Report of the

Drugs/Role/Harmonization Working Group

submitted by:

Sharon Henegan, Chair
Kevin Blackwell
Nolan Clark
Deborah Dealy-Browning
Amanda Grimsley
Susan Katzenelson
Frank Larry
Chuck McDanal
Krista Murray
Liz Phillips
Jackie Rubin
Vince Ventimiglia
Gordon Waldo
David Levitt

November 10, 1992

United States Sentencing Commission

Table of Contents

I. Introduction

The purpose of the 1992 Drug/Role/Harmonization Working Group (hereafter referred to as the Drug Working Group) has been to re-examine the structure of the drug guideline (§2D1.1) in light of anecdotal and empirical evidence suggesting that sentences for certain drug-trafficking defendants may be overly punitive.[1] The Commission structured the drug guideline to reflect the statutory emphasis on quantity (21 U.S.C. § 841) and established offense levels that would achieve the five-year and ten-year mandatory minimum sentences for those quantities of drugs designated by Congress.

The Commission began its in-depth study of the drug guideline in 1991, focusing primarily on the relationship between drug offenses and role in the offense. The drug guideline's reliance on quantity sometimes produces guideline ranges well in excess of the mandatory penalties required by statute, even for defendants who may have only played a relatively peripheral role in the offense. In light of this, the 1991 Drug/Role Working Group focused on the guideline sentences for those defendants who play a minimal or minor role in drug offenses involving a large quantity of a controlled substance, exploring how the drug and/or role guidelines might be modified to reflect the lesser culpability of certain of these defendants, while retaining higher sentences up to, and including, life imprisonment for the most culpable defendants.

While the 1992 Drug Working Group continued to focus on role, the primary focus of the group shifted to an examination of the current quantity-driven drug guideline. Our task has been to explore alternative means of distinguishing drug offenses and offenders other than drug quantity. We have discussed ideas with Commissioners and the Judicial Working Group on Drug Sentencing and this report attempts to memorialize the majority of their recommendations.

II. Background

The 1991 Drug/Role Working Group research focused on (1) the operation of the relevant conduct guideline (§1B1.3), (2) the application of the mitigating role guideline (§3B1.2), (3) the addition of a "cap" to the drug guideline for those defendants who receive mitigating role adjustments, and (4) the need to consider drug quantity in offenses that involve renting a drug establishment. Amendments were suggested for each of these four areas. Effective November 1, 1992, the Commission promulgated a clarifying amendment to the relevant conduct guideline and an amendment to §2D1.8 (Renting or Managing a Drug Establishment) that added a reference to the drug quantity table at §2D1.1. The

[1] Data collected at the Commission indicate that defendants sentenced for drug trafficking offenses receive downward departures or sentences at or near the bottom of the applicable guideline range significantly more frequently than do defendants sentenced for other types of offenses. See Section IV of this Report.

Commission did not adopt the amendment that provided a "cap" to the drug quantity table for defendants who receive the mitigating role adjustment in §3B1.2, nor the amendment that clarified the operation of mitigating role.

In conducting its research, the 1991 Drug/Role Working Group completed a detailed review of approximately 1500 drug case files. For a summary of the case review findings on drug trafficking offenders and mitigating role factors see pages 3-16 in Appendix A. The 1992 working group has not repeated this effort; rather, we have considered this earlier work in developing several alternatives to the current drug and role guidelines.

Research conducted at the Commission by the 1991 Drug/Role Working Group, research from the Federal Judicial Center, and anecdotal evidence reported by probation officers and judges suggests that the provisions of relevant conduct have, at times, been interpreted too broadly in applying the guidelines to drug trafficking offenses. For defendants involved in conspiratorial activity, this overly broad interpretation of relevant conduct may have held defendants accountable for significantly greater quantities of drugs than appropriate. Those who report that the guideline sentences are too high for many low-level drug traffickers may have reached this conclusion because the court's application of the drug guideline and relevant conduct included more drugs than the Commission intended to be included.

It is anticipated that the November 1, 1992, clarifying amendment to the relevant conduct guideline will effectively reduce any overly broad application of the relevant conduct provisions for defendants involved in jointly-undertaken criminal activity. However, the amendment to §1B1.3 did not narrow, and was not intended to narrow, the application of the relevant conduct standard for acts and omissions that the defendant aided or abetted. Presently, a defendant who was peripherally involved in the drug trafficking conduct will nevertheless be held accountable for all the drugs involved in the acts the defendant aided or abetted. For example, the 1992 amendment made clear that the jointly-undertaken criminal activity of a defendant who agrees to help off-load a single shipment, out of many, in a large marihuana importation offense is limited to the importation of the single shipment. However, relevant conduct will hold the defendant accountable for the entire amount of marihuana contained in the single shipment because he aided and abetted its off-loading. Presuming enough drugs to produce a base offense level of 42 and possession of a weapon by a guard hired to protect the shipment, the offense level is increased to level 44. Even if the defendant were to receive a 4-level reduction for minimal role, a 3-level reduction for acceptance of responsibility, and had no criminal record, he would be exposed to a guideline sentencing range of 210 - 262 months of imprisonment, a sentence well in excess of the ten-year mandatory minimum penalty required by statute.

While Congress intended that offenders who traffic in large amounts of drugs[2] receive substantial terms of imprisonment, it cannot be said that Congress required that defendants such as the off-loader in the preceding example receive more than ten years imprisonment. In certain cases, the drug guidelines would require such a sentence because of the way §2D1.1 was designed (i.e., using the five- and ten-year statutory amounts to anchor the offense levels in the Drug Quantity Table at §2D1.1 and increasing the sentence for larger drug quantities in a proportional manner). Particularly where the amount of drugs results in unusually lengthy sentences, quantity may be a less significant factor in determining the appropriate sentence for the least culpable defendants in a drug trafficking offense.

III. Legislative History

To assist in the staff working group's evaluation of alternatives to the current operation of the drug guideline, the working group looked to the language in the 1986 Anti-Drug Abuse Act, the law establishing many of the current mandatory minimum penalties for drug-trafficking offenses. That statute, together with its legislative history, indicates a congressional view that at least five factors were relevant in sentencing drug offenses: drug type, drug quantities, role in the offense, scope of the operation, and recidivism.

The 1986 Act set five- and ten-year mandatory minimum sentences for offenses involving specified quantities of certain drugs. In setting the mandatory penalties, Congress clearly intended to target mid- and high-level drug traffickers. In its report to Congress on the Act, the House Committee on the Judiciary stated that it "strongly believes that the Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs." Thus, the ten-year mandatory penalty was tied to "quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level...[t]he quantity 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."

---

[2] Title 21 U.S.C. § 841(b)(1)(A) requires a ten-year mandatory minimum sentence for the following amounts of drugs:

(i)	1 kilogram or more of . . . heroin;
(ii)	5 kilograms or more of . . . cocaine;
(iii)	50 grams or more of a . . . cocaine base;
(iv)	1 kilogram or more of . . . PCP;
(v)	10 grams or more of . . . LSD;
(vi)	400 grams or more of . . . propanamide;
(vii)	1000 kilograms or more of . . . marihuana; or
(viii)	1 kilogram or more of . . . methamphetamine.

The five-year mandatory penalty, the "second level of focus" as described by the Committee, was intended to punish "the managers of the retail level traffic" who handle drugs "in substantial street quantities. The Committee is calling such traffickers serious traffickers because they keep the street markets going."

Under the statutory scheme of the 1986 Act, recidivism would double the mandatory minimum sentences. The major traffickers subject to the ten-year mandatory minimum for a first offense were subject to a 20-year sentence if they had previously sustained a conviction for a felony drug offense and mandatory life imprisonment if they had previously sustained convictions for two or more felony drug offenses. The serious traffickers subject to the five-year sentence were subject to a ten-year sentence if they had previously sustained one or more convictions for a felony drug offense.

IV. Monitoring Data

A. Profile of Drug Trafficking Offenses

In fiscal year 1991, drug trafficking was the primary offense in 40.7 percent of all guideline cases received by the Commission. Conviction was obtained by trial in 21.5 percent of these cases. In 94.4 percent of the cases the defendant was sentenced to imprisonment, with a mean term of 87.8 months and a median term of 60 months.[3]

Tables 1 to 5, reprinted from the Commission's 1991 Annual Report, present a detailed descriptive profile of drug cases sentenced under §2D1.1.[4]

As described in Table 1, 11,258 defendants were sentenced under the drug trafficking guideline in 1991. Base offense levels under §2D1.1 are determined by the quantity and type of drugs involved in the offense. The largest number of cases had base offense levels of 26 and 32, which correspond to the five- and ten-year mandatory minimum penalties set by statute for certain drugs. An enhancement for possession of a firearm was applied in 9.6 percent of the cases. An additional 670 cases (6.0%), involved convictions under 18 U.S.C. § 924(c) where the defendant received a mandatory consecutive penalty of five years for use or possession of a firearm during a crime of violence or drug trafficking crime. Involvement of an aircraft in the offense was found in 32 cases (0.3%).

Victim-related adjustments from Chapter Three, Part A, were almost non-existent in drug cases. However, 25 percent of drug trafficking defendants received aggravating or mitigating role adjustments from Chapter Three, Parts A and B, respectively, to reflect their relative culpability in the offense. Additionally, five percent of defendants received an adjustment under §3C1.1 for obstruction of justice. Seventy-five percent received an adjustment under §3E1.1 for acceptance of responsibility (see Table 2).

As reported in Table 3, 71.3 percent of the drug trafficking cases involved defendants with some prior criminal involvement reported in the presentence report, with the other 28.7 percent of the drug cases involving defendants with no criminal record. However, it must be noted that prior criminal record does not necessarily translate into criminal history points under Chapter Four of the guidelines. Just more than half (51.8%) of the drug cases involved defendants who had no "countable" prior sentences and who therefore received zero criminal history points. This figure includes, of course, the 28.7 percent of defendants with no criminal record. Another 12.0 percent of the drug cases involved defendants who received one criminal history point for a total of 63.8 percent of drug cases involving defendants in Criminal History Category I. Only 16 percent of the drug cases involved

---

[3]United States Sentencing Commission, Annual Report, 1991, Chapter Five Section A.

[4]*op.cit.*, Chapter Five, pp. 112-121.

Table 1

CHAPTER TWO GUIDELINE APPLICATION INFORMATION*
(October 1, 1990 through September 30, 1991)

Guideline §2D1.1 — Drug Trafficking

BASE OFFENSE LEVEL**		Number	Percent
6	(Less than 250 gms of Marihuana)	133	1.2
8	(At least 250 gms of Marihuana)	45	0.4
10	(At least 1 kg of Marihuana)	67	0.6
12	(Less than 5 gms of Heroin, 25 gms of Cocaine, or 5 kgs of Marihuana)	620	5.5
14	(At least 5 gms of Heroin, 25 gms of Cocaine, or 5 kgs of Marihuana)	441	3.9
16	(At least 10 gms of Heroin, 50 gms of Cocaine, or 10 kgs of Marihuana)	602	5.4
18	(At least 20 gms of Heroin, 100 gms of Cocaine, or 20 kgs of Marihuana)	782	7.0
20	(At least 40 gms of Heroin, 200 gms of Cocaine, or 40 kgs of Marihuana)	562	5.0
22	(At least 60 gms of Heroin, 300 gms of Cocaine, or 60 kgs of Marihuana)	322	2.8
24	(At least 80 gms of Heroin, 400 gms of Cocaine, or 80 kgs of Marihuana)	413	3.7
26	(At least 100 gms of Heroin, 500 gms of Cocaine, or 100 kgs of Marihuana***)	2,339	20.8
28	(At least 400 gms of Heroin, 2 kgs of Cocaine, or 400 kgs of Marihuana)	1,064	9.4
30	(At least 700 gms of Heroin, 3.5 kgs of Cocaine, or 700 kgs of Marihuana)	437	3.9
32	(At least 1 kg of Heroin, 5 kgs of Cocaine, or 1,000 kgs of Marihuana****)	1,422	12.6
34	(At least 3 kgs of Heroin, 15 kgs of Cocaine, or 3,000 kgs of Marihuana)	876	7.8
36	(At least 10 kgs of Heroin, 50 kgs of Cocaine, or 10,000 kgs of Marihuana)	687	6.1
38	(At least 30 kgs of Heroin, 150 kgs of Cocaine, or 30,000 kgs of Marihuana)	221	2.0
40	(At least 100 kgs of Heroin, 500 kgs of Cocaine, or 100,000 kgs of Marihuana)	151	1.4
42	(At least 300 kgs of Heroin, 1,500 kgs of Cocaine, or 300,000 kgs of Marihuana)	68	0.6
43	(In accordance with 2D1.1 (a)(1)*****)	1	0.0
	Missing	5	--
	TOTAL	11,258	100.0

**See USSC Guidelines Manual for equivalencies of other drug types.

***Drug amounts including and above which may carry a five-year mandatory minimum prison term.

****Drug amounts including and above which may carry a ten-year mandatory minimum prison term.

*****Convicted under 21 U.S.C. § 841 (b)(1)(A,B, or C) or § 960 (b)(1,2, or 3) and offense caused death or serious bodily injury from use of substance and defendant has prior conviction for similar offense.

SPECIFIC OFFENSE CHARACTERISTICS	Number	Percent
Firearm or Other Dangerous Weapon Possessed		
Firearm or dangerous weapon possessed	1,085	9.6
No weapon adjustment - convicted under 18 USC § 924(c)	670	6.0
No firearm or dangerous weapon possessed	9,503	84.4
TOTAL	11,258	100.0
Convicted Under 21 U.S.C. § 960(a) Involving Aircraft		
Offense involved importation aboard aircraft	32	0.3
Offense did not involve importation aboard aircraft	11,027	99.7
Offense committed before adjustment added to Guidelines	199	--
TOTAL	11,258	100.0

*Of the 33,419 guideline cases, the Commission received complete guideline application information for 26,820. Of the 26,820 cases with such information, 11,258 cases involved the application of the drug guideline (§2D1.1). Additional descriptions of each guideline adjustment can be found in the USSC Guidelines Manual.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 2

CHAPTER THREE GUIDELINE APPLICATION INFORMATION*
(October 1, 1990 through September 30, 1991)

Guideline §2D1.1 — Drug Trafficking

VICTIM-RELATED	Number	Percent
Vulnerable Victim (§3A1.1)		
Vulnerable victim involved	4	0.1
No vulnerable victim involved	11,254	99.9
TOTAL	11,258	100.0
Official Victim (§3A1.2)		
Official victim involved	16	0.1
No official victim involved	11,242	99.9
TOTAL	11,258	100.0
Restraint of Victim (§3A1.3)		
Offense involved restraint of victim	1	0.1
Offense did not involve restraint of victim	11,257	99.9
TOTAL	11,258	100.0

ROLE IN THE OFFENSE	Number	Percent
Aggravating Role (§3B1.1)		
Organizer or leader	363	3.2
Lesser organizer, leader, manager or supervisor	275	2.4
Manager or supervisor	594	5.3
No aggravating role	10,026	89.1
TOTAL	11,258	100.0
Mitigating Role (§3B1.2)		
Minimal participant	478	4.2
Less than minor role but not minimal	78	0.7
Minor participant	1,032	9.2
No mitigating role	9,670	85.9
TOTAL	11,258	100.0
Abuse of Position of Trust or Use of Special Skill (§3B1.3)		
Defendant abused position of trust or used special skill	66	0.6
Defendant did not abuse position of trust or use special skill	11,192	99.4
TOTAL	11,258	100.0

OBSTRUCTION	Number	Percent
Obstruction of Justice (§3C1.1)		
Defendant obstructed justice	559	5.0
Defendant did not obstruct justice	10,699	95.0
TOTAL	11,258	100.0
Reckless Endangerment During Flight (§3C1.2)		
Offense involved reckless endangerment during flight	9	0.1
Offense did not involve reckless endangerment during flight	9,867	99.9
Offense occurred before adjustment added to Guidelines	1,382	--
TOTAL	11,258	100.0

ACCEPTANCE OF RESPONSIBILITY	Number	Percent
Acceptance of Responsibility (§3E1.1)		
Defendant accepted responsibility	8,443	75.0
Defendant did not accept responsibility	2,815	25.1
TOTAL	11,258	100.0

*Of the 33,419 guideline cases, the Commission received complete guideline application information for 26,820. Of the 26,820 cases with such information, 11,258 cases involved the application of the drug guideline (§2D1.1). Additional descriptions of each guideline adjustment can be found in the USSC Guidelines Manual.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 3

CHAPTER FOUR GUIDELINE APPLICATION INFORMATION*
(October 1, 1990 through September 30, 1991)

Guideline §2D1.1 — Drug Trafficking

CRIMINAL HISTORY	Number	Percent
Any Criminal History Reported**		
Criminal history reported	8,026	71.3
No criminal history reported	3,228	28.7
Missing	4	–
TOTAL	11,258	100.0

CRIMINAL HISTORY (§4A1.1)		
Number of prior countable sentences of 13 months or greater	Number	Percent
0	9,430	84.0
1	1,107	9.9
2	401	3.6
3	185	1.6
4	65	0.6
5	26	0.2
6 or more	10	0.1
Missing	34	–
TOTAL	11,258	100.0

CRIMINAL HISTORY (§4A1.1)		
Number of prior countable sentences of 60 days or greater	Number	Percent
0	9,954	88.7
1	942	8.4
2	219	2.0
3	80	0.7
4	20	0.2
5 or more	9	0.1
Missing	34	–
TOTAL	11,258	100.0

**Refers to any criminal conduct, as reported in the Presentence Report, regardless of applicability in calculating guideline criminal history score (including, but not limited to: prior adult or juvenile convictions, prior uncounseled misdemeanor convictions that did not result in incarceration, and prior unadjudicated criminal conduct).

CRIMINAL HISTORY (§4A1.1)		
Number of other prior countable sentences	Number	Percent
0	7,080	63.1
1	2,482	22.1
2	977	8.7
3	373	3.3
4	306	2.7
5 or more	4	0.0
Missing	36	–
TOTAL	11,258	100.0

Commission of Offense While Under Criminal Justice Sentence (§4A1.1(d))	Number	Percent
Additional points given for commission of instant offense while under criminal justice sentence	2,044	18.2
No additional criminal history points given	9,181	81.8
Missing	33	–
TOTAL	11,258	100.0

Commission of Offense Within Two Years of Prior Countable Conviction (§4A1.1(e))	Number	Percent
Points given for commission of instant offense within two years of certain prior countable convictions	972	8.7
No additional criminal history points given	10,254	91.3
Missing	32	–
TOTAL	11,258	100.0

Total Criminal History Points	Number	Percent
0	5,814	51.8
1	1,342	12.0
2	567	5.1
3	925	8.3
4	545	4.9
5	402	3.6
6	437	3.9
7	228	2.0
8	203	1.8
9	203	1.8
10	113	1.0
11	86	0.8
12	91	0.8
13	61	0.5
14	56	0.5
15	39	0.4
16	17	0.2
17	25	0.2
18	15	0.1
19	17	0.2
20	7	0.1
21	10	0.1
22 or more	15	0.1
Missing	40	--
TOTAL	11,258	100.0

Career Offender (§4B1.1)	Number	Percent
Defendant found to be career offender	344	3.1
Defendant not found to be career offender	10,885	96.9
Missing	29	--
TOTAL	11,258	100.0

Armed Career Criminal (§4B1.4)	Number	Percent
Defendant found to be armed career criminal	1	0.0
Defendant not found to be armed career criminal	9,847	100.0
Offense committed before adjustment added to Guidelines	1,382	--
Missing	28	--
TOTAL	11,258	100.0

*Of the 33,419 guideline cases, the Commission received complete guideline application information for 26,820. Of the 26,820 cases with such information, 11,258 cases involved the application of the drug guideline (§2D1.1). Additional descriptions of each guideline adjustment can be found in the USSC Guidelines Manual.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

defendants who received points for prior sentences of 13 months or longer. Additionally, only 3.1 percent qualified for career offender status.

Table 4 shows the distribution of drug trafficking cases by final offense level and criminal history category. The highest overall percentages centered around the offense levels that include the five- and ten-year mandatory minimums (levels 26 and 32) or around offense levels corresponding to mandatory minimums less two levels for acceptance of responsibility (levels 24 and 30). A guideline range of 51-63 months corresponding to offense level 24 was found in 9.4 percent of the cases, and was the most common final guideline range for offenders convicted of drug trafficking (see Table 5).

Almost 74 percent of the drug trafficking cases in fiscal year 1991 were sentenced within the appropriate guideline range determined by the court, compared to 85 percent of all non-drug cases. Tables 6a and 6b track the position of sentences relative to their ranges for non-drug and drug cases. Overall, 58.2 percent of the non-drug trafficking cases received sentences that were located in the bottom quarter of the guideline range or that were below it. By comparison, 66.1 percent of the drug trafficking cases received sentences that were located in the bottom quarter of the guideline range or below the guideline range.

Table 7 describes the number of drug cases within each base offense level category by Chapter Three Role Adjustments. While mitigating role adjustments were granted at all base offense levels, the occurrence of aggravating role adjustments increased at the higher levels. Of all cases at or above level 32, 7.2 percent received a 2-level increase, 6.0 percent received a 3-level increase, and 7.4 percent received a 4-level increase for aggravating role.

Table 8 examines drug type by base offense level for cases sentenced in the first 10 months of fiscal year 1992. Of the 10,005 drug trafficking cases, 44.4 percent involved cocaine, 15 percent "crack" (cocaine base), 7.4 percent heroin, 24.7 percent marihuana, 4.9 percent methamphetamine, 0.3 percent steroids, and 3.5 percent for all other drugs. The most frequently occurring (modal) base offense level was 26 for all major drug types. Means and quartile values[5] of base offense levels by drug type are summarized below:

[5]The quartile values (first quartile, second quartile or median, and third quartile) divide the population into percentages (25, 50, and 75 percent, respectively) up to that value, and the rest of the population (75, 50, and 25 percent, respectively) above that value.

