**Written Statement of Molly Roth**

**On Behalf of the Federal Public and Community Defenders**

**Before the United States Sentencing Commission**

**Public Hearing on Proposed Amendments to the Guidelines for Drug Offenses**

**March 13, 2014**

My name is Molly Roth and I am an Assistant Federal Public Defender for the Western District of Texas (San Antonio). I thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendment to change how the base offense levels in the Drug Quantity Table incorporate the statutory mandatory minimum penalties and issues surrounding marijuana cultivation on public lands and private property.

**Drug Quantity Table**

The Commission's proposal to reduce the Drug Quantity Table offense levels by two could be the most significant improvement in the history of the guidelines. Defenders strongly support changes in the Drug Quantity Table, and applaud the Commission for proposing to reduce the effect of quantity on sentence lengths.

This proposal is firmly rooted in the Commission's duty to (1) establish policies that "assure the meeting of the purposes of sentencing,"[1] (2) formulate guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons";[2] and (3) promulgate guidelines that are "consistent with all pertinent provisions of any Federal statute."[3]

Most defendants whose sentences are based upon the Drug Quantity Table are not drug kingpins or major traffickers, but individuals with a lower level of involvement in drug offenses. Many have little or no criminal history and few are involved with firearms or violence. They often need education and drug treatment. The Commission's proposed amendment to the Drug Quantity Table would still provide significant punishment, while better accounting for individual culpability, deterrence, treatment needs, and the overall seriousness of the offense. By permitting defendants to return home to their families and communities a bit sooner – on average 11 months – reducing sentences would help lessen the destabilizing effect of incarceration on families and communities.

Reducing the Drug Quantity Table level would also give full effect to the Fair Sentencing Act of 2010 (FSA). Many crack cocaine defendants have not benefitted from reduced guideline ranges because, when implementing the FSA, the Commission undid the 2-level reduction for crack made by a 2007 amendment. And some non-crack defendants saw their sentences increase under the FSA because the guidelines continued to set the statutory mandatory minimum triggering quantities at 26 and 32 while adding several aggravating factors, including ones like maintaining a premise for the purpose of manufacturing or distributing a controlled substance.

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[1] 28 U.S.C. § 991(b)(1)(A).

[2] 28 U.S.C. § 994(g).

[3] 28 U.S.C. § 994(a).

Without a 2-level reduction in the Drug Quantity Table for *all* drug types, the FSA's goal to better target prison resources cannot begin to be realized.

Reducing the Drug Quantity Table by two levels also would help alleviate prison crowding with no additional risk to public safety. The best evidence that the Commission's proposal presents no risk to public safety is found in the Commission's findings that the recidivism rates of persons who received a sentence reduction under the retroactive application of the 2007 Crack Cocaine Amendment did not differ in any meaningful way from the recidivism rates of a comparison group of released inmates.[4]

The Commission's proposal is a positive and significant step in the right direction. We believe that the Commission should amend the Drug Quantity Table without increasing the existing specific offense characteristic or adding new ones because existing statutory and guideline provisions adequately account for more serious conduct. We encourage the Commission to make some additional changes to fully and consistently implement the minus-two principle and to bring the guidelines' recommendations in line with the statutory purposes of sentencing in a larger number of cases. The Commission's analysis shows that the recommended sentences for 30 percent of individuals convicted of a drug offense would not be reduced under the amendment as proposed.[5] Defendants with the largest and smallest amounts of drugs would receive no reduction under the proposed Drug Quantity Table. Nor would defendants subject to various offense level floors. We offer additional reasons why the Commission should reset the upper limit of the Drug Quantity Table and lower to level 10 the floor at level 12.

We also offer two suggestions for departure provisions that would help ensure that the drug guideline better tracks the purposes of sentencing: (1) a departure when the weight of the mixture or substance containing a detectable amount of a drug over-represents the actual dosages that are involved and the seriousness of the offense; and (2) a departure when quantity overstates the defendant's role in the offense.

**Marijuana Cultivation**

Defenders encourage the Commission to avoid the culture war over the legalization of marijuana and how to address problems associated with marijuana cultivation. Persons caught up in marijuana growing operations on public land are typically farmers and others hired to tend

[4] USSC, *Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* 2 (2011) (hereinafter *Recidivism 2007 Crack Amendment*).

[5] Louis Reedt, USSC, *Presentation to the U. S. Sentencing Commission: Analysis of Drug Trafficking Offenders* Table 5 (Jan. 2014) (PDF slideshow and speaker notes).

the crops or provide food and supplies to the growers. They are not the financiers. The guidelines and statutes contain numerous provisions that provide for incremental punishment in cases involving pesticides or environmental damage, and no more are needed.

## DRUG QUANTITY TABLE

### I. Reducing Offense Levels in the Drug Quantity Table Would Better Serve the Purposes of Sentencing.

The Commission's proposed changes to the Drug Quantity Table are a significant step toward bringing the drug guidelines nearer to recommending sentences in compliance with 18 U.S.C. § 3553(a). The Commission estimates that about 70 percent of defendants sentenced under the Drug Quantity Table would benefit, with reductions of sentences averaging eleven months. Any of us can imagine what eleven more months of freedom, friends, and family would mean.

To determine who might be affected by the proposed changes, we looked to the past to see who would have benefited had the changes been in effect earlier. We examined data on nearly 25,000 defendants sentenced in FY2012 for whom the Commission received full documentation, and whose primary sentencing guideline was linked to the Drug Quantity Table and thus might have benefitted if the minus-two proposal had been applicable to them.[6] Significantly, many are not career or repeat offenders. The majority of these defendants (53%) were in Criminal History Category I, and 21 percent had no evidence of any prior contact with the criminal justice system. And few are non-violent. Only 15 percent were sanctioned for having a weapon during their offense, and almost all of these merely possessed it. Just 28 defendants (.1%) received a seven-year increase under 18 U.S.C. § 924(c) for brandishing a firearm, and just 44 (.2%) received a ten-year increase, either for discharging a weapon or possessing a more dangerous type of weapon. Only 89 (.37%) of the 23,758 defendants sentenced under USSG §2D1.1 in FY2012 received the 2-level increase under (b)(2) for having "used violence, made a credible threat to use violence, or directed the use of violence." Just 6.6 percent received any increase for playing an aggravating role in the offense, and only .4 percent received a super-aggravating adjustment under §2D1.1(b)(14).

As might be expected, many of these defendants faced significant obstacles before their involvement in crime. Almost half (48%) had less than a high school education, while just 2 percent were college graduates. While most defendants are male, 12.8 percent were women. Most of these defendants are U.S. citizens (69%) or resident aliens (7%), but just over 20 percent are non-citizens (21%) or of unknown status (2%). Assuming they receive full credit for good

[6] USSC, *FY 2012 Monitoring Dataset*.

time while in prison, the best estimate is that 43 percent of these individuals will be in prison past their fortieth birthday, an age well beyond the most crime-prone years. Barring some form of early release, 18 percent will be in prison at age 50, and 5 percent at age 60.[7]

### A. The proposed drug quantity table would better track individual culpability.

The current drug guideline recommends sentences for most defendants that exceed the levels Congress intended for various functional roles.[8] Commission research has consistently shown that most drug defendants in federal court are *not* "serious" or "major" drug dealers but are actually low-level players like street dealers, couriers, and mules.[9] Yet most of these individuals receive sentences that Congress intended for managers or kingpins.[10]

The Commission's reports on cocaine sentencing show, as have previous Commission reports, Working Group Reports, and outside research,[11] that the quantity thresholds – even as

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[7] The Inspector General has noted how the increasing number of elderly inmates presents a growing challenge for the federal prison budget. Michael Horowitz, Inspector General, *Top Management and Performance Challenges Facing the Dep't of Justice – 2013* (Dec. 11, 2013), http://www.justice.gov/oig/challenges/2013.htm#1.

[8] The Addendum to this testimony sets forth some of the history of the Drug Quantity Table and how Congress intended quantity to serve as a proxy for role in the offense.

[9] The Commission's *2007 Cocaine Report* noted that "[a]s in 2000, the function category with the largest proportion of powder cocaine offenders remains couriers/mules (33.1%) and for crack cocaine offenders, street-level dealers (55.4%)." USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 19 (2007) (hereinafter *2007 Cocaine Report*).

[10] *See* USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 7 (2002) (hereinafter *2002 Cocaine Report*) (reviewing legislative history that describes "Congress's intent to establish two-tiered mandatory minimum penalties for serious and major traffickers"); *2007 Cocaine Report*, *supra* note 9, at 28-29 (showing that "[e]xposure to mandatory minimum penalties does not decrease substantially with offender culpability as measured by offender function").

[11] In the early years of guideline implementation, the Commission sponsored several Working Groups and Task Forces that found quantity fails to properly track role and culpability. *See*, *e.g.*, USSC, *Role in the Offense Working Group Report* 7-8 (1990) (finding that application of role adjustments do not depend upon the quantity or type of drugs involved); USSC, *Report of the Drug Working Group Case Review Project* 8-14 (1992) (in reviewing data to support mitigating role cap, quantity was not among factors bearing on whether mitigating role adjustment applied).

One task force reached such controversial recommendations that it never published a report. The controversy appeared to center on the political ramifications of the recommendations, not the factual basis. 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) (discussing unpublished report recommending that the Commission revisit the role of quantity in determining offense levels because "(1) drug quantity was viewed to be an inaccurate gauge of an

revised by the FSA – are too low and result in many mid-level and low-level individuals being treated like wholesalers or even kingpins. In the 2007 report, 20 percent of powder cocaine street level dealers were attributed with amounts triggering a five-year mandatory minimum sentence and 12 percent had amounts triggering penalties of 10 years or more.[12] The powder cocaine thresholds in effect for these individuals were the same that remain in the Drug Quantity Table today.

Findings for other individuals with low-level involvement in powder cocaine offenses were even more striking. Only 19 percent of couriers or mules had amounts below the five-year level, while 27 percent had amounts exposing them to five-year minimums and 54 percent had amounts exposing them to ten years or more. Among renters, loaders, lookouts, enablers, users, and the other lowest level participants, only 25 percent were below the five-year threshold, 14 percent were between five and ten years, and 61 percent were attributed with amounts at the ten-year level or higher. In other words, the current linkage between drug quantity and base offense levels assigns these low-level individuals to the wrong severity level more often than the correct one, under Congress's own rationale for quantity-based drug sentencing.[13]

The report also shows that even the increased quantity thresholds under the FSA and the emergency amendment remain too low to prevent many individuals involved in crack offenses from being subject to penalties more severe than necessary or than Congress intended. For example, 28 percent of street-level dealers, 31 percent of couriers or mules, and 45 percent of loaders, lookouts, users, and other low-level individuals were held accountable for more than 50 grams. Even under the FSA thresholds, these amounts would subject these individuals to base

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individual's culpability; and (2) drug quantity was considered to cause the most injustice in sentencing for low-end individuals who held a minor role in large quantity drug offenses").

[12] *2007 Cocaine Report, supra* note 9, at 28-30, Figure 2-12.

[13] Some of these individuals were exempted from the mandatory penalty by the safety-valve and received downward adjustments for the safety-valve, acceptance of responsibility, or role. But many continued to be sentenced far above the level Congress deemed appropriate. Figure 2-14 in the *2007 Cocaine Report* shows the average length of imprisonment for individuals involved in powder and crack cocaine offenses after guideline adjustments, departures, and reductions for cooperation. *Id*. at 30. Unfortunately it is not possible from averages to determine the number or percentage of individuals who receive sentences more severe than Congress intended. The data show, however, that the average sentence imposed on powder cocaine couriers was 60 months (the sentence intended for wholesalers), while the average sentence for renters, loaders, etc. was 93 months. To obtain these averages many individuals were necessarily sentenced far above the levels Congress intended for their roles. These sentences were obtained under the same Drug Quantity Table threshold amounts currently in effect.

offense levels of at least 26 with guideline ranges for first offenders of at least 63 months – the sentence length intended for wholesalers, not low-level individuals.[14]

Reducing the Drug Quantity Table by two levels, while not solving all the problems with the lack of relationship between drug quantity and culpability,[15] would reduce the frequency of the guidelines recommending excessive terms of imprisonment in the majority of cases.

**B. The proposed drug quantity table would better reflect the empirical evidence on specific and general deterrence, as well as allow for appropriate substance abuse treatment.**

Deterrence is an important goal of criminal justice, but empirical research has shown that the very threat of prosecution, the certainty of detection, and the swiftness of the sanction are more important than the severity of punishment. Marginal decreases in punishment, like that represented by two offense levels, are unlikely to reduce any deterrent effect of punishment.[16] Most individuals who commit crime do not believe they will be caught, and are not aware of the precise punishments applicable to their crimes if they are caught. Because many drug offenses are driven by addiction or economic circumstances, they are particularly resistant to punishment based deterrence.

The present Drug Quantity Table also does not identify those individuals in need of lengthier incapacitation to "protect the public from further crimes of the defendant."[17] The guidelines take account of recidivism risk with the criminal history score, not the offense level. Indeed, Commission research has demonstrated that higher offense levels are *not* correlated with increased risk of recidivism.[18] Individuals convicted of drug offenses actually have *lower* rates

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[14] *Id.* at 29, Figure 2-13.

[15] 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.").

[16] *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).

[17] 18 U.S.C. § 3553(a)(1)(C).

[18] USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (2004) ("There is no apparent relationship between the sentencing guideline final offense level and recidivism risk.") (hereinafter *Measuring Recidivism*); *Recidivism 2007 Crack Amendment*, *supra* note 4, at 2. *See also* Neil Langan & David Bierie, *Testing the Link Between Drug Quantity and Later Criminal Behavior among Convicted Drug Offenders*, (2009) (paper presented at the American Society of Criminology's annual meeting in Philadelphia), available at http://www.allacademic.com/meta/p372733_index.html.

of recidivism than those convicted of other types of offenses.[19] And the Commission's experience with individuals convicted of crack cocaine offenses who benefitted from the previous 2-level reduction shows that short decreases in length of imprisonment are not associated with increases in recidivism rates.[20]

Drug trafficking offenses, like other vice crimes driven by consumer demand, are particularly wasteful choices for a crime control strategy based on lengthy incarceration of sellers. As agents with the DEA and FBI have reported to the Commission, any dealers who are incarcerated are quickly replaced by others vying for their market share.[21] To paraphrase one distinguished criminologist: "Lock up a rapist and there is one less rapist on the street. Lock up a drug dealer and you've created an employment opportunity for someone else."[22]

Finally, the offense levels provided in the Drug Quantity Table, which result in guideline ranges falling within Zone D of the sentencing table for over 90 percent of defendants, do not meet "in the most effective manner," the treatment and training needs of defendants.[23] The Bureau of Prisons has strict eligibility criteria for its residential abuse treatment program.[24] And it has not yet met the goal of providing a full twelve month sentence reduction for those inmates who meet the even stricter eligibility requirements for early release.[25] BOP offers drug education to a greater number of inmates, but those programs do not meet the needs of inmates with chronic substance abuse disorders.[26] Research has shown that only 15.7 percent of federal

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[19] *Measuring Recidivism*, *supra* note 18, at 13 (finding lowest recidivism rates for defendants sentenced "under fraud, §2F1.1 (16.9%), larceny, §2B1.1 (19.1%), and drug trafficking, §2D1.1 (21.2%)").

