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William K. Sessions, III  
Chair  
United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, DC 2002-8002

**Re: Public Comment on Proposed Amendment: Fair Sentencing Act of 2010**

Dear Judge Sessions:

On behalf of the Federal Public and Community Defenders, and pursuant to 28 U.S.C. § 994(o), we offer the following comments on the Commission's proposed emergency amendment implementing the Fair Sentencing Act of 2010 (FSA).

We strongly encourage the Commission to build upon the work it started in 2007 by adopting the level 24 option for setting the drug quantity thresholds that correspond to the statutory mandatory minimum penalties. We are gravely concerned for the number of crack cocaine offenders who would receive no benefit from the Fair Sentencing Act should the Commission adopt the level 26 option. In addition, because quantity-based guidelines and their linkage to mandatory minimums are unsound, we think it unwise for the Commission to take a step backward rather than forward in crafting a guideline that seeks to meet the purposes of sentencing in 18 U.S.C. § 3553(a)(2).

We also urge the Commission to construe narrowly the directives in sections 5 and 6 of the FSA that require the Commission to "provide an additional penalty increase" or an "additional increase of at least 2 levels" for various aggravating factors. Sections 5 and 6, read together with other provisions of the Act, provide the Commission with ample authority to avoid double-counting and "factor creep" that would have an exponential impact on sentence length and undercut the purposes of sentencing set forth at 18 U.S.C. § 3553(a)(2).

Unfortunately, much of the language defining the enhancements in the FSA is ambiguous, which as the Commission knows, creates application issues for judges, attorneys, and probation officers. Here, we offer several suggestions to limit the reach of some of the enhancements so they do not apply too broadly and to clarify definitions. Our chief concerns focus on the definition of violence, what it means to maintain an establishment for distribution of manufacture of controlled substances, and the scope of the vulnerable victim enhancement.

## **CHANGES TO STATUTORY TERMS OF IMPRISONMENT FOR CRACK COCAINE**

### **Level 24 Option versus Level 26 Option**

Section 2 of the FSA increases the quantity thresholds associated with five- and ten-year mandatory minimum penalties for crack cocaine to 28 and 280 grams, respectively. The Commission seeks comment on what guideline amendments should be promulgated in response to this change, particularly changes to the Drug Quantity Table in §2D1.1. We urge the Commission to adopt the level 24 option during the emergency amendment cycle, with an eye toward lowering the base offense levels for all other drugs by two levels during the regular amendment cycle. Amendment of the drug trafficking guideline is long overdue and this need for revision should inform how the Commission implements the emergency amendment under the FSA. The emergency amendment should move the guidelines as close as possible to recommending sentences that are “sufficient, but not greater than necessary” to achieve the purposes of sentencing. Here, we briefly recap some of the longstanding problems with the drug trafficking guideline to provide context for our position on why the Commission should adopt the level 24 option.

**The drug trafficking guideline needs revision.** We, along with others, have urged the Commission to review the guidelines for offenses with mandatory minimums and to set drug guideline offense levels based on data and research rather than drug quantities contained in the statutes.<sup>1</sup> The quantity thresholds and penalties in the mandatory minimum statutes are the

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<sup>1</sup> See, e.g., Statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia, Public Hearing Before the United States Sentencing Comm’n, *Mandatory Minimum Sentencing Provisions Under Federal Law*, at 4, 26 (May 27, 2010); Statement of Julia O’Connell, Federal Public Defender for the Eastern and Northern Districts of Oklahoma, Public Hearing Before The United States Sentencing Comm’n, *The Sentencing Reform Act of 1984: 25 Years Later*, Austin, Texas, at 14-15 (Nov. 19, 2009); Statement of Nicholas T. Drees, Federal Public Defender for the Northern and Southern Districts of Iowa, Public Hearing Before the United States Sentencing Comm’n, *The Sentencing Reform Act of 1984: 25 Years Later*, Denver, Colorado, at 21-25 (Oct. 21, 2009) (citing numerous problems with drug trafficking guidelines and urging major revision).

Others urging a de-linking of the drug guidelines from the quantity thresholds in the mandatory minimum statutes have included the Judicial Conference of the United States, see Letter from Paul G. Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the United States to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Comm’n (Mar. 16, 2007), available at [http://www.usc.gov/hearings/03\\_20\\_07/walton-testimony.pdf](http://www.usc.gov/hearings/03_20_07/walton-testimony.pdf), and numerous witnesses at the Commission’s Regional Hearings, see Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Atlanta, Georgia, at 24, (Feb. 10-11, 2009) (Judge Tjoflat); Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Stanford, California, at 6-22 (May 27, 2009) (Judge Walker); Transcript of Public

primary cause of the severe over-crowding the Bureau of Prisons now faces and have resulted in lengthy incarceration of many tens of thousands of non-violent, low-level drug offenders with little or no criminal history.<sup>2</sup> The Commission's choice to create 17 gradations of drug quantity and to extrapolate below, between, and above the two thresholds in the statutes contributed substantially to the tripling of average time served for drug offenses following implementation of the guidelines.<sup>3</sup>

The current drug trafficking guideline does not generally recommend sentences that are "sufficient, but not greater than necessary" to comply with the statutory purposes of sentencing at 18 U.S.C. § 3553(a)(2). The present guideline does not reliably categorize offenders according to their culpability and functional roles; many low-level offenders receive sentences appropriate only for managers or kingpins.<sup>4</sup> Higher offense levels for drug traffickers are not correlated with increased risk of recidivism or a need for incapacitation.<sup>5</sup> Marginal increases in punishment do not increase any deterrent effects of incarceration.<sup>6</sup> And the offense levels provided in the

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Hearing Before the U.S. Sentencing Comm'n, Chicago, Illinois, 70-71 (Sept. 9-10, 2009) (Judge Carr and Judge Holderman); Transcript of Public Hearing Before the U.S. Sentencing Comm'n, New York, New York, at 92, 139-41 (July 9-10, 2009) (Judge Newman). More than half of the judges surveyed (58%) believe that the sentencing guidelines should be "delinked" from the statutory mandatory minimum sentences. USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 3 (2010).

<sup>2</sup> The Sentencing Project, *The Federal Prison Population: A Statistical Analysis* (2006), available at [http://www.sentencingproject.org/doc/publications/sl\\_fedprisonpopulation.pdf](http://www.sentencingproject.org/doc/publications/sl_fedprisonpopulation.pdf); Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed. Sent'g Rep. 26 (1990).

<sup>3</sup> USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 53-54 (2004) [hereinafter *Fifteen Year Review*].

<sup>4</sup> See USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 28-30 (2007) (showing large numbers of low-level crack and powder cocaine offenders exposed to harsh penalties intended for more serious offenders); *id.* at 28-29 (showing drug quantity not correlated with offender function); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 42-49 (2002) (showing drug mixture quantity fails to closely track important facets of offense seriousness); *Fifteen Year Review* at 47-55 (discussing evidence of numerous problems in operation of drug trafficking guidelines); Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminology 155, 171 (2009) (Drug quantity "is not significantly correlated with role in the offense.").

<sup>5</sup> USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (demonstrating "no apparent relationship between the sentencing guideline final offense level and recidivism risk"); Neil Langan & David Bierie, *Testing the Link Between Drug Quantity and Later Criminal Behavior among Convicted Drug Offenders* (Nov. 4, 2009) (paper presented at the American Society of Criminology's annual meeting in Philadelphia), abstract available at [http://www.allacademic.com/meta/p372733\\_index.html](http://www.allacademic.com/meta/p372733_index.html).

<sup>6</sup> See Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Justice: A Review of Research 28-29 (2006).

Quantity Table, which often result in guideline ranges falling within Zone D of the sentencing table, do not meet, “in the most effective manner,” the treatment and training needs of defendants. 18 U.S.C. § 3553(a)(2)(D).<sup>7</sup>

The links between the Drug Quantity Table and the mandatory minimum quantity thresholds have been defended as assuring a rough “proportionality” in sentencing. However, this linkage assures only that offenses involving larger amounts of a particular mixture or substance containing a detectable amount of drug are punished more severely than smaller amounts of that same mixture or substance. It does not achieve proportionality among all offenses, or among all drug offenses, or even among offenses involving the same type of drug, which often involve mixtures of dramatically different purity.<sup>8</sup> The current thresholds and associated penalties do not properly track the harmfulness of various types of drugs, differences among drugs in the typical dosage size, or variations in the presence of adulterants. The severity of punishment for various types of drugs does not accurately reflect their objective harms, even though empirical data to rank these harms is available.<sup>9</sup>

Given these problems, courts have often rejected the guidelines’ recommendations.<sup>10</sup> The Supreme Court made clear in *Kimbrough*, *Spears*, and *Nelson* that guideline

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<sup>7</sup> BOP has strict eligibility criteria for the residential abuse treatment program. U.S. Dep’t of Justice, Federal Bureau of Prisons, Program Statement 5330.11, ch. 2 (Mar. 16, 2009). And although BOP offers drug education to a greater number of inmates, those programs do not at all meet the needs of offenders with chronic substance abuse disorders. *Drug Treatment for Offenders: Evidence-Based Criminal Justice and Treatment Practices, Testimony before Subcomm. on Commerce, Justice, Science, and Related Agencies of the S. Comm. on Appropriations* (Mar. 10, 2009) (statement of Faye Taxman, Professor, Administration of Justice Department, George Mason University). Research from the National Center on Addiction and Substance Abuse (CASA) shows that only 15.7% of federal prison inmates with substance abuse disorders received professional treatment after admission into the BOP. Nat’l Center on Addiction and Substance Abuse at Columbia University, *Behind Bars II: Substance Abuse and America’s Prison Population*, at 40, tbl. 5-1 (2010). Community residential treatment programs for offenders who receive probation or who are under supervised release offer better options and access to drug treatment than a lengthy prison sentence.