Drug Type	Base Offense Level			
	Mean	First Quartile	Median	Third Quartile
Cocaine	**27.7**	24	**28**	34
Crack Cocaine	**28.6**	26	**30**	34
Heroin	**27.1**	26	**28**	32
Marihuana	**22.2**	18	**22**	26
Methamphetamine	**28.6**	26	**30**	34

Table 4

OFFENSE LEVEL BY CRIMINAL HISTORY CATEGORY
(October 1, 1990 through September 30, 1991)

Guideline §2D1.1 — Drug Trafficking

OFFENSE LEVEL	CRIMINAL HISTORY CATEGORY						TOTAL	
	I	II	III	IV	V	VI	Number	Percent
1	0	0	0	0	0	0	0	0.0
2	4	0	0	0	0	0	4	0.0
3	3	0	0	1	0	0	4	0.0
4	63	10	8	5	3	1	90	0.8
5	6	0	0	0	0	0	6	0.1
6	44	9	5	2	0	3	63	0.6
7	5	0	1	0	0	1	7	0.1
8	59	10	9	4	1	2	85	0.8
9	7	0	2	0	1	0	10	0.1
10	282	61	51	26	13	11	444	4.0
11	13	2	2	3	1	0	21	0.2
12	307	67	56	29	16	8	483	4.3
13	11	2	5	2	0	0	20	0.2
14	345	64	79	23	10	14	535	4.8
15	11	1	4	3	0	11	30	0.3
16	458	103	80	24	8	15	688	6.2
17	17	2	2	3	0	4	29	0.3
18	344	66	63	30	8	11	522	4.6
19	8	2	3	2	1	0	16	0.1
20	328	61	52	22	4	6	473	4.2
21	12	3	1	0	0	0	16	0.1
22	407	66	53	29	7	9	571	5.1
23	10	5	3	3	0	0	21	0.2
24	954	204	175	72	12	17	1,435	12.8
25	11	1	3	1	0	1	17	0.2
26	775	154	140	60	25	16	1,170	10.5
27	16	3	5	1	0	1	26	0.2
28	427	91	91	29	12	11	661	5.9
29	24	2	3	1	0	0	30	0.3
30	582	142	111	41	14	87	977	8.7
31	17	9	1	0	0	0	27	0.2
32	560	122	96	52	16	108	955	8.5
33	28	7	7	1	2	4	49	0.4
34	391	88	65	22	6	36	608	5.4
35	32	7	6	1	3	40	88	0.8
36	221	42	43	16	8	9	339	3.0
37	28	7	10	1	2	56	103	0.9
38	142	23	31	10	5	14	225	2.0
39	26	2	4	0	0	1	33	0.3
40	69	18	25	13	6	4	135	1.2
41	21	1	7	2	0	1	32	0.3
42	49	13	11	6	2	3	84	0.8
43	35	11	7	4	3	1	60	0.5
TOTAL	7,151	1,481	1,320	544	189	506	11,191	
Percent	63.9	13.2	11.8	4.9	1.7	4.5	100.0	

*Of the 33,419 guideline cases, the Commission received complete guideline application information for 26,820. Of the 26,820 cases with such information, 11,258 cases involved the application of the drug guideline (§2D1.1). 67 of the 11,258 cases were excluded due to missing information on criminal history or final offense level. Additional descriptions of each guideline adjustment can be found in the USSC Guidelines Manual.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 5

GUIDELINE SENTENCING RANGE
(October 1, 1990 through September 30, 1991)

Guideline §2D1.1 — Drug Trafficking

Final Guideline Range	Number	Percent
0-6	131	1.2
1-7	13	0.1
2-8	69	0.6
3-9	0	0.0
4-10	21	0.2
6-12	294	2.7
8-14	75	0.7
9-15	0	0.0
10-16	357	3.2
12-18	81	0.7
15-21	431	3.9
18-24	82	0.7
21-27	578	5.2
24-30	137	1.2
27-33	465	4.2
30-37	86	0.8
33-41	423	3.8
37-46	93	0.8
41-51	507	4.6
46-57	94	0.8
51-63	1,043	9.4
57-71	228	2.1
63-78	978	8.8
70-87	181	1.6
77-96	79	0.7
78-97	569	5.1
84-105	10	0.1
87-108	120	1.1
92-115	71	0.6
97-121	664	6.0
100-125	18	0.2
108-135	158	1.4
110-137	55	0.5
120-150	15	0.1
121-151	673	6.1
130-162	13	0.1
135-168	188	1.7
140-175	11	0.1
151-188	506	4.6
168-210	264	2.4
188-235	310	2.8
210-262	207	1.9
235-293	199	1.8
262-327	112	1.0
292-365	150	1.4
324-405	63	0.6
360-life	213	1.9
life	59	0.5
Missing	164	–
TOTAL	11,258	100.0

*Of the 33,419 guideline cases, the Commission received complete guideline application information for 26,820. Of the 26,820 cases with such information, 11,258 cases involved the application of the drug guideline (§2D1.1). Additional descriptions of each guideline adjustment can be found in the USSC Guidelines Manual.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 6a

POSITION OF SENTENCE RELATIVE TO GUIDELINE RANGE BY GUIDELINE SENTENCING RANGES*
(October 1, 1990 through September 30, 1991)

-All Non-Drug Trafficking Cases-

GUIDELINE RANGE	TOTAL	POSITION OF SENTENCE RELATIVE TO GUIDELINE RANGE											
		Below Range		Bottom Quarter		Second Quarter		Third Quarter		Upper Quarter		Above Range	
		N	%	N	%	N	%	N	%	N	%	N	%
0-6	3,073	1	0.0	2,552	83.1	93	3.0	220	7.2	173	5.6	34	1.1
1-7	901	122	13.5	271	30.1	183	20.3	224	24.9	74	8.2	27	3.0
2-8	892	111	12.4	336	37.7	168	18.8	180	20.2	85	9.5	12	1.4
3-9	11	1	9.1	3	27.3	1	9.1	0	0.0	5	45.5	1	9.1
4-10	850	88	10.4	383	45.1	168	19.8	86	10.1	102	12.0	23	2.7
6-12	1,084	172	15.9	564	52.0	73	6.7	127	11.7	126	11.6	22	2.0
8-14	777	189	24.3	253	32.6	83	10.7	142	18.3	92	11.8	18	2.3
9-15	60	4	6.7	21	35.0	3	5.0	13	21.7	16	26.7	3	5.0
10-16	797	155	19.5	283	35.5	106	13.3	110	13.8	118	14.8	25	3.1
12-18	679	109	16.1	233	34.3	80	11.8	111	16.4	125	18.4	21	3.1
15-21	788	111	14.1	255	32.4	30	3.8	169	21.5	186	23.6	37	4.7
18-24	393	56	14.3	145	36.9	23	5.9	48	12.2	104	26.5	17	4.3
21-27	542	101	18.6	151	27.9	18	3.3	111	20.5	136	25.1	25	4.6
24-30	483	60	12.4	200	41.4	17	3.5	59	12.2	121	25.1	26	5.4
27-33	353	58	16.4	107	30.3	8	2.3	87	24.7	72	20.4	21	6.0
30-37	248	33	13.3	77	31.1	24	9.7	38	15.3	56	22.6	20	8.1
33-41	257	40	15.6	69	26.9	36	14.0	45	17.5	52	20.2	15	5.8
37-46	227	35	15.4	55	24.2	35	15.4	36	15.9	52	22.9	14	6.2
41-51	241	39	16.2	69	28.6	16	6.6	56	23.2	50	20.8	11	4.6
46-57	176	30	17.1	54	30.7	27	15.3	29	16.5	31	17.6	5	2.8
51-63	206	46	22.3	59	28.6	18	8.7	50	24.3	26	12.6	7	3.4
57-71	137	19	13.9	42	30.7	28	20.4	16	11.7	23	16.8	9	6.6
63-78	116	9	7.8	46	39.7	19	16.4	16	13.8	20	17.2	6	5.2
70-87	126	25	19.8	29	23.0	27	21.4	17	13.5	25	19.8	3	2.4
77-96	42	3	7.1	17	40.5	10	23.8	4	9.5	5	11.9	3	7.1
78-97	79	14	17.7	27	34.2	12	15.2	9	11.4	17	21.5	0	0.0
84-105	52	8	15.4	12	23.1	12	23.1	5	9.6	12	23.1	3	5.8
87-108	51	8	15.7	18	35.3	9	17.7	2	3.9	14	27.5	0	0.0
92-115	41	4	9.8	14	34.2	9	22.0	3	7.3	8	19.5	3	7.3
97-121	41	12	29.3	13	31.7	6	14.6	7	17.1	2	4.9	1	2.4
100-125	36	6	16.7	10	27.8	6	16.7	4	11.1	10	27.8	0	0.0
108-135	29	1	3.5	10	34.5	9	31.0	3	10.3	3	10.3	3	10.3
110-137	31	2	6.5	8	25.8	3	9.7	5	16.1	13	41.9	0	0.0
120-150	16	0	0.0	7	43.8	1	6.3	4	25.0	3	18.8	1	6.3
121-151	38	10	26.3	19	50.0	2	5.3	4	10.5	2	5.3	1	2.6
130-162	13	1	7.7	4	30.8	0	0.0	2	15.4	4	30.8	2	15.4
135-168	29	1	3.5	12	41.4	9	31.0	3	10.3	3	10.3	1	3.5
140-175	0	0	–	0	–	0	–	0	–	0	–	0	–
151-188	31	3	9.7	17	54.8	2	6.5	6	19.4	3	9.7	0	0.0
168-210	103	26	25.2	43	41.8	11	10.7	10	9.7	12	11.7	1	1.0
188-235	25	3	12.0	13	52.0	3	12.0	2	8.0	3	12.0	1	4.0
210-262	92	10	10.9	28	30.4	7	7.6	25	27.2	20	21.7	2	2.2
235-293	15	1	6.7	5	33.3	2	13.3	0	0.0	5	33.3	2	13.3
262-327	31	4	12.9	8	25.8	2	6.5	5	16.1	12	38.7	0	0.0
292-365	18	2	11.1	8	44.4	2	11.1	4	22.2	2	11.1	0	0.0
324-405	3	0	0.0	1	33.3	0	0.0	0	0.0	2	66.7	0	0.0
TOTAL	14,237	1,733	12.2	6,552	46.0	1,402	9.9	2,097	14.7	2,027	14.2	426	3.0

*Ranges of 360-Life and Life have been excluded due to inapplicability of sentence position to these ranges.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 6b

POSITION OF SENTENCE RELATIVE TO GUIDELINE RANGE BY GUIDELINE SENTENCING RANGES*
(October 1, 1990 through September 30, 1991)

-Drug Trafficking Cases-

GUIDELINE RANGE	TOTAL	POSITION OF SENTENCE RELATIVE TO GUIDELINE RANGE											
		Below Range		Bottom Quarter		Second Quarter		Third Quarter		Upper Quarter		Above Range	
		N	%	N	%	N	%	N	%	N	%	N	%
0-6	127	0	0.0	101	79.5	9	7.1	7	5.5	7	5.5	3	2.4
1-7	12	2	16.7	2	16.7	3	25.0	3	25.0	0	0.0	2	16.7
2-8	66	6	9.1	15	22.7	26	39.4	13	19.7	6	9.1	0	0.0
3-9	0	0	–	0	–	0	–	0	–	0	–	0	–
4-10	16	3	18.8	4	25.0	6	37.5	2	12.5	1	6.3	0	0.0
6-12	292	33	11.3	162	55.5	35	12.0	31	10.6	29	9.9	2	0.7
8-14	90	23	25.6	22	24.4	12	13.3	25	27.8	6	6.7	2	2.2
9-15	0	0	–	0	–	0	–	0	–	0	–	0	–
10-16	376	73	19.4	157	41.8	63	16.8	43	11.4	37	9.8	3	0.8
12-18	88	8	9.1	27	30.7	23	26.1	11	12.5	19	21.6	0	0.0
15-21	470	86	18.3	179	38.1	42	8.9	88	18.7	71	15.1	4	0.9
18-24	82	15	18.3	29	35.4	10	12.2	11	13.4	16	19.5	1	1.2
21-27	592	122	20.6	241	40.7	46	7.8	116	19.6	63	10.6	4	0.7
24-30	134	26	19.4	44	32.8	12	9.0	27	20.2	25	18.7	0	0.0
27-33	460	95	20.7	193	42.0	22	4.8	81	17.6	62	13.5	7	1.5
30-37	82	10	12.2	29	35.4	15	18.3	14	17.1	11	13.4	3	3.7
33-41	433	98	22.6	168	38.8	53	12.2	53	12.2	58	13.4	3	0.7
37-46	91	18	19.8	29	31.9	13	14.3	7	7.7	22	24.2	2	2.2
41-51	494	99	20.0	137	27.7	57	11.5	69	14.0	129	26.1	3	0.6
46-57	95	17	17.9	31	32.6	12	12.6	8	8.4	25	26.3	2	2.1
51-63	1,015	313	30.8	524	51.6	24	2.4	74	7.3	76	7.5	4	0.4
57-71	229	66	28.8	93	40.6	17	7.4	21	9.2	32	14.0	0	0.0
63-78	976	220	22.5	436	44.7	160	16.4	57	5.8	98	10.0	5	0.5
70-87	178	50	28.1	56	31.5	31	17.4	11	6.2	30	16.9	0	0.0
77-96	76	21	27.6	28	36.8	11	14.5	7	9.2	9	11.8	0	0.0
78-97	564	128	22.7	215	38.1	91	16.1	32	5.7	96	17.0	2	0.4
84-105	9	5	55.6	0	0.0	1	11.1	3	33.3	0	0.0	0	0.0
87-108	115	20	17.4	29	25.2	30	26.1	5	4.4	29	25.2	2	1.7
92-115	66	14	21.2	14	21.2	11	16.7	10	15.2	17	25.8	0	0.0
97-121	649	240	37.0	296	45.6	38	5.9	35	5.4	38	5.9	2	0.3
100-125	17	9	52.9	4	23.5	2	11.8	0	0.0	2	11.8	0	0.0
108-135	149	44	29.5	61	40.9	18	12.1	10	6.7	15	10.1	1	0.7
110-137	55	11	20.0	22	40.0	9	16.4	4	7.3	9	16.4	0	0.0
120-150	14	6	42.9	2	14.3	1	7.1	2	14.3	3	21.4	0	0.0
121-151	667	220	33.0	270	40.5	76	11.4	57	8.6	42	6.3	2	0.3
130-162	13	4	30.8	2	15.4	2	15.4	3	23.1	1	7.7	1	7.7
135-168	191	79	41.4	57	29.8	23	12.0	11	5.8	20	10.5	1	0.5
140-175	0	0	–	0	–	0	–	0	–	0	–	0	–
151-188	495	174	35.2	181	36.6	69	13.9	35	7.1	35	7.1	1	0.2
168-210	261	86	33.0	86	33.0	32	12.3	21	8.1	35	13.4	1	0.4
188-235	312	98	31.4	112	35.9	45	14.4	23	7.4	32	10.3	2	0.6
210-262	212	80	37.7	74	34.9	20	9.4	27	12.7	10	4.7	1	0.5
235-293	202	61	30.2	92	45.5	26	12.9	12	5.9	9	4.5	2	1.0
262-327	117	29	24.8	43	36.8	20	17.1	14	12.0	11	9.4	0	0.0
292-365	152	56	36.8	46	30.3	26	17.1	13	8.6	11	7.2	0	0.0
324-405	64	20	31.3	24	37.5	10	15.6	3	4.7	7	10.9	0	0.0
TOTAL	**10,798**	**2,788**	**25.6**	**4,337**	**40.5**	**1,252**	**11.6**	**1,099**	**10.1**	**1,254**	**11.6**	**68**	**0.6**

*Ranges of 360-Life and Life have been excluded due to inapplicability of sentence position to these ranges.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 7

ROLE IN THE OFFENSE ADJUSTMENT BY BASE OFFENSE LEVEL
(October 1, 1990 through September 30, 1991)

Base Offense Level	TOTAL		Role Adjustment													
			Mitigating						None		Aggravating					
			-4		-3		-2		0		2		3		4	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	11,202	100.0	477	4.3	78	0.7	1,027	9.2	8,395	74.9	589	5.3	274	2.5	362	3.2
Under 26	3,953	35.3	97	2.5	25	0.6	356	9.0	3,299	83.5	139	3.5	19	0.5	18	0.5
26	2,336	20.9	125	5.4	13	0.6	176	7.5	1,831	78.4	126	5.4	22	0.9	43	1.8
28	1,062	9.5	98	9.2	9	0.9	123	11.6	729	68.6	54	5.1	18	1.7	31	2.9
30	438	3.9	24	5.5	5	1.1	51	11.6	303	69.2	26	5.9	12	2.7	17	3.9
32	1,417	12.7	40	2.8	11	0.8	103	7.3	1,045	73.8	101	7.1	59	4.2	58	4.1
34	877	7.8	39	4.5	4	0.5	80	9.1	578	65.9	60	6.8	48	5.5	68	7.8
36	685	6.1	29	4.2	7	1.0	98	14.3	382	55.8	57	8.3	38	5.6	74	10.8
38	221	2.0	11	5.0	4	1.8	21	9.5	123	55.7	9	4.1	23	10.4	30	13.6
40	151	1.4	9	6.0	0	0.0	12	8.0	80	53.0	13	8.6	23	15.2	14	9.3
42	62	0.6	5	8.1	0	0.0	7	11.3	25	40.3	4	6.5	12	19.4	9	14.5

*Only cases in which the base offense level was determined by the drug quantity table in §2D1.1 are included.

SOURCE: U.S. Sentencing Commission, 1991 Data File, MONFY91.

Table 8

DRUG TYPE BY BASE OFFENSE LEVEL
(October 1, 1991 through July 31, 1992)

Base Offense Level	TOTAL		Drug Type													
			Cocaine		Crack		Heroin		Marihuana		Methamphetamine		Steroids		Other	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	10,005	100.0	4,447	100.0	1,504	100.0	739	100.0	2,471	100.0	490	100.0	32	100.0	354	100.0
6	97	1.0	0	0.0	0	0.0	1	0.1	63	2.6	1	0.2	21	65.6	32	9.0
8	65	0.7	2	0.0	1	0.1	1	0.1	54	2.2	0	0.0	5	15.6	7	2.0
10	59	0.6	3	0.1	0	0.0	0	0.0	47	1.9	1	0.2	4	12.5	8	2.3
12	491	4.9	222	5.0	40	2.7	54	7.3	93	3.8	33	6.7	0	0.0	49	13.8
14	325	3.3	131	3.0	43	2.9	11	1.5	117	4.7	13	2.7	1	3.1	10	2.8
16	448	4.5	153	3.4	61	4.1	15	2.0	189	7.7	10	2.0	1	3.1	20	5.7
18	646	6.5	212	4.8	68	4.5	22	3.0	312	12.6	13	2.7	0	0.0	19	5.4
20	500	5.0	165	3.7	33	2.2	14	1.9	248	10.0	12	2.5	0	0.0	28	7.9
22	307	3.1	95	2.1	23	1.5	18	2.4	148	6.0	10	2.0	0	0.0	13	3.7
24	350	3.5	138	3.1	25	1.7	19	2.6	152	6.2	6	1.2	0	0.0	10	2.8
26	2,023	20.2	926	20.8	283	18.8	179	24.2	520	21.0	80	16.3	0	0.0	35	9.9
28	871	8.7	397	8.9	143	9.5	111	15.0	151	6.1	52	10.6	0	0.0	17	4.8
30	473	4.7	219	4.9	86	5.7	57	7.7	77	3.1	26	5.3	0	0.0	8	2.3
32	1,325	13.2	654	14.7	273	18.2	120	16.2	159	6.4	72	14.7	0	0.0	47	13.3
34	887	8.9	449	10.1	188	12.5	71	9.6	79	3.2	72	14.7	0	0.0	28	7.9
36	568	5.7	339	7.6	115	7.7	24	3.3	29	1.2	42	8.6	0	0.0	19	5.4
38	282	2.8	183	4.1	61	4.1	10	1.4	3	0.1	22	4.5	0	0.0	3	0.9
40	163	1.6	106	2.4	37	2.5	5	0.7	3	0.1	12	2.5	0	0.0	0	0.0
42	125	1.3	53	1.2	24	1.6	7	1.0	27	1.1	13	2.7	0	0.0	1	0.3
Mean/ Median	26.3	26.0	27.7	28.0	28.6	30.0	27.1	28.0	22.2	22.0	28.6	30.0	7.4	6.0	21.8	22.0

*Only cases in which the base offense level was determined by the drug quantity table in §2D1.1 are included.

SOURCE: U.S. Sentencing Commission, 1992 Data File, MONFY92 (incomplete file - ending 7/31/92 - when complete, full release will be through 9/30/92).

B. §2D1.1 and Mandatory Minimums

The drug table in 2D1.1 is "anchored" at the five- and ten-year mandatory minimum levels by base offense levels of 26 and 32 that correspond to the drug amounts specified in the mandatory minimum penalties set forth in 21 U.S.C. § 841(B) and (A), respectively. The mandatory minimum penalties have consistently been interpreted to allow for aggregation of drug amounts only in cases involving convictions for conspiracy. In cases involving only a single distribution count or counts, a defendant will qualify for a mandatory minimum penalty only if the amount specified in that penalty is distributed in any single transaction. The provisions of relevant conduct relating to drug offenses and the structure of the drug guideline, however, are centered around the concept of aggregation, regardless of whether there is a conviction on a conspiracy count or not. This sometimes results in defendants who do not qualify for mandatory minimum penalties under 21 U.S.C. § 841 receiving sentences at or above the mandatory minimum "anchors" in the drug table. A defendant who, for example, is apprehended with 500 grams of cocaine on one occasion will have the same base offense level under the guidelines as another defendant with an aggregate amount of 500 grams of cocaine distributed over several episodes but with no single amount qualifying for a mandatory minimum penalty. Although the guidelines treat the two defendants in this example the same, the statutory minimum penalties distinguish between them, exposing only the defendant who trafficked in 500 grams of cocaine on one occasion to the mandatory minimum.

This section of the report examines the number of cases that fall into the latter category; that is, cases with aggregated drug amounts between offense levels 26 and 31 (the five-year mandatory minimum equivalent) or at and above level 32 (the ten-year mandatory minimum equivalent) but with no single drug amount to qualify for the mandatory minimum penalties.[6] Available data were limited to two drug types: heroin and cocaine or cocaine derivatives, and included only cases in which the first (or only) count of conviction was 21 U.S.C. § 841 rather than section 846 (conspiracy).