[20] *Recidivism 2007 Crack Amendment*, *supra* note 4, at 10, Table 2.

[21] USSC, *Special Report to the Congress – Cocaine and Federal Sentencing Policy* 68 (1995) (DEA and FBI reported dealers were immediately replaced).

[22] Paul Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity 1980-1988*, 12 Fed. Sent. Rep. 12, 15 (1999) (quoting Alfred Blumstein).

[23] 18 U.S.C. § 3553(a)(2)(D).

[24] U.S. Dep't of Justice, *Federal Bureau of Prisons, Program Statement 5330.11*, ch. 2 (Mar. 16, 2009); Alan Ellis & Todd Bussert, *Looking at the BOP's Amended RDAP Rules*, 26 Crim. Just. 37 (2011).

[25] *Federal Bureau of Prisons FY 2014 Budget Request*, Hearing before U.S. House of Rep. Comm. on Appropriations, Subcomm. on Commerce, Justice, Science and Related Agencies (April 17, 2013) (Statement of Charles Samuels, Jr., Director of the Federal Bureau of Prisons), http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-samuelsc-20130417.pdf.

[26] *Drug Treatment for Offenders: Evidence-Based Criminal Justice and Treatment Practices*, Testimony before Subcomm. on Commerce, Justice, Science, and Related Agencies of the Senate Committee on Appropriations (Mar. 10, 2009) (Statement of Faye Taxman, Professor, Administration of Justice

prison inmates with substance abuse disorders received professional treatment after admission into the BOP.[27] Community residential treatment programs for individuals who receive probation or who are under supervised release offer better options and access to drug treatment than a lengthy prison sentence.[28]

### C. Amending the Drug Quantity Table across drug types will help ameliorate the negative impacts on family and community that have resulted from current drug sentences.

A sizable number of individuals convicted of federal drug offenses are parents of young children.[29] One of the often overlooked effects of long prison terms is how they burden children of incarcerated parents and "dismantle black and Latino communities."[30] More black (1 in 15)

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Department, George Mason University), http://www.gmuace.org/documents/presentations/2009/2009-presentations-drug-treatment-for-offenders.pdf.

[27] Nat'l Center on Addiction and Substance Abuse at Columbia University, *Behind Bars II: Substance Abuse and America's Prison Population* 40, Table 5-1 (2010).

[28] Marshall Clement, et al., *The National Summit of Justice Reinvestment and Public Safety: Addressing Recidivism, Crime, and Corrections Spending* 26 (2011) ("[d]rug treatment in the community is more effective than drug treatment in prison"), http://www.justicereinvestment.org/summit/report; National Institute of Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations – A Research-Based Guide* 13 (2012) ("Treatment offers the best alternative for interrupting the drug abuse/criminal justice cycle."), http://www.drugabuse.gov/publications/principles-drug-abuse-treatment-criminal-justice-populations.

The Office of National Drug Control Policy recognizes how "innovative strategies can also save public funds and improve public health by keeping low-risk, non-violent, drug involved offenders out of prison or jail, while still holding them accountable and ensuring the public safety of our communities." Office of National Drug Control Policy, *Alternatives to Incarceration: A Smart Approach to Breaking the Cycle of Drug Use and Crime* 2 (2011), http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/alternatives_to_incarceration_policy_brief_8-12-11.pdf.

[29] Lauren Glaze & Laura Maruschak, Bureau of Justice Statistics, *Parents in Prison and Their Minor Children* 3, 4 (2010) (2004 survey data showed that 62.9 percent of federal inmates were parents and that those convicted of a drug offense (69%) were more likely to report having children than those convicted of a property or violent offense).

[30] Ifetayo Harvey, *Children of Incarcerated Parents Bear the Weight of the War on Drugs* (July 18, 2013), http://www.huffingtonpost.com/ifetayo-harvey/incarcerated-parents-war-on-drugs_b_3617665.html; The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7 (long prison sentences have "profoundly disruptive effects that radiate into other spheres of society"), http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf.

and Hispanic (1 in 41) children have an incarcerated parent than white children (1 in 110).[31] "Parental incarceration is associated with greater risk that a child will experience material hardship and family instability."[32] These disruptive effects are incompatible with the need for the sentence imposed to promote respect for the law, afford adequate deterrence, and just punishment – three of the purposes of sentencing under 18 U.S.C. § 3553(a). Perhaps the largest burden, and the one that the Commission should not ignore in policy making, is the cycle of "intergenerational incarceration", where "[p]eople with parents behind bars are more likely to end up in trouble with the criminal justice system."[33] For the criminal justice system to play a role in the prevention of recidivism and delinquency, it should weigh the long term effects of parental incarceration in setting sentencing policy.[34] A reduction in sentence length for individuals involved in nonviolent drug offenses would be a step toward helping both them and their children lead a law abiding life.

### D. The proposed Drug Quantity Table would better reflect the relative seriousness of drug crimes.

Proportionality is an important principle in sentencing policy. Commentators have noted that the radically increased sentences for drug offenses in the guidelines era have exerted upward pressure on sentences for other types of crime, such as economic offenses.[35] The Drug Quantity Table calls for extremely harsh sentences, even for first time offenders, compared to other types of crime.

While all crimes have different impacts that can make comparisons difficult, one measure of impact is financial. Based on data on national average retail prices and purities,[36] we can calculate the street value of various drugs that would earn a base offense level 26 under the Drug

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Michelle Alexander's book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012), sets forth a thorough analysis of how mass incarceration and the War on Drugs have decimated communities of color and functions as a system of racial control.

[31] Harvey, *supra* note *30,* at 2.

[32] National Conference of State Legislatures, *Children of Incarcerated Parents* 3 (2009, http://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf (hereinafter *Children of Incarcerated Parents*).

[33] Harvey, *supra* note 30.

[34] *Children of Incarcerated Parents, supra* note 32, at 7.

[35] Frank Bowman, The *Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1332 (May 2005).

[36] Institute for Defense Analysis, *The Price and Purity of Illicit Drugs: 1981 – 2007* 15-20 (2008), http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/bullet_1.pdf.

Quantity Table, corresponding to five years imprisonment for a criminal history category I defendant. Defendants sentenced for methamphetamine (actual) would qualify with about $1000 worth of the drug. Crack cocaine defendants would need $4,760 worth, while powder cocaine defendants would need $43,750. Heroin defendants would need $12,600 worth, while marijuana defendants would need about $1,700,000 in street-level value. To earn the same offense level, a defendant sentenced for an economic offense under USSG §2B1.1, or a tax fraud under §2T1.1, would have to be attributed with losses or tax avoidance of over $ 7 million dollars.

Another point of comparison is the degree of personal injury or violence involved. A defendant convicted of aggravated assault that caused permanent or life-threatening bodily injury receives an offense level of 21 under §2A2.2, corresponding to a sentence of just over three years for a first offender. Only if a firearm were discharged as part of the offense would the offense level reach 26. To have the same offense level under the current Drug Quantity Table, a street level seller would only have to be attributed with selling enough methamphetamine (actual) to sustain one user for about a week.[37]

These comparisons suggest that reducing the Drug Quantity Table by two levels would improve the proportionality of sentences across different offenses and be an important step in reducing the excessive severity in drug offenses.

## II. Reducing the Drug Quantity Table by Two Levels Would Give Full Effect to the Fair Sentencing Act.

In 2007, the Commission recognized the "urgent and compelling problems" associated with the way the Drug Quantity Table incorporated the statutory mandatory minimum penalties for crack cocaine offenses.[38] Wanting to address the problems, while recognizing Congress's prerogative to establish cocaine sentencing policy, the Commission took the interim step of lowering the offense levels for crack cocaine so that the mandatory minimum amounts triggered offense levels 24 and 30.[39] That amendment established base offense levels that included the statutory mandatory minimum penalties. As the Commission notes in its Issues for Comment this year, the changes did not alter plea rates or substantial assistance departures in any

[37] National Highway Traffic & Safety Admin., *Drugs and Human Performance Fact Sheets: Methamphetamine (And Amphetamine)* (purity of methamphetamine is at 60-90%; "[c]ommon abused doses are 100-1000mg/day, and up to 5000 mg/day in chronic binge use").

[38] USSG App. C, amend. 706 (2007).

[39] *Id.*

significant way. Nor did recidivism rates change for those individuals given relief under the 2007 amendments.[40]

Following passage of the FSA, the Commission reverted from the minus-two treatment of crack cocaine to again linking quantities of crack cocaine to levels 26 and 32. That change put sentences for defendants in criminal history category I above the statutorily required minimum. Commission data now show that re-linking at minus-two is needed to give full effect to the FSA for defendants involved in both crack and non-crack offenses. When the Commission promulgated the FSA amendments, it recognized that the Drug Quantity Table base offense levels would not be reduced for some defendants because of the reversal of the 2007 minus-two amendment. At the time, the Commission estimated that several hundred crack defendants a year would not benefit from the FSA amendments.[41] Data from recent years confirm this prediction: many crack defendants received the same Drug Quantity Table offense levels in 2011 and 2012 that they would have received before the FSA.[42] For example, 425 individuals with 280 to 500 grams of crack remained at level 32. Some of these were subject to mandatory minimum penalties, or to the career offender guideline, which would have prevented them benefitting from the FSA in any event. But based on information in the PSRs recorded in Commission datasets, 185 could have received a lower offense level if minus-two had not been reversed. Individuals at other offense levels were also denied a benefit, including 73 who remained at the highest offense level 38 after the FSA.

The aggravating adjustments added under the FSA amendments also increased sentences for various non-crack defendants. By directing the Commission to add aggravating adjustments to the drug guidelines, the FSA sought to place more emphasis on certain aggravating conduct rather than have drug quantity serve as a blanket proxy for offense seriousness. For some crack defendants, the additional aggravating adjustments offset the higher drug quantity thresholds in the base offense levels in the Drug Quantity Table. For example, a defendant who stored and distributed crack out of an apartment might be subject to the same sentence before the FSA as after the FSA because the change in the Drug Quantity Table lowered his base offense level, but

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[40] *Recidivism 2007 Crack Amendment*, *supra* note 4, at 2.

[41] The Commission released no data analyses on this issue, but remarks at a public meeting indicated that the Commission estimated that hundreds of individuals a year would receive the same sentence if the 2007 amendment were reversed when the new FSA threshold for crack were added. *See* USSC, *United States Sentencing Commission Public Meeting Minutes* 4 (Oct. 15, 2010) (remarks of Commissioner Reuben Castillo) ("100 to 500 individuals are expected to be sentenced from November 1, 2010, when the emergency amendment becomes effective, to November 1, 2011, when the permanent amendment would become effective, who will be unaffected by the proposed amendment because of the decision to set the base offense levels at 26 and 32 to account for the new mandatory minimum gradations").

[42] USSC, *FY2011 and 2012 Monitoring Dataset*.

the new enhancement for maintaining a premise for the purpose of distributing a controlled substance increased the offense level. [43] But because the FSA did not raise quantity thresholds for drugs other than crack, the aggravating adjustments exposed non-crack defendants to greater punishment.

Because the aggravating adjustments in the FSA apply to all individuals sentenced under §2D1.1, the Commission's proposal to change the base offense levels in the Drug Quantity Table would better achieve the FSA's goal of reducing the emphasis on drug quantity while also targeting the more culpable individuals for enhanced sentences. We believe that the aggravating adjustments added under the FSA,[44] along with the many other aggravating adjustments that have been added to the drug guidelines in the years since the Drug Quantity Table was created, more than offset the change in the Drug Quantity Table the Commission has proposed. Guideline §2D1.1 currently contains fourteen aggravating adjustments, and only three mitigating ones. A reduction in the Drug Quantity Table has been "prepaid" by years of increases in offense levels and aggravating adjustments.

## III. A Two level Reduction in The Drug Quantity Table Would Help Reduce the Costs of Incarceration and Overcapacity of Prisons.

### A. Sentences for individuals convicted of drug offenses have contributed to the climbing and costly federal prison population.

Just as overly lengthy sentences exact a high cost on individuals, families, and communities, over-incarceration of individuals convicted of drug offenses has driven up the prison population and increased the costs of the criminal justice system.[45] The decision to base

[43] USSG §2D1.1(b)(12).

[44] The FSA amendments added 2- level adjustments for maintaining a premise, the use of violence or credible threat to use violence, §2D1.1(b)(2), and bribery of a law enforcement officer, §2D1.1(b)(11). They also added a "super-aggravating" adjustment under §2D1.1(b)(14), which requires a 2-level increase for defendants who receive an aggravating role adjustment and whose conduct included any one of five aggravating circumstances, such as being directly involved in drug importation or distributing to a minor or a person otherwise vulnerable or over 65. The FSA amendments added a minimal role cap of offense level 32 at §2D1.1(a)(5) and a 2-level reduction at §2D1.1(b)(15) for defendants who receive a 4-level mitigating role adjustment and who also meet three other stringent criteria. USSG, App. C, amend. 750 (2011).

[45] Nathan James, *Congressional Research Service, The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* 1, 8 (2013) ("largest portion of newly admitted inmates are being incarcerated for drug offenses"), https://www.fas.org/sgp/crs/misc/R42937.pdf; Gov't Accountability Office, Bureau of Prisons: *Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure* 14 (2012) (48 percent of inmates housed were serving sentences for drug offenses), http://www.gao.gov/assets/650/648123.pdf; Urban Institute, *Examining Growth in the Federal Prison Population 1998 to 2010* (2012) (concluding that increase in expected time served by inmates convicted

sentence length for drug trafficking offenses on the type and quantity of drugs has had a substantial effect on the federal prison population.[46] Probation and other sentencing alternatives, which were imposed in almost 20 percent of drug cases the year the Sentencing Reform Act of 1984 (SRA) was enacted, were nearly eliminated by 1991. Average time served in prison by drug defendants increased more than two and a half times in the years immediately following guideline implementation.[47]

These changes were driven by the Anti-Drug Abuse Act of 1986, not the Sentencing Reform Act.[48] Before the Commission even wrote a guideline for drug trafficking, the Anti-Drug Abuse Act created mandatory minimums linked to quantities of several drugs, greatly complicating the Commission's work.[49] Before 1984, drug quantity had not been a statutory consideration in drug sentencing at all. In 1986, it became the overriding factor.