<sup>8</sup> Office of Nat’l Drug Control Policy, *The Price and Purity of Illicit Drugs* (2004), available at [http://www.ncjrs.gov/ondcppubs/publications/pdf/price\\_purity\\_tech\\_rpt.pdf](http://www.ncjrs.gov/ondcppubs/publications/pdf/price_purity_tech_rpt.pdf) (showing broad ranges of purity and little relation between purity and total amount).

<sup>9</sup> See, e.g., David Nutt *et al.*, *Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse*, 369 *The Lancet* 1047 (Mar. 24, 2007).

<sup>10</sup> The courts have frequently disagreed with the crack guideline, and some have adopted a 1:1 ratio. See *United States v. Williams*, 2010 U.S. Dist. LEXIS 30810 (S.D. Ill. Mar. 30, 2010); *United States v. Greer*, 2010 U.S. Dist. LEXIS 30887 (E.D. Tex. Mar. 30, 2010); *United States v. Gully*, 619 F. Supp. 2d 633 (N.D. Iowa 2009); *United States v. Lewis*, 623 F. Supp. 2d 42, 46 (D.D.C. 2009); *United States v. Medina*, 2009 U.S. Dist. LEXIS 82900 (S.D. Cal. Sept. 11, 2009); *United States v. Owens*, 2009 U.S. Dist. LEXIS 70722, 2009 WL 2485842 (W.D. Pa. Aug. 12, 2009); *United States v. Luck*, 2009 U.S. Dist. LEXIS 71237, 2009 WL 2462192 (W.D. Va. Aug. 10, 2009); *United States v. Carter*, 2009 U.S. Dist. LEXIS 73094 (W.D. Va. Aug. 18, 2009); *Henderson v. United States*, 2009 U.S. Dist. LEXIS 83208 (E.D. La. Sept. 10, 2009). Courts have disagreed with the powder cocaine guideline as well. See *United States v. Thomas*, 595 F. Supp. 2d 949 (E.D. Wis. 2009) (imposing below-guideline sentence for

recommendations cannot be presumed to comply with § 3553(a)(2), and this applies with special force to guidelines, like the drug guidelines, that track mandatory minimum statutes and are not based on empirical data or national experience.

**The Commission may account for mandatory minimums in a variety of ways.** As the Commission has previously explained, statutory mandatory minimums and sentencing guidelines are unquestionably “policies in conflict.”<sup>11</sup> The statutes hamper the Commission’s ability to design guidelines that take account of the myriad of factors relevant to the purposes of sentencing. The statutes create “tariff” and “cliff” effects and are a major source of unwarranted disparity. In theory, statutory minimum penalties could be incorporated into the guideline structure without creating disproportionality and disparity, but only if the statutory penalties were targeted at the *least serious* offense that can arise under a statute and corresponding guideline. The full range of mitigating adjustments could then operate without the statutory penalties trumping the guideline range and requiring imposition of sentences more severe than necessary given the complete circumstances of the case.

In reality, however, mandatory penalties take into account only one or two facts and are set at levels appropriate not for the most mitigated offense but for typical, or even aggravated, offenses. Mandatory minimums are often enacted in reaction to sensational crimes and result from political competition.<sup>12</sup> They are used to convey that Congress is tough on a general type of crime, not what punishment would be appropriate for the *least serious* instance of that crime.

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attempted distribution of powder cocaine because the Sentencing Commission “departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes,” and “sentences in drug cases have since increased far above pre-guideline practice”); *United States v. Urbina*, 2009 WL 565485, \*3 (E.D. Wis. Mar. 5, 2009) (following *Thomas* in conspiracy to distribute powder cocaine case); *United States v. Cabrera*, 567 F. Supp. 2d 271 (D. Mass. 2008) (disagreeing with over-emphasis on drug quantity, under-emphasis on minimal role). Courts have also disagreed with the methamphetamine guidelines. *See, e.g., United States v. Santillanes*, 274 Fed. App’x 718, 718-19 (10th Cir. 2008) (remanding for resentencing because government conceded that it was error for court to refuse to address defendant’s argument that it should reject the guidelines’ policy of treating mixed methamphetamine differently from pure methamphetamine); *United States v. Goodman*, 556 F. Supp. 2d 1002, 1016 (D. Neb. 2008) (finding in conspiracy to manufacture methamphetamine case that “[a] variance is appropriate in view of the fact that the Guidelines at issue were developed pursuant to statutory directive and not based on empirical evidence”); *United States v. McCormick*, 2008 WL 268441, \*10 (D. Neb. Jan. 29, 2008) (same for possession of precursor chemicals because those guidelines, “were, like the drug-trafficking Guidelines, determined with reference to statutory directives and not grounded in empirical data”).

<sup>11</sup> USSC, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991). “Policies in Conflict” is the title of Chapter 4 of the Report.

<sup>12</sup> As Justice Rehnquist noted in 1993: “Mandatory minimums . . . are frequently the result of floor amendments to demonstrate emphatically that legislators want to ‘get tough on crime.’ Just as frequently they do not involve any careful consideration of the effect they might have on the sentencing guidelines as a whole.” William H. Rehnquist, Luncheon Address (June 18, 1993), in USSC, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286-87 (1993).

Justice Breyer concluded in 1999 that “statutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments. . . [T]heir existence then prevents the Commission from . . . writ[ing] a sentence that makes sense.”<sup>13</sup>

As the Commission describes in its 2007 Reason for Amendment to the crack threshold and its report on child pornography, the Commission has a variety of options for accounting for mandatory minimums within the guideline structure.<sup>14</sup> The Commission “may abandon its old methods in favor of what it has deemed a more desirable approach.”<sup>15</sup> It may set the base offense level (the BOL) to include, but not exceed, the mandatory minimum, as it has currently done with crack. It may set the BOL below the mandatory minimum and rely on Chapter Two and Three adjustments to reach the mandatory minimum in appropriate cases. The Commission may also “select a new (or maintain an existing) base offense level without regard to a newly adopted (or increased) mandatory minimum.”<sup>16</sup> In the latter two approaches, in cases in which the guideline calculation fails to reach the mandatory minimum, the mandatory minimum would apply through §5G1.1(b).

The Commission’s typical approach to incorporating the drug quantity thresholds into the guidelines has been particularly unfortunate. As noted in Issue for Comment 1, until 2007 the Commission generally—though not always<sup>17</sup>—incorporated the five- and ten-year quantity thresholds from the statutes into the Drug Quantity Table at levels 26 and 32. This made the guideline range linked to the BOL for most drugs *exceed* the mandatory minimum penalties, even for first offenders receiving no aggravating enhancements and involved with quantities just above the threshold amounts. Greater drug amounts or criminal history or other aggravating factors pushed the guideline ranges still further above the statutory requirements. The relatively few mitigating adjustments found in the guidelines could lower ranges for some offenders, but many thousands received penalties far above the statutory requirements due to the Commission’s approach.

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<sup>13</sup> Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent’g Rep. 180, 1999 WL 730985, \*8 (Feb. 1, 1999) [hereinafter Breyer, *Guidelines Revisited*].

<sup>14</sup> USSG, App. C, Amend. 706 (Nov. 1, 2007); USSC, *The History of the Child Pornography Guidelines* 44-47 (2009).

<sup>15</sup> *Neal v. United States*, 516 U.S. 284, 295 (1996) (approving amendment of LSD guideline to use presumptive-weight methodology instead of statute’s “mixture or substance” methodology).

<sup>16</sup> *Id.* at 46.