1. Levels 26 and 32

After combining the cocaine and heroin data sets, 247 defendants had base offense levels between 26 and 31. The large majority of these cases would qualify for the five-year mandatory minimum penalty under 21 U.S.C. § 841(a)(1)(B) because only 5.7 percent of the defendants had single transactions with drug amounts below the

[6]The data sets used for this project were developed for the Commission's Evaluation study. The detailed case review and analysis of the samples included the coding of drug type and the amount of drugs for up to three separate transactions.

mandatory minimum level set forth in the statute.[7] In the combined data set there were 200 defendants whose base offense level was 32 and above. In this instance, 10.5 percent of the defendants had single transactions with drug amounts below the mandatory minimum level set forth in 21 U.S.C. § 841(a)(1)(A), yet had offense levels that would result in a guideline range commensurate with or exceeding ten years.[8] The table that follows presents the breakdown of these sample cases by drug type, and distinguishes whether or not the case involved a single-transaction amount that, by itself, involved a quantity that would reach the "mandatory minimum base offense levels" that these defendants received (26 to 31 and 32 or above).

SINGLE-TRANSACTION	HEROIN		COCAINE	
Drug Amount	**Number**	**Percent**	**Number**	**Percent**
LEVEL 26 TO 31				
Achieved M.M. Amount	27	93.1	206	94.5
Below M.M. Amount	2	6.9	12	5.5
LEVEL 32 OR GREATER				
Achieved M.M. Amount	3	37.5	176	91.7
Below M.M. Amount	5	62.5	16	8.3

C. Information on Cocaine Base ("crack")

The Drug Abuse Act of 1986 set forth penalties that formed the basis of the United States Sentencing Commission's Guidelines on drug offenses.[9] Codified at 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 841(b)(1)(B), these statutes include language that distinguishes between punishments for cocaine and cocaine base ("crack")[10] and for other forms of

[7] The range of amounts for levels 26 to 31 for cocaine is 500 grams to 5 kilograms; for cocaine base (or crack cocaine) the range is 5 to 50 grams; and for heroin the range is 100 grams to 1 kilogram.

[8] The range of amounts for level 32 and above for cocaine is greater than 5 kilograms; for cocaine base (or crack cocaine) the range is greater than 50 grams; and for heroin the range is greater than 1 kilogram.

[9] See "The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses", Ronnie M. Scotkin, Criminal Law Bulletin, 1990, 26(1); 50-59.

[10] Throughout this section, "crack", the colloquial term for cocaine base will be used.

cocaine.[11] This section examines the difference between cocaine and "crack," a type of cocaine base; why Congress has treated them differently for the purposes of determining statutory penalties; and what effect the differences in statutory penalties has on race and gender distribution in sentencing of "crack" and cocaine powder offenders. The working group has used three resources to study this topic: legislative history, state initiatives, and Commission Monitoring Data.

1. Technical Discussion

To understand why Congress has distinguished between cocaine and "crack," it is important to know how they differ. Although cocaine and "crack" are both derived from coca leaves, they differ in several ways, the most significant of which is the way in which each substance is processed. Cocaine is made by first forming a "crude cocaine base" from coca leaves. This base is purified and diluted with ethyl ether and filtered. Acetone and concentrated hydrochloric acid are added to the solution to form cocaine hydrochloride. The mixture is dried to form a crystalline structure, commonly referred to as cocaine powder.

"Crack" is made by returning cocaine powder to its cocaine base by removing the hydrochloric acid. This is done by dissolving the cocaine powder in water and ammonia or baking soda and heating the solution. Heating the solution produces a yellow, oily substance on the surface. This substance, which is removed from the mixture, contains the hydrochloric acid. After the removal of the acid is completed, the remaining solution is placed in an ice bath to harden. The block is broken into chips or pellets ("crack") and packaged for sale.[12] This process of creating chips or "rocks" makes "crack" easier to handle and market than cocaine powder and produces a more marketable product because "crack" appears to be a more substantial product than does cocaine powder of equal cost.

---

[11] 21 U.S.C. § 841(b)(1)(A) reads:

> ...In the case of a violation of subsection (a) of this section involving-...
> (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of-
> (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
> (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;...
> (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base...
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life.

21 U.S.C. § 841(b)(1)(B) reads the same as above except 500 grams is substituted for 5 kilograms and 5 grams is substituted for 50 grams above. Also the term of imprisonment is not less than 5 years and not more than 40 years.

[12] "Crack: A Non-Traditional Form of Freebasing," Drug Enforcement Administration (DEA), an unclassified document, 1990; p.7

Different melting points is another factor that distinguishes the two substances. "Crack" has a melting point approximately 100 degrees lower than cocaine powder that allows it to be smoked and thus absorbed into the blood stream more quickly than cocaine powder.

The "high" associated with "crack" is quite different from the "high" experienced with powder cocaine. Cocaine base gives a more intense "high" that occurs within 10 to 15 seconds after ingestion and usually lasts 10 to 15 minutes. The "high" associated with cocaine powder is not as intense, occurs within three to five minutes of ingestion and usually lasts 60 to 90 minutes.[13] Because "crack" is so quickly absorbed and the duration of the high is relatively short, the "crack" user needs to ingest more "crack" to sustain the high. Therefore, the repeated doses over a shorter period of time make "crack" more addictive than cocaine powder.[14]

2. Legislative History

In determining appropriate minimum and maximum statutory penalties for cocaine powder and "crack" dealers, Congress devised a 100 to one ratio between cocaine powder and "crack." For example, distribution of 5 kilograms of cocaine powder results in a 10-year mandatory minimum term of imprisonment. Distribution of only 50 grams of "crack" mandates a 10-year mandatory minimum term of imprisonment. In other words, it takes 100 times the amount of cocaine powder to get a sentence similar to that for "crack." A review of the legislative history of these statutes indicates that because of the perceived more addictive nature of "crack," its low cost and availability, Congress saw it as a more serious drug than cocaine powder. Senator Alfonse D'Amato's comments on the Senate floor exemplify this point:

> Because crack is so potent, drug dealers need to carry much smaller quantities of crack than of cocaine powder. By treating 1000 grams of [crack] cocaine no more seriously than 1000 grams of cocaine powder, which is far less powerful than [crack], current law provides a loophole that actually

---

[13] DEA, p.4

[14] Dr. Robert Byck, M.D., Professor of Psychiatry and Pharmacology, Yale University School of Medicine testified before congress as follows:

> [I]f you heat [cocaine base] to about the temperature of boiling water, it goes off into a vapor. [Then you can] inhale it into your lungs, and you can take a lot [in]. [With cocaine], however, [y]ou can pack your nose only so far...As long as you keep breathing [the cocaine base] vapor, you can get more dosage into yourself. That is the reason why crack...is so dangerous. There is an unlimited amount that can go in.

("Meaning of the term 'Cocaine Base' as used in 21 U.S.C. § 841(b) and Sentencing Guidelines §2D1.1" Danny S. Ashby, Narcotics Update, 1992, U.S. Department of Justice, Vol VI(1); p.16).

encourages drug dealers to sell the more deadly and addictive substance...[15]

On the basis of perceptions similar to those set forth above, Congress set penalties to ensure that the "crack" dealer was punished more severely than the cocaine powder dealer.

Other legislative bodies have wrestled with issues regarding cocaine powder and "crack." Minnesota criminal statutes, like federal statutes, use drug weight as the basis for sentencing drug defendants. Their ratio for cocaine powder to "crack" cocaine varied depending upon the amount trafficked, from two to one up to a five to one ratio. In December 1991, the Minnesota State Supreme Court found only anecdotal, not scientific evidence for the notion that "crack" is more dangerous than powder cocaine. (See section V, Case Law for fuller discussion of this matter).

3. Monitoring Data

Using Sentencing Commission data, the working group explored the issue of race and gender distribution in sentencing of "crack" and cocaine powder offenders. The attached tables reflect numbers of guideline drug cases by drug type and defendant's race and gender, sentenced between April 1 and July 31, 1992, and received by the Commission's Monitoring Unit as of August 20, 1992. The pool of drug cases includes any case with a Title 21 statute of conviction and/or a Chapter Two, Part D guideline application. These cases (more than 4600) provide a sufficient random sample and are representative of all drug cases expected to be received for fiscal year 1992. Drug type was determined using the information in the Judgment and Commitment Order and Presentence Report. If drug type could not be ascertained, cases were excluded from the sample.

The final sample used consists of 4122 cases for which both drug type and the defendant's race[16] and gender are known. Table 9 presents the distribution of cases by race and drug type; Table 10 presents the distribution of gender and drug type.[17]

---

[15] 132 Cong. Rec. S8092, June 20, 1986.

[16] The race variable, taken from the Presentence Report, contains a known anomaly in the way U.S. District Probation Offices collect and report information on a defendant's race and ethnicity. While both the Administrative Office of the Courts' Probation Division and the U.S. Sentencing Commission are in the process of correcting existing inconsistencies in this variable, currently available figures overrepresent the number of white defendants and underrepresent that of Hispanic defendants. Based on our best estimates, the number and relative frequency of black defendants is accurate, with only a negligible margin of error.

[17] These are preliminary data that have not gone through the rigorous edit procedures and validity checks the Commission's Monitoring Unit routinely undertakes at the end of a fiscal year prior to public release. Final statistics on the fully edited data set will be published in the Commission's 1992 Annual Report, due for release in the spring of 1993.

Table 9

DEFENDANT RACE BY DRUG TYPE*
(April 1, 1992 through July 31, 1992)

RACE**	TOTAL	DRUG TYPE***											
		Cocaine		Crack		Heroin		Marijuana		Methamphetamine		Other	
		N	%	N	%	N	%	N	%	N	%	N	%
White	1,973	760	45.2	29	4.7	97	29.5	823	69.8	143	89.4	121	82.3
Black	1,315	500	29.7	578	92.6	155	47.1	65	5.5	3	1.9	14	9.5
Hispanic	758	392	23.3	16	2.6	61	18.5	284	24.1	2	1.3	3	2.0
Other	76	30	1.8	1	0.2	16	4.9	8	0.7	12	7.5	9	6.1
TOTAL	4,122	1,682	100.0	624	100.0	329	100.0	1,180	100.0	160	100.0	147	100.0

* Includes all Guideline drug offenses. Of the 4,667 guidelines cases, 545 were excluded due to one or both of the following conditions: missing race (161) or missing drug type (399).

** Information on Race of the defendant is obtained from the Presentence Report. For the purposes of this report, the categories of White Hispanic, Black Hispanic, and Hispanic, Race Unknown have been combined into the *Hispanic* category. The *Other* category includes defendants whose categories are American Indian, Alaskan Native, or Asian or Pacific Islander.

*** Information on Drug Type is obtained from the Presentence Report. For the purposes of this report, *Marihuana* includes its derivatives, i.e., Hashish; *Methamphetamine* includes its precursors. The category *Other* includes all drug types not listed above.

SOURCE: U.S. Sentencing Commission, Monitoring Data Files.

Table 10

DEFENDANT GENDER BY DRUG TYPE*
(April 1, 1992 through July 31, 1992)

Gender	TOTAL	DRUG TYPE**											
		Cocaine		Crack		Heroin		Marijuana		Methamphetamine		Other	
		N	%	N	%	N	%	N	%	N	%	N	%
Male	3,752	1,542	89.2	562	88.8	279	80.2	1,082	89.1	151	81.6	136	87.7
Female	511	186	10.8	71	11.2	69	19.8	132	10.9	34	18.4	19	12.3
TOTAL	4,263	1,728	100.0	633	100.0	348	100.0	1,214	100.0	185	100.0	155	100.0

* Includes all Guideline drug offenses. Of the 4,667 guidelines cases, 404 were excluded due to one or both of the following conditions: missing gender (6) or missing drug type (399).

** Information on Drug Type is obtained from the Presentence Report. For the purposes of this report, *Marihuana* includes its derivatives, i.e., Hashish; *Methamphetamine* includes its precursors. The category *Other* includes all drug types not listed above.

SOURCE: U.S. Sentencing Commission, Monitoring Data Files.

As shown in Table 9, the distribution of race is considerably different between offenses involving cocaine powder and "crack." Of the 624 defendants sentenced for distribution of "crack," 92.6 percent are black. In contrast, black defendants represent only 29.7 percent of the population of cocaine powder offenders. Table 10 demonstrates that the majority of defendants in all drug types are male. Therefore, the sentencing data on "crack" cases shows a population comprised almost entirely of black males.

4. Summary

Given the maxim that the appearance of fairness is as important as fairness itself, the Commission may want to continue to monitor this situation. If further research determines that a 100 to 1 ratio is not supportable by scientific evidence, the Commission may want to recommend that Congress re-examine this matter. Such a recommendation could be viewed as within the ambit of the duties of the Commission listed at Title 28 U.S.C. § 994(w).

V. Case Law

The working group reviewed relevant case law to identify additional potential areas of interest to the Commission concerning the drug and role guidelines. Cases were reviewed with the primary objective of identifying circuit court conflicts over guideline application.

A. Use of Substance Resulting in Death or Serious Bodily Injury (§2D1.1(a)(1) and (a)(2))

Subsections (a)(1) and (a)(2) of §2D1.1 provide for greater offense levels in cases in which "the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance."[18] This language suggests that the "use resulting in death or injury" factor is an element of the offense. It is not clear, however, whether courts will treat the penalty enhancement provided in sections 841(b) and 960(b) as an element of the offense to be proven beyond a reasonable doubt, or as a sentencing factor to be determined by the judge based on a preponderance of the evidence. If courts follow trends in related areas, the guideline language requiring that the offense of conviction establish death or serious bodily injury may be inconsistent with the holdings in a majority of circuits.

Most circuits have held that despite the effect of drug quantities on statutory maximums and mandatory minimums under section 841(b)(1), the quantity of drugs involved is not an element of section 841 or section 846 offenses. Rather, these subsections are sentence enhancement provisions that come into play at the sentencing stage. As a result, the quantity of drugs involved is not an issue for the government to prove, or the jury to decide, beyond a reasonable doubt. Instead, it is an issue for the judge to decide at the sentencing hearing by a preponderance of the evidence.[19]

---

[18]Subsection (a)(1) provides base offense level 43 where use of the drug results in death or injury and the defendant committed the offense after one or more prior convictions for a similar offense; otherwise, subsection (a)(2) provides base offense level 38 where use of the drug results in death or injury.

[19]See United States v. Madkour, 930 F.2d 234 (2d Cir.) (drug quantity, for purposes of mandatory minimum sentence, relates solely to sentencing; court not limited to conclusions reached by jury or even evidence presented at trial, but instead may consider any evidence that it deems appropriate), cert. denied, 112 S. Ct. 308 (1991); United States v. Gibbs, 813 F.2d 596 (3d Cir.), cert. denied, 484 U.S. 822 (1987); United States v. Powell, 886 F.2d 81 (4th Cir. 1989), cert. denied, 493 U.S. 1084 (1990); United States v. Moreno, 899 F.2d 465 (6th Cir. 1990) (jury finding as to weight does not bind judge), cert. denied, 112 S. Ct. 1504 (1992); United States v. McNeese, 901 F.2d 585 (7th Cir. 1990); United States v. Luster, 896 F.2d 1122 (8th Cir. 1990); United States v. Sotelo-Rivera, 931 F.2d 1317 (9th Cir. 1991) (quantity is not element of offense and is matter for court to determine at sentencing), cert. denied, 112 S. Ct. 1186 (1992); United States v. Morehead, 959 F.2d 1489 (10th Cir. 1992) (failure of indictment to allege quantity of marijuana did not preclude mandatory minimum sentence); United States v. Milton, 965 F.2d 1037 (11th Cir. 1992) (government not required to allege in the indictment or prove at trial specific amount of drugs involved in offense in order for statutory minimum sentence of 60 months to apply); but cf., United States v. Pumphrey, 831 F.2d 307 (D.C. Cir. 1987) (dictum).

In short, if this line of decisions with respect to drug quantity is followed in the context of "use resulting in death or injury" under subsections (a)(1) and (a)(2) (i.e., factor is a sentencing factor, not an element of the offense), the Commission may wish to consider amending the guideline language consistent with those holdings. Alternatively, the Commission could consider requiring a higher standard of proof to establish whether death or serious bodily injury resulted from the use of the substance. Since, in some cases, the enhancement could be large in relation to the otherwise applicable base offense level, some courts might impose a higher standard as a necessity to ensure due process. See, e.g., United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990).

B. Firearms Enhancement (§2D1.1(b)(1))

The circuits appear to hold consistently that the defendant need not literally have the firearm on his/her person in order for the defendant to receive the firearm enhancement under §2D1.1(b)(1). Further, the circuits hold uniformly that relevant conduct can support the enhancement when the firearm is in the possession of a co-conspirator.

However, the relevance of the distance between the firearm and the drug activity or the defendant appears to be interpreted differently in various circuits. Generally, where the firearm is next to, or in proximity to, the drugs, an enhancement may be applied.[20] However, where the firearm is more remote, the enhancement may or may not be applied. Some courts have upheld the enhancement even where the firearm was located a relatively short distance from the drugs.[21] Some courts also uphold the enhancement where the gun is located a considerable distance from the defendant. United States v. Stewart, 926 F.2d 899 (9th Cir. 1991) (loaded machine gun found in defendant's home 15 miles from act of distribution in furtherance of drug conspiracy supports enhancement). However, other courts have declined to apply the enhancement in such cases. See United States v. Edwards, 940 F.2d 1061 (7th Cir. 1991) (guns found in house 25 miles from where defendant arrested for drug trafficking does not support enhancement); United States v. Vasquez, 874 F.2d 250 (5th Cir. 1989) (loaded gun on bedside table several miles from where defendant arrested in parking lot buying drugs does not support enhancement).

---

[20]United States v. Willard, 919 F.2d 606 (9th Cir. 1990) (guns and drugs need not be in proximity to each other to support enhancement), cert. denied, 112 S. Ct. 208 (1991); United States v. Streeter, 907 F.2d 781 (8th Cir. 1990) (enhancement proper when weapons on ground floor and drugs in attic); United States v. Gillock, 886 F.2d 220 (9th Cir. 1989) (loaded gun in closet with drugs supports enhancement).

[21]United States v. McDowell, 918 F.2d 1004 (1st Cir. 1990) (defendant arrested inside airport trying to open locker he believed had drugs; loaded gun in his parked car outside supported enhancement); United States v. McGhee, 882 F.2d 1095 (6th Cir. 1989) (weapon need not be quickly and easily available to support enhancement; weapons found in secret compartment and a safe in defendant's house); United States v. White, 875 F.2d 427 (4th Cir. 1989) (enhancement appropriate for defendant when gun found under codefendant's seat in car).

C. Enhanced Penalties for Cocaine Base

The enhanced penalty provisions for cocaine base found in 21 U.S.C. § 841(b) and §2D1.1 have been the target of several types of constitutional attack. The applicable statute and guideline have been challenged on vagueness grounds because the term cocaine base is defined neither in the statute nor the sentencing guidelines. No circuit that has ruled on the void for vagueness challenge has held the statute to be unconstitutionally vague. However, the decisions have resulted in differing definitions of "cocaine base."

The enhanced penalty provisions have also been challenged on the grounds that the 100 to 1 ratio found in the drug equivalency table of §2D1.1 is not rationally related to any legislative purpose, and on equal protection grounds. Neither of these challenges has been sustained.

1. Definition of Cocaine Base

There is a split both within and among circuits with respect to the definition of cocaine base. This confusion arises from the lack of any specific definition of cocaine base in 21 U.S.C. §§ 841(b)(1)(A)&(B) and 812, or in §2D1.1. While it is generally accepted that the term cocaine base includes "crack," a rocklike, smokable, inexpensive form of cocaine base, the controversy arises over what other forms of cocaine base, if any, are subject to the enhanced penalties for cocaine base.

Cocaine base comes in "crack" form, a white, rocklike, smokable substance, that is highly addictive and relatively inexpensive. United States v. Shaw, 936 F.2d 412, at 415, 416 (9th Cir. 1991). The legislative history is clear that cocaine base in "crack" form is subject to the enhanced penalties. However, other forms of cocaine base exist. Although these forms comport with the chemical properties of cocaine base, they do not necessarily present the danger that the "crack" form presents. Those substances include coca paste, coca leaves, and cocaine base imported to be processed into the ingestible salt form of cocaine known as cocaine hydrochloride. See United States v. Lopez-Gil, 965 F.2d 1124, at 1129-1130 (1st Cir. 1992), amended, No. 90-2059 (1st Cir. May 14, 1992) (en banc), petition for cert. filed, No. 92-5524 (U.S. Aug. 10, 1992), and United States v. Madison, 781 F. Supp. 281, at 285 n.4 (S.D.N.Y. 1992). Those substances also include highly impure substances that contain cocaine base, but are in an unsmokable form. See United States v. Jackson, 968 F.2d 158, at 159 (2d Cir. 1992). The lack of any definition of cocaine base in 21 U.S.C. § 841 or §2D1.1 causes the most confusion with respect to these non-"crack" substances.

The circuits that have analyzed the legislative history of the enhanced penalty provisions for cocaine base have uniformly found that "crack" was the chief target of these enhanced penalties. See United States v. Barnes, 890 F.2d 545, 553 (1st Cir.

1989), cert. denied, 494 U.S.1019 (1990); United States v. Pinto, 905 F.2d 47, 49 (4th Cir. 1990); United States v. Avant, 907 F.2d 623 (6th Cir. 1990); United States v. Buckner, 894 F. 2d 975, 976 n.1 (8th Cir. 1990); United States v. Shaw, 936 F.2d 412, 415 (9th Cir. 1991); United States v. Brown, 859 F.2d 974, 976 (D.C. Cir. 1988). However, only one panel of one circuit has restricted the ambit of the enhanced penalties to "crack." United States v. Shaw, 936 F.2d at 416.[22]

Some circuits define cocaine base as "crack." See United States v. Thomas, 932 F.2d 1085, 1090 (5th Cir. 1991), cert. denied, 112 S. Ct. 887 (1992); United States v. Avant, 907 F.2d 623, 625-627 (6th Cir. 1990); United States v. Williams, 876 F.2d 1521, 1525 (11th Cir. 1989). Other circuits either refuse to adopt a definition of cocaine base, United States v. Turner, 928 F.2d 956, 960 (10th Cir.), cert. denied, 112 S. Ct. 230 (1991), or adopt a combination of definitions, United States v. Pinto, 905 F.2d 47 (4th Cir. 1990).

The D.C. Circuit made one of the earliest attempts to define cocaine base in United States v. Brown, 859 F.2d 974 (D.C. Cir. 1988). The Brown court arrived at a chemical definition for cocaine base, defining it as any form of cocaine that has a hydroxyl radical. Id. at 976.[23] The Eighth Circuit adopted the D.C. Circuit's definition in United States v. Buckner, 894 F.2d 975, 976 n.1 (8th Cir. 1990). However, the hydroxyl radical definition was adopted by one Ninth Circuit panel in United States v. Van Hawkins, 899 F.2d 852 (9th Cir. 1990), and later rejected by another Ninth Circuit panel in United States v. Shaw, 936 F.2d 416 (9th Cir. 1991).