The Commission accurately predicted the consequences of these changes. In its 1987 *Supplementary Report*, the Commission predicted that prison populations would nearly quadruple within fifteen years of guideline implementation, in large part due to changes in the drug laws.[50] In 1985, the prison population consisted of 40,000 inmates in 46 facilities. By 2012, prison population had climbed to over 218,000 inmates in 118 facilities.[51] In January

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of drug offenses "was the single greatest contributor to growth in the federal prison population between 1998 and 2010," accounting for nearly one-third of total growth), http://www.urban.org/UploadedPDF/412720-Examining-Growth-in-the-Federal-Prison-Population.pdf.

[46] Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed. Sent'g Rep. 26 (1990); John Scalia Jr., *The Impact of Changes in Federal Law and Policy on the Sentencing of, and Time Served in Prison by, Drug Defendants Convicted in U.S. Courts*, 14 Fed. Sent'g Rep. 152, 157 (2002).

[47] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 52, 53 (2004) (hereinafter *Fifteen Year Review*).

[48] Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde*, 57 Fed. Probation 9 (1993).

[49] Ronnie Skotkin, *The Development of the Federal Sentencing Guidelines for Drug Trafficking Offenses*, 26 Crim. Law Bull. 50, 52 (1990) (describing Commission's abandonment of guideline development research upon passage of the Anti-Drug Abuse Act of 1986); *Fifteen Year Review*, *supra* note 47, at 48-49.

[50] USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 72 Figure 3; 74 Figure 4 (1987).

[51] Congressional Research Service, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options* Table A-1 (Jan 22, 2013).

2014, individuals convicted of a drug offense accounted for 50.1 percent of inmates,[52] up from a third in the mid-1980s.[53]

Much of this growth has been attributed to the Anti-Drug Abuse Act, but the Commission's choices when implementing the statute also contributed. The Drug Quantity Table extrapolated quantity ranges below, between, and above the two statutory thresholds, first with 16 gradations of drug quantity, later expanded to 19, and currently at 17. This results in many guideline recommendations greater than the terms required by statute. In the past 3 years, 45,831 defendants (63% of all defendants sentenced under guidelines that linked to the Drug Quantity Table) met the mandatory minimum threshold quantities for drugs. Of these 14,799 (32%) were sentenced to prison terms greater than required by the statutory minimum applicable to their case.

Previous Commission analyses showed that 25 percent of the average prison time served by individuals convicted of a drug offense was the result of the Commission's choice to link the statutory thresholds to the guidelines in the manner that it did.[54] "The drug trafficking guideline . . . in combination with the relevant conduct rule . . . had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes."[55]

The dramatic increase in lengthy incarceration of drug traffickers has come at great cost. The budget of the Federal Bureau of Prisons has grown to nearly $7 billion a year.[56] While state sentencing commissions have evaluated the cost effectiveness of sentencing *vis a vis* other crime control policies, to identify those that give the greatest return on investment,[57] no such analysis

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[52] Federal Bureau of Prisons, *Inmate Statistics: Offenses* (Jan. 25, 2014), http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

[53] The Sentencing Project, *The Expanding Federal Prison Population* 2, http://www.sentencingproject.org/doc/publications/inc_FederalPrisonFactsheet_March2011.pdf.

[54] *Fifteen Year Review*, *supra* note 47, at 54.

[55] *Id*. at 49.

[56] U.S. Dep't of Justice, *FY 2014 Budget Request at a Glance*, http://www.justice.gov/jmd/2014summary/pdf/bop.pdf.

[57] *See* Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State* (2009), http://www.wsipp.wa.gov/rptfiles/09-00-1201.pdf; Washington Institute for Public Policy; *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates* (2006), http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf. *See generally* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 771-90 (2005) (describing work of sentencing commissions

has been undertaken for federal sentencing.[58] Outside economic analyses have shown that the dramatic increase in the imprisonment of individuals convicted of a drug offense in the United States since the 1980s is unlikely to have been cost-effective.[59] The fact is that federal sentencing and imprisonment policy toward individuals convicted of a drug offense is perhaps the most poorly targeted spending in the criminal justice system.

### B. A two level reduction in the drug quantity table will help better allocate scarce criminal justice resources.

Because quantity has not proven to be a good measure of the seriousness of an offense or culpability of individuals involved in drug offenses, it has resulted in unnecessarily long prison sentences for many individuals.[60] Judges,[61] scholars,[62] and others[63] have long cited the

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in North Carolina, Minnesota, and Washington to shift the use of prison to defendants convicted of more serious offenses).

[58] Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001, 1011 (2001) ("the Commission has yet to address that task [of measuring the guidelines effectiveness] in any way"); Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and Critique of Federal Mandatory Minimums)*, 56 Stan. L. Rev. 1017, 1039 (2004) (reviewing cost-benefit analysis of state systems and noting that "no comprehensive assessment of federal sentences has been performed").

[59] Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. of Pub. Econ. 2043, 2043 (2004) ("it is unlikely that the dramatic increase in drug imprisonment was cost-effective.").

[60] The history of the Drug Quantity Table and the problems with it are discussed in an Addendum to this testimony. We have often urged the Commission to review how the drug guidelines are linked to mandatory minimums through the Drug Quantity Table. *See e.g.*, Statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia, Before the U.S. Sentencing Comm'n, Washington, D.C. (May 27, 2010); Statement of Julia O'Connell, Federal Public Defender for the Eastern and Northern Districts of Oklahoma, Before the U.S. Sentencing Comm'n, Austin, Tex. (Nov. 19, 2009); Statement of Nicholas T. Drees, Federal Public Defender for the Northern and Southern Districts of Iowa, Before the U.S. Sentencing Comm'n, Denver, Col. (Oct. 21, 2009) (citing numerous problems with drug trafficking guidelines and urging major revision).

[61] *See* USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, Question 3 (2010) (58% of judges surveyed believe the guidelines should be "delinked" from statutory mandatory minimums). 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."); Judicial Conference of the United States, Letter from Paul G. Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the United States to the Honorable Ricardo Hinojosa, Chair, U.S. Sentencing Comm'n (Mar. 16, 2007), http://www.usc.gov/hearings/03/20/07/walton-testimony.pdf.

excessive weight given drug quantity as the drug guideline's chief flaw. Research and analyses have shown that determinations of drug quantity are often arbitrary and capricious, are estimated from hearsay or other unreliable evidence,[64] are easily manipulated by law enforcement agents and confidential informants,[65] and result in "false precision."[66] Because of the emphasis placed on drug quantity in lieu of other factors, many defendants whose crimes are relatively less serious and who pose little danger to the public have been incarcerated for long periods of time. Those lengthy prison sentences have wasted scarce federal prison resources.

One of the striking facts about federal drug sentencing is that almost everyone goes to prison. This did not change after previous reform efforts, such as creation of the safety valve or addition of a minimum role offense level cap. Nor has the switch to advisory guidelines reduced the rate of imprisonment, even though within-range sentencing for this group of defendants fell to 44 percent in FY2012. Figure 1 shows the type of sentence imposed on the nearly one-third million (323,332) federal drug defendants sentenced under the quantity-based guidelines since

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Other judges have urged rethinking the link between the drug guidelines and the quantity thresholds in the mandatory minimum statutes, including witnesses at the Commission's Regional Hearings. *See* Transcript of Hearing Before the U.S. Sentencing Comm'n, Atlanta, GA, at 24, (Feb. 10-11, 2009) (Judge Tjoflat); Transcript of Hearing Before the U.S. Sentencing Comm'n, Stanford, Cal., at 6-22 (May 27, 2009) (Judge Walker); Transcript of Hearing Before the U.S. Sentencing Comm'n, Chicago, Ill., at 70-71 (Sept. 9-10, 2009) (Judge Carr and Judge Holderman); Transcript of Hearing Before the U.S. Sentencing Comm'n, New York, NY, at 92, 139-41 (July 9-10, 2009) (Judge Newman).

[62] Peter Reuter & Jonathan 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.").

[63] *See* General Accounting Office, *Sentencing Guidelines: Central Questions Remain Unanswered* (1992) (harshness and inflexibility of drug guideline most frequent problem cited by interviewees).

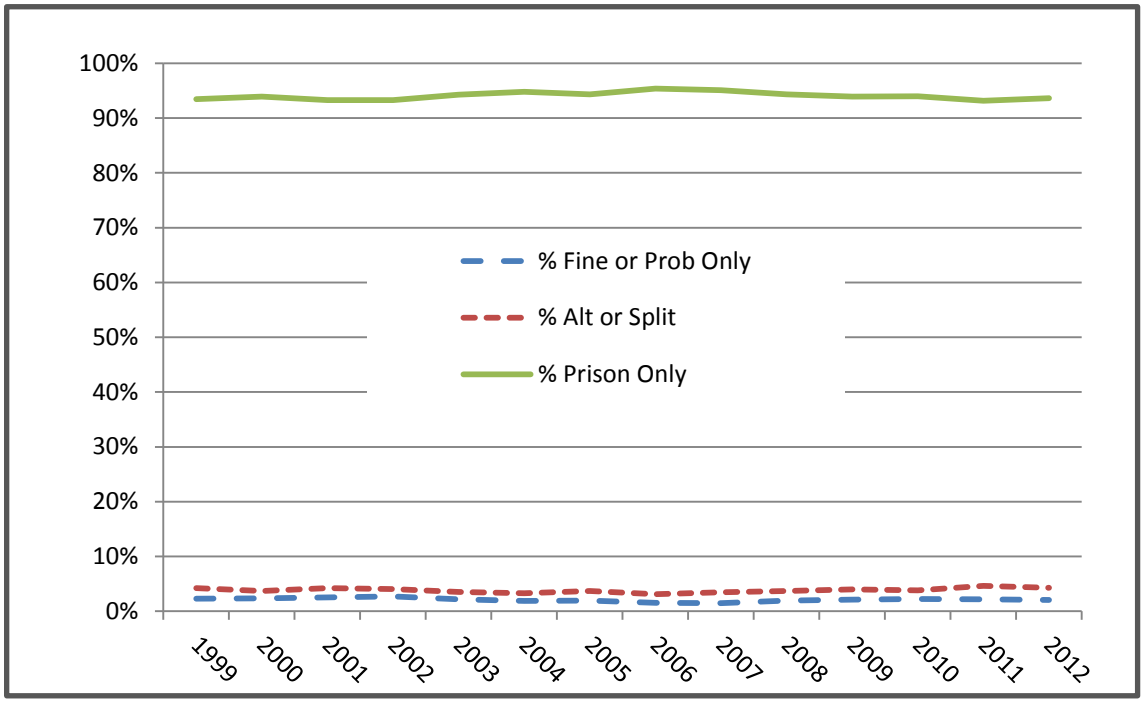
[64] Estimates of quantities that were not actually seized, that were under negotiation, etc., inevitably are unreliable approximations. The complexity and ambiguity of key concepts such as "relevant conduct" lead to widely different guideline calculations regarding identical facts. Pamela B. Lawrence & 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).

[65] 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 (1993).

[66] The Honorable Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180 (Feb. 1999).

1999.[67] Despite the growing interest in drug courts, addiction treatment, and alternatives to imprisonment like electronic monitoring, in FY2012 only 2 percent of individuals sentenced for a drug offense received simple probation, and just 1.5 percent more received an alternative without any months of imprisonment.

**Figure 1: Type of Sentence Imposed**
**Defendants subject to the Drug Quantity Table FY1999-2012**




The proposed change to the Drug Quantity Table would help shift this decades long trend of prison for individuals convicted of federal drug laws. The growth of the federal prison system has been described as a "crisis,"[68] which not only impacts the safety and welfare of the inmate population and BOP staff, but has sizable effects on the Department of Justice's other law enforcement priorities. Containing the costs of incarceration is critical. Incarceration is the most costly option of all criminal justice sanctions. The annual average cost of incarceration in a BOP facility is $28,948 compared to $26,930 for a residential reentry center, and $3,347 for probation

[67] USSC, *FY1999 – FY 2012 Monitoring Dataset*.

[68] Michael Horowitz, *Inspector General, Top Management and Performance Challenges Facing the Dep't of Justice – 2013* (Dec. 11, 2013), http://www.justice.gov/oig/challenges/2013.htm#1.

supervision.[69] Reducing terms of imprisonment for individuals convicted of drug offenses is one way of containing costs without risking harm to public safety.

## IV. No Specific Offense Characteristics Need to be Increased or Added to the Guidelines for Drug Offenses.

The Commission requests comment on whether any circumstances should be partially or wholly excluded from amendment to the Drug Quantity Table, asking in particular if any existing specific offense characteristics should be increased or new specific offense characteristics promulgated. Defenders oppose any such changes because they are unnecessary and would undo the benefits of a 2-level reduction across drug types.

### A. Reducing the average sentence of drug defendants by 11 months will not compromise public safety.

Commission data and a number of other studies show that the average drug defendant sentenced to a shorter period of time will present no greater risk of recidivism or danger to others and may well present a lesser risk.

As previously discussed, the Commission's data show (1) no link between offense levels and recidivism;[70] and (2) no significant difference in recidivism rates between crack defendants who received a reduced sentence under the 2007 crack amendments and a comparable group of defendants who served their original full sentence.[71]

A study of New York felony drug defendants released as a result of the 2004 reforms of the "Rockefeller Drug Laws" bolsters this point. When the New York legislature contemplated changes in drug laws, some opponents of reform suggested that crime rates would soar and that harsh sentences were necessary to deter crime. An analysis of the recidivism rates of drug defendants resentenced under the reformed law showed low rates of recidivism.[72] Moreover, since reform of its drug laws, New York crime rates fell, with drug arrests in New York City

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[69] U.S. Probation & Pretrial Services, *OPPS Announces New Costs of Incarceration & Supervision* (June 7, 2013).

[70] *Measuring Recidivism, supra* note 18, at 13.

[71] *Recidivism 2007 Crack Amendment, supra* note 4, at 2.

