. Therefore, we REVERSE the sentences of Michael Spiker, Thomas Spiker, Dorlis Spiker, and Larry Jessee, and REMAND for resentencing in accordance with this opinion. The judgments of the district court are in all other respects AFFIRMED.

BRIGHT, Senior Circuit Judge, concurring in part and dissenting in part:

I.

CONCURRING/DISSENTING OPINION

I concur in the convictions, but would remand for resentencing of the Spikers (Willis, Michael and Thomas). I would affirm the other sentences imposed by the district court. In remanding the sentences of the Spikers, I would permit the district court to adjust the sentences.

In my view, the sentencing court retains sentencing prerogatives on the reversals of sentences and here should be afforded the opportunity to evaluate whether a proper basis exists for sentence reduction based on acceptance of responsibility pursuant to U.S.S.G. s 3E1.1. Even if the Spikers were not entitled to a reduction, resentencing would be necessary so that the district court could decide whether to consider or disregard what it might characterize as "partial acceptance of responsibility" in determining where in the guideline range to fix defendants' sentences. United States v. Valencia, 957 F.2d 153, 156 n. 4 (5th Cir.1992).

II.

I dissent from the majority's reversal striking down the district court's resolution of the drug quality issue. The district court concluded that the methamphetamine intended for production was "methamphetamine" and not "pure methamphetamine" for sentencing purposes under s 2D1.1(c). As will become apparent if it has not already, the majority embarks upon a journey through troubled waters emanating from complexities in the Guidelines.

A. Background

There are six forms of methamphetamine referred to in this case: methamphetamine, pure methamphetamine, D-methamphetamine, L-methamphetamine, levo-methamphetamine, and DL-methamphetamine. As discussed below, L-methamphetamine and levo-methamphetamine are sometimes lumped together and referred to as L-methamphetamine/levo-methamphetamine.

The 1990 Guidelines applied by the district court make two distinctions concerning methamphetamine: (1) between methamphetamine and pure methamphetamine, and (2) between methamphetamine, pure methamphetamine and L-methamphetamine/levo-methamphetamine.

The first distinction--between methamphetamine and pure methamphetamine--is found in the Drug Quantity Table of U.S.S.G. s 2D1.1(c) (1990) at pp. 2.42-.47. The table assigns a ten times higher relative offense level to pure methamphetamine (one gram of methamphetamine equals five grams of cocaine; one gram of pure methamphetamine equals fifty grams of cocaine). The asterisk-designated note at the end of the table states *748 that when calculating the offense level for methamphetamine, apply the greater of the level determined by: (1) the entire weight of the mixture or substance containing the methamphetamine, or (2) the entire weight of the pure methamphetamine.

The second distinction--between methamphetamine, pure methamphetamine and L-methamphetamine/levo-methamphetamine--is found in the Drug Equivalency Tables of U.S.S.G. s 2D1.1 at pp. 2.49-.52. This table also assigns a ten times higher relative offense level to pure methamphetamine when compared to methamphetamine, but adds a 250 times higher relative offense level to pure methamphetamine when compared to L-methamphetamine/levo-methamphetamine (one gram of L-methamphetamine/levo-methamphetamine equals .2 grams of cocaine; one gram of pure methamphetamine equals fifty grams of cocaine).

Thus, there are three types of methamphetamine identified for purposes of calculating a defendant's base offense level under the 1990 Guidelines:

ie[redacted]mphetamine, pure methamphetamine, and L-methamphetamine/levo-
ie[redacted]mphetamine.

B. The Record in this Case

A problem arose at sentencing because the defendants in this case were :onvicted of crimes involving DL-methamphetamine, which is not one of the three :orms of methamphetamine identified in the 1990 Guidelines. In an attempt to :esolve the problem, the district court considered two factors: the subsequent .991 revisions to the Guidelines and expert testimony.

The Commission made two relevant changes in the November 1991 amendments to :he Sentencing Guidelines. The first is in the Drug Quantity Table in s ?D1.1(c) at pp. 76-82 (1991), where "Pure Methamphetamine" is changed to 'Methamphetamine (actual)." The official commentary concerning this change provides, in relevant part:

> 'The terms "PCP (actual)" and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual).'
>
> ....
>
> This amendment clarifies the operation of the guideline in cases involving methamphetamine or PCP by replacing the terms 'Pure PCP' and 'pure methamphetamine' with 'PCP (actual)' and 'methamphetamine (actual),' and by providing an example of their application.

U.S.S.G. App. C. P 395 (1991).