The most recent efforts to define cocaine base were made by the Second Circuit in United States v. Jackson, 968 F.2d 158 (2d Cir. 1992), and the First Circuit in United States v. Lopez-Gil, 965 F.2d 1124 (1st Cir. 1992), amended on other grounds, No. 90-2059 (1st Cir. May 14, 1992) (en banc). Unlike the fact patterns in the cases recited above that dealt with substances that were indisputably "crack," both Jackson and Lopez-Gil involved substances that were found to be cocaine base, but neither was found to be "crack." In Jackson, the Second Circuit confronted a "highly impure" substance that was "soft, sticky, oily and brownish." Id. It was "difficult to predict whether this material could have been used as 'crack' " Id. Similarly, in Lopez-Gil, the First Circuit was confronted with a substance that was indisputably cocaine base, but was bonded to a suitcase, and not "crack." Both the First and the Second Circuits

---

[22]The difficulty engendered by the lack of definition of cocaine base is illustrated by the First Circuit's opinions in Lopez-Gil, a case that involved a substance that was cocaine base but not "crack." The panel of three judges in the original opinion held unequivocally that the term cocaine base was exclusively "crack." In the en banc opinion, the First Circuit reversed and found that the term cocaine base included the non-"crack" substance at issue.

[23]It should be noted that this chemical definition of cocaine base was rejected by Dr. George Shwartz, an expert in toxicology. See United States v. Jackson, 768 F. Supp. 97, (S.D.N.Y. 1991), reversed on other grounds, 968 F. 2d 158 (2d Cir. 1992).

held that these non-crack forms of cocaine base were subject to the enhanced penalties for cocaine base.

In an en banc opinion reversing the panel holding that cocaine base is exclusively crack, the First Circuit determined that cocaine base is a scientific term and consequently a district court should rely on expert opinion to determine what is cocaine base. The First Circuit explicitly stated that, although "crack" was clearly the target of the enhanced penalty provisions for cocaine base, the term must also refer to other forms of cocaine base as well. Id.

The Second Circuit reached a similar result in Jackson. Employing the doctrine that scientific terms in a statute should be defined by the science to which they are appropriate, Corning Glass Works v. Brennan, 417 U.S. 188, 201 (1974), the Second Circuit adopted a chemical definition of cocaine base. The Second Circuit found the impurity of the substance to be troubling. However, the court held that the substance was subject to the enhanced penalties because the impure substance comported with the scientific properties of cocaine base.[24]

2. Challenges to the 100 to 1 Ratio

The 100 to 1 ratio of punishment for offenses involving cocaine base or cocaine has been challenged on due process grounds. The principal claim is that punishing cocaine base offenses far more harshly than cocaine offenses is not rationally related to any legislative purpose. The 100 to 1 ratio has been upheld against this claim by all the circuits that have considered the issue.[25]

The harsher penalties for cocaine base offenses have also been challenged on equal protection grounds. This claim has also been rejected by every circuit to have considered it.[26] However, in December 1991, the Minnesota Supreme Court in Minnesota v. Russell, 477 N.W. 2d 886 (1991) held that there is no rational basis to distinguish between powder cocaine and "crack" cocaine. Although the court was presented with anecdotal evidence, such as the highly addictive nature of "crack," the

---

[24]The Second Circuit found the reference to cocaine base as "crack" in the drug equivalency tables of §2D1.1 was not determinative on the issue of whether cocaine base included substances other than "crack." Id. at 163.

[25]See United States v. Lawrence, 951 F.2d 751 (7th Cir. 1991); United States v. Pickett, 941 F.2d 411 (6th Cir. 1991); United States v. Turner, 928 F.2d 956 (10th Cir.), cert. denied, 112 S. Ct. 230 (1991); United States v. Buckner, 894 F.2d 975 (8th Cir. 1990); United States v. Pinto, 905 F.2d 47 (4th Cir. 1990).

[26]See United States v. Harding, 971 F.2d 410 (9th Cir. 1992); United States v. Lawrence, 951 F.2d 751 (7th Cir. 1991); United States v. House, 939 F.2d 659 (8th Cir. 1991); United States v. Avant, 907 F.2d 623 (6th Cir. 1990); United States v. Thomas, 900 F.2d 37 (4th Cir. 1990); United States v. Cyrus, 890 F.2d 1245 (D.C. Cir. 1989); United States v. Solomon, 848 F.2d 156 (11th Cir. 1988).

court found that there was no scientific evidence for the designation of a two to one ratio between cocaine powder and "crack" weights. The court also ruled that the ratio causes racial disparity since most "crack" defendants are black. As a result of this ruling, the Minnesota State Legislature equalized the penalties for cocaine powder and "crack" in January 1992.

D. Treatment of "Mixtures or Substances"

The circuits have come to different conclusions as they have attempted to define the word "mixture" found in 21 U.S.C. § 841 and Application Note 1 of §2D1.1, as that term applies to various types of controlled substances. The courts dealing with this issue have had to interpret Chapman v. United States, 111 S. Ct. 1919 (1991), the recent Supreme Court decision on the meaning of "mixture" in the context of LSD combined with blotter paper. Chapman appears to have resolved the issue of whether the gross weight of mixtures that are usable, consumable, or ready for retail or wholesale distribution is used to determine the offense level. The issue that continues to generate confusion is whether the gross weight of unusable or undistributable mixtures should be used to determine the offense level. In this context, two different interpretations of Chapman have emerged; the more inclusive approach uses the "plain" meaning of "mixture," while the less inclusive approach interprets Chapman to require that the weight of the drugs be determined only including the "usable" or "marketable" portions of any drug mixture.

1. Cocaine Mixtures

There is a split in the circuits with respect to the definition of "mixture." The split arises from the different interpretations of Chapman v. United States, 111 S. Ct. 1919 (1991).[27] All but one of the circuits have interpreted Chapman to exclude from the drug weight computation unusable, unconsumable, or unmarketable substances.[28]

---

[27]The Courts have defined "mixture" involving cocaine in a myriad of factual contexts. Cocaine has been combined with beeswax, United States v. Restrepo-Contreras, 942 F.2d 96 (1st Cir. 1991), cert. denied, 112 S. Ct. 955 (1992); with cornmeal, United States v. Robins, 967 F.2d 1387 (9th Cir. 1992); with boric acid, United States v. Rodriguez, Nos. 91-5494, 91-5751 (3d Cir. Sept. 18, 1992); with plaster of paris, United States v. Davern, 937 F.2d 1041 (6th Cir. 1991); with various liquors in liquor bottles, United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991); United States v. Acosta, 963 F.2d 551 (2d Cir. 1990); United States v. Salgado-Molina, 967 F.2d 27 (2d Cir. 1992); United States v. Bristol, 964 F.2d 1088 (11th Cir. 1992); and chemically bonded to suitcases, United States v. Lopez-Gil, 965 F.2d 1124 (1st Cir. 1992), amended on other grounds, No. 90-2059 (1st Cir. May 14, 1992) (en banc) petition for cert. filed, No. 92-5524 (U.S. Aug. 10, 1992); United States v. Mahecha-Onofre, 936 F.2d 623 (1st Cir.), cert. denied, 112 S. Ct. 648 (1991).

[28]United States v. Acosta, 963 F.2d 551 (2d Cir. 1992); United States v. Salgado-Molina, 967 F.2d 27 (2d Cir. 1992); United States v. Rodriguez, Nos. 91-5494, 91-5751 (3d Cir. Sept. 18, 1992); United States v. Davern, 937 F.2d 1041 (6th Cir. 1991); United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991); United States v.

Representative of these opinions is Rolande-Gabriel. In Rolande-Gabriel, the Eleventh Circuit confronted a mixture of cocaine dissolved in liquid. Neither the liquid, nor the cocaine dissolved in the liquid, were usable. The court held that only the net weight of the cocaine without the liquid should be used to assess drug quantity. The court reasoned that to include the gross weight of unusable mixtures would lead to "widely divergent sentences for conduct of relatively equal severity." Id. at 1235. The court stated that the sentencing of a defendant based on the total weight of a mixture where only a fraction of that mixture was consumable would be a "hypertechnical and mechanical application of the statutory language, that defeats the purpose behind the sentencing guidelines and creates an absurdity in their application: the disparate and irrational sentencing arising out of a rational and uniform scheme of sentencing." Id.

The court emphasized the language of Chapman focusing on Congress' adoption of a market-oriented approach to drug sentencing. In so doing, Chapman held, Congress intended to target substances that were "ready for wholesale or ready for distribution at the retail level." It followed that the unusable portion of the liquid mixture should not be factored into determining the appropriate offense level, and only the mixtures usable in the "chain of distribution" should be considered for penalty determinations. Id.

The First Circuit reached the opposite result. In United States v. Mahecha-Onofre, 936 F.2d 623, 625-626 (1st Cir. 1991) and Lopez-Gil, the First Circuit had to define "mixture" in the context of cocaine bonded chemically to the acrylic part of a suitcase, and held that the gross weight of the acrylic parts of the suitcase and the cocaine were to be used to determine the drug quantity. The court interpreted Chapman to mean that if a controlled substance was in a mixture, the gross weight is to be used to determine the guideline range. In Mahecha-Onofre, the court noted that the acrylic part of the mixture was not "ingestible" but determined that this was not a critical aspect of the term "mixture."

2. Methamphetamine Mixtures

A similar conflict among the circuits exists with respect to the definition of "mixture" in respect to methamphetamine. The fact pattern typically confronted is where quantities of a liquid including a small percentage of methamphetamine and "waste" water that is sometimes poisonous are found. This liquid is typically either the precursor to methamphetamine that has to be distilled to be in usable form or the waste liquid resulting from the manufacture of methamphetamine.

Bristol, 964 F.2d 1088 (11th Cir. 1992).

In United States v. Jennings, 945 F.2d 129, 134 (6th Cir. 1991), the Sixth Circuit confronted precisely this type of substance, and held that only the net weight of the methamphetamine without the poisonous liquid should be used to determine the offense level. The court reasoned that "it seems fortuitous and unwarranted by the statute, to hold the defendants punishable for the entire weight of the mixture when they could have neither produced that amount of methamphetamine nor distributed the mixture containing methamphetamine." Id. at 136. The court went on to note that to include uningestible waste products would contradict the legislative intent underlying the sentencing scheme as noted by the Supreme Court in Chapman. While Congress wished to punish more harshly the person who diluted the drugs in order to distribute them more widely, it is not the case where the mixture was in unusable or undistributable form. Id. at 137.

The Fifth and Ninth Circuits reached the opposite conclusion from the Sixth Circuit on analogous facts. In a pre-Chapman case, the Ninth Circuit in United States v. Bertran-Felix, 934 F.2d 1075 (9th Cir. 1991), cert. denied, 112 S. Ct. 955 (1992), held that the gross weight of a mixture containing methamphetamine should be used to determine the offense level, despite the defense argument that the mixture was not "marketable." Similarly, the Fifth Circuit held that the gross weight of a mixture containing methamphetamine should be used to compute the offense level. In United States v. Walker, 960 F.2d 409 (5th Cir.), cert. denied, 1992 U.S. LEXIS 6804 (1992), the Fifth Circuit held that the gross weight of a toxic liquid containing 5 percent methamphetamine should be used to calculate the offense level. The court distinguished Chapman simply by noting that Chapman dealt with LSD and not methamphetamine. Id. at 412.

Two months later, the Fifth Circuit elaborated on the interpretation of Chapman as it related to a liquid mixture containing methamphetamine in United States v. Sherrod, 964 F.2d 1501 (5th Cir. 1992). In Sherrod, the Fifth Circuit rejected the Sixth Circuit's interpretation of Chapman. The court found that the "market-oriented" approach referred to in Chapman that focused on the amount of distributable narcotics did not apply to methamphetamine. Id. at 1510. The court noted that the statute dealing with methamphetamine distinguishes between pure methamphetamine and a mixture containing methamphetamine for sentencing purposes. The punishment is less severe for a mixture containing the drug than for the same amount of the pure drug, taking into account the fact that the drug in the mixture was diluted. This statutory distinction, said the court, demonstrates that the gross weight is to be used when calculating the offense level. Id.

The Supreme Court has signaled a reluctance to resolve the conflict over the definition of "mixture" in either the context of cocaine or methamphetamine. The Court denied certiorari in the unreported case of United States v. Fowner, 947 F. 2d 954 (10th Cir. 1991) (unpublished), cert. denied, 112 S. Ct. 1998 (1992), over the written dissent of Justice White. The Fowner case presented precisely the issue

discussed above in the context of methamphetamine. Justice White in his dissent noted that there is a conflict between the circuits with respect to the definition of "mixture" in the context of both cocaine and methamphetamine, and that this conflict results in disparate penalties for similar conduct.

E. Weighing Marihuana

The courts have struggled with a number of issues in the context of marihuana offenses. Two approaches to weighing marihuana are generally followed by the courts. First, in cases where the defendant is found with live plant marihuana, each plant of marihuana is multiplied by 1000 grams to determine the weight for sentencing purposes. Second, where only dry leaf is found, the dry leaf is weighed, unless the number of plants producing the dry leaf has been observed or is otherwise known.

In the more obscure case of root balls, at least one court treated the ball as a plant. In cases of ungerminated seeds, it appears the seeds are weighed. Finally, in cases where stalks, fibers, and seeds are seized along with leaf, the guidelines direct that the total weight of the stalks, fibers, and seeds are to be included for purposes of determining the guideline range, but are not included for statutory purposes of determining whether defendant is subject to a mandatory minimum.

1. Weight of Dry Leaf and Plant Marihuana

An issue has arisen over the weight of marihuana for which the defendant is accountable when the government is aware of the number of plants involved in the marihuana grow operation but does not intervene prior to the harvest of the plants. As a result, both the number of plants is known and the actual, dry weight of the harvested plants is known. In most, if not all cases, this dry weight is considerably less than the weight resulting from the "one plant equals one kilogram" equivalency ratio provided in §2D1.1(c) n.*.[29]

Note * to §2D1.1(c) appears to bear on the question. That provision reads:

> In the case of an offense involving marihuana plants, if the offense involved (A) 50 or more marihuana plants, treat each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marihuana plants, treat each plant as equivalent to 100 G of marihuana. *Provided*, however, if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

---

[29]One estimate is that the typical adult marijuana plant can produce no more than a pound (about 450 grams) of marijuana. The Marijuana Crop: Moonshine Again, The Economist, Oct. 20, 1990, at 25, (cited in United States v. Haynes, 969 F.2d 569 (7th Cir. 1992).

§2D1.1(c) n.*.

The court in United States v. Haynes, 969 F.2d 569 (7th Cir. 1992)[30] notes that the plain language of this equivalency provision appears to permit only one result in this situation: because the offense "involved marihuana plants" (50 or more) the plants known to the government are to be treated as the equivalent of 1 kilogram of marihuana unless the dry weight is greater. The fact that the marihuana plants have been harvested and dried does not mean that the offense does not involve plants.[31] The court notes this result is consistent with apparent congressional intent to punish marihuana growers of 150 plants as severely as a distributor who distributed 150 kilograms. Consequently, the equivalency ratio "does not encompass the activities of those individuals who enter the marihuana distribution chain after the processing stage."

United States v. Blume, 967 F.2d 45 (2d Cir. 1992) takes an approach in a slightly different case (reconcilable with that in Haynes). Approximately 3,700 marihuana plants were seized from the Blume defendant, who was believed to have produced 6-9 kilograms of marihuana bud per month. The lower court sentenced the defendant based on the 3,700 plants seized plus the estimated number of plants required to produce the monthly product (the actual number of plants was not known). This total was multiplied by one kilogram for each plant. The appellate court instead determined that "the intent of the guidelines was 'to measure live marihuana by the number of plants and dry leaf marihuana by weight'" (citing United States v. DeLeon, 955 F.2d 1346, 1350 (9th Cir. 1992)). The court considered the fact that the dry weight added to the plants seized "might support a sentence for 4,000 kilograms. This amount differs materially from the 11,100 kilograms used for sentencing."

While United States v. Corley, 909 F.2d 359 (9th Cir. 1990) has been cited for the result contrary to Haynes, Corley does not address the issue directly, despite its statement "when live marihuana plants are found, their quantity is appropriate for determining base offense level. When the marihuana leaves have been dried, their weight should be used." Corley, 909 F.2d at 361. Corley does not involve the seizure of both dry marihuana and plants, and does not appear to address weight of marihuana in this situation. Instead, Corley appears to address the issue whether a previous version of the guideline is facially invalid because it presents two apparently contradictory methods of weighing marihuana -- one dependent on the number of plants, one dependent on the dry weight. United States v. DeLeon, 955 F.2d 1346,

---

[30]Haynes involves a defendant who tended 12,500 plants and aided in the harvesting and processing of the marihuana into 400 kilograms of consumable substance.

[31]The proviso will almost never take effect in cases involving 50 or more plants; its primary use occurs where the 100 gram to one plant ratio underestimates the weight in 50 plant cases.

1350 (9th Cir. 1992) further clarifies the context of Corley and a lower court opinion (United States v. Graham, 710 F. Supp. 1290 (N.D. Cal. 1989)) cited in Corley, by noting that the rationale behind the guidelines measuring "live marihuana by the number of plants and dry leaf marihuana by weight" is "that it is impossible to determine the number of plants from which processed marihuana is derived." This may suggest that where the number of plants is known, the number of plants should be used.

2. Weighing Root Balls and Seeds

Two related issues involve determining the weight of the root ball remnants of a marihuana plant, and the weight of marihuana seeds that are apparently intended to be planted or have been planted.

The first issue has been addressed in United States v. Lewis, 762 F. Supp. 1314 (E.D. Tenn. 1991), aff'd without op., 951 F.2d 350 (6th Cir. 1991), where agents seized 86 marihuana plants and 20 marihuana plant root balls (which the defendant admitted had yielded a quantity of marihuana in the six weeks prior to his arrest). The court in that case reviewed legislative history and determined that the 1 kilogram to 1 plant ratio was intended to approximate the entire weight of a plant by making the entire plant in effect a "mixture or substance." Consequently --

> [b]y making the entire plant in effect a mixture or substance containing marihuana, and by the reference to Miller where the marihuana was both dead and alive, harvested and unharvested, it can be concluded (in the absence of any other helpful authority) that dead rootballs which were once live marihuana plants are indeed marihuana plants under 21 U.S.C. § 841(b)(1).

Lewis 762 F. Supp. at 1315-17. The court also relied on the definition of marihuana in 21 U.S.C. § 802(16) (marihuana includes "all parts of the plant Cannabis sativa L., whether growing or not"). The court finishes by saying "there appears to be no reason to distinguish between a plant that is growing and one that has, for a period of time, been harvested." This holding is almost certainly consistent with Haynes (disregard dead plant weight when number of live plants producing that marihuana is known) and with Blume (weigh dead plants when number of live plants producing that marihuana is not known).

The second related issue is how to weigh seeds that are capable of producing seedlings, or have been planted but have not yet sprouted. No case law appears to have addressed the issue, but the issue has been the subject of hotline calls. The Commission responds to calls on this issue by advising that seeds are weighed unless they have germinated, in which case each seedling having a root and some leaf is treated as a separate plant.

3. Weighing Stalks, Fibers, and Seeds, and Damp Marihuana

Two lines of cases appear to address the issue of whether the stalks, fibers, and sterile seeds should be counted. The first line of cases holds that for purposes of determining the mandatory minimum sentence under the statute, relevant statutory penalties for importing marihuana under 21 U.S.C. § 960(b) provide that the marihuana is to be weighed excluding the mature stalks, fibers, and non-germinating seeds. See 21 U.S.C. § 802(16). These cases also hold that the sentencing guidelines permissibly use the total weight of the marihuana (including the stalks, etc.) since the weight set forth in the drug quantity table refers to the "entire weight of any mixture or substance containing a detectable amount of the controlled substance." U.S.S.G. §2D1.1 note *. See e.g., United States v. Vasquez, 951 F.2d 636, 637 (5th Cir. 1992). See also United States v. Garcia, 925 F.2d 170, 172-73 (7th Cir. 1991) (dicta) ("stalks of the marihuana plant, although excluded from the guideline definition of marihuana, can still constitute part of a 'mixture or substance' containing a detectable amount of marihuana for the calculation of weight of the controlled substance seized").

A second line of cases (relying on legislative history surrounding the term "mixture or substance") holds that stalks, fiber, and seeds from "marihuana seized at a stage before it [has] been turned into a readily marketable or consumable product" should not be counted in the weight for purposes of the guideline or the statute. However, marihuana containing stalks, fibers, and sterile seeds may be counted when the marihuana is in a "marketable" form. United States v. Miller, 680 F. Supp. 1189 (E.D. Tenn. 1988); see also United States v. Beltran-Felix, 934 F.2d 1075 (9th Cir. 1991) (dicta) (citing Miller with approval).

"Damp" marihuana may be weighed because damp marihuana is a mixture or substance, the entire weight of which should be considered for sentencing purposes. United States v. Garcia, 925 F.2d 170, 172-73 (7th Cir. 1991).

4. Weighing Less Than 50 Plants of Marihuana

A circuit conflict appears to have developed over the direction in §2D1.1(c) n.* to consider each marihuana plant, in an offense involving less than 50 plants, as weighing 100 grams.[32] The Fourth Circuit finds this provision to be inconsistent

---

[32]Note * reads:

> In the case of an offense involving marihuana plants, if the offense involved ... (B) fewer than 50 marihuana plants, treat each plant as equivalent to 100 G of marihuana. Provided, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

with congressional intent under 21 U.S.C. § 841(b)(1)(D) to consider actual weight as the sentencing measure for offenses involving fewer than 50 plants. The court found that Congress intended courts as a general rule to use the actual weight of the controlled substance. Exceptions to this rule apply but, in the case of marihuana, only because Congress explicitly exempted offenses involving 50 plants or more.[33] United States v. Hash, 956 F.2d 63, 64 (4th Cir. 1992). See also United States v. Streeter, 907 F.2d 781, 790-91 (8th Cir. 1990) (interpreting earlier version of guideline to lack rational basis for 100 gram to one plant ratio, and to be inconsistent with statute at 21 U.S.C. § 841(b)(1)(D)).

The Seventh Circuit, however, upheld the provision against a due process challenge asserting that the equivalencies were arbitrary and nonsensical. The court found that the equivalencies reflected Congress' decision to use the 50th plant as an indicator of culpability as a distributor, and not to reflect scientific yields of each plant. United States v. Webb, 945 F.2d 967 (7th Cir. 1991), cert. denied, 112 S. Ct. 1228 (1992).