[72] William Gibney, The Legal Aid Society, *Drug Law Resentencing: Saving Tax Dollars with Minimal Community Risk* 8 (2010), http://www.legal-aid.org/media/127984/drug-law-reform-paper-2009.pdf.

declining 32 percent between 2007 and 2011 and by 27 percent in the other counties that account for 80 percent of index crime reported.[73] Other crime rates fell as well.[74]

Rather than increasing the risk to public safety, a modest reduction in sentence for drug defendants may help decrease the risk of recidivism. As one report described:

> The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality.[75]

The destabilizing effect of imprisonment is particularly acute in the federal system, where inmates are often housed hundreds if not thousands of miles from home, and are unable to maintain family and community connections. Those connections are important to their successful reentry.[76] In the absence of continuing contact, family members are often unwilling to provide housing and other support services for the individual upon release, thereby increasing the risk of re-offense.

Reduced sentences will also help ameliorate the criminogenic effects of imprisonment. Much of our sentencing policy over the past twenty-eight years has been premised on the notion that incapacitation reduces crime. Research, however, shows that "the use of custodial sanctions may have the unanticipated consequence of making society less safe."[77] In a review of five quality studies and other systematic reviews of the evidence, researchers concluded that (1) [c]ustodial sentences do not reduce recidivism more than noncustodial sanctions; (2) the evidence tilts in the direction of those proposing that the social experience of imprisonment are likely crime generating; and (3) although "the evidence is very limited, it is likely that low-risk offenders are most likely to experience increased recidivism due to incarceration."[78] For

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[73] N.Y. State Division of Criminal Justice Services, *2009 Drug Law Changes: June 2012 Update* 6 (2012), http://www.criminaljustice.ny.gov/drug-law-reform/documents/dlr-update-report-june-2012.pdf.

[74] *Id*.

[75] The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7 (2005), http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf.

[76] *See generally* William D. Bales & Daniel Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, 45 J. of Research in Crime & Delinquency 287 (reviewing literature on the importance of family ties and prosocial influences).

[77] Francis T. Cullen, et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 The Prison Journal 48S (2011).

[78] *Id*. at 60S.

purposes of federal drug sentencing policy, these findings show that reducing the drug quantity table by two levels presents no real risk to public safety and may actually improve the chance of success for some defendants.[79]

The notion that most individuals convicted of federal drug offenses are violent or dangerous individuals who need to be incapacitated is also belied by data from the Bureau of Prisons. As of January 25, 2014, BOP housed 99,444 drug offenders.[80] Of those, over 50 percent (52.1%) were housed in administrative, low, or minimum security facilities. About a third (32.9%) was housed in medium security facilities. Only 8.5 percent were housed in high security facilities.[81] Only 11.8 percent had been found guilty of a violent prison rule infraction and even less (8.5%) were a member, associate or affiliated with a prison gang.

### B. Other statutory and guideline provisions are available to ensure sufficiently severe penalties for the few violent and serious drug traffickers.

Defenders see no need to increase existing levels or add to the multitude of specific offense characteristics present in §2D1.1. As the Commission notes in its proposed amendments, when it promulgated the Drug Quantity Table that set mandatory minimum levels at 26 and 32, the guideline contained just a single enhancement. While the Drug Quantity Table has remained largely unchanged (with the exception of the crack quantity adjustments under the Fair Sentencing Act), §2D1.1 now contains fourteen enhancements to account for a wide variety of aggravating factors that may occur in a drug offense. Those fourteen enhancements include "super aggravating" role enhancements that add additional offense levels for a person who receives one of three aggravating role enhancements under §3B1.1 and engaged in certain other aggravating conduct. It also contains enhancements for dangerous weapons and the use of violence.

In addition to these enhancements, the guidelines contain several other provisions that reach individuals who may pose a risk to public safety. These include Chapter 5 upward departures[82] and the criminal history guidelines. Defendants who have criminal histories are

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[79] USSC, *2012 Sourcebook of Federal Sentencing Statistics*, Table 37 (2012) (in FY 2012, 64.6 percent [16,123] of drug offenders were in Criminal History Category I or II).

[80] Email from Deputy Assistant Director, Information, Policy & Public Affairs Division, Federal Bureau of Prisons (Feb. 24, 2014, 12:37 EST) (on file with National Sentencing Resource Counsel for the Federal Public and Community Defenders) (providing Bureau of Prisons data on Drug Offenders in BOP Custody 1/25/14).

[81] The remainder (6.4%) were housed in contract facilities. *Id*.

[82] *See* USSG §5K2.1 (death resulting); §5K2.2 (significant physical injury), §5K2.6 (weapons and dangerous instrumentalities).

subject to increased penalties to account for their risk of recidivism. And if a judge concludes that the criminal history score underrepresents that risk, the judge may depart upwardly to impose a higher sentence.[83]

Those defendants who are involved in organized crime, engage in more serious violence, or possess firearms face significant terms of imprisonment under other statutory and guideline provisions. These include (1) 21 U.S.C. § 848, which targets individuals who organize, manage, or supervise a continuing criminal enterprise and carries a minimum base offense level of 38 under §2D1.5 and a mandatory sentence of life imprisonment for leaders of the enterprise;[84] (2) 18 U.S.C. § 924(c), which prohibits possession, brandishing, or discharge of a firearm during a drug trafficking crime or crime of violence and carries mandatory minimum terms that must run consecutively to any other term of imprisonment;[85] (3) 18 U.S.C. § 922(g), which, among other things, prohibits unlawful drug users, drug addicts, and individuals previously convicted of a felony from possessing firearms;[86] and (4) 18 U.S.C. § 1959 (violent crime in aid of racketeering activity), 18 U.S.C. §§1961-1963 (Racketeer Influenced and Corrupt Organizations Act), and 18 U.S.C § 371, which encompasses a breadth of conspiratorial activity, can easily provide a reference to a more serious guideline, including murder at §2A1.1, which calls for a life sentence.[87]

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[83] USSG §4A1.3.

[84] *See, e.g.*, Immigration & Customs Enforcement, News Release: *Life Sentence for Former American Airlines Employee Who Led Drug Enterprise* (Oct. 2012), http://www.ice.gov/news/releases/1210/121017newyork2.htm; U.S. Attn'y E.D.N.Y., News Release, *Former Hip-Hop Manager James Rosemond, Leader of a Notorious Drug Trafficking Organization, Sentenced to Life in Prison* (Oct. 2013), http://www.justice.gov/usao/nye/pr/2013/2013oct25.html; U.S. Attn'y S. D. Ohio, News Release, *Dayton Man Sentenced to Life Imprisonment for Operating a Continuing Criminal Enterprise* (Feb. 2010), http://www.justice.gov/usao/ohs/news/2010/02-26-10.pdf.

[85] U.S. Attn'y M.D. Tenn., Press Release, *Nashville Gang Member Sentenced to Life in Prison for Drug Trafficking and Firearms Offenses Near Elementary School* (Feb. 2014), http://www.justice.gov/usao/tnm/pressReleases/2014/2-14-14.html; Immigration & Customs Enforcement, News Release, *Charlotte Felon Sentenced to 60 Years for Drug, Firearm Offenses*, (Jan. 2014), http://www.ice.gov/news/releases/1401/140122charlotte.htm.

[86] *United States v. Billy May*, No. 1:11-cr-00509-LY-1 (W.D. Tex. 2012) (48-year-old recreational user of marijuana with no prior felony convictions who possessed firearms sentenced to 30 months imprisonment – a downward variance from a guideline range of 63-78 months); *United States v. Roberts*, 529 Fed. Appx. 488 (6th Cir. 2013) (retail seller of small quantities of prescription pills sentenced to 235 months imprisonment following conviction for distribution of hydrocodone, and unlawful possession of a single handgun after having been convicted of three prior qualifying crimes under 18 U.S.C. § 924(e)).

[87] *United States v. Shryock*, 342 F.3d 948 (9th Cir. 2003) (defendants convicted of substantive RICO violations, conspiracy, and related crimes sentenced to life imprisonment for murder of rival gang member); *United States v. Quinones*, 511 F.3d 289 (2d Cir. 2007) (two defendants sentenced to life

## V. Minus-Two Should be Implemented Throughout the Drug Quantity Table and Guideline.

The Commission's impact analysis showed that 30 percent of drug defendants would *not* benefit from re-linking quantity ranges in the Drug Quantity Table to offense levels at minus two. In many cases this is due to legal restrictions beyond the Commission's control. Barring revision of the mandatory minimum penalty statutes at 21 U.S.C. § 841(b), statutory minimums will continue to trump the guidelines' recommendations in a large number of cases. The career offender guideline, which is partially mandated by 28 U.S.C. § 994 (h), will continue to over-ride offense levels and criminal history scores determined under the guidelines' normal rules. We believe these provisions intrude into what is properly the Commission's decision making and cause the guidelines to function less fairly and effectively. But we understand that the remedy for mandatory minimum penalties and some of the problem[88] with the career offender guideline is legislation.

Other defendants will fail to benefit from the Commission's proposal, however, not because of any legal restriction but because of the limited way the Commission proposes to implement the minus-two principle. The Request for Comment cites several reasons for the Commission's proposal. These include the proliferation of sentence enhancements added to the guidelines since the creation of the Drug Quantity Table, and the statutory directive for the Commission to formulate the guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."[89] Both of these reasons weigh in favor of extending the minus-two principle as widely as possible. We have been unable to identify countervailing principles or policy reasons that justify denying the reduction to the particular defendants who would *not* benefit under the published proposal.

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imprisonment for murder of a confidential informant after having been convicted of substantive and conspiratorial counts of racketeering and drug trafficking and murder in relation to a continuing criminal enterprise); *United States v. Rivera*, 2013 WL 5516077 (D. Conn. 2013) (defendant convicted under 18 U.S.C. § 1962(d); 18 US.C. § 1962(c); 18 U.S.C. § 1959(a); and 21 U.S.C. § 846 would not be entitled to relief under 18 U.S.C. § 3582(c); putting aside the guideline calculations related to the controlled substance counts, the guidelines for the RICO counts and conspiracy to murder set his base offense level at 43, which would permit a life sentence); *United States v. Tyler*, 2008 WL 925126 (E.D.N.Y. 2008) (defendant found guilty of racketeering and conspiracy to commit murder, as well as conspiracy to distribute crack and cocaine, not entitled to relief under crack cocaine amendment because his base offense level of 43 was determined without regard to the quantity of drugs involved in the offense).

[88] We have in past comments discussed how the Commission made the career offender guideline broader than required under 28 U.S.C. § 994(h). *See* Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 22-23 (May 17, 2013).

[89] 28 U.S.C. § 994(g).

**A. The upper limit of the drug quantity table should be no more than a base offense level of 36, and ideally a base offense level 34.**

Rather than reducing the upper limit of the Drug Quantity Table from level 38 to level 36, the Commission's proposal retains an upper limit of level 38 and creates a new quantity range at level 36. Defenders do not believe this is necessary and recommend keeping the top of the quantity range as it currently is (e.g. 30KG or more of heroin) and making level 36 the upper limit of the Drug Quantity Table. The Commission could also implement the minus two principle by setting the upper limit at level 34, which would be two levels below the original Drug Quantity Table.

What principle is behind the decision to not lower the entire table by two levels is not apparent. The proposed table creates the new minimum quantities that trigger proposed level 38 by multiplying by three the quantities that now trigger level 38. It creates the new quantity ranges for proposed offense level 36 the same way. Looking at the rest of the table, only level 32 also has quantity ranges based upon a multiple of three. Level 26 has quantity ranges based upon a multiple of four, while the quantity ranges in level 22 are a multiple of 1.3. Absent any clear principle that necessitates retaining level 38 or creating new quantity ranges at level 36, and in light of the Commission's concern with prison crowding and excessive and duplicative sentence enhancements, a better approach is to lower the entire table by two levels.

The Commission could also make level 34 the upper limit of the Drug Quantity Table while adhering to the minus-2 principle. When the Commission first set the statutory mandatory minimum drug quantity thresholds at levels 26 and 32, it set the upper limit of the Drug Quantity Table at level 36. The Commission then changed the table several times: (1) in 1989, the Commission increased the maximum base offense level to 42 to reflect offenses of extremely high quantities;[90] (2) in 1994, it decreased the upper limit to 38, concluding that a higher level was unnecessary to ensure adequate punishment given the 2 to 4-level adjustment for role and the 2-level enhancement for possession of a dangerous weapon.[91] Although the Commission has since added to §2D1.1 thirteen enhancements beyond the original one for possession of a firearm or dangerous weapon, it has not yet readjusted the upper limit of the Drug Quantity Table.

Because the upper limit of the table was originally set at 36, decreasing the upper limit to 34, would implement the minus 2 principle in the same manner that the Commission proposes to reduce the original statutory mandatory minimum thresholds from 26 and 32 to 24 and 30. Given the wide range of non-quantity related enhancements in the guidelines, setting the upper limit at level 34would ensure adequate punishment for more serious offenses. Congress did not

[90] USSG, App. C, amend. 125 (1989).

[91] USSG, App. C, amend. 505 (1994).

describe a tier of punishment above the "major traffickers" for whom it wished to ensure ten year minimum sentences based on quantity alone.

We see no reason to extend the Drug Quantity table beyond level 34 or a maximum of 36. Commission reports have sometimes described the levels of the Drug Quantity Table as necessary to avoid "cliffs," where, for example a small difference in quantity could make a large difference in punishment.[92] But this rationale, if needed to avoid cliffs below the ten-year statutory threshold of level 32, does not explain extension of the Drug Quantity Table for several levels above level 32. The Drug Quantity Table has at other times been described as assuring "proportionality" in sentencing. The idea is that the more drugs an offender traffics, the more harm is done, and the more punishment deserved. On close inspection, however, this "proportionality" proves illusory. Quantity as currently defined assures only that offenses involving larger amounts of a particular mixture or substance containing a drug are punished more severely than smaller amounts of *that same mixture or substance*. It does not assure similar punishment for offenses involving similar doses or actual amounts of a drug. Nor do the ratios among the quantity thresholds established by Congress for different drugs, which were apparently chosen for the unrelated purpose of acting as proxies for role, reflect the relative harmfulness of different drugs in any rational way.[93]

Instead of deleting level 38, the Commission's proposal creates a new set of quantity ranges at level 36. This ensures that defendants with quantities greater than the new top of level 36 will not benefit from the proposed amendment at all. These defendants' sentences are increased by drug quantity more than any other defendants, so the problems with quantity-based sentencing apply especially to them. Level 38 corresponds to a minimum guideline recommendation of nearly twenty years for offenders in criminal history category I with no other guideline adjustments.

