

14. Proposed Amendment #14 - Vulnerable Victim (§3A1.1); Civil Rights (§§2H1.1, 2H1.3, 2H1.4, and 2H1.5)

The PAG supports the general goal of consolidation and simplification embodied in Option 1 of this proposal. The PAG does not take any position on which of the several offense levels should be selected.

15. Proposed Amendment #15 - Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition (§2K2.1)

Consistent with the position of the PAG on the need for Guideline simplification, we support the generic approach reflected in the proposed amendment. We vigorously oppose the Additional Issue for Comment -- the request of the Department of Justice to create a new enhancement for semi-automatic assault weapons.

16. Proposed Amendment #16 - Firearms (§2K2.1)

The PAG supports Option 1 regarding the offense level for transfer of a firearm to a juvenile. Option 1 would result in a base offense level of 6.

17. Proposed Amendment #17 - Firearms (§2K2.1)

The PAG believes that no action is required. Offenses involving semi-automatic firearms already represent the typical or "heartland" cases.

18. Proposed Amendment #18 - Firearms (§2K2.4)

If §2K2.4 is amended to address the Congressional directive and statutory change, the PAG supports approach number 2, which would call for the application under §2K2.4 of the minimum term of imprisonment required by statute, with a departure recommended when this sentence, combined with the sentence for the underlying offense, does not provide adequate punishment.

19. Proposed Amendment #19 - Firearms (§2K2.1)

The PAG opposes any action in connection with the Issue for Comment issued by the Commission. We note in general that it appears that Chapter 4 of the Guidelines already provides for an appropriate enhancement based on a defendant's prior criminal record.

20. Proposed Amendment #20 - Firearms (§2K2.1); Theft (§2B1.1)

Two options are proposed by the Commission to address the disparity in §2B1.1 and §2K2.1 penalties. The PAG supports Option 2 which would amend §2B1.1 to recommend an upward departure.

21. Proposed Amendment #21 - Firearms (§2K2.1); Explosives (§2K1.3)

The PAG supports this proposed amendment which would amend the statutory index to take into account the new subsection in 18 U.S.C. § 924.

22. Proposed Amendment #22 - Immigration, Naturalization and Passports (§§2L1.1, 2L1.2)

The PAG does not believe that the decision of Congress to increase the statutory maximum penalty for bringing in or harboring an alien or for failing to depart and re-entering the United States warrants another amendment to the Guidelines to provide for increased offense levels. Thus, we oppose Issue for Comment 22(A) and (B).

The PAG also opposes the proposed amendments of the Department of Justice under 22(C) and (D).

23. Proposed Amendment #23 - Immigration, Naturalization and Passports (§§2L1.1, 2L1.2)

The PAG opposes any amendment to the Guidelines with respect to passport and visa offenses merely because Section 130009 of the Violent Crime Control and Law Enforcement Act of 1994 increases the statutory maximum penalties for passport and visa offenses to ten years.

The PAG also opposes the proposed amendment sponsored by the Department of Justice in 23(B).

24. Proposed Amendment #24 - Terrorism (§5K2.15); Career Offender (§4B1.1)

The PAG opposes the promulgation of a Guideline amendment based on a narrative description of the issue, rather than a specific published proposal. The PAG does not believe that Commission action is necessary in light of the existing Guideline provision recommending an upward departure in cases involving terrorism.

25. Proposed Amendment #25 - Juvenile Involvement

As to 25(A) - the Issue for Comment - the PAG supports the implementation of Section 140008 of the Violent Crime Control and Law Enforcement Act of 1994 by a Chapter 3 adjustment.

The PAG opposes Proposed Amendment #25(B), sponsored by the Department of Justice.

26. Proposed Amendment #26 - Criminal Street Gangs

The PAG opposes the creation of a specific offense characteristic for conduct involving "street gang activity." This is a factor that is best left to the departure authority of the sentencing court. Thus, we support no action in this area.

The PAG opposes Proposed Amendment #26(B) sponsored by the Department of Justice.

27. Proposed Amendment #27 - Elderly Victims

The PAG does not believe that any action is necessary in connection with 27(A) - Issue for Comment. The Guidelines already provide sufficiently stringent punishment for a defendant convicted of a crime of violence against an elderly victim.

The PAG supports Proposed Amendment #27(B) which recommends a departure under §3A1.1 (Vulnerable Victim).

The PAG opposes any action under Proposed Amendment #27(C) - Issue for Comment.

28. Proposed Amendment #28 - Career Offender (§4B1.1)

The PAG urges the Commission not to incorporate the "three strikes" in the Guidelines. Section 5G1.1 already provides instructions on the application of mandatory statutory penalties that conflict with the Guidelines.