<sup>17</sup> For LSD and marijuana plants, the Commission correctly recognized that tying penalties to the weight of filler substances or to the number of plants, regardless of size, would lead to arbitrary variations in punishment unrelated to the seriousness of the offense. Although 21 U.S.C. § 841(a) requires a mandatory minimum of ten years for 1000 marijuana plants, and five years for 100 plants, the base offense levels are set at 26, and 16, significantly lower than what is required to reach the mandatory minimum.

In recognition that the statutory thresholds for crack cocaine undermined the objectives of the Sentencing Reform Act,<sup>18</sup> the Commission amended the Drug Quantity Table in 2007. Following this amendment, the five- and ten-year mandatory penalties fell within, rather than below, the guideline range associated with the BOL for first offenders receiving no aggravating enhancements with drug amounts at or just above the statutory thresholds. This amendment provided much-needed relief for thousands of defendants who were subject to unnecessarily severe penalties. It ameliorated some of the added unfairness caused by the Commission's decision to peg the statutory thresholds to BOLs and guideline ranges above the level required by statute, and to extrapolate these flawed threshold quantities to additional gradations below, between, and above the two statutory levels.

**Flawed quantity ratios have dominated the debate, unnecessarily complicated guideline calculations, and resulted in “false precision.”** Unfortunately, the debate over drug sentencing, and crack cocaine in particular, has too often been cast as a search for the correct quantity ratio between crack and powder cocaine and between cocaine and other drugs. The focus on ratios is particularly misplaced given that drug mixture quantity has long been recognized as a very imperfect proxy for the seriousness of the offense.<sup>19</sup> Factors that determine the quantity of the mixture or substance containing a detectable amount of a drug involved in a case are often arbitrary<sup>20</sup> and are sometimes even manipulated.<sup>21</sup> The debate over ratios has turned what should be a substantive debate over how best to achieve the purposes of sentencing into a quasi-mathematical and pseudo-scientific exercise. There are no “correct” ratios in light of 18 U.S.C. § 3553(a)(2).

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<sup>18</sup> USSG, App. C, Amend. 706 (Nov. 1, 2007).

<sup>19</sup> Judicial Conference of the United States, *1995 Annual Report of the JCUS to the U. S. Sentencing Commission* 2 (1995) (“[T]he Judicial Conference . . . encourages the Commission to study the wisdom of drug sentencing guidelines which are driven virtually exclusively by the quantity or weight of the drugs involved.”); General Accounting Office, *Sentencing Guidelines: Central Questions Remain Unanswered* (1992) (harshness and inflexibility of drug guideline most frequent problem cited by interviewees); Reuter & Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 Am. J. of Pub. Health 1059, 1062 (1995) (reporting recommendations of a RAND corporation working group, which concluded: “The U.S. Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug.”).

<sup>20</sup> Estimates of quantities that were not actually seized, that were under negotiation, *etc.*, inevitably are unreliable approximations. The complexity and ambiguity of key concepts such as “relevant conduct” lead to widely different guideline calculations regarding identical facts. Pamela B. Lawrence & Paul J. Hofer, Federal Judicial Center, Research Division, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 10 Fed. Sent’g Rep. 16 (July/August 1997); *United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007).

<sup>21</sup> Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims under the Federal Sentencing Guidelines*, 94 Mich. L. Rev. 2385 (1996); Eric P. Berlin, *The Federal Sentencing Guidelines’ Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 Wis. L. Rev. 187.

The “false precision”<sup>22</sup> created by over-reliance on drug quantity and consistent ratios is especially problematic since neither Congress nor the Commission has explained how drug quantity is intended to track offense seriousness or achieve other purposes of sentencing. Without this understanding, judges have no basis for determining if a guideline is working as intended in a particular case. The measurement of quantity becomes an end in itself rather than a means of determining the sentence likely to comply with the statutory purposes.

Commission reports have described the relevance of quantity in several ways, but none of these make clear why 17 quantity levels with consistent ratios among drug mixtures are needed.<sup>23</sup> For example, quantity might be conceived as a measure of the amount of harm caused by the drug mixture involved in an offense. But this neglects culpability—an important component of offense seriousness—because under the relevant conduct rules persons with limited responsibility, for example, persons whose sole job is to transport or off-load a shipment organized and owned by others, are attributed with the same amounts as persons who manufactured, owned, or profited from the shipment. Alternatively, quantity has been alleged to reflect defendants’ roles within drug trafficking enterprises and their relative culpability. The limited legislative history of the Anti-Drug Abuse Act of 1986 appeared to establish three tiers of culpability for “major traffickers” (manufacturers or the heads of organizations), “serious traffickers” (managers of the retail level traffic) and lower-level offenders.<sup>24</sup> But no legislative history or empirical data have suggested that 17 quantity levels with consistent ratios are needed to properly track role or culpability. Indeed, the Commission’s own data show that the current quantities and ratios regularly fail to do so.<sup>25</sup>

The Commission was correct in its 2007 crack amendment to disregard any false constraint that the ratios found at the two thresholds specified in the statute must be mimicked throughout the 17 levels of the Quantity Table. That amendment to the crack guideline resulted in thresholds at various offense levels that did not reflect fixed ratios between mixtures and substances containing crack and powder cocaine. Although mathematical anomalies arose when

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<sup>22</sup> Breyer, *Guidelines Revisited*, at \*11.

<sup>23</sup> *Fifteen Year Review* at 47-52; *United States v. Cabrera*, 567 F. Supp. 2d 271 (D. Mass. 2008) (noting that “the Sentencing Commission has never explained how drug quantity is meant to measure offense seriousness, and significantly, how it correlates with the purposes of sentencing under 18 U.S.C. § 3553(a),” and that “apart from the recent adjustment in the crack cocaine guidelines . . . the Commission has never reexamined the drug quantity tables along the lines that the scholarly literature, the empirical data, or [the Commission’s own] 1996 Task Force and others, recommended”).

<sup>24</sup> USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 119-21 (1995).

<sup>25</sup> See *supra* note 4. The Commission has sponsored several Working Groups and Task Forces that have found that quantity regularly fails to properly track role and culpability. See *Initial Report to the Commission: Working Group on Drugs and Role in the Offense* (1991); *Report of the Drug Working Group Case Review Project* (1992); *Addendum to the Drug/Role Working Group Report* (1993); Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of A Task Force Examining the Drugs-Violence Interrelationship*, 63 Alb. L. Rev. 749, 761 (2000).



combining different types of drugs, those anomalies were successfully addressed through a special application note to the Drug Quantity Table.<sup>26</sup>

The critical point is that substantive justice must take priority over abstract mathematical consistency. Elsewhere in the guidelines, the Commission has acknowledged that attempts to quantify harm may result in over-punishment, but the Commission has not recognized the widespread problems with drug quantity. For example, the fraud guideline, USSG §2B1.1, is driven to a large extent by the “loss” involved in the offense. The attempt to quantify loss greatly complicates guideline determinations and has required numerous special rules to account for special circumstances. With loss, however, the Commission has recognized that attempts at quantification are inherently imperfect by inviting downward departures where the offense level “overstates the seriousness of the offense.”<sup>27</sup> No such downward departures are invited where drug quantity overstates the seriousness of the offense, despite the Commission’s own evidence that this frequently occurs.

Given all of these problems, we believe the guidelines should be revised in light of the FSA to yield recommendations that comport as closely as possible with the principles of 18 U.S.C. § 3553(a). Punishment should not be dictated by abstract considerations of ratio consistency or ease of calculation of drug equivalencies. As Justice Breyer aptly stated, sentencing is ultimately a “blunderbuss.”<sup>28</sup> Attempts at exactness of measurement or consistency in ratios among inherently rough dimensions like drug quantity cannot eliminate this fact.

**The emergency amendment should continue to peg the statutory quantities for crack to base offense levels 24 and 30.** The Commission should continue the approach of the 2007 crack amendment that made the mandatory minimum penalty fall *within*, rather than *below*, the guideline ranges for first offenders with no aggravating circumstances and with quantities at, or just above, the statutory thresholds. This helps ameliorate some of the unfortunate effects of the original Commission’s decision to extrapolate below, between, and above the statutory levels in the Drug Quantity Table. The crack quantity would result in unnecessarily high guideline ranges in fewer cases. Aggravating and mitigating factors, including the new adjustments directed by the Act, would receive greater weight in relation to quantity, which is an over-arching purpose of the FSA. The gap in average sentences between crack offenders and other drug offenders, and between African American and other defendants, would be reduced.

Most important, maintaining the current correspondence between the statutory thresholds for crack and the Drug Quantity Table *is necessary to give full effect to the FSA*. If the Commission were to peg the new statutory quantities to the old BOLs, many offenders would receive no benefit from the legislation. For example, the request for comment shows that if the Commission adopted the level 26 option, offenders with quantities of 28 to 112 grams would receive a BOL of 26. Under today’s guidelines, quantities of 20 to 35 grams receive a BOL of 26. Thus, offenders to whom 28 to 35 grams were attributed would receive the same

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<sup>26</sup> USSG §2D1.1 comment. (n.10(D)).