In FY2012, numerous defendants whose sentences were based upon the Drug Quantity Table were held responsible for quantities of drugs sufficient to deny them any relief under the proposed table, including 124 powder cocaine defendants, 94 meth (actual) defendants, and 16 crack defendants.[94] Just seven of these defendants faced the career offender adjustment and just twelve had statutory mandatory minimums longer than ten years. Yet all faced base offense

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[92] *Fifteen Year Review*, *supra* note 47, at 50.

[93] *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 (2007); Nutt et al., *Drug Harms in the UK: A Multicriteria Decision Analysis*, 376 The Lancet 1558 (2010); Van Amsterdam et al., *Ranking the Harm of Alcohol, Tobacco and Illicit Drugs for the Individual and the Population*, 16 Eur. Addiction Research 202 (2010).

[94] USSC, *FY2012 Monitoring Dataset*.

levels under the Drug Quantity Table linked to minimum guideline recommendations of at least twenty years, which would not be reduced under the proposed Drug Quantity Table.

We see no reason to deny these already-heavily punished individuals the same modest decrease in base offense levels that the proposed amendment would extend to other defendants whose sentences are based upon the Drug Quantity Table.

**B. The offense level floor of 12 for some drugs should reduce to 10.**

The Commission's proposal also denies relief to defendants with the *smallest* amounts of common drugs. The current Drug Quantity Table creates an offense level floor of 12 for the most common drugs, including cocaine, heroin, and methamphetamine. The Synopsis of Proposed Amendment states that "certain higher minimum offense levels are incorporated into the Drug Quantity Table for particular drug types, e.g., a minimum offense level of 12 applies if the offense involved any quantity of certain Schedule I or II controlled substances." We do not understand the rationale for setting a floor for certain drug types and none is provided in the synopsis, the commentary to §2D1.1, or Appendix C of the Guidelines Manual. Apart from that, not all Schedule I or II controlled substances are subject to the floor. Marijuana, a schedule I drug, is included in the Drug Quantity Table with ranges extending to the lowest level six.

Perpetuating this floor at level twelve would prevent a group of defendants, involved with the smallest amounts of drugs, from benefitting from the Commission's proposal. Last year, 252 defendants subject to the guidelines linked to the Drug Quantity Table were involved with drug quantities that would qualify them for a 2-level reduction of base offense level from 12 to 10 if the Commission applied the two-minus principle throughout the Drug Quantity Table.[95] Just over 60 of these defendants were subject to the career offender guideline or a mandatory minimum penalty from which they received no relief, and would not have benefitted from minus-two in any event. But 189 defendants would likely see their guideline ranges directly affected if the Commission dropped the offense level floor from 12 to 10.[96]

Most of these defendants received final offense levels of 8 (27), 10 (126) or 12 (21) after application of all other Chapter 2 and 3 adjustments. At these levels of the Sentencing Table, the guidelines recommend a range of sentencing options, depending on the defendant's criminal history category. For defendants in criminal history category I, the guidelines recommend probation at level 8, probation with confinement conditions at level 10, and a split sentence with some imprisonment at levels 12 and 13. For the 33 defendants in zones B and C of criminal

[95] USSC, *FY2012 Monitoring Dataset*.

[96] The analysis presented in this section is based upon the USSC, FY2012 Monitoring Dataset.

history category I, moving down two levels opens up alternatives from which judges may choose.

At higher criminal history categories, two-point reductions do not have the same effect. None of the 48 defendants in categories IV-VI would move into zone A where the guidelines recommend probation. Although for 24 defendants in category V, judges would have the option of imposing a split sentence rather than a full term of imprisonment. Five defendants at category III, level 12 could also become eligible for a split sentence; five more at category II for probation with alternative confinement. At level 10, 37 defendants could become eligible for probation with confinement conditions instead of a split sentence. While the overall number of defendants affected is relatively small, the difference between, for example, home confinement and imprisonment can make an invaluable difference in the lives of our clients.

Nor should the Commission assume that defendants in a higher criminal history category are not good candidates for sentence reductions or alternatives to imprisonment. One of our colleagues had a case in which the client was charged with two counts of distributing cocaine. The first sale was 1.1 grams, and the second sale was 5.9 grams, for a total of 7 grams. The base offense level was 12. The client was in criminal history category IV due to prior drug possession offenses, giving a guideline range of 15 to 21 months. The judge gave the client 12 months and a day. If the Drug Quantity Table had been reduced to level 10 for this defendant, the guideline recommendation would have comported with the sentence the judge thought appropriate.

A two point reduction would make a real difference for many of our clients. Take for example one of our clients – a 25-year-old defendant convicted of selling less than 5 grams of heroin, with a criminal history category II due to a prior conviction for heroin possession. Under the current guidelines, his range was 8 to 14 months imprisonment (base offense level 12 minus 2 for acceptance of responsibility). If the Commission were to implement the minus-2 offense level reduction throughout the Drug Quantity Table, that range would be 4 to 8 months. For a father facing the loss of his liberty, the loss of employment, and the stability of a relationship, the difference between spending 4 versus 8 months in imprisonment is significant.

Experience and data have shown that judges exercise their discretion when imposing sentence in zones A, B, C. Just because the guidelines make probation or alternatives available does not mean defendants automatically receive such sentencing options. In some cases, defendants receive short prison sentences of “time served.” In other cases, judges impose imprisonment, especially on defendants with more serious criminal records, even in zones that do not require it. Just half of the defendants who fell in zone A received simple probation; over half who fell in zone B received some imprisonment, even though non-imprisonment alternatives are an option in Zone B.

Among the 56 defendants in zone D, where the guidelines recommend only imprisonment, just nine received an alternative sentence as a result of a downward departure or variance. Judges who now accept the guidelines' recommendations to require imprisonment may well consider alternatives to incarceration if they were included among the available options.

Figure 1 in Part III shows how the rate of imprisonment has not declined for drug offenses over the past fourteen years. Maintaining the offense level floor of 12 in the Drug Quantity Table prevents the Commission's minus-two proposal from addressing, in even a minor way, the astonishingly high incarceration rate of drug defendants. The proposed amendment would only serve to modestly *shorten* prison terms, not divert from prison the individuals who committed the least serious offenses.

**C. Minimum offense levels in other guideline provisions**

While not a part of the Drug Quantity Table, we note that other provisions in the drug guidelines will prevent some defendants from benefitting from the minus-two proposal. Specific offense characteristics in several guidelines contain minimum offense levels that override the Drug Quantity Table in cases where quantity and other adjustments do not meet the minimum. These include:

- §2D1.1(b)(3) use of aircrafts, submersibles, defendant pilots — minimum level 26
- §2D1.1(b)(13)(B) meth in the presence of a minor — minimum level 14
- §2D1.1(b)(13)(C) meth manufacture and minor or risk — minimum level 27
- §2D1.1(b)13)(D) meth manufacture and risk of harm to minor — minimum level 30
- §2D1.2(a)(4) all offenses — minimum level 13
- §2D1.2(a)(3) if protected person under 18 — minimum level 26
- §2D1.5 all offenses — minimum level 38
- §2D1.10 all offenses — minimum level 20
- §2D1.10 if meth manufacture — minimum level 27
- §2D1.10 if meth manufacture and risk to minor or incompetent — minimum level 30

Perhaps the most significant minimum offense level is the floor of 17 contained in the safety-valve provision at §5C1.2(b). This applies to low-level, non-violent, first-time offenders who qualify for the safety valve, but who would otherwise be subject to a five-year mandatory minimum based on the quantity of drugs alone. This provision arose as a result of congressional action. We hope that as part of the discussion and reforms to the safety valve now being considered in Congress, any remaining restriction on the Commission's ability to amend this provision will be removed. We strongly support applying the minus-two principle to this and all minimum offense levels throughout the guidelines manual.

## VI. Additional Changes to the Guidelines Would Help Ensure that Quantity Better Tracks the Purposes of Sentencing.

In addition to the changes discussed above, we offer two additional changes to the guideline commentary that would help ensure that the drug guidelines better serve the purposes of sentencing. Note 26 of section 2D1.1 should be amended to encourage downward departure whenever the weight of the mixture or substance containing a detectable amount of a drug over-represents the actual dosages that are involved and the seriousness of the offense. The Note should also be amended to encourage downward departure if drug quantity over-represents a defendant's role in the criminal enterprise.

Attached to this testimony is an addendum that reviews some of the history of the Drug Quantity Table, explains how it was premised on the notion that quantity could serve as a proxy for role in the offense, and resulted in different rules for when the weight of a controlled substance is determined by counting the entire weight of any mixture or substance containing a detectable amount of the controlled substance and when weight is determined only by the actual amount of the controlled substance. That history provides context to the discussion below and why we believe several other amendments could help judges fashion sentences that meet the purposes of sentencing.

Because the guidelines do not explain how drug quantity is intended to relate to the purposes of sentencing at 18 U.S.C. § 3553(a), judges have little guidance when evaluating, in a particular case, whether the guideline recommendation tracks those purposes. Too often, this has led to mechanical guideline application, where a drug mixture is simply weighed and the offense level calculated, without analysis of whether quantity is properly tracking the statutory purposes in a particular case.

Application Note 26 to guideline §2D1.1 provides "Departure Considerations" and offers three examples of when consideration of quantity might not track the statutory purposes. Note 26(A) concerns "reverse stings" when government agents sell a defendant drugs at artificially low prices, "thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed." Downward departure is invited, on the apparent theory that, in this situation, drug quantity exaggerates either the defendant's culpability or his or her ordinary scale of drug trafficking.

Note 26(B) invites upward departure "if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance." Under the current Drug Quantity Table, this is level 38 for most drugs. As an example, the note states: "upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38." If the Commission were to make 36 or 34 the highest offense

level in the Drug Quantity Table, as we have recommended, the Commission could also amend this Application Note to encourage upward departures in "an extraordinary case."

**A. Encourage a downward departure whenever the weight of the mixture or substance containing a detectable amount of a drug over-represents the actual dosages that are involved and the seriousness of the offense.**

Note 26(C), which invites upward departure based on unusually high purity,[97] is of particular interest. It concerns potential problems with the use of the weight of the entire mixture or substance that contains a detectable amount of a drug, instead of the weight of the actual drug itself**.** The note explains:

> The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs.

The note then alludes to a potential problem with drug quantity as a proxy for a defendant's role and culpability: "[a]s large quantities are normally associated with high purities; this factor is particularly relevant where smaller quantities are involved." In other words, if a defendant is held responsible for just a small quantity, but it is unusually pure, quantity may not properly track the defendant's role and culpability and upward departure may be warranted.

We understand the potential problem the guideline addresses, but believe it is quite rare. What we do not understand is how this is the only problem with the use of quantity that sufficiently concerns the Commission to warrant an application note and an invited departure. The Commission's research has made clear that the biggest problem with the use of quantity is the frequency that it over represents a defendant's role. Yet the Application Notes are silent concerning any of the common circumstances in which quantity fails to track the seriousness of an offense.

The Commission has previously acknowledged that the use of quantities of drug mixtures can misrepresent offense seriousness. We review in the Addendum how special rules were developed for LSD and other circumstances where the weight of the mixture or substance

[97] The note excepts "PCP, amphetamine, methamphetamine, or oxycodone for which the guideline itself provides for the consideration of purity."

exceeds the weight of the active ingredient. We believe that similar problems will become more frequent in the years ahead, particularly in offenses involving edible marijuana products. Products that include marijuana or its active ingredient THC, such as cookies, candies, and drinks, are now available for sale in Colorado,[98] and will be available this summer in Washington. At this point, it appears that federal marijuana enforcement will shift to interdiction of products that move inter-state. An increase in federal cases involving products in which the weight of the active drug is small relative to the rest of the mixture are likely to increase.

We believe the Commission should act now to avoid repeating the problems that led to unfairness and waste regarding LSD offenses. Note 26(C) should be amended to encourage downward departure whenever the weight of the mixture of substance containing a detectable amount of a drug over-represents the actual dosages that are involved and the seriousness of the offense.

### B. Encourage downward departure if drug quantity over-represents a defendant's role in the criminal enterprise.

Finally, Commission research has long established that the aggregation of many small quantities, either across time or across many participants in jointly undertaken activity, can result in street dealers, look-outs, and other low-level participants being held accountable for large quantities, and subject to prison terms Congress intended for kingpins. Couriers and mules, who may receive only a small payment for their role, are temporarily in possession of large quantities, from which they reap no profit.

The Application Note should be amended to encourage downward departure, at least in extraordinary circumstances, if drug quantity over-represents a defendant's role in the criminal enterprise.[99] We recognize that this is a difficult issue, but believe it is at the core of problems with the Drug Quantity Table. A more extensive revision of the drug guidelines is needed to address the ways that quantity can go wrong. But we believe that the Commission should at this point acknowledge these problems and alert judges to the unfairness that can result from mechanical application of the Drug Quantity Table.

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[98] Russell Haythorn, *Edible Marijuana Sales Shattering Sales Projections in Colorado*, ABC 7 News: TheDenverChannel.com (Jan. 15, 2014), http://www.thedenverchannel.com/news/local-news/edible-marijuana-sales-shattering-sales-projections-in-colorado.

[99] The role cap at §2D1.1(a)(5) recognizes that the offense levels in the Drug Quantity Table over-state role at the higher base offense levels, but do nothing to account for that over-representation below level 32.

**MARIJUANA CULTIVATION**

Defenders encourage the Commission to avoid the current controversy surrounding marijuana grow operations – the largest of which are concentrated in California.[100] First, the recent emphasis on environmental harms associated with marijuana growing is part of the cultural debate surrounding the legalization of marijuana. Some opponents of legalization have been emphasizing the environmental harms as part of an effort to turn the tide of public opinion. At the same time, many environmentalists who have watched the growing operations explode in size believe that regulation rather than increased penalties for the workers caught in the fields is the solution to the problem. Second, environmental and other harms associated with some marijuana growing operations will not be ameliorated by increasing penalties for the farmers, laborers, and delivery drivers (aka "lunch men") involved. If the federal government is going to continue to wage a war on marijuana, limited resources should be directed at eradication efforts, not prison bed space for low level field workers or drivers. Third, existing statutes and guideline provisions are more than adequate to address these issues. Neither prosecutors nor the Office of National Drug Control Policy[101] have complained that penalties for these offenses are inadequate.

If the Commission nonetheless amends the guidelines, any such amendment should be narrowly tailored and targeted at those who play an aggravating role and finance marijuana growing operations. Mitigating circumstances should also be provided for in the guidelines.

## I. The Culture War over the Legalization of Marijuana Has Exacerbated the Problems Associated with the Unregulated and Covert Growing of Marijuana.