The second change is the addition of a new drug called "ice" to the Drug Quantity Table in s 2D1.1(c) at pp. 76-82 (1991). For purposes of establishing a base offense level, "ice" is treated the same as methamphetamine (actual). Th[redacted]sterisk-designated note at the end of the table (p. 82) includes the following definition:

> 'Ice,' for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.

U.S.S.G. s 2D1.1(c) asterisk-designated note at p. 82 (1991).

Both the Government and the defendants had chemists provide expert testimony at trial: Harold Hanel for the Government, and Dr. Owens for the defendants. Both stated that DL-methamphetamine consists of 50% D-methamphetamine and 50% L-methamphetamine, of which the D-methamphetamine is the only physiological active ingredient and the L-methamphetamine is inactive. Owens testified that DL-methamphetamine is not the purest form of the drug, and that the purer D-methamphetamine could be purified from the L-methamphetamine part of the DL-methamphetamine to produce a more potent form of methamphetamine. Owens also testified that D-methamphetamine is processed from a completely different primary chemical, ephedrine, and involves a completely different manufacturing process.

Each expert testified that DL-methamphetamine has one-half the potency and effect of D-methamphetamine. Owens conceded that in pharmaceutical "parlance" D- and DL- are used interchangeably, but argued this is inaccurate because the two are different. Hanel conceded that the DEA *749 distinguishes between D-, DL- and L- in its substance reports.

Apparently, the Government's report merely identified the substances confiscated in this case as "methamphetamine," and Hanel could not determine

from the report whether the methamphetamine was D- or DL-. Owens stated that polarimeter readings are necessary to make this determination and that Booth (defendants' cook) did not use the required equipment in his process.

From this information--the 1991 Guidelines amendments and the testimony of Owens and Hanel--the district court concluded that the type of drug involved in the crimes was "methamphetamine," not "pure methamphetamine."

C. Discussion

The majority states that "the distinction between methamphetamine and pure methamphetamine refers to the relative purity of any methamphetamine compound; it does not refer to a particular form of methamphetamine." Maj. op. at 744-45. Then, in contravention of the expert testimony elicited, the majority concludes that

> D-methamphetamine, rather than representing the 'pure' form of methamphetamine, is merely one form of that chemical compound. It follows that 100% D-methamphetamine, like 100% DL-methamphetamine, would constitute 100% 'Pure Methamphetamine' for purposes of sentencing under Guidelines s 2D1.1. (It is only because the Commission chose to distinguish L-methamphetamine from 'Methamphetamine' and 'Pure Methamphetamine' that 100% L-methamphetamine would not likewise constitute 100% 'Pure Methamphetamine.')

Maj. op. at 745.

D. Additional Comments

Not surprisingly the reader is now experiencing great confusion due to the convoluted chemical rhetoric in the minority and majority opinions. In another case, this writer said:

> Now, if the reader is confused by the complexity of a correct application of the guidelines in this case, that confusion is understandable. The guideline system of sentencing has become exceedingly opaque. We judges do the best we can to interpret the increasingly bulky, almost incomprehensible code of the guidelines. Nevertheless, without an overhaul of the entire guideline system, it is nearly impossible to sentence offenders in a straightforward and equitable manner. One commentator characterized the federal guidelines as an "incredibly insane, complicated system." Cris Carmody, Sentencing Overload Hits the Circuits, Nat'l L.J., Apr. 5, 1993, at 32, (quoting Judy Clarke, Executive Director, Federal Defenders of Eastern Washington). Ms. Clarke's somewhat pejorative comments call attention to the frustrations of lawyers, judges and probation officers who must try to understand the complexities of the system.
>
> The federal sentencing guidelines system cries out for change. See Marc Miller & Daniel J. Freed, Suggestions for the President and the 103rd Congress on the Guideline Sentencing System, 5 Fed.Sent.R. 187 (Jan./Feb. 1993).

United States v. Smith, 997 F.2d 396, 399 (8th Cir.1993) (Bright, J., dissenting). In a separate concurrence to Smith, Judge John R. Gibson wrote, in part:

> I agree that the sentencing guideline system cries out for change. The guidelines have not eliminated disparity, but have created a complex hypertechnical system consuming great amounts of judicial time for both trial and appellate judges. It is to be hoped that the legislative and executive branches will give careful review to the system. Perhaps a first step would be

ITE AS: 6 F.3D 735, *749)
ONCURRING/DISSENTING OPINION
o make the guidelines simply that, guidelines.
Id. at 398.
I dissent from the majority's decision reversing the district court's esolution of the drug quality issue. In my view the trial court made a actual determination relative to the confusing material in the guidelines. No asis exists for calling that determination an error of law or clearly rroneous.
D OF DOCUMENT