F. Upward Departure for Murder

At least two cases have applied the murder guidelines where the defendant was convicted of a drug offense, but was found to have committed a murder related to the drug offense. In United States v. Melton, No. 90-5056 (4th Cir. July 1, 1992), the lower court determined that the murder was not accounted for by the guideline range, and the court departed upward from the applicable guideline range of 70 to 87 months, to a sentence of 240 months pursuant to §5K2.1 (Death) (Policy Statement). The circuit court found that "the district court appropriately identified [the victim's] murder as an aggravating factor that warranted an upward departure from the Guideline range" and appropriately analogized to sentences available for offenses involving first degree murder (§2A1.1), drug-related murder 21 U.S.C. § 848(e)(1), use of a substance resulting in death (§2D1.1(a)(2)). See also United States v. Harris, 932 F.2d 1529 (5th Cir. 1991) (court applied §2K2.1(c) (firearms guideline cross reference to §2A1.1 (First Degree Murder) instead of §2D1.1).

The background commentary to §2D1.1 explains the scientific basis for this ratio as well as the legal justification that plants weighing less than 100 grams be treated as attempts to achieve the typical 100 grams produced by a mature plant. U.S.S.G. §2D1.1, comment. (backg'd).

[33] 21 U.S.C. § 841(b)(1)(D) provides a penalty --

> [i] the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight ... such person shall ... be sentenced to a term of imprisonment of not more than 5 years.

G. Treatment of Drug Purity

A number of cases have considered the purity of the drugs involved in the offense as a basis for sentencing within the guideline range, or as a basis for departure. Application Note 9 to U.S.S.G. §2D1.1 provides:

> Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure. . . . 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. ... As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.

A number of cases uphold such upward departures in the case of high purity.[34] Courts generally have not, however, permitted departures downward based on low purity.[35]

H. Challenges to Commission Compliance with Statutory Authority

In United States v. Lattimore, 974 F.2d 971 (8th Cir. 1992) the appellate court overturned a lower court holding that the Commission did not adequately consider congressionally mandated sentences (21 U.S.C. § 841(b)) for controlled substances in cases where the statutory minimum is less than the relevant guideline range. The appellate court cites the lower court as saying "the statutory minimum is Congress's own clear expression . . . of the mandatory minimum for a particular offense, and the Court however, finds no recitation in the Guidelines reflecting the Commission's consideration of that fact." The lower court then constructed a range of 60-97 months (the guideline range had been calculated as 78-97 months) and sentenced the defendant to 72 months (60 months for the drug offense, and 12 months for a firearm enhancement). The appellate court notes this thinking is "error" and continued --

---

[34]See e.g., United States v. Ryan, 866 F.2d. 604 (3d Cir. 1989) (upward departure on grounds of quantity and purity warranted for defendant convicted of simple possession of 10.32 grams of crack at 90% purity and packaged in 33 bags since it is "unusual" case not contemplated by the Commission in setting the base offense level for simple possession); United States v. Asseff, 917 F.2d. 502 (11th Cir. 1990) (upward departure from 6-12 month range to 48 month sentence based on 278 kilogram quantity and 91 percent purity of cocaine is "consistent with the goals of the Guidelines"); but c.f., United States v. Martinez-Duran, 927 F.2d. 453 (9th Cir. 1991) (reversing upward departure for unusually high purity because no evidence to support that 46% purity of heroin was unusual); United States v. Contractor, 926 F.2d. 128 (2d Cir.) (reversing upward departure for purity because no evidence to support the defendant was involved in the specific transaction involving unusually high purity of drugs), cert. denied, 112 S. Ct. 123 (1991).

[35]United States v. Touby, 909 F.2d 759 (3d Cir. 1990) (denying defendant request that sentence be based on quantity of drugs accounting for the fact that the substance was only 2.7% pure), affirmed on other grounds, 111 S. Ct. 1752 (1991); United States v. Davis, 868 F.2d 1390 (5th Cir. 1989) (low purity of drugs not a ground for downward departure because §2D1.1 provides only for upward departure for high purity). Failure to account for low purity is not a violation of due process. United States v. Luster, 896 F.2d 1122 (8th Cir. 1990).

> A reading of §2D1.1 and the related commentary clearly indicates that the Sentencing Commission adequately considered the established mandatory minimums when it created its sentencing ranges. . . . [T]he aim of the guidelines [is] to provide incremental and graduated sentencing. Such a sentencing scheme does not run afoul of the mandatory minimum created by Congress.

Intent to Produce and Reasonably Capable of Producing (§2D1.4, comment. (n.1))

Note 12 of the commentary to §2D1.1 (previously appearing as note 1 to §2D1.4) provides that "the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount" except "where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount." §2D1.1, comment. (n.12) (emphasis added). The use of the conjunctive in this commentary literally requires that both prongs apply before the quantity is excluded from consideration.

The circuits, however, are not consistent in their interpretation of the language in the commentary. Some courts read the guideline as literally requiring the conjunctive -- both prongs must be satisfied before the quantity is not considered. See United States v. Brooks, 957 F.2d 1138 (4th Cir.) (note 1 requires conjunctive), cert. denied, 112 S. Ct. 3051 (1992) (citing United States v. Jacobo, 934 F.2d 411, 416 (2d Cir. 1991) (drug amount should be excluded if defendant "lacked the intent and ability to deal in the negotiated amount"); United States v. Estrada-Molina, 931 F.2d 964, 966 (1st Cir. 1991) (drug amount should be excluded if defendant "neither intended to produce nor was capable of producing the disputed amount"); United States v. Palmer, 761 F. Supp. 697, 705 (D. Idaho 1991) as requiring the conjunctive).

But the court in Brooks notes that other courts have misformulated the rule to require no more than the disjunctive. See United States v. Ruiz, 932 F.2d 1174, 1183-84 (7th Cir.) (drug amount should be included if defendant "intended to produce and was 'reasonably capable of producing'" drugs), cert. denied, 112 S. Ct. 151 (1991); United States v. Bradley, 917 F.2d 601, 604 (1st Cir. 1990) (drug amount should be included if defendant "fully intended to produce, and was reasonably capable of producing," drugs); United States v. Buggs, 904 F.2d 1070, 1079 (7th Cir. 1990) (drug amounts should be excluded if defendant "did not intend to or could not produce those amounts").

I. Treatment of Mules and Couriers

Appellate courts have upheld as not clearly erroneous lower court decisions finding that persons who transport quantities of drugs, either on their person, or using vehicles, are not entitled to a mitigating role reduction. The courts hold that couriers or mules are not automatically entitled to such reductions but may receive them where the defendant demonstrates that s/he is substantially less culpable than the average participant in the

offense. Some circuits have also approved downward departures based on the defendant's role as a mule or courier.

1. Mitigating Role Reduction

The general rule among circuits is that a one-time mule or transporter of drugs is not necessarily entitled to minor or minimal status. United States v. Bethley, 973 F.2d 396 (5th Cir. 1992) (citing United States v. Buenrostro, 868 F.2d 135, 137-38 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990)); United States v. Zweber, 913 F.2d 705 (9th Cir. 1990) (courier status alone does not require a role reduction; "Culpability, not courier status, is the key") (citing Buenrostro). Other circuits have held similarly.[36]

The Tenth Circuit in United States v. Caruth, 930 F.2d 811 (10th Cir. 1991), notes that a district court faced with a defendant who was offered a ride in a car that defendant later found out to be transporting drugs, and who committed no other offense than to fail to leave the car before it was stopped by authorities "may have been hard pressed to find that he was not a minimal participant." However, the court goes on to note that

> [t]ranscontinental transportation of a commercial drug shipment constitutes more serious involvement than merely off-loading the shipment at its destination. ... We have observed that "[w]hile the commentary indicates that some couriers may appropriately receive classification as minimal participants, it does not mandate this result for all couriers." United States v. Calderon-Porras, 911 F.2d at 423. In fact, even minor participant classification is routinely denied. See United States v. Donaldson, 915 F.2d 612, 615 (10th Cir.1990) ("drug couriers, allegedly under the direction of others, are not necessarily minor participants"); United States v. Arredondo-Santos, 911 F.2d at 425-26 ("mere driver" who attempted to transport marihuana from Mexico to United States not a minor participant); United States v. Pelayo-Munoz, 905 F.2d 1429, 1431 (10th Cir.1990) (transportation of large amount of drugs into country not minor participation).
> . . .

---

[36]See, e.g., United States v. Caballero, 936 F.2d. 1292 (D.C. Cir. 1991) (minor role may not be based solely upon status as courier), cert. denied, 112 S. Ct. 943 (1992); United States v. Garcia, 920 F.2d 153 (2d Cir. 1990) (courier not automatically minor); United States v. Calderon-Porras, 911 F.2d 421 (10th Cir. 1990) (courier not per se minimal); United States v. Paz-Uribe, 891 F.2d 396 (1st Cir. 1989) (courier not automatically minor or minimal), cert. denied, 495 U.S. 951 (1990); United States v. Williams, 890 F.2d 102 (8th Cir. 1989) (defendant's status as courier does not necessarily mean he is less culpable than other participants in drug operation); cf., United States v. Boyer, 931 F.2d. 1201 (7th Cir.) (mere status as facilitator does not entitle one to role reduction), cert. denied, 112 S. Ct. 209 (1991); United States v. Goebel, 898 F.2d 675 (8th Cir. 1990) (distributor is not per se less culpable than manufacturer).

> We cannot state categorically that transporting a commercial shipment of drugs across the United States, an essential distribution link in a drug enterprise, constitutes minimal participation compared to average participants in drug offenses, even though the individual is uncompensated and has no knowledge of the scope of the enterprise beyond the fact that he is accomplishing a transcontinental shipment of drugs of significant commercial dimension. See United States v. Arredondo-Santos, 911 F.2d at 426 ("Couriers are indispensable to any drug-dealing network.").

Additional circuits have upheld the refusal of the district court to apply a reduction under §3B1.2 (Mitigating Role). See, e.g., United States v. Carter, 971 F.2d 597 (10th Cir. 1992) (defendant's services as courier in transporting 42 pounds of marihuana coast to coast were as indispensable to completion of criminal activity as those of seller and buyer; courier is "an essential cog in any drug distribution scheme"); United States v. Paz-Aguirre, 956 F.2d 279 (10th Cir. 1992) (unpublished) (defendant who owned vehicle and carried 33 kilograms of marihuana in secret compartment).

2. Departure

The Ninth Circuit has held that a 10- or 11-level downward departure based on mule status may be appropriate where the defendant acts only as a mule or courier (or in cases of other "relatively blameless defendants") and the defendant is the sole participant in the offense to which he pleads guilty. The court noted the relevance of the lower court's findings concerning the socioeconomics and the internal politics of the drug trade along the Mexican border. United States v. Valdez-Gonzalez, 957 F.2d 643 (9th Cir. 1992).

J. Mitigating Role Reductions and "Average Participant"

Background commentary language of §3B1.2 (Mitigating Role) was the subject of at least one opinion regarding the meaning of "any participant who is less culpable than most other participants" and "substantially less culpable than the average participant". In United States v. Andrus, 925 F.2d 335 (9th Cir.), cert. denied, 112 S. Ct. 249 (1991), the court held that defendants of roughly equal culpability, even if one less culpable, are not entitled to reduction for minor role. The court notes the lack of definition of "minor" and "average participant" -- pointing out that "average participant" may refer to the instant offense or to that general type of crime. The court side-stepped the issue by finding that under either standard the defendant was not entitled to a reduction.

K. Additional Issues

The working group notes the possibility of a review of case law in certain additional areas:

- application of existing drug and role guideline and commentary not reviewed as part of this report;
- departures; and
- interaction of mandatory minimum statutes and the drug guidelines.

Review of these areas may assist the Commission in discerning additional aspects of the guideline and commentary that merit clarification. The working group will undertake such a review should the Commission so desire.

VI. Hotline Calls

During fiscal year 1991, the Training and Technical Assistance "Hotline" received approximately 2,230 calls.[37] Of these, 129 concerned operation of the drug guidelines, with the majority (64%) of these pertaining to the operation of §2D1.1. Many of these requests for guidance from probation officers and judges pertained to the technical aspects of guideline application, such as the correct application of the relevant conduct guideline in conjunction with §2D1.1. The operation of the drug equivalency table and the conversion of drugs from one substance to another for application purposes also prompted many calls. In addition, the TAS staff received questions on many of the issues raised in the case law overview, such as: the appropriateness of drug purity considerations; the influence of marihuana seeds; attributing weight to marihuana plants; determining what constitutes a marihuana plant; and determining what substances should be considered as part of the drug mixture or substance.

Occasionally, the "hotline" receives specific recommendations for amendment from the judiciary. One such recommendation pertains to §2D1.2, the guideline for drug offenses occurring near protected locations. Judge Kimba Wood suggested that the language in §2D1.2(a)(1) is not clear and should be modified. Specifically, it was recommended that §2D1.2(a)(1) be amended as follows:

> §2D1.2(a) (1) 2 plus the offense level from §2D1.1 applicable to the quantity of controlled substances involved in the offense conduct that occurred near the protected location or that involved ~~directly involving a protected location or~~ an underage or pregnant individual; or. . .

The "hotline" provides technical assistance and support to probation officers and the court in application of the sentencing guidelines. However, it is not unusual for probation officers, and in more limited instances, judges to use this telephone service as a means of communicating to the Commission their reaction and comments about the guidelines. TAS has often heard via the "hotline" that the penalties for the drug guidelines are too high, especially for the least culpable offenders. Additionally, probation officers have commented that the 100 to 1 ratio between "crack" and cocaine is inappropriately high and results in sentences that are too severe.

---

[37] *U.S.S.C. 1991 Annual Report*

VII. State Initiatives

As part of its research, the working group looked to state systems to examine their methods for sentencing drug offenders. The working group solicited information from: 1) states that have sentencing guidelines currently in effect; 2) states awaiting legislative passage of proposed guidelines; and 3) states with systems that include characteristics worthy of study in their treatment of drug offenses but not guideline systems by definition.[38] Table 11 represents a compilation of the information gathered by the working group.[39] This section highlights some of the more significant features of the state systems' methods of sentencing defendants convicted of drug offenses.

Thirteen of the 18 states that responded have a guidelines system in operation, although two of these systems are in their very preliminary stages of development. Eight of 11 states who addressed the issue said their guidelines systems rely on drug type (schedule) to determine offense levels. Quantity often is considered as an aggravating or mitigating factor in determining the appropriate penalty in these states.

All of the systems adopting this approach classify each drug type according to its potential for addiction/harm and its popularity. In most cases, these categories of drug types conform with felony and misdemeanor classifications. A specific penalty, therefore, is assigned to each specific type of drug. Under such a system, for example, distribution of three grams of cocaine is technically the same crime and would receive the same penalty as distribution of a kilogram of cocaine. However, at least five of these systems use quantity as an aggravating or mitigating factor in determining the appropriate sentence. It should be noted that drug cases prosecuted at the state level often involve smaller amounts of drugs than is common in the federal system. For example, 60 percent of all drug offenses in

---

[38] Eighteen states responded to the working group's solicitation for information. Interviews were conducted with staff members from the following sentencing commissions or their counterparts: Alaska, California, Delaware, Florida, Iowa, Kansas, Louisiana, Michigan, Minnesota, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, Washington, and Wisconsin. (Counterparts include criminal justice planning and court/correctional agencies.) Some information was also obtained from "A Summary of Sentencing Policies and Practices for Drug Offenses: A Comparison of Policies in Thirteen States and Under the Federal Sentencing Guidelines," a staff report by the Minnesota Sentencing Guidelines Commission, May 1992.

[39] Delaware, North Carolina and Wisconsin are excluded from this table although each were contacted for information. Delaware's information was insufficient, North Carolina's guideline system is in too embryonic a stage to offer much insight, and Wisconsin is in the process of revamping their guidelines entirely, as a result of numerous changes in their statutes.

Virginia involve less than 1/4 gram of cocaine.[40]

The penalty levels for drug type are generally the same in most states. Heroin, cocaine, cocaine base, and crack are without exception considered the most dangerous drugs and are placed in the most severe punishment level. Varying from state to state, but sometimes included in this category, are: PCP, methamphetamine, and LSD. Other Schedule I and II substances are often grouped together in the next level of severity. Finally, substances in Schedules III, IV, and V follow, with some states combining Schedule III and IV, while leaving Schedule V in its own category, while other states combine these last three schedules into one category. In addition, marihuana often is placed in less serious punishment categories, although the category in which it is placed varies. Tennessee classifies the sale, manufacture, or possession with intent to deliver marihuana as a Class D or E felony, depending on the amount, and places it with Schedule IV and V controlled substances. In contrast, Florida places marihuana in the second most serious category, along with other Schedule I substances.

A final factor in state guideline sentencing that was explored by the working group was the interaction of these sentencing rules with state mandatory minimum penalties. In addition to the federal government, seven of the states studied have mandatory minimum statutory penalties based on the amount of drugs present in the commission of the instant offense. As in the federal system, the mandatory minimums trump the state guidelines in all cases, i.e., if the final guideline range is less than the mandatory minimum, the defendant will serve the time required by statute. However, these mandatory minimums are not the basis upon which these guidelines are created.

[40] Telephone interview with Dr. Richard Kern, Director of the Judicial Sentencing Guidelines Committee in Virginia, August 4, 1992. This information is based on a sample of 3,403 cases in which a defendant was convicted for a felony drug offense from 1988 to 1989.

Table 11 - State Sentencing Commissions and Drugs

State	Separate "Sentencing Table" for Drugs?	Quantity based Drug Guidelines?	Does the state have mandatory minimums?	Mandatory minimums quantity based?	Are guidelines based on mandatory minimumus?
Florida	Yes	No	Yes	Yes	No
Kansas	Yes	No	No	No	No
Louisiana	Yes	No	Yes	Yes	No
Michigan	Yes	No	Yes	Yes	No
Minnesota	Yes	Yes	Yes	Yes	No
Oregon	No	No	No	No	No
Pennsylvania	Yes	Yes	Yes	Yes	No
Tennessee	No	No	Yes	Yes	No
Virginia	Yes	No	Yes	No	No
Washington	Yes	No	No	No	No
United States	**No**	**Yes**	**Yes**	**Yes**	**Yes**

VIII. Public Comment and Expert Assistance

A. Judicial Working Group on Drug Sentencing

In addition to the staff working group on drugs, the Commission in the summer of 1992 formed a Judicial Working Group comprised of one Article III judge from each circuit. The purpose of this group was to examine the operation of the drug guidelines, determine if problems exist, and if so, seek solutions that could be implemented given the reality of mandatory minimum sentences.

The Judicial Working Group met twice[41] at the Sentencing Commission to report on their experiences with sentencing drug traffickers and to explore alternative guideline strategies. The first meeting produced an array of comments that the staff working group considered in developing six proposals for modification of both the drug and role guidelines.

In their discussion of the operation of §2D1.1, a number of the judges expressed concern over the long sentences required for drug defendants who may be among the least culpable defendants in the offense. Judges were troubled that the most minimal participants in drug offenses often receive insufficient mitigation. They suggested a "super minnow" or "novice" category that would provide for a greater reduction for mitigating role when defendants have little or no criminal history and play a peripheral role in the offense. The judges agreed that those defendants who pose a greater risk to society, such as those who possess weapons, should receive stiffer penalties.

The Judicial Working Group communicated its concern about the inequity and unfairness created when the most culpable defendant cooperates with the government and receives a §5K1.1 (Substantial Assistance) departure that results in a sentence lower than that received by the less culpable codefendant who has no assistance to provide.[42] It was noted that in "reverse sting cases" where the government initiates negotiations regarding the amount of drugs or the location of the drug transaction, the guidelines provide for significantly greater sentences if the government suggested a "protected (e.g. within 1,000 feet of a school) location" or a large amount of drugs.

---

[41]This group met initially on September 21, 1992, and returned to the Commission on October 19, 1992.

[42]Although not a member of this Judicial Working Group, the Honorable George E. MacKinnon, United States Circuit Judge for the District of Columbia Circuit and former Commissioner of the United States Sentencing Commission, echoed this concern in a letter to Chairman Wilkins dated November 2, 1992 (see Appendix B). Judge MacKinnon suggests that the guidelines "provide in such circumstances that the sentencing judge would have a considerable discretion to mitigate the guidelines with respect to some of the accomplices."

B. Pharmacologist's Concern

Dr. Morris S. Zedeck, a consultant for federal attorneys in the areas of pharmacology and toxicology for Zedeck Advisory Group, Inc., expressed concern in a public comment letter about the use of the terms "cocaine," "cocaine base," and "crack." Dr. Zedeck states that the use of these terms in the statute (21 U.S.C. §841) is inconsistent with their use in the sentencing guidelines. According to Dr. Zedeck, minor changes in terminology in the guidelines "would resolve the problems and simplify and make more consistent the sentencing of those found guilty of trafficking in cocaine and its derivatives." In 21 U.S.C. §812, Schedule II(a)(4), and 21 U.S.C. §841 (b)(1)(A)(ii)(II) "cocaine" is used to mean "cocaine base," because the statutes draw a distinction between cocaine and its salts. Cocaine salts (cocaine hydrochloride) is the correct term for the non-base form of cocaine, i.e., the powder form commonly referred to as simply "cocaine," Dr. Zedeck said. The statute becomes inconsistent and later refers to "cocaine base" instead of continuing to refer to this substance as "cocaine." Dr. Zedeck sees this problem of interpretation as being "very evident" in the Drug Quantity and Drug Equivalency Tables at §2D1.1. The guideline treats "cocaine" and "cocaine base" as separate drugs. Dr. Zedeck states, "[a]gain, using cocaine and then cocaine base to mean two different things is incorrect. I would guess the Commission intended cocaine in the Drug Quantity Table to mean cocaine salts, but this was neither specified nor accomplished." To further complicate matters, Dr. Zedeck says, the term "crack" is used by the Commission to clarify the meaning of "cocaine base" in the Drug Equivalency tables. Dr. Zedeck states: "Crack and cocaine base...are not synonymous." According to Dr. Zedeck, crack contains cocaine base as the active ingredient.

Dr. Zedeck's suggestions for correcting these inconsistencies:

1) Only use the word "cocaine" when referring to the base form of cocaine, not use the words "cocaine base."

2) Use the term "cocaine salts" when referring to the non-base form of cocaine.