Twenty states and the District of Columbia have legalized medical marijuana.[102] Two other states have legalized its recreational use. Other states have decriminalized the possession of small quantities for personal use. Thirteen more states have pending legislation or ballot

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[100] *See* Karen August, *Playing the Game: Marijuana Growing in a Rural Community, A Thesis Presented to the Faculty of Humboldt State University* 20-22 (May 2012), http://humboldt-dspace.calstate.edu/bitstream/handle/2148/978/Augustthesis%20FINAL_DRAFT.pdf?sequence=3.

[101] *Exploring the Problem of Domestic Marijuana Cultivation*, Hearing before Senate Caucus on International Narcotics Control (Dec 7, 2011) (Statement of R. Gil Kerlikowske, Director of National Drug Control Policy), http://www.drugcaucus.senate.gov/hearing-12-7-11/ONDCP%20testimony%20on%20marijuana%2012%2006%2011%20final.pdf.

[102] Julie Lee & Kari Gelles, USA Today, *Which States have Legalized Marijuana?*, http://www.usatoday.com/story/news/nation-now/2014/01/06/marijuana-legal-states-medical-recreational/4343199 (Jan. 6, 2014).

measures to legalize medical marijuana.[103] The net result is an increased demand for high quality marijuana. Because marijuana is still illegal under federal law, however, growers must operate in the shadows – on public lands or private property.

Growers have cultivated cannabis on federal property and private property within the United States since before the guidelines inception. The DEA, through its Domestic Cannabis Eradication/Suppression Program, has been funding eradication programs since 1979. The recent attention given to grow operations in California and the focus on the harm caused to the environment is a direct result of the increasing conflict between state and federal laws on the legalization of marijuana and the lack of agricultural regulations. Local officials and scholars, intimately familiar with the problems of trespass grows, point out that they are a symptom of the Drug War itself and that the current focus on environmental damage is a strategy – similar to the now disavowed fears of violent Mexican drug cartels[104] – designed to "undermine local growing across the board, as opposed to going after people who are violating environmental laws."[105]

The conflict between federal and state authorities is most apparent in Mendocino County, California. Mendocino County is one of three counties in the "Emerald Triangle," a region in Northern California where cannabis has been grown since the 1960s. The legalization of marijuana for medical and recreational use has caused growth in the cannabis industry there and elsewhere. While legalization has generated revenues for local and state governments in California, Washington, Colorado, and elsewhere, the demand has placed a strain on agricultural resources. In Northern California watersheds, which had been damaged by years of logging, ranching, and development, marijuana growing has presented new and unique challenges. Unlike vineyards and other agricultural operations subject to environmental regulations, marijuana growing is an unregulated industry driven underground because it is a violation of federal law.

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[103] ProCon.org, *13 States with Pending Legislation to Legalize Medical Marijuana* (as of Feb 13, 2014), http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481.

[104] Three years after blaming Mexican drug trafficking organizations for cultivating marijuana on public lands, the Office of National Drug Control Policy reportedly said "there was scant evidence that the cartels exerted much control over marijuana growing in the national forests." *Compare* Phil Taylor, *Cartels Turn U.S. Forests into Marijuana Plantations, Creating Toxic Mess*, N.Y. Times (July 30, 2009) (quoting Gil Kerlikowske, Chief of the White House's Office of National Drug Control Policy), http://www.nytimes.com/gwire/2009/07/30/30greenwire-cartels-turn-us-forests-into-marijuana-plantat-41908.html?pagewanted=all *with* Joe Mozingo, *Roots of Pot Cultivation in National Forests Are Hard to Trace*, L.A. Times (Dec. 26, 2012) (quoting Tommy Lanier, director of the National Marijuana Initiative, Office of National Drug Control Policy), http://articles.latimes.com/2012/dec/26/local/la-me-mexican-marijuana-20121226.

[105] David Downs, *Greenwashing the War on Drugs*, East Bay Express (Oct. 9, 2013), http://www.eastbayexpress.com/oakland/greenwashing-the-war-on-drugs/Content?oid=3732589.

In 2010, Mendocino County officials sought through regulatory efforts to control a surge in marijuana cultivation, and the attendant environmental and other harms.[106] Officials issued permits to medical marijuana growers, which would have required growers to install security fencing and cameras, pay permit fees up to $6,450 a year, and undergo inspections four times a year. Plants were given a zip-tie with a sheriff's serial number on it to show that the growers were in compliance. During the first year, eighteen growers signed up. Another ninety-one signed up the second year. The permit program not only helped to ensure safe agricultural practices and generated an estimated $600,000, but, as Sherriff Allman of Mendocino County explained: "it allowed his department – which spends 30 percent of its $23 million budget on pot enforcement – to target major cultivators.".[107] The Mendocino County program, and one in the works in adjoining Humboldt County, came to a halt, however, when the U.S. Attorney and DEA agents raided several of the regulated grow sites and threatened county officials with legal action.[108] Similar federal enforcement actions have been taken in Fresno County, where persons growing marijuana on private property in compliance with state law have been subjected to federal prosecution.[109] Many observers believe that these actions have driven more growers into the backwoods to hide from federal law enforcement authorities.[110] The end result is that growers who wish to operate legitimate, environmentally safe enterprises cannot obtain help from county agricultural officials because of federal prohibitions.[111]

Of course, Mendocino County is not the only place where marijuana is grown within the United States,[112] but it highlights the complexity of the problem and how increasing penalties for

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[106] Joe Mozingo, *Mendocino County Spars with Feds Over Conflicting Marijuana Laws*, L.A. Times (Jan. 20, 2013), http://articles.latimes.com/2013/jan/20/local/la-me-mendo-pot-20130122.

[107] Peer Hecht, *California's Emerald Triangle Pot Market is Hitting Bottom*, The Sacramento Bee (May 2012), http://www.sacbee.com/2012/05/05/4467516/californias-emerald-triangle-pot.html.

[108] *Id.*

[109] *See* Letter from Margaret Mimms, Fresno County Sheriff, to Land Owners Using Property to Cultivate or Distribute (April 24, 2012), http://operationmercury.org.

[110] Downs, *Greenwashing the War on Drugs*, *supra* note 105.

[111] *See, e.g.*, Josh Harkinson, *How Industrial Pot Growers Ravage the Land: A Google Earth Tour* (Feb. 6, 2013), http://www.motherjones.com/blue-marble/2013/02/google-earth-tour-marijuana-farms-environment-video.

[112] *See* Drug Enforcement Administration, *2012 Domestic Cannabis Eradication/Suppression Statistical Report* (identifying eradicated outdoor grow sites in 47 states and Puerto Rico; the top five states, accounting for more than half the 6470 sites, were California, Kentucky, Ohio, Hawaii, and Michigan), http://www.justice.gov/dea/ops/cannabis_2012.pdf. The DEA statistics do not distinguish between industrial hemp and marijuana, which both come from the cannabis sativa plant, but which are cultivated differently so that hemp contains a much lower level of tetrahyrdocannabinoids (THC). *See* Hempethics,

the farmers and other agricultural workers – whether they are small farmers who supply medical marijuana dispensaries, small groups of users cooperatively growing cannabis, or larger operations that supply the black market – is not going to solve the problem.

## II. Increased Penalties for those Prosecuted for Marijuana Cultivation Will Not Deter Growers.

The notion that higher penalties for those prosecuted for trespass grows on public or private land will serve any legitimate purpose of sentencing is misguided. The persons prosecuted in these trespass grows typically play small roles and have no connection to those who finance the operations or set up the grow site. Many are immigrants or other persons with financial struggles who are willing to work as farm laborers in any agricultural business or at whatever job is available. Their roles in marijuana grow operations vary. For the three to six months during the growing season, growers often remain on site. Sometimes they have other workers to cook, do laundry, or otherwise help around camp or in the fields. Drivers, known as "lunch men" will deliver food and other supplies to the growers. When the crop is ready to harvest, more workers are brought in to harvest and process the buds. Once the buds dry, the marijuana is packaged. At that point, drivers will deliver the drugs to those responsible for distribution.

The persons charged in these trespass grows often receive lengthy terms of imprisonment even though they fall low in the hierarchy of the grow operations and are just trying to make a living. One Defender client, a 54-year- old man with little criminal history, who cooked, did laundry and performed other mundane tasks for the growers received a 120 month sentence for manufacturing marijuana and a consecutive 60 month sentence under 18 U.S.C. § 924(c) for a gun found in his waistband when officers apprehended him at the grow site. Another Defender client was arrested four days after he arrived at a grow site to trim plants. He had been abandoned at the age of 7. For years, he worked in the fields of Mexico and California picking produce. For him, trimming marijuana plants paid more than he could make harvesting grapes. The offense involved 7,343 plants, yielding a base offense level of 30. Even with an adjustment for minor role, safety valve, and acceptance of responsibility, his guideline range was 51-63 months.[113] The government argued for a below range sentence of 46 months. Agreeing instead with the probation officer's recommendation, the court imposed a sentence of 37 months. In

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*Difference Between Industrial Hemp and Cannabis*, http://hempethics.weebly.com/industrial-hemp-vs-cannabis.html. Industrial hemp cultivation is legal in Colorado, Oregon, Kentucky, Vermont, Montana, West Virginia, North Dakota, and Maine, but remains illegal under federal law. Raju Chebium, *Farm Bill Would Allow Hemp Cultivation in Some States*, USA Today (Jan. 29, 2014), http://www.usatoday.com/story/news/politics/2014/01/29/hemp-cultivation/5039263.

[113] His criminal history was II as a result of single offense for driving a bicycle while intoxicated.

another case in Oregon, the defendant and others on the grow site were hired to cultivate the marijuana. The defendant had no decision-making authority and was unarmed. He pled guilty to conspiracy to manufacture marijuana and depredation of government property. Upon the government's recommendation, he received concurrent sentences of 51 months and was ordered to pay $97,474 restitution for the costs of cleanup and restoration.

Locking up workers for longer periods of time will do nothing to deter the growing operations. Cannabis is a highly profitable crop in high demand.[114] Sales in Colorado are expected to reach $1 billion in the next fiscal year and this year the state is expected to reap more than $100 million in marijuana taxes.[115] For every person incarcerated for working at a grow site, another will step in because they can earn more money tending cannabis plants than grapes, almonds, berries or other crops.[116] Because growing cannabis is such a profitable enterprise, whether eradication will solve the problem is subject to considerable debate.[117] But so long as marijuana remains illegal, the federal goal of "[p]reventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands" [118] is not going to be served by increasing sentence length.

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[114] Matt Baume, *Marijuana Crushes Grapes as Cash Crop*, NBC Bay Area (July 6, 2011), http://www.nbcbayarea.com/blogs/prop-zero/Marijuana-Crushes-Grapes-as-Cash-Crop-105288093.html. In addition to California, marijuana is a sizable cash crop in Alaska, Alabama, California, Connecticut, Hawaii, Kentucky, Maine, North Carolina, Oregon, South Carolina, Tennessee, and West Virginia. Jon Gettman, *Marijuana Production in the United States* (2006), DrugScience.org, http://www.drugscience.org/Archive/bcr2/cashcrops.html.

[115] Jack Healy, *Colorado Expects to Reap Tax Bonanza From Legal Marijuana Sales*, N.Y. Times (Feb. 20, 2014), http://www.nytimes.com/2014/02/21/us/colorado-expects-to-reap-tax-bonanza-from-legal-marijuana-sales.html?hpw&rref=us&_r=1.

[116] This is similar to the observation the Commission made in the *Fifteen Year Report* about how "retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high." USSC, *Fifteen Years of Guidelines Sentencing* 131 (Nov. 2004).

[117] Mason Tvert of the Marijuana Policy Project opined that we "cannot simply arrest and jail our way out of [the problem]" and that the "quickest and easiest way to prevent marijuana from being grown on public lands is to regulate it like alcohol." *See* Robin Wilkey, *California Lawmakers Worry About Pollution Caused by Illegal Marijuana Growers*, The Huffington Post (Dec. 10, 2013), http://www.huffingtonpost.com/2013/12/10/marijuana-pollution_n_4415248.html.

[118] Memorandum from James M. Cole, Deputy Att'y Gen. of the United States, to United States Attorneys, *Guidance Regarding Marijuana Enforcement* 2 (August 29, 2013), http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.

As the Commission heard from many social scientists at its recidivism roundtable, long prison sentences do not deter criminal activity.[119] The certainty of getting caught and being punished are more important than the severity of the sentence.[120] And setting aside the social science, the practical reality is that for every dollar spent on imprisonment, the Department of Justice loses money for enforcement. Enforcement is key. As Fresno County Sheriff Mims put it: "sustained success [in taking down growing operations] appears to be a product of perseverance with focused operations that use the resources of local, state, and federal agencies, but which rely chiefly on the considerable resources afforded by the federal government."[121]

## III. Existing Statutory and Guideline Provisions Adequately Address the Environmental and Other Harms Caused by Marijuana Cultivation.

A multitude of criminal statutes and guideline provisions already serve the purposes of sentencing and adequately address the environmental and other harms identified in the issues for comment and Congressman Huffman's November 21, 2013 letter to the Commission. The criminal code makes it a separate crime to cultivate or manufacture a controlled substance on federal property. 21 USC § 841(b)(5). Subsection (b)(5) expressly states that "the person shall be *imprisoned as provided in [21 U.S.C. § 841(b)]* and shall be fined [certain specific amounts]." Section 21 U.S.C. § 841(b)(6) sets forth a separate offense for a person who violates 21 U.S.C. § 841(a), or attempts to do so, "and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use – (A) creates a serious hazard to humans, wildlife, or domestic animals; (B) degrades or harms the environment or natural resources; or (C) pollutes an aquifer, spring, stream, river, or body of water."

While these statutes are not expressly referenced in the appendix to the guidelines, because they depend upon a violation of 21 U.S.C § 841(a), they are referred to §2D1.1. Section

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[119] Raymond Pasternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. Crim. L. & Criminology 765, 817 (2010) (there is "no real evidence of a deterrent effect for severity"). *See* Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 Crime & Just. 143, 189 (2003) ("no consistent and plausible evidence that harsher sentences deter crime"). *See generally* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At its Worst When Doing its Best*, 91 Geo. L. J. 949, 953 (2003); A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. Legal Stud. 1, 4-7 (1999).

[120] Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* (Nov. 2010).

[121] *Exploring the Problem of Domestic Marijuana Cultivation*, Hearing before Senate Caucus on International Narcotics Control (Dec. 7, 2011) (Statement of Margaret Mims, Fresno County Sheriff), http://www.drugcaucus.senate.gov/hearing-12-7-11/Sheriff-Mims-Testimony-Marijuana-on-Public-Lands.pdf.