<sup>27</sup> USSG §2B1.1 comment. (n.19(C)).

<sup>28</sup> Breyer, *Guidelines Revisited*, at \*11.

recommended sentence under guidelines amended under the level 26 option that they receive today, rendering the threshold changes in the FSA a nullity for those offenders. Similarly, those defendants whose offenses involved between 280 and 499 grams of crack would remain at offense level 32. Those defendants whose offense involved between 840 grams and 1.49 kilograms would remain at level 34. Moreover, some of these offenders may qualify for new enhancements directed by the FSA. For these offenders, the cumulative effect of the FSA—which was, after all, enacted primarily to address the unfair severity of crack sentencing—would be to *increase* sentences above the lengthy prison terms the guidelines recommended at the time of the legislation.

With the “level 24 option,” some defendants who would otherwise qualify for certain downward adjustments may not benefit from them because the mandatory minimum would truncate or trump their guideline range. (Only some deserving offenders benefit from safety valve relief under 18 U.S.C. § 3553(f), or substantial assistance motions under § 3553(e) or Rule 35(b). We hope that the Commission and Congress will expand safety valve relief in the near future.) This trumping and truncating means that some less culpable defenders may be treated the same as more culpable ones.<sup>29</sup> This unwarranted uniformity is an inevitable consequence of mandatory minimums, however. The entire guideline structure should not be ratcheted upward only to partially accommodate the interaction between guideline adjustments and mandatory minimum statutes, particularly when the mandatory minimums are fundamentally incompatible with the guidelines, as described above. No defendants should be denied the benefit of the Fair Sentencing Act to correct a flaw that lies with the statutes any more than Congress should have lowered the triggering quantities for cocaine powder rather than raise the quantity for crack.<sup>30</sup>

Recent experience has alleviated the concern that drove the original Commission to link the statutory thresholds to the guidelines in the manner that it did. The Commission reported in 1995 that it set the base offense levels for first offenders “slightly higher than the mandatory minimum levels to permit some downward adjustments for defendants who plead guilty or otherwise cooperate with authorities.”<sup>31</sup> In other words, the range was set higher than necessary to ensure that defendants would plead guilty or otherwise cooperate. Even assuming that this was a legitimate reason, the 2007 amendment of the crack guidelines provides an empirical test of this concern. The data show that the plea rate in crack cocaine offenses did not fall after the amendment.<sup>32</sup> Moreover, defendants who provide assistance in the prosecution of other persons may still get sentences below the mandatory minimum by operation of 18 U.S.C. § 3553(e) and Rule 35 of the Federal Rules of Criminal Procedure. In any event, the guidelines should not be

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<sup>29</sup> *Fifteen Year Review* at 49 (“‘[T]rumping’ of the otherwise applicable guideline range creates disparity by treating less culpable offenders the same as more culpable ones . . .”).

<sup>30</sup> See Statement of Ricardo H. Hinojosa, Acting Chair, United States Sentencing Comm’n Before the House Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, at 16 (May 21, 2009).

<sup>31</sup> See USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, ch. 7 (1995).

<sup>32</sup> See USSC, *Sourcebook of Federal Sentencing Statistics*, tbl. 38 (93.9% plea rate in crack cases in FY2009; 95.1% in 2008; 93% in 2007; 93.7% in 2006; and 91.8% in 2005).

designed to recommend sentences greater than necessary to achieve the purposes of sentencing merely to provide room for the partial operation of guideline adjustments intended to reward cooperation. This, in effect, punishes non-cooperation, which is against the Commission's express policy.<sup>33</sup> Creating incentives for plea bargaining or cooperation is *not* a purpose that sentencing judges, or the Commission, must consider under 18 U.S.C. § 3553(a)(2).

The trumping of guideline ranges by mandatory minimums is an unfortunate consequence of the incompatibility of the mandatory minimum statutes and the guidelines, but it is also an important reminder of the Congressional role in sentencing. If a statute overrides the judgment of the Commission as to the appropriate sentencing range, responsibility for the policy should be clear. The policy judgment of the political branches should not be cloaked as the work of the Commission, particularly if those judgments fail to meet the standards of § 3553(a)(2).

As under the current guideline, adopting the level 24 option would not establish a consistent ratio between crack cocaine and other drugs. But we do not believe this is a compelling consideration upon which to base sentencing policy. If the Commission believes consistent ratios are preferable, the way to achieve them is to link the quantities for other drugs to the Drug Quantity Table in the same manner that is now used for crack, *i.e.*, adopt the level 24 option for all drug types. We understand that this is beyond the scope of the Commission's emergency amendment authority. But, the case for linking the new statutory thresholds to the current BOLs for crack is compelling and provides a first step toward later revision of the BOLs for other drugs. For the reasons stated in previous comment and in the testimony of Federal Public Defenders at the regional and mandatory minimum Public Hearings, reduction of all BOLs by two levels would be a useful step toward improvement of the drug trafficking guidelines.

**The Department of Justice's suggestions are unwise and unworkable.** We emphatically disagree with the views in the Department's letter to the Commission dated June 28, 2010. The Department stated that tying the guidelines to applicable mandatory minimums is the "correct policy." It suggested that for drug offenses the "Commission should generally choose a base offense level so that after accounting for regularly occurring aggravating and mitigating factors elsewhere in the guidelines manual, the low end of the guideline range for the final offense level is not generally below the mandatory minimum sentence."<sup>34</sup> While much depends on the meaning of "generally" and "regularly occurring" in the Department's proposal, as a guide to guideline drafting this proposal appears both unworkable and profoundly unwise.

The Department's proposal would, of course, compound the many problems created by linkage of the guidelines to the statutes, as described above. On its face, the proposal would appear to require major amendment of the *current* guidelines, resulting in significant *increases* in

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<sup>33</sup> See USSG §5K1.2, p.s. ("A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor.").

<sup>34</sup> Letter from Jonathan Wroblewski, Dep't of Justice Office of Policy and Legislation, to Hon. William K. Sessions, III, Chair, United States Sentencing Comm'n, at 6 (June 28, 2010).

drug sentences for all types of drugs. The guidelines already recommend imprisonment ranges with a low end below the mandatory minimum level in many thousands of cases each year.<sup>35</sup>

By requiring a linkage between *final* offense levels, after all other Chapter Two and Three adjustments are applied, rather than *base* offense levels, the Department's proposal would greatly handicap any future Commission's ability to amend the guideline structure. The proposal requires that base offense levels be *increased* whenever the Commission adds a mitigating adjustment intended to *decrease* sentences for appropriate defendants. Under the current guidelines, if a new mitigating adjustment would be "regularly occurring" it would lower final offense levels below the statutory minimum in many cases. To comply with the Department's proposal, base offense levels would need to be increased to prevent this from occurring. This would mean that adding mitigating adjustments would actually have the effect of maintaining sentence lengths for those defendants subject to the adjustment while *increasing* sentences for everyone else.

Such a policy is particularly inapt in light of the FSA, which itself added new mitigating (as well as aggravating) factors. The intent of the act was "increased emphasis on defendant's role," not increased base offense levels, and sentences, for all drug offenders based on drug quantity alone.

#### **Elimination of Mandatory Minimum for Simple Possession of Crack Cocaine**

The Commission proposes to strike from §2D2.1(b)(1) the cross-reference to §2D1.1 in cases where the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine base. We believe this change is necessary because Congress eliminated the mandatory minimum penalty for simple possession of crack cocaine.

### **ENHANCEMENTS AND ADJUSTMENTS**

**The directive does not require that the Commission promulgate enhancements cumulatively.** Before addressing the Commission's specific proposals regarding each of the adjustments, we here set out our analysis of the FSA and why it does not require the Commission to provide for the enhancements to apply cumulatively. Under a plain reading of the FSA, the Commission must "review and amend the Federal sentencing guidelines" to ensure that they call for a 2-level increase for certain aggravating factors. Nothing in the FSA, however, requires that those increases be in "addition" to existing enhancements or, for those in section 6, to each other. This reading of the FSA is consistent with how the Commission has construed similar directives in the past.

Sections 4, 5, and 6 of the FSA provide for increased penalties for drug traffickers. These sections must be read in *pari materia*. Section 4 is entitled "Increased Penalties for Major

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<sup>35</sup> See Testimony of Michael Nachmanoff, *supra* note 1, at 5 (showing that in FY2009 cases with a mandatory minimum conviction, the minimum was within the guideline range in 16.1% of cases (3,254 of 20,127), was lower than the range in 42.7% of cases (8,581 of 20,127), and was higher than the range in 41.3% of cases (8,292 of 20,127)).