29. Proposed Amendment #29 - "Safety Valve" Provision (§5C1.2)

The PAG supports the "safety valve" proposal in the crime bill, because it does mitigate the harsh impact of mandatory minimum sentences on low-level drug offenders.

The PAG supports the re-promulgation of §5C1.2.

30. Proposed Amendment #30 - Restitution, Fines, Assessments,
Forfeitures (Chapter 5, Part E)

The PAG supports Proposed Amendment #30, which simply implements a mandatory restitution provision in the crime bill.

31. Proposed Amendment #31 - Supervised Release (§§7B1.3, 7B1.4)

The PAG supports Proposed Amendment #31, which simply implements a provision in the crime bill regarding supervised release.

32. Proposed Amendment #32 - Amendments to Appendix A and
Guideline Titles

The PAG supports Proposed Amendment #32, which adds new offenses, conforms the Guidelines to revisions in existing statutes and revises the titles of several offense Guidelines.

Amendments Relating to Drug Offense Guidelines
and Role in the Offense

33.-43. Drug Trafficking and Role in the Offense

CONTROLLED SUBSTANCES

INTRODUCTION

The PAG believes that, without a doubt, the most problematic area of guidelines coverage concerns the sentencing of defendants charged with drug crimes.

The changes we recommend will:

1. Increase dramatically the sentences for those who use violence to further the drug trade. (Proposed Amendment 36, PAG alternative)
2. Slightly reduce the influence of weight in drug sentencing. (Proposed Amendment 33, Option B)
3. Remove the racial discrimination of the current crack-powder ratio, but provide for appropriate increased punishment for the violent acts that led to the political decision to create the ratio in the first place. (Proposed Amendment 38)
4. Provide a reasonable sentencing limit for defendants whose role is mitigated. (Proposed Amendment 34)
5. More clearly spell out who qualifies for aggravating and mitigating role. (Proposed Amendment 35)

The PAG believes that the guidelines which affect controlled substance violators must be altered, and change must occur now. We believe that weight of substance currently plays too great a role in sentencing, that use of weapons and violence are not emphasized enough, that the 100 to 1 crack to powder ratio results in unintentional but clear racial disparity, and that the adjustments concerning role in the offense are too vague and often misapplied. We favor a comprehensive approach to remedy these flaws, but we don't believe that the changes require a drastic reinvention of drug sentencing.

No area of the Guidelines has received more internal commission study with such a comprehensive examination of data and actual case comparisons. The working group reports for 1992 and 1993 provide strong support for the amendments we endorse. Many similar changes were approved by a majority of the Commission which

initially considered them, but simply fell short of the necessary total votes needed for enactment. We strongly urge those who supported these kinds of changes before to do so again, and we ask the new Commissioners to give serious consideration to our proposal.

We favor a building block approach to this problem, with each block representing an amendment currently under consideration. While each amendment can be enacted on its own merits and will cure part of the problem, we favor a comprehensive approach which incorporates several amendments which we believe will cure the current evils of drug sentencing.

The central problem with the drug guidelines is that they paint with too broad a brush. Those who commit horrible crimes too often receive the same sentence as those who are far less culpable or whose crimes are not nearly as serious.

The proposal we endorse selects out those who commit the most egregious acts for the harshest punishment.

We understand that new Commissioners may be reluctant to act so soon after appointment, and we also understand that the Congressional landscape has changed. But the alterations we endorse have taken into consideration these political factors and represent adequate compromise which we believe will meet with Congressional approval. We want the Commission to understand that, as defense lawyers, we might favor more drastic change, but as advisors to this Commission, we have had to take a broader public policy view that considers the totality of the current political reality. However, where fairness in application of these sentencing mechanisms demands change, we have not hesitated to endorse it. We ask no less of this Commission.

33. Proposed Amendment #33 - PAG Endorses Approach One, Option B.
Reduces Influence of Weight by Table Reduction of 4 Levels

As to the drug table, we favor Option B of Approach One. While Commissioner Gelacak's approach (Proposed Amendment #43 - Approach 2) has merit, we feel that in reality weight continues to play a significant factor in sentencing under either approach. We believe that some of the specific offense characteristics in Approach Two will create disparity and, while we favor a leaner drug table, we are concerned that by using Commissioner Gelacak's suggested drug type formula, and by more heavily relying on number of participants, fairer drug sentencing will not occur. For example, marijuana is placed in the intermediate category, but there have never been any recorded deaths from cannabis overdose. Also, certain drugs, like imported marijuana as opposed to that which is domestically grown, require more participants so that organizational size does not necessarily translate into offense seriousness. We also note that in both options of Approach Two weight continues to play a significant factor in sentencing. When we considered the totality of circumstances, we found no compelling reason to shift from the formula that most professions now understand to a new approach that will not result in fairer drug sentences. We, therefore, chose Approach One.