3) If the longer sentence was meant to apply to all smokeable forms of cocaine, use the terms "cocaine" or "crack" or "coca paste"; each should be further defined to distinguish their physical forms.

4) If the shorter sentence was meant to apply to cocaine salts, specifically cocaine hydrochloride, the guidelines should so state.

See Appendix B for the full text of Dr. Zedeck's letter.

C. U.S. Department of Justice Letter

In its letter to the Commission dated October 15, 1992, the Department of Justice recommends three amendments to address what it considers to be problems in the guidelines related to the sentencing of defendants convicted of drug offenses. Responding to "the current scope of 'relevant conduct' under §1B1.3," the Department first urges the Commission to adopt a provision that would prohibit mitigating role reductions under §3B1.2 for defendants held accountable under relevant conduct only for the quantity of controlled substances in which they actually trafficked. Such a rule would ensure that a mitigating role adjustment is considered only for cases in which the measure of the defendant's involvement in the offense is increased by the conduct of others. See Appendix B for letter and proposed language.

The Department's second recommendation is to remove the caps in the Drug Quantity and Equivalency Tables for Schedule I and II depressants and Schedule III, IV, and V substances.[43] In their view, the operation of the current provision is inconsistent with the overall approach of the guidelines in terms of incremental punishment in that the provision limits sentences to those applicable to 20 kilograms of the substances involved regardless of how much greater the actual quantity may be. Furthermore, DOJ reports that through the cap in the Drug Quantity Table, the Sentencing Commission treats Schedule I and II depressants as equivalent to Schedule III substances for sentencing purposes, while Congress treats them very differently by subjecting violations involving Schedule I and II substances to a 20-year maximum prison term, as compared to five years for Schedule III substances. The Department of Justice opposes the other "artificial limitations" placed on Schedule IV and V substance sentences through the 20 kilogram cap at levels 12 and 8, respectively, in the Drug Quantity Table. Consistent with the operation of the drug guidelines for substances such as heroin and cocaine, "larger quantities of these drugs should result in longer sentences."

Lastly, the Department of Justice reports that sentences for anabolic steroids are "inadequate in comparison with those for other Schedule III substances." DOJ states that their specific concerns in this area will be outlined in the near future.

[43] These caps went into effect on November 1, 1991, as the result of Amendment #396.

IX. Issues for Consideration

The working group presented six proposals to the Judicial Working Group and the Commissioners in October 1992 that represented possible amendments to the drug (§2D1.1) and mitigating role (§3B1.2) guidelines. These proposals have been modified slightly since that time to correct clerical errors and technical inconsistencies. The comments of the Judicial Working Group have been added to each proposal. In addition, the staff working group created an Option 2 to Proposal 4 that builds on comments from Commissioners and the judges. These six proposals are found in section X of this report.

In addition to the Judicial Working Group proposals, Ronnie Scotkin has prepared five proposed amendments that relate to the operation of the drug guidelines. (See attachment 1 to this report). These proposed amendments represent issues that the were identified from the discussion of monitoring data, case law, hotline calls, and public comment. Executed amendment language is included in all proposals as a convenience to the Commission given the approaching deadline for publication for public comment. Alternatively, the Commission may want further analysis, additional research, or other non-amendment resolution to these issues.

Finally, the Commission may wish to solicit public comment on the advisability of adding an additional category to mitigating role that provides for a 6-level reduction. Suggested language for this solicitation is found in section X of this report.

X. Proposals

A. Proposal 1

This proposal deletes Application Note 2 to §3B1.2 (Mitigating Role). The examples in this note serve to narrowly define a minimal participant in a drug offense, thereby limiting the application of the 4-level reduction. Judges and probation officers have commented that this language often works to the disadvantage of those participants not included in the application note examples, yet are nevertheless minimally involved in the offense. In this regard, the last six words in the application note are particularly troubling. This example states that the minimal role adjustment would be appropriate for a courier whose smuggling transaction "involv[es] a small amount of drugs." Does this suggest that when a large amount of drugs is involved, a minimal role adjustment is not to be given? If role considerations are tied to the amount of drugs involved in the offense, this may contradict the rule that role adjustments are to be made on the basis of the defendant's relevant conduct. By the time role adjustments are applied relevant conduct has already considered the amount of drugs involved.

Additionally, Application Note 2 begins with a caution that "[i]t is intended that the downward adjustment for a minimal participant will be used infrequently." Judges and

probation officers applying the guidelines have commented that they are uncertain about the meaning of "infrequently" in the context of the case before them. Members of the Judicial Working Group have said that this sentence can create a reluctance to apply the mitigating role adjustment where it might be appropriate. Commissioners report that the role adjustments were designed to provide the court with the flexibility to establish differing offense levels and resultant sentences that reflect the varying culpability of defendants. The current language may limit this flexibility.

1. Judicial Working Group Comments

While the judges favored deletion of the last six words of the note "involving a small amount of drugs" they were not in favor of deleting the entire note (this is executed as Proposal 1, Option B). Some judges report that the first sentence was helpful to them and without it defendants would argue for a mitigating role adjustment in every case.

PROPOSAL 1

Amend §3B1.2 "Mitigating Role by deleting Application Note 2 in its entirety.

Guideline 3B1.2 "Mitigating Role" would then appear as follows:

§3B1.2 Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

Commentary

Application Notes:

1. ***Subsection (a) applies to a defendant who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.***

~~2. *It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation*~~

~~*than to offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.*~~

23. *For purposes of §3B1.2(b), a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal.*

PROPOSAL 1, Option 2

Amend §3B1.2 "Mitigating Role by deleting the last six words of Application Note 2.

Guideline 3B1.2 "Mitigating Role" would then appear as follows:

§3B1.2 Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.

In cases falling between (a) and (b), decrease by 3 levels.

Commentary

Application Notes:

1. *Subsection (a) applies to a defendant who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.*

2. *It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction.* ~~*involving a small amount of drugs.*~~

3. ***For purposes of §3B1.2(b), a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal.***

B. Proposal 2

When the Commission originally drafted §2D1.1, the drug quantity table ended at level 36 compared to its current resting place at level 42. This proposal would return the upper limit of the drug quantity table to level 36, and in so doing attempt to improve the interplay between the drug and role guidelines. The role adjustments are intended to provide an increase or decrease in the sanction for a defendant's offense conduct. However, the present structure of the drug quantity table can severely limit the operation of the aggravating role guideline (§3B1.1). The most serious aggravating role enhancement at

§3B1.1 increases the offense level by 4 levels. This increase cannot presently be achieved at the highest point in the drug quantity table because the Sentencing Table stops at level 43. Thus, a defendant with a Chapter Two offense level of 42 whose offense conduct warrants a 4-level enhancement, can receive at most a 1-level increase.

The mitigating role guideline (§3B1.2) also is constrained by the current structure of the drug quantity table. For example, a defendant whose relevant conduct swept in an amount of drugs that results in an offense level 42, who warrants a 4-level reduction for minimal role due to his extremely limited involvement in the offense (e.g., an offloader who helped to unload a single large shipment of drugs), has his offense level reduced to a level 38. This produces a guideline sentencing range of at least 235-293 months (at Criminal History Category I), substantially in excess of the 10-year mandatory minimum penalty required by statute for this amount of drugs. By lowering the drug quantity table ceiling to level 36, the 4-level reduction for mitigating role reduces the offense level to 32. This produces a guideline sentencing range of 121-151 months (at Criminal History Category I), permitting a sentence only slightly above the mandatory minimum sentence of 10 years.

Another consequence of the current drug quantity table ending at level 42 is that a sufficient quantity of drugs, coupled with an enhancement for weapon possession and/or aggravating role, requires the imposition of a term of life imprisonment. On the other hand, a ceiling of 36 with a 2-level enhancement for weapon possession and a 4-level enhancement for role will produce a sentencing range where life imprisonment is available, but not required.

1. Judicial Working Group Comments

The judges favored the results of this proposal, but expressed concern over the reaction that Congress might have to a proposal that lowered offense levels for those offenders who trafficked in extremely large quantities of drugs. On balance, they thought it worthy of further consideration. They suggested the addition of a cross reference to §2A1.1 where the offense conduct resulted in the death of a victim.

PROPOSAL 2

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

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of

conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(c) Cross Reference

(1) If the offense resulted in the death of a victim under circumstances that would constitute murder, apply §2A1.1 or §2A1.2 as appropriate.

(d) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
~~(1) 300 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); 1500 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); 15 KG or more of Cocaine Base; 300 KG or more of PCP, or 30 KG or more of PCP (actual); 300 KG or more of Methamphetamine, or 30 KG or more of Methamphetamine (actual), or 30 KG or more of "Ice"; 3 KG or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); 120 KG or more of Fentanyl; 30 KG or more of a Fentanyl Analogue; 300,000 KG or more of Marihuana; 60,000 KG or more of Hashish; 6,000 KG or more of Hashish Oil.~~	~~Level 42~~
~~(2) At least 100 KG but less than 300 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 500 KG but less than 1500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 5 KG but less than 15 KG of Cocaine Base; At least 100 KG but less than 300 KG of PCP, or at least 10 KG but less than 30 KG of PCP (actual); At least 100 KG but less than 300 KG of Methamphetamine, or at least 10 KG but less than 30 KG of Methamphetamine (actual), or at least 10 KG but less than 30 KG of "Ice";~~	~~Level 40~~

~~At least 1 KG but less than 3 KG of LSD~~
~~(or the equivalent amount of other Schedule I or II Hallucinogens);~~
~~At least 40 KG but less than 120 KG of Fentanyl;~~
~~At least 10 KG but less than 30 KG of a Fentanyl Analogue;~~
~~At least 100,000 KG but less than 300,000 KG of Marihuana;~~
~~At least 20,000 KG but less than 60,000 KG of Hashish;~~
~~At least 2,000 KG but less than 6,000 KG of Hashish Oil.~~

~~(3) At least 30 KG but less than 100 KG of Heroin Level 38~~
~~(or the equivalent amount of other Schedule I or II Opiates);~~
~~At least 150 KG but less than 500 KG of Cocaine~~
~~(or the equivalent amount of other Schedule I or II Stimulants);~~
~~At least 1.5 KG but less than 5 KG of Cocaine Base;~~
~~At least 30 KG but less than 100 KG of PCP, or at least 3 KG but less than 10 KG of PCP (actual);~~
~~At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of Methamphetamine (actual), or at least 3 KG but less than 10 KG of "Ice";~~
~~At least 300 G but less than 1 KG of LSD~~
~~(or the equivalent amount of other Schedule I or II Hallucinogens);~~
~~At least 12 KG but less than 40 KG of Fentanyl;~~
~~At least 3 KG but less than 10 KG of a Fentanyl Analogue;~~
~~At least 30,000 KG but less than 100,000 KG of Marihuana;~~
~~At least 6,000 KG but less than 20,000 KG of Hashish;~~
~~At least 600 KG but less than 2,000 KG of Hashish Oil.~~

~~(4)~~(1) ~~At least~~ 10 KG ~~but less than 30 KG~~or more of Heroin Level 36
(or the equivalent amount of other Schedule I or II Opiates);
~~At least~~ 50 KG ~~but less than 150 KG~~or more of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
~~At least~~ 500 G ~~but less than 1.5 KG~~or more of Cocaine Base;
~~At least~~ 10 KG ~~but less than 30 KG~~or more of PCP, or ~~at least~~ 1 KG ~~but less than 3 KG~~or more of PCP (actual);
~~At least~~ 10 KG ~~but less than 30 KG~~or more of Methamphetamine, or ~~at least~~ 1 KG ~~but less than 3 KG~~or more of Methamphetamine (actual), or ~~at least~~ 1 KG ~~but less than 3 KG~~or more of "Ice";
~~At least~~ 100 G ~~but less than 300 G~~or more of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
~~At least~~ 4 KG ~~but less than 12 KG~~or more of Fentanyl;
~~At least~~ 1 KG ~~but less than 3 KG~~or more of a Fentanyl Analogue;
~~At least~~ 10,000 KG ~~but less than 30,000 KG~~or more of Marihuana;
~~At least~~ 2,000 KG ~~but less than 6,000 KG~~or more of Hashish;
~~At least~~ 200 KG ~~but less than 600 KG~~or more of Hashish Oil.

NOTE: The balance of the Drug Quantity Table remains unchanged.

A NEW APPLICATION NOTE WOULD BE ADDED TO THE COMMENTARY:

16. If the quantity of drugs substantially exceeds that required for level 36, an upward departure may be warranted.

C. Proposal 3

This proposal is comprised of two parts. First, it provides a ceiling in the drug trafficking guideline (§2D1.1) for defendants who receive a mitigating role adjustment under §3B1.2. Second, the commentary to §3B1.2 is revised to provide greater definition, clarity, and consistency in application.

Judges and probation officers have argued that the guidelines may, in some cases, over-punish certain lower-level defendants when the sentence is driven in large part by the quantity of drugs involved in the offense. For such lower-level defendants, the quantity of drugs involved is often opportunistic and may be a less appropriate measure of the seriousness of the offense than when the defendant has assumed a mid-level or higher role. For this reason, this proposal restructures the operation of the mitigating role guideline (§3B1.2).

The proposed ceiling amendment would limit the impact quantity would play in determining the sentence of a low-level, mitigating role defendant. While quantity continues to play an important part in determining sentence, the amendment suggests that at some point (in this proposal the ten-year mandatory minimum quantity) other relevant specific offense characteristics should play the predominant role in driving a sentence higher or lower, as appropriate.

Commentary language in §3B1.2 may not be sufficiently specific in terms of providing adequate guidance for role reductions (particularly Application Notes 1 and 3).

In addition, the current role commentary permits those using, possessing, or carrying a firearm to receive mitigating role adjustments.

Finally, research has indicated that the current role guideline commentary may not be satisfactory in respect to its treatment of passive participants with very limited roles in an offense, or others remotely connected with the offense. Surprisingly, few of such defendants receive mitigating role adjustments even when their offense levels may be high due to a calculation based on all the drugs involved in the offense behavior.

Proposal 3 amends the commentary for mitigating role to ensure a more clear, concise definition of the defendant who merits a mitigating role. The 1991 Drug Working Group viewed a clarification of mitigating role as critical to reducing disparity in application in light of the proposed ceiling amendment. The proposal would bar defendants from any mitigating role adjustment if they use, possess, or carry a firearm in connection with the offense. Additionally, the proposed commentary explicitly addresses whether couriers and mules may receive mitigating role adjustments with respect to the quantity of drugs they personally carried. Under the proposal defendants who sell, own, or finance drug transactions are restricted from any mitigating role adjustment with respect to the quantity of drugs they personally sell, own, or finance.

1. Judicial Working Group Comments

The judges reacted favorably to Proposal 3, and offered several modifications to the commentary that has been incorporated.

PROPOSAL 3

Proposed Ceiling Amendment

§2D1.1(a)(3) is amended by adding the following sentence:

(3) the offense specified in the Drug Quantity Table set forth in subsection (c) below. Provided, that if the defendant qualifies for a mitigating role adjustment under §3B1.2 (Mitigating Role), the base offense level shall not be greater than level 32.

§3B1.2. Mitigating Role

* * *

Commentary

Application Notes:

1. *This section provides a downward adjustment in offense level for a defendant who has a minimal role (4-level reduction) or a minor role (2-level reduction) in the criminal activity for which the defendant is accountable under §1B1.3 (Relevant Conduct). In cases falling between (a) and (b), a 3-level reduction is provided. One factor that determines whether a defendant warrants a mitigating (minimal or minor) role is the defendant's role and relative culpability in comparison with the other participants in the criminal activity for which the defendant is accountable pursuant to §1B1.3 (Relevant Conduct). The fact that the conduct of one participant warrants an upward adjustment for an aggravating role (§3B1.1) or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating (minimal or minor) role. "Participant" is defined in the Commentary to §3B1.1 (Aggravating Role).*

2. ***This section does not apply if the defendant possessed a firearm, had ready access to a firearm, or directed or induced another participant to possess a firearm in connection with the criminal activity.***

3. ***Subsection (a) (4-level reduction) applies to a defendant who plays a minimal role in the criminal activity. To qualify for a minimal role adjustment under subsection (a), the defendant must be one of the least culpable of the participants in the criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating role listed in Application Note 6 below. In addition, although not determinative, a defendant's lack of knowledge or understanding of the scope and structure of the criminal activity and of the activities of others may be indicative of a minimal role (4-level reduction).***

4. *To qualify for a minor role adjustment under subsection (b) (2-level reduction), the defendant must be one of the less culpable participants in the criminal activity, but have a role that cannot be described as minimal.*

5. *The following is a non-exhaustive list of characteristics that ordinarily are associated with a mitigating (minimal or minor) role:*

   (a) the defendant performed only unskilled and unsophisticated tasks;

   (b) the defendant had no decision-making authority or responsibility;

   (c) total compensation to the defendant was small in amount, generally in the form of a flat fee; and

   (d) the defendant did not exercise any supervision over other participant(s).

6. *With regard to offenses involving contraband (including controlled substances), a defendant who*

   (a) sold, or played a substantial part in negotiating the terms of the sale of, the contraband;

   (b) had an ownership interest in any portion of the contraband; or

   (c) financed any aspect of the criminal activity

   shall not receive a mitigating (minimal or minor) role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, or owned, or for that aspect of the criminal activity that the defendant financed because, with regard to those acts, the defendant has acted as neither a minimal nor a minor participant. For example, a retail-level drug dealer who sells 100 grams of cocaine and who is held accountable under §1B1.3 (Relevant Conduct) for only that quantity shall not be considered for a mitigating (minimal or minor) role adjustment. In contrast, a retail-level drug dealer who sells 100 grams of cocaine, but who is held accountable, pursuant to §1B1.3, for a jointly undertaken criminal activity involving 5 kilograms of cocaine may, if otherwise qualified, be considered for a mitigating (minimal or minor) role adjustment, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendant sold.

7. *A defendant who is entrusted with a quantity of contraband for purposes of transporting such contraband (e.g., a courier or mule, not an offloader or deckhand),*

   ***[Option A** -- shall not receive a minimal role (4-level) adjustment for that quantity of contraband that the defendant transported. If such a defendant otherwise qualifies for a role adjustment, consideration may be given to a minor role (2-level) adjustment.]*

   ***[Option B** -- shall not receive a minimal role (4-level) adjustment for that quantity of contraband that the defendant transported. Consideration may be given to a minor role (2-level) adjustment, if the defendant establishes that he transported contraband on a single occasion, that he neither sold nor had an ownership interest in any portion of the contraband, and that he otherwise qualifies for a role adjustment (see e.g., notes 6 and 7).]*

   ***[Option C** -- shall not receive a mitigating (minimal or minor) role adjustment for that quantity of contraband that the defendant transported.]*

8. *Consistent with the structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating (minimal or minor) role adjustment. In determining whether a mitigating (minimal or minor) role adjustment is warranted, the court should consider all of the available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In making a determination as to whether the defendant had a mitigating role in the offense, a court may consider a defendant's assertion of facts relative to his role but, as in similar contexts, determinations of credibility are the province of the court.*

Background: The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.

D. Proposal 4

The intent of Congress, as expressed in 21 U.S.C. § 811(c) is to classify controlled substances primarily based on an assessment of their history and potential for abuse, psychic and physiological dependence, scientific evidence regarding effects, and risk to the public health. Section 812 of Title 21 classifies the substances into five schedules, a rank ordering by drug type reflective of the considerations listed in 21 U.S.C. § 811(c).

Drug type is the first criterion used by Congress in structuring statutory penalties for trafficking in controlled substances (see 21 U.S.C. § 841(b)). Specific sections and subsections of the penalty statute use drug type/schedule in combination with drug amount to determine penalties (including mandatory minimums). In a survey of state guideline sentencing systems, Commission staff found that most states differentiate punishment on the basis of drug type and schedule rather than drug quantity.

This proposal is an attempt to restructure §2D1.1 as a drug type/schedule based guideline as several state systems have done.[44] Instead of deriving the base offense level from quantity, the type of drug involved in the offense determines the base offense level. In this proposal, a base offense level of 26 is established for the most serious drug types: Heroin, Cocaine, Cocaine Base, PCP, and Methamphetamine. A base offense level of 22 is assigned to any other Schedule I substances and all Schedule II substances. Finally, a base offense level of 18 is established for offense conduct involving Marihuana or any Schedule III, IV, or V substances. Drug type, however, would not be the sole indicator of offense seriousness. In addition to the type/schedule-driven base offense level, specific offense characteristics would consider other factors, thereby fashioning penalties that reflect defendant culpability and risk of harm associated with the offense behavior. Specific

[44] The following state sentencing systems use a drug type/schedule system: Florida, Louisiana, Kansas, Michigan, Oregon, Virginia, Tennessee, and Washington.

offense characteristics for risk/violence and defendant culpability increase or reduce the offense level. For example, a defendant convicted of cocaine distribution would receive a base offense level of 26, and specific offense characteristics could increase the offense level to 40 if the offense involved serious risk factors and an extensive operation. Conversely, the specific offense characteristics could reduce the base offense level of 26 to an offense level of 22 for a simple courier of cocaine who posed no risk and committed no other aggravating offense behavior.

Included in this proposal is an application note with instruction on factors that the court might appropriately consider as reasons for departure. Here, quantity is taken into consideration. If a substantially greater or lesser amount of drugs is involved in the offense (in this note this is quantified as an amount of drugs 10 levels greater or lower than the offense level for that drug as listed in the current drug quantity table), departure is suggested. The proposed system would not override the existing mandatory minimums, which, when applicable, would in effect become the sentencing range (§5G1.1).

1. Judicial Working Group Comments

Judges found aspects of this proposal appealing, however, not the determination of the base offense level on type or schedule of substance. This was seen as too radical a change from the present quantity-driven system. However, it was suggested that all three specific offense characteristics offered sound basis for distinguishing the seriousness of offense conduct.

2. Revised Working Group Proposal

Upon consideration of the comments of the Judicial Working Group, the staff working group submits Proposal 4, Option 2. This proposal combines the specific offense characteristics of Proposal 4 with the drug quantity table found in Proposal 2. Together these proposals create a guideline that considers quantity as a very significant measure of offense seriousness; it can produce a base offense level as high as 36. While quantity alone could require a sentence of almost twenty years for the first offender, it could not alone require a life sentence. The addition of specific offense characteristics for risk concerns and leadership in large organizations could add as many as fourteen additional offense levels. These specific offense characteristics target serious additional offense behavior. This, coupled with the quantity-driven base offense level, creates a guideline that provides greater precision in sanctioning the most serious drug traffickers while not over-punishing the low level defendant. A final specific offense characteristic provides for a four-level reduction for the offender with limited offense behavior culpability. Finally, a cross reference to Chapter Two, Part A is added where death resulted from the offense conduct.