Drug Traffickers.” It contains two subsections that increase financial penalties: one subsection sets forth “increased penalties” under 21 U.S.C. § 841(b); the other subsection sets forth “increased penalties” under 21 U.S.C. § 960(b). Section 5 sets forth a directive for the Commission to “review and amend the Federal sentencing guidelines to provide *an additional penalty increase* of at least 2 offense levels” for certain acts of violence. Given the “increased penalties” language in section 4, the phrase “additional penalty” in section 5 should be read as “in addition to the penalty increases called for in section 4.”

Section 6 then directs the Commission to “review and amend the Federal sentencing guidelines to ensure an *additional increase* of at least 2 offense levels.” Under canons of statutory construction, the term “additional” in section 6 refers back to the immediate antecedent, *i.e.*, the increase in section 5. Norman J. Singer & J.D. Shambie Singer, *2A Sutherland Statutory Construction* § 47:33 (7th ed. 2010) (“[r]eferential and qualifying words and phrases, where no contrary intention appears, refers solely to the last antecedent”).

Read this way, the FSA does not require the enhancements in section 6 to apply cumulatively to each other or for the enhancements in sections 5 and 6 to apply cumulatively to existing guideline provisions. It requires only that the Commission provide for the violence enhancement to apply cumulatively with the enhancements set forth in section 6.

This construction of the FSA is consistent with how the Commission has treated similar directives. Specifically, the Commission has read the term “additional” in other directives as meaning “in addition to other increases called for in the directive,” not as “in addition to other specific offense characteristics” or “in addition to existing guideline provisions.” Two examples demonstrate this point.

*Telemarketing Fraud Prevention Act of 1998.* In June 1998, Congress directed the Commission to increase penalties for certain telemarketing offenses. *See* Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184, § 6 (June 23, 1998). In subsection (b)(1) of the directive, Congress instructed the Commission “to provide for substantially increased penalties for persons convicted of” certain telemarketing offenses. *Id.* In subsection(c)(1), Congress directed that the “guidelines and policy statements . . . reflect the serious nature of the offenses.” *Id.* Subsection (c)(2) then directed that the Commission shall “provide **an additional appropriate sentencing enhancement**, if the offense involved sophisticated means, including but not limited to sophisticated concealment.” *Id.*

In this context, the term “additional” meant “in addition to the requirement that the Commission provide for substantially increased penalties under (b)(1) and that they reflect the seriousness of the crime, as required by subsection (c)(1).” The Commission did not interpret it to mean, “in addition to already existing guidelines.” When Congress passed the Telemarketing Fraud Prevention Act of 1998, the Commission had already sent to Congress an amendment to the fraud guideline that would increase penalties for mass-marketing, including telemarketing, and for “sophisticated concealment.” USSG, App. C, Amend. 577 (Nov. 1, 1998). Instead, of increasing the enhancement in the “sophisticated concealment” amendment it had already submitted to Congress, the Commission merely broadened it to cover all “sophisticated means.” *See* USSG, App. C, Amend. 587 (Nov. 1, 1998).

*Illegal Immigration Reform and Immigrant Responsibility Act of 1996.* In § 211(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress directed the Commission to increase sentences for certain specified offenses involving immigration documents. See IIRIRA, Pub. L. No. 104-208, § 211(b)(2)(A)-(B) (Sept. 30, 1996). It also directed the Commission to “impose an appropriate sentencing enhancement” for an offender with one prior felony conviction involving the same or similar conduct, *id.* § 211(b)(2)(C), and to “impose an **additional appropriate sentencing enhancement**” for an offender with two or more such prior felony convictions. The term “additional” in this context clearly means “in addition to the enhancement for one prior conviction” also specified in the directive. In response to this language, the Commission added a specific offense characteristic to both §§ 2L2.1 and 2L2.2 that provides for a 2-level increase for one prior felony conviction, and a 4-level increase for two or more such convictions. USSG, App. C, Amend. 544 (May 1, 1997).

Just as it did not read the telemarketing fraud or immigration reform directives to require enhancements in addition to those already existing in the guidelines, the Commission should not so interpret the FSA. Nothing in the plain language of the FSA requires that the Commission amend the guidelines so that the enhancements required under the Act apply cumulatively to existing enhancements. The directive for the Commission to “review and amend to ensure an additional penalty increase” or “additional increase” of at least 2-levels should be given a natural, common-sense meaning. With that language, Congress expressed its desire that the guideline range for certain drug trafficking offenders should be greater [at least 2-levels] than the range for quantity alone. Congress, however, left it up to the Commission to review the guidelines and amend them to make sure they provided for such penalty increases.

**Violence Enhancement.** Section 5 of the Act directs the Commission to “review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense.”

The Commission requests comment on several matters related to this directive: (1) whether it should “provide a single level of enhancement for any conduct covered by the violence enhancement” or assign different levels to the different categories of conduct; (2) whether the violence enhancement and the enhancement for weapon possession should be applied cumulatively; and (3) whether the term “violence” should be defined, and if so, how the definition should “interact with other provisions in the Manual where the term is not defined.”

We believe that the Commission should implement this directive by amending §2D1.1(b)(1) as follows:

If a dangerous weapon (including a firearm) was possessed *or the defendant used violence, made a credible threat to use violence, or directed the use of violence in connection the offense*, increase by 2 levels.<sup>36</sup>

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<sup>36</sup> The Commission should make clear that the violence must be done in connection with or to facilitate the offense rather than merely occur at the same time as the drug trafficking offense. Otherwise, the guideline may well reach acts of violence that have nothing to do with the defendant’s drug trafficking, *e.g.*, an assault wholly unrelated to the defendant’s drug activities.

By adding the violence enhancement to the existing enhancement for possession of a dangerous weapon, the Commission would implement the additional penalty increase as contemplated by the directive. It also would maintain symmetry with §5C1.2(a)(2), which treats the use of violence, threats of violence, and possession of a weapon in connection with the offense, as equivalent.

The violence enhancement and the weapon enhancement should not apply cumulatively.<sup>37</sup> Nothing in the guidelines or the legislative history of the FSA supports the notion that weapon possession is a distinct harm from the use or threatened use of violence, which must be punished separately or cumulatively. Indeed, “[t]he enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons.” USSG §2D1.1, comment. (n.3). The congressional hearings surrounding passage of the FSA also reflect the view that weapon possession is a proxy for the presence of violence, not a separate harm unto itself. No witness suggested that weapon possession was to be treated as a harm independent of the risk of violence.<sup>38</sup>

***Provide for a single level enhancement.*** We do not believe that the Commission should provide for increased offense levels according to whether the defendant used violence or threatened it. The essential harm is the same unless bodily injury occurs. In those cases where actual bodily injury does occur, the guidelines encourage an upward departure. USSG §5K2.2 (Physical Injury). The Commission should not unduly complicate the guidelines by adding graduated enhancements depending upon the nature of violent conduct.

***Define violence.*** We believe that some definition of “violence” may be necessary to avoid the enhancement reaching unintentional conduct, damage or threats to damage property, and legally justifiable conduct (self-defense).

We note that the Commission drafted a revised proposed amendment for field-testing that equates violence with “physical force against the person [or property] of another.”<sup>39</sup> While framing the “violence” inquiry with reference to “physical force against the person” is a good start, we do not believe it goes far enough in removing ambiguity, getting at the conduct

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<sup>37</sup> We agree with the Commission’s Second Revised Proposed Amendment, which clarifies that a use of force enhancement (also known as the violence enhancement) does not apply when the defendant also has been convicted under 18 U.S.C. § 924(c).

<sup>38</sup> See generally *Unfairness in Federal Cocaine Sentencing: Is It Time to Crack the 100 to 1 Disparity?*, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary House of Representatives, 111th Congress (May 21, 2009); *id.* at 6 (statement of Rep. Lamar Smith, R. Texas); *id.* at 28 (testimony of Lanny A. Breuer, Assistant Attorney General, U.S. Dep’t of Justice) (supporting increased penalties to address “concerns about violence and guns used to commit drug offenses”); *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity*, Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 111th Congress 23 (April 29, 2009) (weapon enhancement used to judge level of violence associated with crack distribution).

<sup>39</sup> The Commission’s Second Revised Proposed Amendment was provided to the federal defenders in connection with field-testing conducted at the Commission on October 7, 2010.