2D1.1(13)(A) contains a 2-level enhancement "[i]f the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, stage, or disposal of a hazardous waste." This enhancement covers the environmental harms caused by the use of pesticides, rodenticides, herbicide, and similar toxic substances at marijuana grow sites, as well as the disposal of garbage.[122] It is broad enough to cover not only damage to the land, but to watersheds under the Federal Water Pollution Control Act (Clean Water Act). The commentary encourages an upward departure in cases where a 2-level enhancement does not adequately account for the harm. It also instructs the court to consider the costs of cleanup and harm to individuals or property in fashioning restitution and conditions of supervision. USSG §2D1.1, comment. (n. 18).

Other statutes and guidelines also address the environmental harms identified in the issues for comment. One statute that prosecutors have used in these cases is 18 U.S.C. § 1361, which prohibits depredation against government property. Depredation is broad enough to cover such things as water diversion, vegetation removal, and pollution.[123] Section 1361 is referenced to §§2B1.1 and 2B1.5. When a defendant is convicted for drug manufacture and depredation, then the grouping rules provide for incremental punishment. Just as a count involving the sale of a controlled substance and a count involving an immigration law violation are "not grouped together because different societal interests are harmed,"[124] then a count involving the manufacture of marijuana and a count involving a violation of an environmental law do not group together. As a result, the offense level is increased anywhere from 1 to 5 levels or the defendant is subject to a sentence at the higher end of the sentencing range pursuant to §3D1.4(c). In unusual cases where the offense level does not increase and a sentence at the higher end of the range is not adequate, the guidelines expressly provide for upward departure. USSG §3D1.4 comment. (backg'd). In cases involving both marijuana manufacturing and

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[122] *See generally* Environmental Protection Agency, *Resource Conservation and Recovery Act (RCRA)*, http://www.epa.gov/oecaagct/lrca.html.

[123] *See United States v. Jenkins*, 554 F.2d 783 (6th Cir. 1977) (depredation means robbing, plundering or "laying waste"); *United States v. Fairchild*, 46 F.3d 1146, 1995 WL 7696 (9th Cir. 1995) (driving spikes into trees in an effort to prevent logging operations was depredation of property).

We are concerned that congressional representatives who called upon the Commission to increase penalties seem to have misunderstood the reach of this statute and the operation of the guidelines grouping rules. Rep. Huffman released a press release stating that "[u]nder current law, environmental damages such as water diversions and vegetation removal are not considered as separate or aggravating offenses," but they clearly are under 18 U.S.C. § 1361. *Rep Huffman Applauds U.S. Sentencing Commission Action on Trespass Marijuana Cultivation Operations* (Jan. 17, 2014), http://huffman.house.gov/media-center/press-releases/rep-huffman-applauds-us-sentencing-commission-action-on-trespass.

[124] USSG § 3D1.2, comment. n. (2).

depredation of government property, we have seen plea agreements where the parties agree on the applicability of §3D1.4. We are aware of no cases where the prosecution has complained that the penalties are too low or where the court has found the need to depart upward.

Other statutes, including those referenced to Ch. 2, Part Q – Offenses Involving the Environment – cover the use of pesticides, herbicides, rodenticides; damage to water, fish, wildlife, and plants; and the use of hazardous or injurious devices. For example, §2Q1.1 – Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants -- carries a base offense level of 24. Section 2Q1.2 – Mishandling of Hazardous or Toxic Substances or Pesticides: Recordkeeping, Tampering, and Falsification: Unlawfully Transporting Hazardous Materials in Commerce – carries a base offense level of 8, but has substantial specific offense characteristics that can quickly drive the sentence up, including a 4-level increase for the discharge of pesticides; a 4-level increase if the cleanup required a substantial expenditure, and a 4-level increase for transportation without a permit. Other guidelines in Ch. 2, Part Q cover mishandling of environmental pollutants, tampering with a public water system, hazardous or injurious devices on federal lands, and offenses involving fish, wildlife, and plants. As discussed previously, the grouping rules would provide for incremental punishment if the defendant were convicted of an environmental crime referenced to Ch.2, Part Q and a drug trafficking offense referenced to §2D1.2.

Prosecutors have used these environmental crime provisions to obtain incremental punishment where they believed it appropriate. In one case, the defendant delivered chemicals and supplies to a marijuana cultivation site in the Sequoia National Forest where 9,746 marijuana plants were growing. He was charged with multiple counts of manufacture of marijuana, possession with intent to distribute marijuana, depredation of public lands, unlawful distribution of an unregistered pesticide under 7 U.SC. § 136j(a)(1)(A),[125] and possession of a firearm in furtherance of a drug trafficking crime. Pursuant to a plea agreement, he received a sentence of 6 years imprisonment after pleading guilty to the firearm count and the unlawful distribution of an unregistered pesticide. He also agreed to pay restitution in the amount of $4,294.33 for damage to the forest caused by the marijuana cultivation operation.[126] That the government elected to dismiss multiple counts that could have subjected the defendant to a more significant prison term demonstrates that the existing statutory and guideline framework is more than adequate to address the harm caused by marijuana cultivation on public land.

Restitution is always an option for the court in these cases, whether the defendant is convicted of a drug and/or environmental offense. For example, one defendant pled guilty to conspiracy to manufacture and to possess with the intent to distribute marijuana and was

[125] 7 U.S.C. § 136j is referenced to USSG §2Q1.2.

[126] Restitution has been ordered in other cases involving depredation of government property.

sentenced to 69 months imprisonment. The government dismissed the depredation of government property count, but the defendant was nonetheless ordered to pay restitution to the U.S. Forest Service in the amount of $25,9410.00.[127] Similarly, in cases that involve trespass grows on private property, the court may order restitution payable to the property owner.

As to concerns about violence and intimidation at marijuana grow sites, numerous provisions in the criminal code and guidelines reach such conduct. Section 2D1.1 contains enhancements for violence and dangerous weapons, §2D1.1(b)(1) and (2). 18 U.S.C. § 924(c) contains separate mandatory minimum penalties for cases where firearms are possessed, brandished or discharged in relation to a drug trafficking crime. Those provisions apply whether the offense occurs on public or private property. For murder, manslaughter, attempts, conspiracy, or other assaults occurring on federal property, 18 U.S.C. § 113 contains numerous penalty provisions that are referenced to Ch. 2, Part A of the guidelines. We have not seen any cases where the offense has been charged, but the Anti-Drug Abuse Act contains a specific provision for "boobytraps" on federal property where a controlled substance is being manufactured. 21 U.S.C. § 841(d). As the Commission notes, the offense carries a base offense level of 23 under §2D1.9. According to the Commission's data, §2D1.9, has never been used in the past eleven years.[128] We would be surprised if it has ever been used. Accordingly, we see no need to tinker with §2D1.9.

## IV. Trespass on Private Property is a Matter Best Left to the States

Defenders do not believe that trespass on private property to cultivate marijuana is any more aggravating than trespass on public lands. As discussed above, §2D1.1 contains enhancements that reach much of the conduct associated with marijuana cultivation. Many environmental laws regarding the use of pesticides and the protection of water ways apply whether the offense is committed on public or private land.

Beyond those penalty provisions, trespass on private property is best left to the states to prosecute. A recent California case, *Bock v. Smith*, 2012 WL 174968 (E.D. Cal. 2012), demonstrates the messy disputes that can occur about marijuana growing operations on private property. In *Bock*, the plaintiffs, in accordance with California law, were growing 500 plants on private property in Nevada. The defendants, one of whom had acquired title to the property on which the plants were growing, caused the local sheriff to destroy the plants. Plaintiffs sued in state court for damages on claims of trespass, conversion, and interference with contract. In

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[127] *See* U.S. Attn'y E.D. Cal., Press Release, *Fresno, Tulare and Kern Counties Marijuana Prosecution Update* (April 15, 2013), http://www.justice.gov/usao/cae/news/docs/2013/04-2013/04-15-13Marijuana.html.

[128] USSC, *Sourcebook of Federal Sentencing Statistics* (FY 2004 through FY2012).

seeking to remove the case to federal court, defendants argued that federal law prohibiting marijuana growing preempted the state law claims. The federal court disagreed and remanded the case to the Nevada court.[129]

Disputes are also likely to arise about whether marijuana cultivation or corporate activities on private property caused environmental damage. Green Diamond Resource Company is a logging operation mentioned in Congressman Huffman's letter to the Commission. Environmental groups have complained about how Green Diamond, and other corporate industrial logging operations, have used "highly damaging forest practices such as clear cutting, construction of endless road systems, conversion of forests essential for fish, wildlife and watersheds to sterile tree plantations, and the application of chemical herbicides."[130] Whether these allegations are accurate or not, one point is clear: a federal court in a marijuana cultivation case need not be saddled with the additional burden of resolving the inevitable disputes that would arise about whether growing marijuana or industrial logging practices caused environmental damage on private property that then damaged waterways and wildlife.

## V. The Guidelines Should Include, at a Minimum, Mitigating Circumstances for Those Who Operate in Compliance with State Law or Use Environmentally Friendly Growing Practices.

Rather than amend the guidelines to increase penalties for marijuana cultivation, the Commission should amend them to account for mitigating circumstances not considered within the current guidelines. Notwithstanding significant changes in state marijuana laws over the years, the guidelines for marijuana have remained unchanged since they were originally promulgated. The evolution in the treatment of marijuana under state law is relevant to sentencing because it reflects the public's perception about the seriousness of the offense and the risks posed by marijuana use. The Department of Justice's policy not to prosecute those involved in cultivation, distribution and the sale of marijuana in compliance with state law also shows that the Department believes that marijuana related offenses are not as serious as they

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[129] In another case, a landlord sued an insurance company to pay for the cost of cleanup, remediation, and lost rent caused by renters growing marijuana on his property. *Kochendorfer v. Metropolitan Property & Cas. Ins. Co*, 2012 WL 1204714 (W.D. Wash. 2012). These kinds of disputes would unnecessarily complicate the federal sentencing process if the Commission were to increase penalties for trespass grows.

[130] Environmental Projection Information Center, *Industrial Forestry Reform: Exposing Corporate Logging*, http://www.wildcalifornia.org/action-issues/industrial-forestry-exposing-corporate-logging. *See also* The Northcoast Environmental Center, *Green Diamond Plans Clearcut Near Headwaters*, http://yournec.org/content/green-diamond-plans-clearcut-near-headwaters; Center for Biological Diversity, *Lawsuit Challenges Plan to Log 150,000 Acres in Northern California: Logging Would Devastate Salmon, Let 83 Northern Spotted Owls Be Hurt or Killed* (Aug. 12, 2013), http://www.biologicaldiversity.org/news/press_releases/2013/fruit-growers-supply-08-12-2013.html.

once were and that states should be given an opportunity to regulate the industry.[131] The guidelines should account for these changed policies by encouraging downward departures.

The guidelines should also encourage departures in marijuana cultivation cases where the growers use environmentally safe practices. Some marijuana growers recognize how the agricultural cannabis boom threatens the environment and presents new challenges. To promote responsible practices, marijuana growers in Northern California have published a *Northern California Farmers Guide Best Management Practices - A Healthy Environment and a Prosperous Economy: Seeking Balance and Sustainability in North California's "Green Rush."*[132] The guide contains information on all aspects of growing – from water usage, fertilizers, and disease and pest control. Other environmental groups also have promoted growing "in a regulated manner abiding by local, state and federal air quality, water quality, forest protection, endangered species, and land-use laws, without trespassing on public or private lands."[133] Conscientious growers who comply with environmental laws should be punished less harshly.

Similarly, industrial hemp growing, particularly in states where hemp cultivation is legal, should be considered a mitigating circumstance under the guidelines. There is increasing widespread support for cultivating industrial hemp, particularly in farming communities that once thrived on tobacco.[134] Whether federal prosecutors will choose to charge these farmers with violations of the controlled substances law remains to be seen. If they do, however, farmers growing hemp should not be subject to the penalties currently set forth in the guidelines.

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[131] *See United States v. Dayi*, 2013 WL 5878922, *5 (D. Md. 2013).

[132] www.wildcalifornia.org/wp-content/uploads/2013/11/BestPracticesGuide_B_Reprint_120313_proof7.pdf.

[133] Environmental Protection Information Center, *Pollution Pot*, http://www.wildcalifornia.org/action-issues/pollution-pot.

[134] Conan Miller, *Even in Legal States, Farmers Reluctant to Grow Hemp,* Epoch Times (Jan. 30, 2014), http://www.theepochtimes.com/n3/478795-even-in-legal-states-farmers-reluctant-to-grow-hemp.

**ADDENDUM TO WRITTEN STATEMENT OF MOLLY ROTH, MARCH 13, 2014**

## HISTORY OF THE DRUG QUANTITY TABLE

The Anti-Drug Abuse Act of 1996 and subsequent legislation sought to use quantity as a proxy for role in the offense, departed from the past practice of using the purity of drugs as a measure of offense seriousness, and resulted in some drug quantities inexplicably being based upon the weight of the mixture or substance and others being based solely on the amount of the drugs. That legislation greatly influenced the Drug Quantity Table.

### I. The legislative history behind the Anti-Drug Abuse Act of 1986 is limited.

As the Commission has noted, the legislative history surrounding the Anti-Drug Abuse Act is "limited."[1] "In response to a number of well-publicized tragic incidents . . . Congress expedited passage of the 1986 Act . . . [and] bypassed much of its usual deliberative legislative process. As a result there were no committee hearings and no Senate of House Reports accompanying the bill that ultimately passed . . ."[2]

The circumstances surrounding the legislation have subsequently been described by former Congressional staff. Eric Sterling was Counsel to the U.S. House Judiciary Committee responsible for drug law enforcement at the time the law was enacted. In 2007, he testified:

> The Subcommittee's approach in 1986 was to tie the punishment to the offenders' role in the marketplace. A certain quantity of drugs was assigned to a category of punishment because the Subcommittee believed that this quantity was easy to specify and prove and "is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain." [H.R. Rep. 99-845, pt. 1, at 11-12 (1986)] However, we made some huge mistakes. First, the quantity triggers that we chose are wrong. They are much too small. They bear no relation to actual quantities distributed by the major and high-level traffickers and serious retail drug trafficking operations, the operations that were intended by the subcommittee to be the focus of the federal effort. The second mistake was including retail drug trafficking in the federal mandatory minimum scheme at all.[3]

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[1] USSC, *Special Report to the Congress -- Cocaine and Federal Sentencing Policy* 116 (1995) (hereinafter *1995 Cocaine Report*).