If the political landscape had not changed, we probably would have endorsed Option C in Approach One. But because a six-level decrease might meet with Congressional resistance, and because Option C appears to be in potential conflict with Section 80001 of the 1994 Crime Bill (See page 51 of Proposed Amendments), we endorse Option B.

There is strong legislative history supporting the argument that those targeted by the mandatory minimum sentences were the leaders of drug organizations who distribute significant quantities. Therefore, adding four levels to a level that already considers leadership results in double counting, and this is exactly what occurs currently when the pre-adjusted range is tied to the ten and five-year mandatories. Option B ties the post-leadership adjusted sentence to the mandatories which not only eliminates double counting, but which drives down those levels not subject to mandatory sentencing. The resulting punishment levels remain severe but fair and represent significant increases over those imposed prior to the guidelines.

34. Proposed Amendment #34 - PAG Endorses Synopsis: Limits Sentences for Defendants with Mitigated Role

Because minor and minimal participants in large conspiracies can still receive extremely severe sentences under Option B, we favor a Level 28 cap for these peripheral players. A Level 34 conspiracy results in a final offense level of either 29 or 27 for significantly less culpable defendants who accept responsibility. These levels yield sentencing ranges of 87 to 188 months and 70 to 162 months, respectively, depending upon criminal history. A Level 28 cap yields ranges of 46 to 115 months for the minor participant and 37 to 96 months for the minimal participant, depending on criminal history. We believe a floor of 3 years and a ceiling of 11 years 7 months provides adequate punishment for peripheral participants. Such ranges are also fully consistent with the language of Section 80001 of the Crime Bill which authorizes a mandatory minimum abrogation so long as the final range permits no sentence lower than 24 months.

35. Proposed Amendment #35 - PAG Endorses with Minor Modifications
Synopsis: Clarifies the Role in Offense Adjustment

We also endorse the modifications proposed for the role in offense adjustment embodied in Proposed Amendment 35 with a few brief changes. We propose to eliminate the phrase "very small compensation" and substitute the phrase "small compensation" in proposed §3B1.2's application note 2(B) so that exclusions from mitigated role do not occur because of a hyper-technical interpretation of the word "very." We propose to treat "mules" the same as those who sell, own or finance contraband but include a departure for those who sell, own, finance or transport in a manner that is clearly outside the heartland of these transactions, such as the girlfriend or relative who is manipulated into performing an illegal act by a far more culpable co-conspirator. We consider those who regularly transport as a business to be as culpable as dealers, but recognize the need for departures for those less involved. Finally, because we have significantly increased the penalties for firearms and violence, we favor deleting the firearms exclusion from mitigating role because it is inconsistent to factor this characteristic into this adjustment.

Working group reports for 1992 and 1993 have shown that role adjustments are currently unevenly applied. These proposed changes will help judges provide more consistent role adjustments which will lead to less sentencing disparity.

36. Proposed Amendment #36 - PAG Endorses Our Own Alternative
(Issue for Comment, Page 63)

SYNOPSIS: PROVIDES FOR GRADUATED INCREASE IN SENTENCES FOR VIOLENCE AND GUNS IN DRUG CRIMES UP TO AS MUCH AS 20-YEAR INCREASE FOR PERMANENT INJURY CAUSED BY FIREARMS DISCHARGE.

The linchpin of the PAG compromise between Approaches One and Two is the enhancement for violence and firearms reproduced on page 63 of the proposed Amendments. These specific offense characteristics act in a proportional and systematic way to provide for incremental sentencing increases depending upon the degree of violence occurring in a drug offense. These provisions re-establish deterrence for drug-related violence. Currently there is no deterrent to violence for a crack organization that distributes more than 1,500 grams. In fact, there may be an incentive to obstruct justice with violence. The leader who uses no violence is subject to life, while the leader who uses violence to intimidate witnesses receives no increase in sentence if violence does not obstruct, but receives no sentence if violence eliminates all evidence of guilt.

Once the drug table is downsized and the crack-powder ratio is reduced, a significant increase in the penalty for violence provides a strong deterrent and provides just punishment for violent drug-distribution predators. The leader of a 50 kilogram cocaine conspiracy who uses no violence has a new sentencing range under this proposal of 188 - 405 months, depending upon criminal history. Under this proposal the same defendant is subject to penalties up to mandatory life if permanent injury occurs as a result of firearms discharge, even if the leader has no prior convictions. By isolating these perpetrators for extremely severe penalties, the justifications of punishment, protection, deterrence and retribution are fulfilled.

Our proposal's elimination of the Pinkerton approach for these specific offense characteristics is both just and acts as a further deterrent. By increasing sentences for only those who actually use or induce violence, the true perpetrators are punished, while non-violent co-conspirators are sentenced only for the drug portion of the conspiracy. Thus, there is a reduced incentive for conspiratorial violence to proliferate once one violent act occurs.