Congress contemplated under the enhancement, and ensuring proportionality. Hence, we propose the following language:

*Violence means physical force that is intended to cause and capable of causing serious bodily injury to another person. “Serious bodily injury” has the meaning given to that term in Application Note 1 of the Commentary to §1B1.1. An act of self-defense is not the use of violence for purposes of this section.*

Our proposal builds on the field-tested proposed amendment in several ways. First, we think it important that the use of physical force be defined by reference to *intent to do bodily harm*. Such intent is embodied within the meaning of “violence.” Black’s Law Dictionary (8th ed. 2004) (defining violence as “the use of physical force, usually accompanied by fury, vehemence, or outrage, especially physical force unlawfully exercised with *the intent to harm*”).<sup>40</sup>

The Commission should not expand the common and ordinary meaning of “violence” to include acts against property. Had Congress intended such an expansive definition, it could have easily said so. Congress more likely had in mind the kind of violence identified as aggravating conduct in the Commission’s 2007 report, *i.e.*, conduct causing actual physical harm to another person.<sup>41</sup> Defining violence by reference to physical force against the person of another is consistent with the Department of Justice’s position at the Congressional hearing, which called for enhancements for those “who injure or kill someone in relation to a drug trafficking offense.”<sup>42</sup> Defining violence as the use of physical force against another also tracks the definition of violence set forth in USSG §4B1.2(a)(1) and §2L1.2, comment. (n.1(B)(iii)). If the Commission were to expand the reach of the enhancement to the use of physical force against property, any number of acts that might occur during the course of drug trafficking would be considered aggravating, including acts of vandalism, such as the slashing of tires and keying of cars of rival dealers.

Second, to avoid confusion caused by multiple definitions of the term, we encourage the Commission to define the term “physical force” in a way that is consistent with the Supreme Court’s analysis in *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010), *i.e.*, “*force capable of causing physical pain or injury to another person.*”

Third, we recommend adding to the *Johnson* definition the requirement of “serious” injury to ensure proportionality between the new 2-level enhancement under §2D1.1 and other guideline provisions that contain 2-level increases for serious bodily injury.<sup>43</sup>

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<sup>40</sup> See *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (term “use” does not mean accidental).

<sup>41</sup> USSC, *Report to Congress: Cocaine and Federal Sentencing Policy* 37 (2007).

<sup>42</sup> See *Unfairness in Federal Cocaine Sentencing: Is It Time to Crack the 100 to 1 Disparity?*, Hearing Before the House Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 111th Cong. 28 (2009) (statement of Lanny Breuer, Ass’t Attorney General).

<sup>43</sup> See USSG §§2A2.1(b), 2A4.1(b)(2), 2B1.1(13), 2B5.3(b)(5), 2L1.1(b)(6).



We also think it appropriate to make clear that this enhancement is limited to those acts of the defendant for which he would be accountable under §1B1.3(a)(1)(A). To promote such clarity, the Commission could include language like that in Application Note 4 to USSG §5C1.1: “*Consistent with §1B1.3 (Relevant Conduct), the term “defendant,” as used in subsection [cite violence enhancement subsection], limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured or willfully caused.*” One of the driving forces behind the FSA was the recognition that guidelines with specific enhancements that target an individual offender’s role in the offense promote sentencing proportionality better than blanket application of quantity-based guidelines to a broader number of defendants. Holding defendants accountable for their own conduct, or that which they aided or abetted or willfully caused, is consistent with this renewed focus on the defendant’s actual role in the offense.<sup>44</sup>

**Bribery Enhancement.** Section 6 of the Act directs the Commission to “ensure an additional increase of at least 2 levels if the defendant bribed a Federal, State, or local law enforcement official in connection with a drug trafficking offense.” The Commission requests comment on how this provision should interact with other provisions, such as §3C1.1 (Obstructing or Impeding the Administration of Justice). “In particular, should they be applied cumulatively, or should they not be applied cumulatively?”

With this directive, it appears that Congress was concerned with ensuring increased penalties for those rare cases that fall outside of §3C1.1 because the bribery of the officer did not occur with respect to the investigation, prosecution, or sentencing of the instant offense of conviction (*e.g.*, a case where a defendant offers a law enforcement agent money to overlook drug trafficking activity when no federal investigation is pending).<sup>45</sup>

We encourage the Commission to ensure that the provision does not cumulate with §3C1.1 unless the defendant obstructed the investigation or trial of the instant offense by engaging in conduct other than the bribery of a law enforcement officer. In circumstances where the offense guideline already accounts for the obstructive conduct, the guidelines do not apply cumulatively. *See* USSG §2J1.3, comment (n.2) (instructing that §3C1.1 does not apply to offenses covered under §2J1.3 (perjury or bribery of a witness) unless the defendant obstructed the investigation or trial of the perjury count); *id.* §2J1.9, comment (n.1) (instructing that §3C1.1 does not apply to offenses covered under §2J1.9 (payment to witness) unless defendant obstructed the investigation or trial of the payment to witness count). No evidence suggests that a different rule should apply here. It would be unduly harsh and not serve any purpose of sentencing set forth in 18 U.S.C. § 3553(a)(2) to allow conduct identical to that giving rise to the enhancement under §2D1.1 to also support the obstruction enhancement under §3C1.1.

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<sup>44</sup> Other guideline provisions contain the same limitation. *See, e.g.*, USSG §2K1.1, comment. (n.13(B)); §2K2.6, comment. (n.1(A)) (use of body armor in connection with another felony offense); §3B1.5, comment. (n.2) (use of body armor); §3C1.1, comment (n.9) (obstructing or impeding administration of justice).

<sup>45</sup> *See United States v. Jenkins*, 275 F.3d 283, 291 (3d Cir. 2001) (requiring nexus between defendant’s conduct and investigation, prosecution or sentencing of the federal offense; interference with state prosecution insufficient to warrant application of §3C1.1).

The Commission should add an application note to §3C1.1, such as the following, to address the interplay between the new §2D1.1 enhancement and §3C1.1:

*Inapplicability of Adjustment in Certain Cases under §2D1.1.—If the adjustment from §2D1.1(b)(11) applies, this adjustment is not to be applied to the offense level for that offense unless a significant further obstruction occurred during the investigation, prosecution, or sentencing of the instant offense itself (e.g., if the defendant threatened a witness during the course of the prosecution).*<sup>46</sup>

For the same reasons, we agree with the Commission’s proposal in the Second Revised Proposed Amendment at Application Note 27 to §2D1.1 instructing that the enhancement for bribery of a law enforcement officer does not apply if the new super-aggravating factor for obstructing justice applies.

We also urge the Commission to limit application of the enhancement to the defendant’s acts and omissions covered under §1B.3(a)(1)(A). Such a limitation would be consistent with Application Note 9 to § 3C1.1, which makes the defendant accountable only for “his own conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.”

**Enhancement for Maintaining an Establishment.** Section 6 of the Act directs the Commission to “ensure an additional increase of at least 2 levels if the defendant *maintained* an establishment for the *manufacture or distribution* of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. § 856).” The Commission requests comment on whether “this enhancement should apply more broadly, *e.g.*, if the defendant “committed an offense described in 21 U.S.C. 856?” The Commission also asks if it should “raise the alternative base offense level 26 in §2D1.9 to [28] [30]?” Our answer to both of these questions is “no” for the reasons discussed below.

As a threshold matter, we suggest that the Commission implement this directive by simply adding to the existing specific offense characteristic (SOC) at §2D1.1(b)(5) for those convicted under 21 U.S.C. § 856 rather than setting forth a separate SOC. Language such as the following would more clearly eliminate any questions about double-counting of separate SOC’s.

*If the defendant is convicted under 21 U.S.C. § 865 or maintained an establishment for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels.*

(New language in bold.)

Should the Commission choose instead to provide for a new SOC, it should make clear that it does not apply if the defendant was convicted of an offense under 21 U.S.C. § 856. In such cases, only the current §2D1.1(b)(5) should apply.

***The enhancement for maintaining an establishment for the manufacture or distribution of a controlled substance should not apply to other conduct covered under 21 U.S.C. § 856.*** Subsection (a) of § 856 sets forth, in two separate paragraphs, a series of

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<sup>46</sup> This language is adapted from USSG §3C1.2, comment. (n.6).

prohibited acts. Paragraph (1) makes it unlawful to “knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance.” Paragraph (2) makes it unlawful to “manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully, manufacturing, storing, distributing, or using a controlled substance.” These two provisions do not proscribe the same conduct. Paragraph (1) requires the person with the interest in the premises to have the express purpose of doing so for engaging in drug related activity. For that reason, a person cannot be convicted under (1) on the basis of willful blindness. Paragraph (2), in contrast, contains a lesser mens rea, requiring only that the person knowingly and intentionally allow it for the purpose of manufacturing, storing, or distributing.<sup>47</sup>

In contrast to the multitude of ways in which a person may commit an offense under 21 U.S.C. § 856, the FSA directive singles out two: (1) *maintaining an establishment for the manufacture of a controlled substance*; or (2) *maintaining an establishment for the distribution of a controlled substance*. If Congress had meant for the Commission to add an enhancement for a defendant who commits *any* of the acts described in § 856, it knew how to say so.