[2] USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 5 (2002) (hereinafter *2002 Cocaine Report*).

[3] *Mandatory Minimum Sentencing Laws – The Issues*, Hearing Before the Subcomm. on Crime Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong., 1st Sess., at 166, 169-70 (June

## II. Congress chose to have drug quantity serve as a proxy for role in the offense, but the link between the two is tenuous.

The limited legislative history suggests that Congress was interested in using quantity to prioritize federal drug enforcement. As the Commission later characterized it: "Drug quantity would serve as a proxy to identify those traffickers of greatest concern."[4] One way that quantity might theoretically help prioritize is by differentiating among individuals playing different roles. The Commission described Congress's approach as creating a "two-tiered penalty structure for discrete categories of drug traffickers."[5] The categories were defined as:

- **Major traffickers**: "the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities";

- **Serious traffickers**: "The managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities."[6]

The hope was that the five and ten-year mandatory sentences "would create the proper incentives for the Department of Justice to direct its 'most serious focus' on 'major traffickers' and 'serious traffickers'."[7]

This approach to using quantity as a proxy for role appeared again in the FSA. Senator Richard Durbin, the chief sponsor of the FSA, explained to the Commission that Congress intended quantity to serve as a marker for role. According to Senator Durbin, Congress chose 28 grams for the five-year threshold for crack cocaine because it read a Commission's report as finding that this amount is typical of wholesalers, for whom Congress intended five-year minimum sentences.[8]

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26, 2007) (Statement of Eric Sterling). Mr. Sterling has described the legislative process as "like an auction house . . . . It was this frenzied, panic atmosphere – I'll see you five years and raise your five years. It was the crassest political poker game." Michael Isikoff & Tracy Thompson, *Getting Too Tough on Drugs: Draconian Sentences Hurt Small Offenders More Than Kingpins*, C1, C2, Wash. Post (Nov. 4, 1990) (quoting Sterling).

[4] *1995 Cocaine Report*, *supra* note 1, at 118.

[5] *2002 Cocaine Report*, *supra* note 2, at 6.

[6] *Id*. at 7.

[7] *Id.* (quoting H.R. Rep. No 845, 99th Cong., 2d Sess. Pt 1, at 16-17 (1986)).

[8] Letter from The Honorable Richard Durbin, U.S. Senate, to The Honorable William Sessions, Chair, U.S. Sentencing Comm'n 2 (Oct. 8, 2010) ("Congress selected 28 grams as the trigger for five-year

Unfortunately, Congress misunderstood the Commission's report and overlooked how drug quantity is calculated under the relevant conduct rules. The Commission's 2007 cocaine report defined a wholesaler as a person who "[s]ells more than retail/user level quantities (more than one ounce) [the equivalent of 28 grams] *in a single transaction*, or possesses *two ounces or more on a single occasion*." (emphasis added).[9] The report does not classify as a wholesaler a person who sells user level quantities over a period of time. The guidelines, however, require that courts aggregate drug quantities involved in multiple transactions when they are part of the "same course of conduct or common scheme or plan as the offense of conviction."[10] Hence, a street seller who distributes 1 gram of crack to twenty-eight customers over the course of several days is held accountable for 28 grams of crack.

Previous Commission research examined a person's actual conduct rather than merely the quantities of drugs for which the guidelines held him or her accountable.[11] It found that the quantity thresholds Congress chose for crack and powder cocaine, in interaction with the guidelines' relevant conduct rules, do a poor job of assigning individuals to the punishments Congress intended. Although the Commission has not released any analysis of the interplay between role in the offense and quantity for drugs other than crack and powder cocaine, the lack of a meaningful relationship between role in the offense and drug quantity likely applies to other drugs as well.

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mandatory minimums because the Commission and other experts have concluded that less than one ounce is a retail/user quantity, while more than one ounce is the quantity sold by wholesalers). *See e.g.* , USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 18 (2007) (hereinafter *2007 Cocaine Report*).

[9] *Id*.

[10] USSG §1B1.3(a)(2) (Relevant Conduct). The Commission has previously considered, but not adopted, guideline amendments that would limit quantity to amounts involved in a "snapshot" of time or a single transaction. *See Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary. Request for Comment. Notice of Hearing*, 60 Fed. Reg. 2430, 2451-52 (Jan. 9, 1995). In some cases, like those involving street-level dealers, such "snapshots" would provide a better indicator of functional role and culpability. In other cases, like those involving couriers, such "snapshots" of quantity would need to be combined with the surrounding circumstances to determine functional role.

[11] *See, e.g.*, *2007 Cocaine Report* 7-8; *2002 Cocaine Report* vii.

## III. Congress's decision to base quantity on the "entire weight of any mixture or substance containing a detectable amount of the controlled substance" rather than the purity of the substance inexplicably departed from existing practice and created considerable confusion.

When statutory penalties were first linked to drug quantities in the Controlled Substances Penalties Amendments Act of 1984, the weight of the *pure* drug was used.[12] The Parole Commission guidelines in effect at the time of the Sentencing Reform Act also measured offense seriousness based on the amount of pure drug. "For example, if 10 grams of 10% pure heroin was seized, it would be treated as 1 gram of heroin; if it was 50% pure, it would be treated as 5 grams of heroin."[13] The Parole Commission's practice makes sense – similar actual amounts, with similar potential for harm, are treated similarly.

For reasons that are unclear, Congress in the Anti-Drug Abuse Act departed from its previous approach and that of the Parole Commission and made the new mandatory penalties contingent on the entire weight of any "mixture or substance containing a detectable amount" of a drug. This added an arbitrary element to weight determinations, where varying amounts of actual drug were treated similarly. It also had the perverse effect of *increasing* punishments for individuals *lower* in the distribution chain, where dilution of drugs is more common.[14]

The legislative record casts little light on why Congress made this change. The House Committee report referred to the inclusion of inert ingredients in the weight as a "market-oriented approach." The report stated: "[t]he quantity is based on the minimum [weight of the mixture including the drugs] that might be controlled . . . by a trafficker in a high place in the . . . distribution chain." [15] Upon what evidence Congress based these thresholds is not mentioned in the report.

Conflicting interpretations of legislative intent have only added to the confusion about the relevance of purity and quantity in sentencing. Writing for a majority of the Supreme Court in *Chapman*, Justice Rehnquist cited Congress's "market-oriented approach" to conclude that

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[12] *Chapman v. United States*, 500 U.S. 453, 460-61 (1991) (describing how the Controlled Substances Penalties Amendments Act of 1984 "first made punishment dependent upon the quantity of the controlled substance involved" and was based "upon the weight of the pure drug involved").

[13] USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* Appendix B, Notes on §2D1.1 (1987), http://www.fd.org/docs/select-topics---sentencing/Supplementary-Report.pdf.

[14] *See* Institute for Defense Analysis, *The Price and Purity of Illicit Drugs: 1981 – 2007* (2008), http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/bullet_1.pdf (reporting purity of seizures involving four quantity ranges of various drugs) (hereinafter *Price and Purity*).

[15] H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986).

"Congress did not want to punish retail traffickers less severely, even though they deal in smaller quantities of the pure drug, because such traffickers keep the street markets going."[16] But as we have seen, the Commission concluded from other aspects of the legislative record that Congress wanted to treat serious and high-level traffickers more seriously, and expected quantity to make these distinctions. Justice Stevens, writing in dissent in *Chapman*, noted that the legislative history is "sparse" and found the "mixture and substance" language itself ambiguous.

*Chapman*'s approach of counting the entire weight of the LSD and carrier medium produced unwarranted disparities. One dose of LSD on a sugar cube could result in the same offense level as 125 doses on blotter paper. Such unwarranted disparity led the Commission in 1993 to depart from an approach of weighing the entire mixture or substance containing LSD and instead to base punishment on standardized dosage units.[17] Courts accepted the Commission's dosage-based method for guideline application, but not for statutory minimum penalties.[18]

The Commission also developed special rules for other situations. These include standardized weights for marijuana,[19] and instructions to allow unsmokable, rain- or sea-soaked marijuana to dry before determining the weight.[20] In response to circuit conflicts and disparate practices in the district courts, the Commission added directions to *not* count fiberglass, or beeswax, or other materials from which a drug must be separated before it can be consumed. Courts were directed to not count laboratory wastewater containing unusable trace amounts of drug.[21] In many cases today, however, inert substances mixed with drugs continue to add offense levels and arbitrary variation to drug offense sentences, which create unwarranted disparity. For example, opioid pain medications come in many different forms – pills, liquid, or intravenous. The same amount of active ingredient can be found in a pill and liquid form, but the pill weighs more because it contains a multitude of inactive ingredients.

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[16] *Chapman* , 500 U.S. at 461 (holding that weight of carrier medium must be included in determining whether offense involved more than one gram of "mixture or substance containing detectable amount" of LSD – the triggering amount for a five year mandatory minimum sentence).

[17] App. C, amend 488 (1993); USSG §2D1.1(C) Drug Quantity Table, Note (G).

[18] *Neal v. United States*, 516 U.S. 284 (1996).

[19] USSG §2D1.1(C) Drug Quantity Table, Note (E).

[20] USSG §2D1.1, comment (n.1).

[21] App. C, amend. 484 (1993).

## IV. Consideration of the actual amount of controlled substance for some drugs – PCP, Amphetamine, Methamphetamine, Oxycodone – complicated matters.

To confuse matters still further, Congress itself departed from the "mixture or substance" approach for certain drugs. Initially for PCP, and two years later for methamphetamine in various forms, Congress provided separate quantity thresholds for mixtures containing the drug and for the drug itself.[22] Congress then proceeded to enact additional legislation that affected sentencing for methamphetamine. In 1999, Congress directed the Commission to equalize penalties for amphetamine with those of methamphetamine.[23] The history of congressional action and the Commission's various responses are set forth in a 1999 Commission staff report.[24] Neither the report nor any other information we have been able to find in consultation with Commission staff reveal why Congress chose to treat these particular drugs differently.

Any rationale for different treatment of actual and mixtures containing amphetamine, methamphetamine, and PCP would appear to be lost under the Drug Quantity Table's Note (B) because it instructs the court to use the greater of (1) the offense level based upon the entire weight of the mixture or substance; or (2) the offense level based upon the weight of the actual drug. The Commission added this commentary at the same time it added methamphetamine to the Drug Quantity Table and when it expanded the Drug Quantity Table to level 42 (later reversed) – an effort seemingly designed to increase sentences for drug traffickers well beyond the levels required by statute.[25]

The Commission has previously observed that when a form of a drug, such as crack, is typically smoked, the greater addictiveness of the form of administration can support a higher ratio and harsher punishment.[26] Pure forms of PCP and methamphetamine are often smoked rather than ingested orally or through snorting. But for reasons no one seems to understand, Note (B) disregards the form of the drug that a person actually trafficked, even though the distinction is recognized in the statutes.

The rule has the effect of sometimes treating impure forms of the drugs as harshly as the same quantity of a smokable form. Mixtures have quantity thresholds in the Drug Quantity Table ten times higher than the pure forms of the drugs, so mixtures of greater than 10 percent

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[22] USSC, *Methamphetamine: Final Report* 8 (1999), http://www.ussc.gov/Research/Working_Group_Reports/Drugs/199911_Meth_Report.pdf.

[23] *Id*. at 12.

[24] *Id*.

[25] USSG, App. C, amend. 125 (1989).

[26] USSC, *Special Report to the Congress – Cocaine and Federal Sentencing Policy* 183 (1995).

purity will regularly receive higher offense levels under Note (B) than they would under the statutory approach. According to the most recent available empirical data, mixtures containing methamphetamine have fluctuated around the 50 percent purity level.[27] Thus, a 320 gram *mixture* of methamphetamine at 50 percent purity would receive offense level 28 under the Drug Quantity Table. But after application of Note (B), the 160 grams of actual meth is assigned to level 34, the same that would be assigned if the entire 320 grams had been actual meth. Any different treatment based on the likely mode of ingestion – which is found in cases of crack and powder cocaine – has been lost.[28]

Note B also treats oxycodone (actual) differently than other opioids. In 2003, the Commission amended §2D1.1 to refer to oxycodone (actual), defined as the "weight of the controlled substance, itself, contained in the pill, capsule, or mixture."[29] The Reason for Amendment states that the Commission found "proportionality issues in the sentencing of oxycodone trafficking offenses" because Percocet and Oxycontin are formulated differently and because "different amounts of oxycodone are found in pills of identical weight."[30] Similar issues exist with other opioids, like Dilaudid, where the active ingredient weight can change without any meaningful change in the total weight of the pill.

## V. The current Drug Quantity Table

In sum, the current Drug Quantity Table reflects a hodgepodge of quantity thresholds, special rules, and piecemeal actions by Congress and the Commission that lack any clear rationale. In addition to the thresholds and ratios in the mandatory minimum statutes that the Commission has chosen to incorporate in the Drug Quantity Table, it has been subject to statutory directives concerning methamphetamine, amphetamine, powder and crack cocaine, MDMA/ecstasy, anabolic steroids, hydrocodone, and oxycodone, precursor drugs like ephedrine, and so-called "date-rape" drugs like flunitrazepam and GHB. The prison terms associated with quantities of many types of drugs were chosen in part based on aggravating factors thought to be associated with those drugs, such as violence (crack), or use by role models such as athletes (anabolic steroids), or marketing to youth (ecstasy). Through the years, however, many aggravating upward offense level adjustments were added to the guideline to reflect these harms, and a variety of other factors, without any reduction in the quantity-based base offense level.

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[27] *Price and Purity*, *supra* note 14, at B-39, Table B-19.

[28] We can find no evidence that the milder stimulant amphetamine is ever smoked, so the Commission's application of the same rules to it as to methamphetamine, at the same offense levels, remains incomprehensible.

[29] App. C, amend. 657 (2003).

[30] *Id*.

Quantities were chosen initially because they were mistakenly thought to indicate different defendants' aggravated roles in drug distribution schemes, such as sellers of large amounts to retail dealers (wholesalers), or heads of large organizations (kingpins). However, not only were the quantity levels mistaken, but these defendants are also subject to upward adjustments under the aggravated role guidelines. This accumulation of base offense levels erroneously set to reflect different functional roles and different harms, specific offense characteristics that reflect some of those same harms, and additional adjustments under Chapter Three of the guidelines, result in relentless "factor creep" and double counting that drive offense levels far above what is necessary to achieve the purposes of sentencing.[31]

[31] Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 742 (2001) (The guidelines embody "factor creep," where "more and more adjustments are added" and "it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness.").