We strongly believe that these three mechanisms for fairer sentences in the drug arena are all essential components of a balanced mechanism for drug sentences which, if fully digested and understood by Congress, will meet with little resistance. By reducing the overall impact of quantity, by downsizing the table, by eliminating racial disparity by reducing the crack-powder cocaine ratio, and by significantly increasing the penalty for drug-related violence up to life without parole for larger scale

perpetrators, this Commission can administer just, appropriate and racially neutral punishment, which incrementally increases as conduct becomes more severe. Enacting these changes will ensure that the guidelines' ultimate goals of proportionality, uniformity, and elimination of disparity will finally be achieved for the drug-related perpetrator.

37. Proposed Amendment #37 - Drug Trafficking (S2D1.1)

The PAG supports Proposed Amendment #37 which would detach the equivalency used in the Guidelines from the one plant - one kilogram ration used in the statute and substitute the 100 grams per marijuana plant ratio (currently used in the Guidelines for cases involving fewer than 50 plants) for all cases.

38. Proposed Amendment #38 - PAG Endorses Synopsis: Reduce Ration Between Crack and Powder Cocaine Immediately Before Congress Acts on Minimum Mandatory Ratios.

In conjunction with downsizing the table, it is absolutely necessary to reduce the crack-powder cocaine ratio. This should be done this amendment cycle even if the Commission is unwilling to make other changes in the drug Guidelines. There is no doubt that the effect of the 100 to 1 ratio results in disparate sentences for black defendants. There exists no proven scientific basis for a 100 to 1 differential, and the best research indicates that the most addictive method of ingesting cocaine is by needle which utilizes powder. Finally, many times these enormous crack sentences do not account for the violence and firearms use that drove the political decision to create the 100 to 1 ratio in the first place. By reducing the ratio and increasing the penalty for weapons use and injury, a more selective sentencing mechanism is created which bases length of punishment on neutral criteria.

It is absolutely essential that the Commission reduce the ratio and increase the sanctions for violence now, before Congress decides on what, if any, action is required concerning the mandatory minimums and the crack-powder differential. Action now will reduce the unfair enormity of a drug table that permits a life sentence for a first offender who leads a conspiracy which distributes 1501 grams of crack over a five-year period, but allows an offender with more than nineteen criminal history points who possesses slightly more than one and one-half kilograms of powdered cocaine on one occasion to receive no more than twelve and one-half years in prison. Such a differential can never be justified and must be remedied now. Hopefully, by enacting comprehensive violence provisions now, Congress will be able to fully comprehend the guidelines penalties available for all cocaine entrepreneurs who further their enterprises with violence regardless of the type of cocaine they choose to distribute. By isolating violence as the engine which drives cocaine sentencing significantly above the mandatory minimums, the Commission can lead by example toward more rational sentencing that is properly based on neutral criteria and not on the race of the perpetrator.

RECOMMENDATION

We believe that the proper ratio between crack cocaine and powder cocaine is one to one instead of 100 to 1. It would probably also be wise to add specific offense characteristics (enhancements) for trafficking in crack cocaine. Suggested specific characteristics include:

- 1) use of a weapon during the offense;
- 2) causing bodily injury with a weapon during the offense;
- and
- 3) tracking the factors in §2D1.2(a) -- protected location, or involving an underage (less than 18 years old) or pregnant individual.

39.-42. Proposed Amendments #'s 39-42 - Drug Trafficking
(§2D1.1) and Offenses Involving Drugs (Chapter Two, Part D)

The PAG favors Amendment 39 and prefers using the largest single transaction to determine punishment, which would limit law enforcement manipulations which foster disparity, and would eliminate sentences based on tenuous extrapolations. If Option 2 is not endorsed by a majority of the Commissioners, we favor as our second choice the 30-day time frame [Option 1].

We also favor returning to a system of utilizing drug purity to determine punishment so we endorse Amendments 40 and 41. We also strongly endorse the technical changes proposed in Amendment 42.

43. Proposed Amendment #43 - Drug Trafficking (§2D1.1)

In light of our comments as to Proposed Amendment #33 in which we favor Approach One, Option B, we do not endorse proposed amendment #43. We seriously urge the Commission to work towards a compromise between Approach One and Two, if necessary, to effectuate needed changes in the drug Guidelines.

CONCLUSION

In total, a system of sentencing which clarifies role, increases drastically the punishment for violence, decreases but does not eliminate weight in determining sentences, and reduces the racial disparity resulting from the current crack-powder cocaine ratio are all laudable goals which can be achieved if our comprehensive compromise proposal is enacted. We have enclosed **Attachment A (pages 47-64)** to illustrate how the guidelines will appear if these proposals are enacted, and we look forward to continuing to work with each of you on this difficult task.