Here, a narrow reading of the directive is especially warranted because a new enhancement for maintaining an establishment for manufacture or distribution would free the government of the burden of proving the conduct beyond a reasonable doubt as required under existing USSG §2D1.1(b)(5) (2-level increase if “defendant is convicted under 21 U.S.C. § 856”). Under these circumstances, it would erode respect for law, contrary to 18 U.S.C. § 3553(a)(2)(A), if the Commission was to broaden application of the enhancement to all of the conduct described in § 856.

***The alternative base offense level 26 in §2D1.8 should remain the same.*** For related reasons, we object to any proposal that would raise the alternative base offense 26 in §2D1.8 to 28 or 30. Some defendants convicted under 21 U.S.C. § 856 will be sentenced under §2D1.1, with its 2-level increase for the § 856 conviction. USSG §2D1.1(5). Defendants most likely to benefit from the alternative base offense level in §2D1.8 are those who do nothing more than allow use of premises that the defendant “initially leased rented, purchased, or otherwise acquired a possessory interest in . . . for a legitimate purpose.” USSG §2D1.8. comment. (n.1). Such persons are hardly the people Congress intended to punish more harshly because of their aggravating role in the offense and are unlikely to be responsible for maintaining an establishment for the manufacture or distribution of controlled substances.<sup>48</sup> These individuals are more likely to have been convicted under 21 U.S.C. § 856(a)(2), which contains a lesser mens rea requirement than 21 U.S.C. § 856(a)(1).

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<sup>47</sup> See, e.g., *United States v. Wilson*, 503 F.3d 195, 197-98 (2d Cir. 2007) (discussing different mens rea requirements of the two sections); *United States v. Soto-Silva*, 129 F.3d 340, 344 (5th Cir. 1997) (deliberate ignorance instruction inappropriate in prosecution under § 856(a)(1); defendant must “have the purpose of engaging in illegal drug activities”).

<sup>48</sup> In FY 2008, 33 defendants sentenced under §2D1.8 had a base offense level of 26 (the alternative offense level under §2D1.8(a)(2)). Twenty-five (75.8% were female). Source: BJS FY2008 (Offenders Sentenced, tables), available at <http://bjs.ojp.usdoj.gov/fjsrc>.

Absent a clear and unambiguous statement of congressional intent, the Commission should not use the directive in the FSA to ratchet up sentences for defendants who “had no participation in the underlying controlled substance offense other than allowing use of the premises.” USSG §2D1.8(a)(2). Less than ten years ago, the Commission increased the alternative offense level 61.5% (from level 16 to level 26) “in response to concerns that the guidelines pertaining to drug offenses do not satisfactorily reflect the culpability of certain offenders.” USSG, App. C, Amend. 640 (Nov. 1, 2002). No testimony presented at the congressional hearings or any evidence suggests that the penalties are too low for these offenders.

As a more general proposition, nothing in the FSA purports to require the Commission to add aggravating factors to guidelines that cover narrowly tailored drug offenses like 21 U.S.C. § 856. The directives for additional penalties in the FSA apply to only two types of offenses – distribution-related offenses under 21 U.S.C. § 841 and importation offense under 21 U.S.C. § 960(b). As previously discussed, section 4 of the Act sets forth the additional penalties for those offenses. Sections 5 and 6 then provide for an “additional penalty increase” or “additional increase” for those offenses. The FSA does not speak to any of the other offenses covered under title 21.

***The proposed application note on maintaining an establishment for distribution or manufacture of a controlled substance should be modified to avoid ambiguity.*** The Commission has prepared a Second Revised Proposed Amendment, which adds an application note that seeks to instruct the court on the meaning of “maintaining an establishment for the manufacture or distribution of a controlled substance.” While we think it advisable to define what it means to “maintain an establishment for the manufacture or distribution of a controlled substance,” we fear that the proposed application note sweeps too broadly and may confuse matters. We suggest the following changes to the provision so that it clearly addresses the two essential elements of the enhancement: (1) maintaining an establishment; (2) for the purpose of manufacture or distribution of a controlled substance.

*Subsection (b)(12) applies to a defendant who knowingly maintains an establishment premises (i.e., a “building, room or enclosure,” see USSG §2D1.8, comment. (backg’d), for the purpose of manufacturing or distributing a controlled substance.*

*Among the factors the court should consider in determining whether the defendant “maintained” the premises are (A) whether the defendant held a possessory interest in (e.g., owned or rented) the premises, (B) the amount of time the defendant was present at the premises, (C) the defendant’s activities at the premises (such as activities to furnish, repair, protect, or supply the premises) and (D) the extent to which the defendant controlled access to, or activities at, the premises.*

***If the court concludes that the defendant “maintained” the premises, it must also determine whether the defendant did so for the purpose of manufacturing or distributing, not storing or using, a controlled substance. For the enhancement to apply, manufacturing or distributing a controlled substance ~~need not be the sole purpose for which the premises were used,~~ but must be for more than a collateral purpose of***

*the premises, it must be a ~~a~~ **one of the primary or principal uses** (italics in original, bolded language is new).*<sup>49</sup>

We propose that the Commission make clear that the purpose not be for storing or using a controlled substance. Whereas § 856 prohibits manufacturing, distributing, using, or storing, the FSA limits the enhancement to manufacture and distribution. The Commission should also include language that manufacture or distribution must be for more than a collateral purpose and must be a primary use of the premises. Such language would better target the harms with which Congress was concerned in 21 U.S.C. § 856. Section 856 is at bottom a “crack house” statute, which was designed to “outlaw operation of houses or buildings, so-called ‘crack houses,’ where ‘crack,’ cocaine and other drugs are manufactured and used.” H.R. 5484, 99th Cong., 2d Sess., 132 Cong. Rec. S13779 (Sept. 26, 1986).<sup>50</sup>

**Implementation of the Super-Aggravators.** The Commission has requested comment regarding how it should implement the directive in section 6(3) of the Act, which directs the Commission to “ensure an additional increase of at least 2 levels” if the defendant “is an organizer, leader, manager or supervisor” subject to an aggravating role enhancement and if the offense involved one or more the “super-aggravating” factors listed in the directive. In particular, the Commission requests comment regarding whether it should implement this directive in Chapter 3 (Issue for Comment 6); whether it should distinguish among the various factors by assigning different levels to each or providing for a higher total adjustment if more than one applies; (Issue for Comment 7); how it should interact with other provisions in the guideline manual, particularly whether the factors should apply cumulatively (Issue for Comment 8); and how should the directive interact with other directives set forth in section 6 of FSA (Issue for Comment 9).

We encourage the Commission to implement this directive by amending §2D1.1 and combining into a single offense characteristic the super-aggravating role enhancement, the enhancement for bribery of a law enforcement officer, and the enhancement for maintenance of an establishment for the purpose of manufacturing or distributing a controlled substance. Specifically, the Commission should establish a new subsection under §2D1.1(b), which contains three subparts: (1) the bribery of a law enforcement office enhancement; (2) the maintenance of an establishment for the purpose of manufacturing or distributing a controlled substance offense; and (3) the super-aggravating role enhancement. These enhancements would not apply cumulatively. A single enhancement with multiple subparts is consistent with the language of section 6 of the Act, which sets out the aggravating factors in the alternative and does not state that they should apply cumulatively.

A single multi-part enhancement would provide for aggravating factors set forth in section 6, while recognizing that at some point the piling on of enhancements accomplishes no sentencing purpose and creates an “inherently unstable” system because of “continual factor

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<sup>49</sup> See *United States v. Lancaster*, 968 F.2d 1250, 1253 (D.C. Cir. 1992) (statute does not reach drug activity that is “incidental” to purpose of maintaining house as a residence).

<sup>50</sup> See, e.g., *id.* at 1252 (defendant maintained house for the regular sale and use of crack; on repeated occasions, agents found twenty or more people in house along with drugs and drug paraphernalia).

creep.”<sup>51</sup> The Commission itself has recognized the phenomenon of “factor creep,” observing, that “as more and more adjustments are added to the sentencing rules, it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.”<sup>52</sup> Sound policy reasons exist for avoiding the phenomenon of “factor creep” by consolidating these factors into a single multi-part offense characteristic that does not apply cumulatively.