PROPOSAL 4 - Option 1

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

(a) Base Offense Level (If the offense involves more than one drug type, apply the one with the highest base offense level):

(1) **26,** if the Drug Type is Heroin, Cocaine, Cocaine Base, PCP, or Methamphetamine;

(2) **22,** if the Drug Type is any other Schedule I or any Schedule II Controlled Substance; or

(3) **18,** if the Drug Type is Marihuana, or any Schedule III, IV, or V Controlled Substance.

(b) Specific Offense Characteristics

(1) (If more than one applies, use the greatest):

(A) If the defendant possessed a dangerous weapon (including a firearm), increase by **2** levels.

(B) If the defendant brandished, displayed, or otherwise used a dangerous weapon (including a firearm), increase by **4** levels.

(C) If the defendant discharged a firearm, or otherwise created a substantial risk of death or serious bodily injury, increase by **6** levels.

(2) If the defendant committed the offense in concert with five or more other participants and the defendant was the principal administrator, organizer, or leader of the criminal activity or was one of several such principal administrators, organizers, or leaders, increase as follows based on the size of the organization:

	Number of Other Participants	Increase in Level
(i)	At least 5 but less than 15	add **4**
(ii)	At least 15 but less than 50	add **6**; or
(iii)	50 or more	add **8**.

If this subdivision is applicable, do not apply §3B1.1 (Aggravating Role).

(3) If the defendant did not own or sell the drugs, did not exercise decision-making authority, did not finance the operation, and did not use relevant special skills, decrease by **4** levels.

Provided, however, that this subdivision is not to be applied if an increase has been made under subdivision (b)(1).

If this subdivision is applicable, do not apply §3B1.2 (Mitigating Role).

(c) Special Instructions

(1) If the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense, increase to level 43.

(2) If the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance, increase to level 38.

Commentary

Application Notes:

1. *Where the offense involved unusually small or large drug amounts, the court may consider departure from the applicable guideline range. Following is a partial listing of unusual drug amounts by drug type.*

Unusually low amount -

Less than 10 G of Heroin
Less than 50 G of Cocaine
Less than 500 MG of Cocaine Base
Less than 10 G of PCP
Less than 10 G of Methamphetamine
Less than 50 MG of LSD
Less than 2 G of Fentanyl
Less than 500 MG of Fentanyl Analogue
Less than 250 G of Marihuana
Less than 50 G of Hashish
Less than 5 G of Hashish Oil
Less than 125 G of Secobarbital or Schedule III substances
Less than 250 units of anabolic steroids.

Unusually high amount -

30 KG or more of Heroin
150 KG or more of Cocaine
1.5 KG or more of Cocaine Base
30 KG or more of PCP
30 KG or more of Methamphetamine
30 G or more of LSD
1.2 KG or more of Fentanyl
300 G or more of Fentanyl Analogue
700 KG or more of Marihuana
140 KG or more of Hashish
14 KG or more of Hashish Oil

PROPOSAL 4 - Option 2

PART D - OFFENSES INVOLVING DRUGS

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

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

(a) Base Offense Level (Apply the greatest):

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) (If more than one applies, use the greatest):

(A) If the defendant possessed a dangerous weapon (including a firearm), or directed or induced another participant to possess a firearm, increase by **2** levels.

(B) If the defendant brandished, displayed, or otherwise used a dangerous weapon (including a firearm), or directed or induced another participant to do so, increase by **4** levels.

(C) If the defendant discharged a firearm, or directed or induced another participant to do so, or otherwise created a substantial risk of death or serious bodily injury, increase by **6** levels.

(2) If the defendant committed the offense in concert with five or more other participants and the defendant was the principal organizer or leader of the criminal activity or was one of several such principal organizers or leaders, increase as follows based on the number of participants involved in the criminal activity:

	Number of Other Participants	Increase in Level
(i)	At least 5 but less than 15	add 4
(ii)	At least 15 but less than 50	add 6; or
(iii)	50 or more	add 8.

If this subdivision is applicable, do not apply §3B1.1 (Aggravating Role).

(3) If the defendant did not own or sell the drugs, did not exercise decision-making authority, did not finance the operation, and did not use relevant special skills, decrease by **4** levels.

Provided, however, that this subdivision is not to be applied if an increase has been made under subdivision (b)(1), or the defendant has been convicted of 18 U.S.C. § 924(c).

If this subdivision is applicable, do not apply §3B1.2 (Mitigating Role).

(4) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.

(c) Cross Reference

(1) If the offense resulted in the death of a victim under circumstances that would constitute murder, apply §2A1.1 or §2A1.2 as appropriate.

(d) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
~~(1) 300 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); 1500 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); 15 KG or more of Cocaine Base; 300 KG or more of PCP, or 30 KG or more of PCP (actual); 300 KG or more of Methamphetamine, or 30 KG or more of Methamphetamine (actual), or 30 KG or more of "Ice"; 3 KG or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); 120 KG or more of Fentanyl; 30 KG or more of a Fentanyl Analogue; 300,000 KG or more of Marihuana; 60,000 KG or more of Hashish; 6,000 KG or more of Hashish Oil.~~	~~Level 42~~

~~(2) At least 100 KG but less than 300 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 500 KG but less than 1500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 5 KG but less than 15 KG of Cocaine Base; At least 100 KG but less than 300 KG of PCP, or at least 10 KG but less than 30 KG of PCP (actual); At least 100 KG but less than 300 KG of Methamphetamine, or at least 10 KG but less than 30 KG of Methamphetamine (actual), or at least 10 KG but less than 30 KG of "Ice"; At least 1 KG but less than 3 KG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 40 KG but less than 120 KG of Fentanyl; At least 10 KG but less than 30 KG of a Fentanyl Analogue; At least 100,000 KG but less than 300,000 KG of Marihuana; At least 20,000 KG but less than 60,000 KG of Hashish; At least 2,000 KG but less than 6,000 KG of Hashish Oil.~~ ~~Level 40~~

~~(3) At least 30 KG but less than 100 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 150 KG but less than 500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 1.5 KG but less than 5 KG of Cocaine Base; At least 30 KG but less than 100 KG of PCP, or at least 3 KG but less than 10 KG of PCP (actual); At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of Methamphetamine (actual), or at least 3 KG but less than 10 KG of "Ice"; At least 300 G but less than 1 KG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 12 KG but less than 40 KG of Fentanyl; At least 3 KG but less than 10 KG of a Fentanyl Analogue; At least 30,000 KG but less than 100,000 KG of Marihuana; At least 6,000 KG but less than 20,000 KG of Hashish; At least 600 KG but less than 2,000 KG of Hashish Oil.~~ ~~Level 38~~

~~(4)~~(1) ~~At least~~ 10 KG ~~but less than 30 KG~~or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); ~~At least~~ 50 KG ~~but less than 150 KG~~or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); ~~At least~~ 500 G ~~but less than 1.5 KG~~or more of Cocaine Base; ~~At least~~ 10 KG ~~but less than 30 KG~~or more of PCP, or ~~at least~~ 1 KG ~~but less than 3 KG~~or more of PCP (actual); ~~At least~~ 10 KG ~~but less than 30 KG~~or more of Methamphetamine, or ~~at least~~ 1 KG ~~but less than 3 KG~~or more of Methamphetamine (actual), or ~~at least~~ 1 KG ~~but less than 3 KG~~or more of "Ice"; ~~At least~~ 100 G ~~but less than 300 G~~or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); ~~At least~~ 4 KG ~~but less than 12 KG~~or more of Fentanyl; ~~At least~~ 1 KG ~~but less than 3 KG~~or more of a Fentanyl Analogue; ~~At least~~ 10,000 KG ~~but less than 30,000 KG~~or more of Marihuana; ~~At least~~ 2,000 KG ~~but less than 6,000 KG~~or more of Hashish; ~~At least~~ 200 KG ~~but less than 600 KG~~or more of Hashish Oil. Level 36

Note: The balance of the Drug Quantity Table remains unchanged.

E. Proposal 5

This proposal would place an upper limit on the offense level to which a minimal or minor participant in a drug case is exposed. The rationale for this is that once a certain quantity of drugs is reached, the amount of a controlled substance may not be the best measure of the culpability of a minor or minimal participant; e.g., a ship carrying 25,000 kilos of marihuana may require three deck hands; one carrying 100,000 kilos of marihuana may require eight deck hands. Are the eight deck hands on the larger boat substantially more culpable than the three deck hands on the smaller vessel? Under the current guidelines the guideline range for the deck hands on the smaller boat is 108-135 months if given a 3- level reduction for acceptance of responsibility (i.e., offense level 38, minus 4 levels for minimal role, minus 3 levels for acceptance of responsibility).[45] For the eight deck hands on the larger boat, the current guideline range is 135-168 months if a 3-level reduction for acceptance of responsibility (i.e., offense level 40, minus 4 levels for minimal role, minus 3 levels for acceptance of responsibility).[46] Under proposal 5, an upper limit on the offense level would be established for defendants with minimal or minor roles, depending upon the type of controlled substance. The U.S. Parole Commission has used the same type of guideline structure to cap offense levels for less culpable defendants in drug cases for many years (see 28 C.F.R. 2.20).

1. Judicial Working Group Comments

This proposal was not favored by the judges. While seeing the benefit of limiting the sentencing exposure of less culpable defendants, they preferred the simpler approach found in Proposal 3.

---

[45] The current guideline range is 151-188 months without acceptance of responsibility.

[46] The current guideline range is 188-235 months without acceptance of responsibility.

PROPOSAL 5

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

* * *

(b) Specific Offense Characteristics

* * *

(3) If the defendant was a minimal participant, decrease by 4 levels, but if the offense involved –

(A) only marihuana, hashish, hashish oil, a Schedule I or II Depressant, or a Schedule III, IV, or V substance,

in no event shall the offense level be greater than level [16-26]; or

(B) any other controlled substance, in no event shall the offense level be greater than level [20-30] .

(4) If the defendant was a minor participant, decrease by 2 levels, but if the offense involved –

(A) only marihuana, hashish, hashish oil, a Schedule I or II Depressant, or a Schedule III, IV, or V substance, in no event shall the offense level be greater than level [22-28] ; or

(B) any other controlled substance, in no event shall the offense level be greater than level [26-32].

* * *

Commentary

* * *

Application Notes:

* * *

15. Do not apply an adjustment from §3B1.2 (Mitigating Role) if the offense level is adjusted under subsection (b)(3) or (b)(4).]

F. Proposal 6

Five options for compressing the Drug Quantity Table are shown below. Although the different options reflect somewhat different rationales, the effect of each option would be to (1) reduce the number of gradations in the drug quantity table, making the guidelines somewhat less sensitive to drug quantity, and (2) slightly lower the offense levels, particularly at the upper end of the scale.

For ease of presentation, only the current and proposed offense levels for heroin offenses are shown. As the controlled substances in the Drug Quantity Table are related by established ratios, the offense levels for the other controlled substances would be conformed according to these ratios.

1. Option 6A

When the Commission initially developed the Drug Quantity Table, it keyed the offense level for 1 KG of heroin (ten-year mandatory minimum) at level 32 (121-151 months for a first offender) and 100 grams of heroin (five-year mandatory minimum) at level 26 (63-78 months for a first offender) because these guideline ranges included the five- and ten-year mandatory minimum sentences. However, offense levels 30 (97-121 months) and 24 (51-63 months) also include the five-year and ten-year mandatory minimum sentences, as do offense levels 31 (108-135 months) and 25 (57-71 months). Option 6A displays how the heroin offense levels would look if the Commission used the offense levels corresponding to the lowest (rather than the highest) guideline ranges that include the statutory minimum sentence.

2. Option 6B

The legislative history of the Anti-Drug Abuse Act of 1986 provides support for the proposition that the heartland of the conduct that the Congress envisioned for the ten year mandatory minimum was the large scale drug dealer. The typical or heartland role adjustment for such cases arguably is 4 levels. If this is correct, the Commission's drug offense levels (when applied in conjunction with the role in the offense enhancements), in effect, could be described as "double punishing." That is, although Congress envisioned a level 32 offense for a first offender large scale dealer with 1 kilo of heroin (or a level 30, see the discussion at Option 6A), the Commission has in effect provided a level 36 for the heartland case (level 32 from the Drug Quantity Table plus a 4-level increase from §3B1.1). Likewise, it may be argued that the heartland case of the mid-level dealer at whom the five-year mandatory minimum was aimed includes a 2-level enhancement for role in the offense. If so,

the Commission has assigned an offense level of 28 (26 from the Drug Quantity Table plus 2 levels from §3B1.1) to the heartland case for which Congress envisioned an offense level of 26 (or level 24, see discussion at Option 6A). Option 6B shows how the heroin offense levels would look if adjusted to avoid this double punishment (pegging the adjusted total offense levels to levels 32 and 26).

3. Option 6C

This option combines Options 6A and 6B. It adopts the logic of Option B, but pegs the total offense levels to levels 30 and 24 (as in Option 6A).

4. Option 6D

This option is Option 6A except that the offense level is capped at level 36 (with substantially larger quantities to be addressed by departure). See the discussion in Proposal 2.

5. Option 6E

This option is Option 6B except that the offense level is capped at level 36 (with substantially larger quantities to be addressed by departure). See the discussion in Proposal 2.

6. Judicial Working Group Comments

The judges offered no reaction to these proposals.

OFFENSE LEVELS FOR HEROIN DISTRIBUTION
OFFENSES (CURRENT GUIDELINES
AND OPTIONS 6A, 6B, 6C, 6D, and 6E)

OFFENSE LEVEL	CURRENT GUIDELINES	OPTION 6A	OPTION 6B	OPTION 6C	OPTION 6D	OPTION 6E
42	300 KG	-	-	-	-	-
40	100 KG	300 KG	-	-	-	-
38	30 KG	100 KG	300 KG	-	-	-
36	10 KG	30 KG	100 KG	300 KG	30 KG	100 KG
34	3 KG	10 KG	30 KG	100 KG	10 KG	30 KG
32	1 KG	3 KG	10 KG	30 KG	3 KG	10 KG
30	700 G	1 KG	3 KG	10 KG	1 KG	3 KG
28	400 G	700 G	1 KG	3 KG	700 G	1 KG
26	100 G	400 G	500 G	1 KG	400 G	500 G
24	80 G	100 G	100 G	500 G	100 G	100 G
22	60 G	70 G	70 G	100 G	70 G	70 G
20	40 G	40 G	40 G	50 G	40 G	40 G
18	20 G	20 G	20 G	20 G	20 G	20 G
16	10 G	10 G	10 G	10 G	10 G	10 G
14	5 G	5 G	5 G	5 G	5 G	5 G
12	less than 5 G	less than 5 G	less than 5 G	less than 5G	less than 5G	less than 5G

Note: The amounts shown are the minimum quantities associated with each offense level offense (e.g., in the current guidelines, offense level 40 covers at least 100 KG but less than 300 KG).

G. Proposed Question for Public Comment

In addition to the above-listed proposed amendments, the Judicial Working Group suggested that the Commission solicit public comment on the following question:

"Should the Commission add a third mitigating role category to §3B1.2, that would provide a 6-level reduction for participants who have a very minor role in the offense? Specifica ly, the Commission solicits comment regarding language that could be used to identify defendants who would qualify for such a new mitigating role category."

Appendix A

REPORT

of the

DRUG WORKING GROUP
CASE REVIEW PROJECT

March 27, 1992

REPORT
of the
DRUG WORKING GROUP
CASE REVIEW PROJECT

TABLE OF CONTENTS

I. INTRODUCTION

This report summarizes the work of the Drug Working Group case review project. Detailed supporting documentation is available as an attachment to this report and from the Working Group.

The Working Group reviewed data relevant to the consideration of amendments during the 1992 amendment cycle in the following areas:

§1B1.3 (Relevant Conduct) (Amendment 1(A)). This amendment to guideline and commentary is intended to clarify the scope of the guideline, and to reduce confusion in application.

§3B1.2 (Mitigating Role) (Amendment 18(A)). This amendment to the mitigating role guideline and commentary is intended to clarify the factors a court must consider in determining whether a defendant warrants a mitigating role reduction, and to facilitate application of the guideline.

§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) (Amendment 19). This amendment is intended to limit the offense level of certain mitigating role defendants involved with large quantities of drugs.

§2D1.8 (Renting or Managing a Drug Establishment) (Amendment 20). This amendment applies the §2D1.1 quantity table to 21 U.S.C. §856 offenses.

II. §1B1.3 (RELEVANT CONDUCT) (AMENDMENT 1(A))

A. Summary

Concern has been expressed that some practitioners in the field may not fully understand the proper scope of relevant conduct as it is trained by Commission staff, and that this problem is largely attributable to unclear language in the guideline and commentary. See Public Comment Summary.

B. Profile of Relevant Conduct Determinations

To assist the Commission's consideration of this issue, the Working Group completed a relevant conduct profile of the 815 drug cases reviewed. These cases were drawn from a random 25 percent sample of all drug cases appearing in the 25 percent Departure Sample of MONFY90 cases. See Section 24 for more detail on the methodology and coding instruments used.

The relevant conduct profile delineated --

(1) the quantity of drugs with which the defendant was "personally involved" (excludes quantities for which defendant would only have been held responsible under the "otherwise accountable" language of §1B1.3);

(2) the court's finding of relevant conduct (or, in the absence of a statement of reasons, the Pre-Sentence Report determination of relevant conduct);

(3) the quantity of drugs with which the entire conspiracy was involved (includes all §1B1.3 relevant conduct quantities, as well as quantities for which the defendant would not be accountable as they were beyond the scope of the jointly undertaken conduct of the defendant, as determined by the court).

Five variations of these three quantities (denominated classes A,B,C,D,F) were observed in practice. (A sixth possible variation (class E below) was not observed in the sample.)

Class A -- the quantity of drugs with which he was personally involved (see coding manual) was equal to the quantity for the entire conspiracy, and the court held the defendant accountable for such quantity. In other words, defendant was held accountable by the court for the full quantity of drugs with which he was personally involved.

Class B -- defendant was personally involved with less drugs than the conspiracy, and was held accountable only for those drugs.

Class C -- defendant was held accountable for the drugs of the entire conspiracy, but was personally involved with a smaller quantity.

Class D -- defendant was held accountable for a smaller quantity of drugs than he was personally accountable for, and he was personally involved with the same amount of drugs as the entire conspiracy.

Class E -- defendant was held accountable by the court for a quantity of drugs less than that of the entire conspiracy, but more than that with which he was personally involved.

Class F -- similar to class D, but he was personally involved with less drugs than the entire conspiracy.

Examples:

Class	Personally Involved (base offense level)	Court Assessed (base offense level)	Entire Conspiracy (base offense level)
A	20	20	20
B	10	10	20
C	10	20	20
D	20	10	20
E	10	15	20
F	15	10	20

The tables at Section 18 of the Appendix depict the frequency of these variations in the 815 cases reviewed. Class A was observed in the majority of cases (70%), and classes B and D were each observed in 12 percent of the cases. Classes C and F were rarely observed. Class E was, as noted above, not observed. Thus, §1B1.3's "otherwise accountable" provision may have played only a limited role in setting the offense level in 70 percent of the cases.

III. §3B1.2 (MITIGATING ROLE) (AMENDMENT 18(A))

A. Summary

To assist the Commission in its consideration of Amendment 18(A), the Working Group completed an extensive review of case law, and conducted a detailed review of almost 1500 drug case files. See the discussion on methodology above.

Case law was reviewed for offense conduct (referred to herein as "offense factors" or "factors") the courts typically considered as warranting a mitigating role adjustment or no such adjustment. In the fall of 1991, in light of this review, the Working Group reviewed approximately 600 cases.

After the Commission published proposed amendment 18(A) with a specific list of factors, the Working Group reviewed an additional 815 cases to profile drug defendants in

terms of the role adjustments applied and the specific factors and offender functions that might impact on the Commission's consideration of amendment 18(A).[1]

Following are data regarding --

* the frequency of mitigating role adjustments among certain populations of MONFY90 defendants;

* profiles of mitigating role adjustment and no-adjustment defendants in terms of offense factor (e.g., how many minimal role (-4) defendants had decision-making authority);

* the relationship of offense factors to mitigating role adjustments (e.g., how often an offense factor is more or less likely to result in a mitigating role adjustment);

* the relationship of offense factors to courier and mule functions (e.g., how many couriers owned some part of the drugs involved);

* the estimated prison impact of the amendment.

B. Frequency of Mitigating Role Adjustments

The Working Group profiled the frequency of role adjustments in all §2D1.1 MONFY90 cases, and in the 815 MONFY90 cases reviewed. See Section 3 of the Appendix. The frequencies in the two populations were generally similar (9.7% of all §2D1.1 defendants received minor role (-2), compared with 9.6% of the sample; 84.4% of all §2D1.1 defendants received no mitigating role reduction (0), compared with 85.0% of the sample). Small variations were noted in the relative percentages of minimal role (-4) defendants (5.0% of all §2D1.1 defendants, 3.6% of the sample), and intermediate role (-3) defendants (0.8% of all §2D1.1 defendants, 1.5% of the sample).[2]

---

[1] The modified amendment at Section 1 of the Appendix has, where feasible, been annotated to reference data in the Appendix that addresses specific issues or elements of the amendment. Section 3 of the Appendix also compares and contrasts variations of the modified amendment, and their impact on frequency of mitigating role adjustments.

[2] Some variation was also noted among "missing" defendants (0.0% of all MONFY90 defendants, 0.8% of the sample).

C. Offense Factors and Role Adjustments[3]

1. Profiles of Mitigating Role Adjustments and Relevant Offense Factors

This section briefly profiles the offense factors commonly associated with defendants who received a mitigating role adjustment. A factor was considered "generally" present where it appeared more than 70 percent of the time among mitigating role defendants.[4]

Not the Only Known Participant: Mitigating role defendants are generally (86%) not the only known participant in the offense. That is, in 86 percent of the cases, other defendants were known.[5] (However, a relatively large number of -4 defendants -- possibly from EDNY -- were the only known participants.)

No Possession of Weapons: Mitigating role defendants generally (92%) did not possess or use a weapon. No (0%) -4 or -3 defendant had a firearm.