First, §2D1.1 already contains eleven different specific offense characteristics. The addition of five more, with each one having the potential to increase substantially the length of a term of imprisonment, would complicate the sentencing process—making it harder and longer for probation officers, prosecutors, defense attorneys, and judges.<sup>53</sup> The more decision points there are in a guideline calculation, the less reliable the result.<sup>54</sup>

Second, the guideline table’s logarithmic structure ensures that the size of the sentence increase associated with even a 1-level change is significantly greater at higher total offense levels than lower ones. Take for example, a defendant in Criminal History Category I who starts out at a base offense level of 32—the base offense level most often used for powder and crack cocaine offenders.<sup>55</sup> His guideline range would start at 121-151 months. If he then receives a 2-level role adjustment, a 2-level adjustment for maintaining an establishment for the purpose of distribution, a 2-level adjustment for distributing to a 65 year old, and a 3-level reduction for acceptance of responsibility, his final range jumps to 168-210 months—nearly *four to five years longer*. If, however, the defendant started at the next most frequent base offense level for cocaine and crack offenders, level 26,<sup>56</sup> his starting range would be 63-78 months. With the same upward and downward adjustments, his final range would jump to 87-108 months—*two to two and one-half years longer*. This gaping disparity in the amount of prison time added on as a result of “factor creep” is disproportionate, unjustifiable and unfair.

Third, the gross disparities that result from the accumulation of aggravating factors encourage prosecutors to manipulate the factual basis upon which the guidelines are calculated to

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<sup>51</sup> R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol’y & L. 739, 752 (2001) [hereinafter Ruback & Wroblewski, *Reasons for Simplification*].

<sup>52</sup> *Fifteen Year Review* at 137 (citing Ruback & Wroblewski, *Reasons for Simplification*). As an example of factor creep, the Commission uses the “countless circumstances” that one can imagine would make a drug offense more serious. *Id.*

<sup>53</sup> Ruback & Wroblewski, *Reasons for Simplification*, at 752.

<sup>54</sup> *Id.* at 765 (citing P.B. Lawrence & P.J. Hofer, *An Empirical Study of the Application of Relevant Conduct Guidelines*, 4 Fed. Sent’g Rep. 330 (1992)).

<sup>55</sup> USSC, *Report to Congress: Cocaine and Federal Sentencing Policy 25* (2007).

<sup>56</sup> *Id.*

arrive at a particular result. Such manipulation then injects yet another layer of unwarranted disparity into the process.<sup>57</sup>

In similar situations where the Commission has sought to account for numerous circumstances that might make an offense more serious, it has set forth alternative specific offense characteristic in a non-cumulative manner. For example, §2D1.1(10), which was promulgated in response to the “substantial risk” directive in the Methamphetamine and Club Drug Anti-Proliferation Act of 2000, Pub. L. No. 106-878, sets forth enhancements for a variety of harms, such as discharge of a toxic substance, transportation or storage of hazardous waste, distribution of methamphetamine on premises where a minor is present or resides, manufacture of methamphetamine where a minor is present or resides, and manufacture of methamphetamine creating a substantial risk of harm. Those enhancements do not apply cumulatively.

Section 2G2.2(b)(3) likewise sets forth six separate enhancements for distribution of child pornography for pecuniary gain, distribution for receipt or expectation of receipt of a thing of value, distribution to a minor, distribution to a minor that was intended to induce participation in illegal activity, distribution to a minor that was intended to induce the minor to travel for sexual conduct, and distribution for other reasons. Those enhancements do not apply cumulatively.

In sum, we strongly encourage the Commission to provide for a maximum 2-level increase regardless of whether or not the offense involved one or all of the aggravating factors set forth in section 6 of the Act. No evidence suggests that the drug guidelines are too low and that cumulative aggravating factors are necessary to accomplish the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). For cases in which more than one factor is present, the court may, and undoubtedly will, consider those factors in deciding whether to sentence at the low, middle, or high-end of the applicable guideline range.

For the same reasons discussed above, we encourage the Commission to avoid cumulative application where other guideline provisions address the harm targeted by the section 6 aggravating factors. We note that the Commission’s Second Revised Proposed Amendment precludes such cumulative application in the commentary discussing application of proposed subsection (b)(14). *See* Second Revised Proposed Amendment USSG §2D1.1, comment. (n.29(A)(ii)-(iii), (C)). We agree that such limiting language is appropriate and necessary.

We also support the language set forth in the Second Revised Proposed Amendment’s commentary that clarifies application of the “super-aggravating” vulnerable victim enhancement, importation of a controlled substance, and pattern of criminal conduct engaged in as a livelihood. *Id.* comment. (n.29(A)(i), (B), (D)). We offer here several additional suggestions for application notes.

First, the Commission should make clear that a person is not “particularly susceptible to the criminal conduct” by virtue of his economic condition. The phrase “particularly susceptible” is vague and subject to widely varying interpretations. Some might consider a poor person “particularly susceptible” to criminal conduct, but there is no evidence that Congress intended such persons to be within the class of persons covered by the enhancement.

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<sup>57</sup> Ruback & Wroblewski, *Reasons for Simplification*, at 752.

Second, for the obstruction super-aggravating factor, the Second Revised Proposed Amendment omits language from the directive, which states that the conduct must be “*in connection with the investigation or prosecution of the offense [of conviction].*” We believe that such limiting language is necessary to avoid having the enhancement apply to situations beyond what Congress intended.

Third, because each of the super-aggravating factors applies only to the defendant, we strongly urge the Commission to provide a general application note, which makes clear that those provisions apply only if the “defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance.” USSG §1B1.3. While the Commission has included such language for the importation super-aggravating factor, there is no reason not to bring the same clarity to the other provisions.

Fourth, we are concerned about one other area where the proposed enhancements may overlap with existing enhancements and result in disproportionate penalty increases even though they may be targeted at more discrete harms. Subsection 6(B) of the FSA contains an aggravating factors targeted at several categories of protected individuals, including persons under 18 and individuals who were unusually vulnerable due to physical or mental condition or who were particularly susceptible to criminal conduct. Section 2D1.1(b)(10) contains an enhancement targeted at protecting minors and incompetents in certain methamphetamine offenses. Because all of these enhancements are targeted toward minors and vulnerable individuals, we encourage the Commission to provide that they not apply cumulatively. To the extent the factors may address slightly different harms to minors or incompetents, the need to avoid “factor creep” and false precision counsels against providing for the factors to apply cumulatively.

**Possible Changes to other Chapter Two Drug Guidelines.** In Issue for Comment 10, the Commission asks “[w]hat, if any, changes should the Commission make to other Chapter Two offense guidelines involving drug trafficking to ensure consistency and proportionality?” The Commission expressly asks about whether it should establish similar offense characteristics in §§2D1.2, 2D1.5, and 2D1.11.

We do not believe the Commission should amend these provisions. First, when Congress enacted the FSA, it was targeting offenses punishable under 21 U.S.C. § 841(b) and 21 U.S.C. § 960(b), not the myriad offenses set forth in chapter 13, title 21 of the United States Code. The only “drug trafficking” offenses mentioned in the FSA are 21 U.S.C. § 841(b) and 21 U.S.C. § 960(b).<sup>58</sup> Thus, when the FSA directs the Commission to increase the emphasis on certain aggravating factors associated with “drug trafficking offenses” it must refer to the major trafficking statutes—21 U.S.C. § 841(b) and 21 U.S.C. § 960(b)—which are specifically mentioned in the FSA and sentenced under USSG §2D1.1.

Second, §§2D1.2, 2D1.5, and 2D1.11 are all crafted to cover distinct offenses with discrete harms not covered by the major drug trafficking provisions at § 841(b) and § 960(b). No evidence suggests that the guideline ranges provided under those provisions are inadequate. Section 2D1.2 is directed at protected locations and protected individuals. It deliberately omits from its application the specific offense characteristics set forth in §2D1.1(b), incorporating only

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<sup>58</sup> The only other provision mentioned in the FSA is 21 U.S.C. § 844(a), the simple possession statute.



the quantity-based provisions in §2D1.2(a)(1) and (2). If the Commission were to start adding offense characteristics to that guideline, it would need to revisit the original reason for the base offense levels under §2D1.2. The same is true for USSG §2D1.11. While §2D1.11 contains some of the same specific offense characteristics as set forth in §2D1.1, it does not contain all of them. To suddenly add enhancements to that provision without any evidence of need would be unsound policy. As to §2D1.5, the minimum base offense level that applies to a defendant sentenced under that provision is 38. USSG § 2D1.5(a)(2). That high base offense level already accounts for the fact that defendants convicted under 21 U.S.C. § 848 have been involved in “one of the most serious types of ongoing criminal activity.” USSG §2D1.5, comment. (backg’ d). In other words, it presupposes the existence of many aggravating factors. It also has a mandatory minimum term of twenty years.

### **Conclusion**

We appreciate this opportunity to comment on the Commission’s exercise of its emergency amendment authority. The FSA presents unique and difficult implementation challenges. We encourage the Commission to proceed cautiously so that the many amendments required under the FSA do not have unintended consequences.

Very truly yours,

/s/ Marjorie Meyers

Marjorie Meyers  
Federal Public Defender

Chair, Federal Defender Sentencing  
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