Performed Unskilled Tasks: Mitigating role defendants generally performed no skilled tasks. Few or no mitigating role defendants piloted a plane or ship, financed operations, directed large or mid-level operations, or grew or manufactured controlled substances. Half of those who had only a passive role in the offense (i.e., performed no tasks), who merely looked out for law enforcement authorities, or who acted as gofers received mitigating reductions.

Decision-Making Authority: Mitigating role defendants (but not -2 defendants) generally (32-78%)[6] had no decision-making authority (depending on treatment of defendants assertions). Minor role (-2) defendants (50-75%) had decision-making authority.

---

[3] The data referenced in this section and those that follow are drawn from various Sections of the Appendix.

[4] Where a response was "Unknown" it was not counted as a "Yes" or "No." Where a response was "Defendant's Assertion Only," it generally did not affect the profile, whether the responses were all counted as "Yes" or all as "No." The exception to this was in the case of decision-making authority and ownership, where counting "Defendant's Assertion Only" as "Yes" resulted in a somewhat inconclusive profile for the factors. In this case, and cases that follow, a range was given, based on all "Defendant's Assertion Only" responses first counted as "Yes" and then as "No." This information is particularly relevant to the question of whether to permit a mitigating role adjustment based on defendant's uncorroborated assertion.

[5] Possible responses to this question were limited to "Yes" and "No."

[6] See note 4 supra.

Compensation Less than $2000: Mitigating role defendants generally (73%) received small payments in amounts less than $2000. Note: assertions regarding the amount of compensation occurred in only 44 percent of all cases. Those assertions were corroborated in only 18 percent of all cases. See Section 15 of the Appendix.

Flat Fee Compensation: Mitigating role defendants generally (46%) received compensation in the form of a flat fee.[7] Note: responses regarding the form of compensation occurred in 63 percent of all cases, and were corroborated in 42 percent of all cases. See Section 15 of the Appendix.

Partial Knowledge of Conspiracy: Mitigating role defendants generally (68-81%) had only partial knowledge of the scope of conspiracy.

No Ownership of Drugs: Mitigating role defendants generally (48%-79%)[8] had no ownership of any portion of drugs. Note: corroboration of defendant's ownership was available in 61 percent of all cases.

No Financing: Mitigating role defendants generally (86%) did not finance any aspect of criminal activity.

Control Over Drugs: Mitigating role defendants generally (75%) had control over the drugs.

Class A Relevant Conduct: Minimal role (-4) defendants were generally (72%) class A (personal quantity same as relevant conduct and entire conspiracy). Minor (-2) and intermediate roles generally (71%) were class A and B (personal involvement was less than entire conspiracy but court assessed only quantity with which defendant was personally involved). See Section II, supra, for explanations of the classes.

2. Profiles of No-Adjustment Defendants and Relevant Offense Factors

Not the Only Known Participant: No-adjustment defendants are generally (73%) not the only known participant in the offense.

---

[7] Due to the large number of possible responses here, and the high frequency of "Flat Fee" responses relative to the infrequency of other responses, the requirement that a factor be present 70 percent of the time before being considered as "generally" present was modified for this factor.

[8] See note 4 supra.

No Possession of Weapons: No-adjustment defendants generally (80%) did not possess or use a weapon.

Performed Skilled Tasks: No-adjustment defendants frequently performed skilled tasks, including having piloted craft, financed operations, directed large or mid-level operations, or grown or manufactured controlled substances. Mitigating role adjustments were applied in half of the cases where defendant had only a passive role in the offense (i.e., performed no tasks), looked out for law enforcement authorities, or acted as a gofer.

Decision-Making Authority: No-adjustment defendants generally (64-80%) had decision-making authority.

Compensation Less than $2000: No-adjustment defendants generally (76%) received small payments in amounts less than $2000. See note supra on corroboration.

Percentage of Profits Compensation: No-adjustment defendants generally (50%) received compensation in the form of a percentage of the profits. See note supra on corroboration.

Knowledge of Conspiracy: No-adjustment defendants (37-63%) had full knowledge of the scope of conspiracy, and 33-60%) had no or partial knowledge (depending on how "only known defendants" are counted.

Ownership of Drugs: No-adjustment defendants generally (40-60%) had ownership of a portion of the drugs, while 18-37% did not (depending on how defendant's assertions are characterized).

No Financing: No-adjustment defendants generally (81%) did not finance any aspect of criminal activity.

Control Over Drugs: No-adjustment defendants generally (92%) had control over the drugs.

Class A Relevant Conduct: No-adjustment defendants generally (73%) had class A relevant conduct (quantity with which personally involved is the same as relevant conduct and entire conspiracy quantities.

D. Relating Offense Factors and Mitigating Role Adjustments

1. Offense Factors that Tend to Bear a Relationship to Whether a Mitigating Role Adjustment is Applied

The following offense factors tended to bear a relationship to the application of a mitigating role adjustment; that is, defendants having the factor seemed to have been more (or less) likely to receive a mitigating role adjustment. The factor has been noted where defendants demonstrating the factor received mitigating role reductions with particular frequency or infrequency, relative to the overall frequency with which the general population of defendants received mitigating role adjustments.

Defendant was the Only Known Participant in the Offense (Less Likely to Receive Reduction -- "Less Likely"): although mitigating role adjustment defendants make up 15 percent of the population, only 10 percent of persons who were the only known participant were given mitigating role adjustments. Those who were not the only known participants were given role reductions at the same rate (17%) as the general population.

Defendant Possessed/Used a Weapon (Less Likely): although mitigating role adjustment defendants make up 15 percent of the population, only 6 percent of persons who possessed or used a weapon received a mitigating role reduction (in all of these cases they received a minor role (-2) reduction, never an intermediate (-3) or minimal role (-4) reduction).

Coconspirator Possessed/Used a Weapon (More Likely to Receive Reduction -- "More Likely"): although mitigating role adjustment defendants make up only 15 percent of the population, where the coconspirator possessed or used a weapon, 25 percent of defendants received a mitigating role reduction. Where neither a coconspirator nor the defendant possessed/used a weapon, reductions were applied at the same rate (16%) as for the general population.

Performed Only Unskilled Tasks (More Likely): although mitigating role adjustment defendants make up 15 percent of the population, including 22 percent of persons transporting drugs with the aid of some vehicle or equipment, 50 percent of passive participants, 53 percent of persons running errands or performing carpentry and the like, 44 percent of persons providing early warnings to dealers, 20 percent of persons running money, 32 percent of persons carrying drugs on their person, 20 percent of persons offloading drugs, 39 percent who rented or permitted their residences to be used, all received mitigating role reductions.

Performed Skilled Tasks (Less Likely): although mitigating role adjustment defendants make up 15 percent of the population, 17 percent of persons who financed the activity, 13 percent of persons who manufactured or grew drugs, none

(0%) who imported or organized and directed a large operation, 5 percent who directed mid-level operations, and none (0%) who piloted a plane or ship, received mitigating role adjustments.

Performed Indeterminate Skill Tasks: although mitigating role adjustment defendants make up 15 percent of the population, none (0%) who performed personal-security functions, 21 percent who brokered deals, and 9 percent who sold user-quantity drugs, received mitigating role adjustments.

No Decision-Making Authority (More Likely):[9] although mitigating role adjustment defendants make up 15 percent of the population, only 8 percent of persons with decision-making authority were given mitigating role adjustments. Thirty-nine percent of persons with no decision-making authority were given mitigating role adjustments.

Small Payments to Defendant (More Likely):[10] mitigating role adjustment defendants make up 23 percent[11] of the population, and received mitigating role adjustments at the following rates --

* 10 percent receiving more than $10000 in compensation,
* 26 percent of persons receiving $5000 or less,
* 24 percent of persons receiving $2000 or less,
* 28 percent receiving $1000 or less,
* 32 percent receiving $500 or less, and
* 36 percent receiving $200 or less.

Flat Fee (Non-Percentage) Form of Compensation to Defendant (More Likely): although mitigating role adjustment defendants make up 23 percent[12] of the population, only 2 percent of defendants receiving a percentage of the profits from the activity received a mitigating role reduction; and 56 percent received flat fees. Note: see the discussion supra regarding corroboration.

---

[9] Where the presence or absence of decision-making authority was corroborated. Where not corroborated, the figures are 12 percent receiving reductions where "Defendant's Assertion Only" equals "Yes," and 67 percent where "Defendant's Assertion Only" equals "No." See note 34 supra.

[10] See discussion supra regarding corroboration.

[11] Due to the large number of unknown responses, the percentage of the population is 23 percent instead of the usual 15 percent.

[12] See note 11 supra.

Only Partial Knowledge of Scope of Conspiracy (More Likely):[13] although mitigating role adjustment defendants make up 15 percent of the population, 30 percent of defendants with no or partial knowledge of the scope of the conspiracy, and 4 percent with full knowledge received a mitigating role reduction.

No Ownership of Any Portion of Drugs (More Likely):[14] although mitigating role adjustment defendants make up 15 percent of the population, 33 percent of defendants who did not own a portion of the drugs, and only 4 percent of defendants who did own a portion of the drugs received a mitigating role reduction.

Financing Any Aspect of Criminal Activity (Less Likely): although mitigating role adjustment defendants make up 15 percent of the population, only 8 percent of those who financed the activity received a mitigating role reduction. Where defendant did not finance the activity, a mitigating reduction was applied at the same rate (15%) as for the general population.

No Control Over Drugs (More Likely): although mitigating role adjustment defendants make up 23 percent of the population, 20 percent of those who controlled the drugs, and 46 percent of those who did not, received mitigating role reductions.

Class B, C, or F Relevant Conduct (More Likely): although mitigating role adjustment defendants make up 14 percent of the population, mitigating role reductions were applied in the following proportions --

* 10 percent of class A defendants;
* 26 percent of class B defendants;
* 33 percent of class C defendants;
* 15 percent of class D defendants; and
* 31 percent of class F defendants.

In class B, C, and F relevant conduct, the defendant's personal involvement is less than that of the entire conspiracy (i.e., mitigating role reductions appeared to be

---

[13] These figures apply where the defendant was not the only known participant in the conspiracy. Where the defendant was, the figures are 6 percent receiving reductions where "Not Applicable" equals "Full Knowledge," and 11 percent where "Not Applicable" equals "Partial Knowledge." See note 34 supra.

[14] Where the presence or absence of decision-making authority was corroborated. Where not corroborated, the figures are 10 percent receiving reductions where "Defendant's Assertion Only" equals "Yes," and 29 percent where "Defendant's Assertion Only" equals "No." See note 34 supra.

applied more frequently where the quantity of drugs associated with the entire conspiracy was greater than that with which the defendant was personally associated).

2. Offense Factors that Do Not Tend to Have a Relationship to Whether a Mitigating Role Adjustment is Applied

The following offense factors tended not to have a relationship with whether a mitigating role adjustment is applied; that is, defendants having the factor did not seem more (or less) likely to receive a mitigating role adjustment. The factor has been noted where defendants showing the factor received mitigating role reductions at the same rate as the overall frequency with which the general population of defendants received mitigating role adjustments.

* Where defendant is not the only known participant;
* Where neither the defendant nor any coconspirator possessed or used weapon;
* Where defendant received moderate payments ($1000-$5000);
* Where defendant did not finance the criminal activity;
* Where defendant had control over the drugs; and
* Where Class A or D relevant conduct was involved.

3. Offense Factors that Could Not be Reliably Discerned From a Review of the Offense Conduct

Certain offense factors are extremely difficult to discern consistently from a review of the offense conduct contained in Commission case files and, for that reason, may not be suitable for inclusion in the guideline and commentary:

* **Comparison of payment to defendant with profit or revenue from the entire conspiracy.** This information could only be coded in 86 of 815 cases. See Section 8 of the Appendix. Reliable information on expected conspiracy revenue or profits was often missing. In addition, the value of drugs was not always consistently estimated -- legitimate methods included street value of large quantities of drugs compared with the wholesale price of those same drugs.

* **The period of time during which defendant participated in the offense, and controlled the drugs.** This information could only be coded in 413 cases, but many of these responses included estimations based on the distance defendant asserted he traveled, on estimated destination, and the like. See Section 14 of the Appendix.

E. Relating Offender Mule and Courier Functions to Mitigating Role Adjustment and Offense Factors[15]

After reviewing appellate case law in the fall of 1991, the Working Group observed considerable attention given by courts to the issue of whether transporters of drugs (couriers[16] and mules[17]) should receive mitigating role adjustments.

1. Mule and Courier Functions and Mitigating Role Adjustments

Couriers and mules received mitigating role reductions more frequently (23% and 32%, respectively) than the general population (17% of whom received such reduction). 22 percent of all mitigating role adjustments applied went to couriers, and 17 percent to mules.

2. Mule and Courier Functions that Tend to Have a Relationship to Offender Factors

The following offense factors tended to have a relationship to whether a person who transported drugs (a courier or mule) received a mitigating role adjustment; that is, defendants having the factor seemed to have been more (or less) likely to receive a mitigating role adjustment.

Defendant was the Only Known Participant in the Offense (Less Likely): although 23 percent of couriers and 32 percent of mules received mitigating reductions, only 11 percent of couriers and 28 percent of mules who were the only known participant were given mitigating role adjustments. Those who were not the only known participants were given role reductions in 28 percent (couriers) and 37 percent (mules) of the cases.

Coconspirator Possessed/Used a Weapon (More Likely): although 23 percent of couriers and 32 percent of mules received mitigating role reductions, where the coconspirator possessed or used a weapon, 30 percent of couriers (there were no cases involving mules) received a mitigating role reduction. Where no one

---

[15] Data from which this section is drawn is found in Section 16 and 17 of the Appendix.

[16] "Courier" was defined as a person who transported controlled substances with the aid of a vehicle or other equipment.

[17] "Mule" was defined as a person who transports or carries controlled substances internally or on their person, including in baggage, souvenirs, or clothing. A person flying on an airplane with cocaine in two pieces of baggage was a mule.

possessed/used a weapon, reductions were applied at the same rate as for all transporters receiving mitigating role reductions.

No Decision-Making Authority (More Likely):[18] although 23 percent of couriers and 32 percent of mules received mitigating role reductions, 18 percent of couriers and no (0%) mules with decision-making authority were given mitigating role adjustments. Thirty-nine percent of couriers and 57 percent of mules with no decision-making authority were given mitigating role adjustments.

Small Payments to Defendant (Couriers More Likely, Mules Less Likely): 21 percent of couriers and 40 percent of mules received mitigating role reductions in cases where the amount of compensation was asserted (but not necessarily corroborated). These defendants received mitigating role adjustments in the following proportions --

* 21 percent (couriers) and no (0%) mules receiving more than $10000 in compensation,
* 23 percent (couriers) and 38 percent (mules) of persons receiving $5000 or less,
* 23 percent (couriers) and 41 percent (mules) of persons receiving $2000 or less,
* 27 percent (couriers) and 33 percent (mules) receiving $1000 or less,
* 30 percent (couriers) and 30 percent (mules) receiving $500 or less, and
* 25 percent (couriers) and 33 percent (mules) receiving $200 or less

Percentage Form of Compensation to Defendant (Less Likely): although 23 percent of couriers and 32 percent of mules received mitigating role reductions, no (0%) couriers and 17 percent of mules receiving a percentage of the profits from the activity received a mitigating role reduction; couriers and mules receiving flat fees received mitigating role adjustments at the same rate as for all transporters receiving mitigating role reductions.

Full or Partial Knowledge of Conspiracy (More Likely):[19] although 23 percent of

---

[18] Where the presence or absence of decision-making authority was corroborated. Where not corroborated, the figures are 18 percent (couriers) and 34 percent(mules) receiving reductions where "Defendant's Assertion Only" equals "Yes," and 24 percent (couriers) and 39 percent (mules) where "Defendant's Assertion Only" equals "No." See note 34 supra.

[19] Where the defendant was not the only known participant in the conspiracy. Where the defendant was, the figures are 15 percent (couriers) and 31 percent (mules) receiving reductions where "Not Applicable" equals "Full Knowledge," and 23 percent (couriers) and

couriers and 32 percent of mules received mitigating role reductions, 28 percent of couriers and 40 percent of mules with partial knowledge of the scope of the conspiracy; and 29 percent of couriers and 40 percent of mules with full knowledge received a mitigating role reduction.

No Ownership of Any Portion of Drugs (More Likely):[20] although 23 percent of couriers and 32 percent of mules received mitigating role reductions, 38 percent of couriers and 55 percent of mules who did not own a portion of the drugs received a mitigating role reduction. No (0%) couriers or mules who did own a portion of the drugs received such a reduction.

Financing Any Aspect of Criminal Activity (Couriers More, Mules Less): although 23 percent of couriers and 32 percent of mules received mitigating role reductions, the only courier who financed the activity received a mitigating role reduction. No (0%) mule who financed the activity received a reduction. Where the defendant did not finance the activity, a mitigating reduction was applied at about the same rate (25% (couriers) and 33% (mules)) as for all transporters receiving mitigating role reductions.

Class B, C, D, F Relevant Conduct: although 23 percent of couriers and 32 percent of mules received mitigating role reductions, mitigating role reductions were received in the following proportions --

* 19 percent (couriers) and 31 percent (mules) of class A defendants;
* 50 percent (couriers) and 50 percent (mules) of class B defendants;
* 44 percent (couriers) and 33 percent (mules) of class C defendants; and
* 12 percent (couriers) and no (0%) mules of class D defendants.

No (0%) couriers of class F defendants received mitigating role reductions. There were no mules in class F.

---

32 percent (mules) where "Not Applicable" equals "Partial Knowledge." See note 34 supra.

[20] Where the presence or absence of decision-making authority was corroborated. Where not corroborated, the figures are 18 percent (couriers) and 32 percent (mules) receiving reductions where "Defendant's Assertion Only" equals "Yes," and 26 percent (couriers) and 40 percent (mules) where "Defendant's Assertion Only" equals "No." See note 34 supra.

3. Courier and Mule Functions that Do Not Tend to Have a Relationship to Offender Factors

The following offense factors tended not to have a relationship with whether a mitigating role adjustment is applied to a courier or mule; that is, defendants having the factor seemed not to have been more (or less) likely to receive a mitigating role adjustment).

* Where mule defendant was the only known participant;
* Where defendant possessed or used a weapon;
* Where no person possessed or used weapon;
* Where defendant received payments over $1000;
* Where defendant received flat fee compensation;
* Where defendant did not finance the criminal activity;
* Where class A (couriers and mules) or C (mules only) relevant conduct was involved; and
* Where defendant had control over drugs: defendants who transported drugs make up 23 percent (couriers) and 32 percent (mules) of the those receiving mitigating reductions, and received mitigating role reductions at these rates regardless of whether they had control over the drugs or not (note only 4 of 113 couriers, and no (0%) mules did not have such control).

F. Estimated Impact of Definition Change on Mitigating Role Reductions Applied[21]

1. Summary

Section 20 of the Appendix summarizes the anticipated prison impact of the modified amendment based on two differing assumptions. Assumption 1 is that the uncorroborated response "Defendant's Assertion Only" was a "No" response. Assumption 2 is that "Defendant's Assertion Only" was "Yes" response.[22] Since assumption 1 presumes the response in defendant's favor, more defendants likely will receive mitigating role adjustments under the modified amendment. On the other hand, assumption 2 (presuming responses against the defendant) likely will result in granting fewer mitigating role reductions.

---

[21] See section 3 of the Appendix for data discussed in this subsection.

[22] In other words, where a defendant asserted, in the absence of any corroboration or any evidence to the contrary, that he did not own any portion of the drugs, assumption 1 treats ownership as "No" and assumption 2 treats it as "Yes."

Caveat: Computer projections can not account reliably for the restrictive conditions of the modified amendment that are difficult to quantify (such as the requirement that mitigating role defendants be "significantly less culpable than other participants in the criminal activity and [be] plainly among the least culpable of those participants"). Accordingly, the number of defendants who actually receive mitigating role reductions will likely be fewer than projected under either assumption.

2. Number of Defendants Receiving Mitigating Role Adjustments

Following is a summary of the impact of the modified amendment, using both assumptions, on the number of defendants receiving mitigating role reductions. The first number of the ranges provided below correlates with assumption 2, the second with assumption 1.

* **Mitigating Role Adjustments:** Under the modified amendment, 112-171 (14-21%) of the 815 defendants are projected (subject to the caveat noted above) to receive mitigating role adjustments, compared with 119 (15%) who actually received such adjustments.

* **Minimal Role Adjustments:** Twenty to fifty (20-50) or (18-30%) of the adjustments under the modified amendment would be for minimal role (-4), compared with 24 percent for minimal role (-4) in actual practice (35% for combined minimal (-4) and intermediate (-3) roles).

* **Minor Role Adjustments:** Under the modified amendment, 92 (82%) to 120 (70%) of defendants would receive minor role (-2) reductions, compared with 66 percent for minor role (-2) in actual practice (76% for combined minor (-2) and intermediate (-3) role defendants).

3. Prison Impact of Definition Change[23]

Following is a summary of prison impact resulting from the change to §3B1.2 alone (not in connection with the cap amendment to §2D1.1). Defendants who received either an upward or downward departure were not included in the estimate of prison impact.

[23] See section 21 of the Appendix for prison impact data.

Assumption 1: 139 of the defendants would be impacted

Total impact on sample:	-284 months
Total impact on §2D1.1:[24]	-4544 months
Median impact:	-4 months
Mean impact:	-2 months
Range of impact on individual:	-104 months to 104 months

Assumption 2: 115 of the defendants would be impacted

Total impact on sample:	+537 months
Total impact on §2D1.1:[25]	+8592 months
Median impact:	+4 months
Mean:	+4.6 months
Range of impact on individual:	-30 months to 104 months

IV. §2D1.1 (UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, OR TRAFFICKING) (BASE OFFENSE LEVEL CAPS) (AMENDMENT 19)[26]

A. Summary

The Working Group reviewed Monitoring data and case review information to provide additional information for the Commission regarding whether or not to promulgate a base offense level cap for defendants who qualify for mitigating role adjustments, and if so, at what level.

Based on two options considered for caps (base offense level 32 and base offense level 36), two groups of defendants were identified. The first group includes 317 defendants with a ten-year mandatory minimum quantity (base offense level 32) who received a

[24] Sample population was approximately 1/16 of the §2D1.1 population. Total prison impact is 16 times the impact on the sample population.

[25] Sample population was approximately 1/16 of the §2D1.1 population. Total prison impact is 16 times the impact on the sample population.

[26] Data provided in this section are found in Section 20 of the Appendix.

mitigating role adjustment.[27] The second group includes 63 defendants with a base offense level greater than level 36, and who received a mitigating role adjustment.[28]

None (0%) of the defendants with greater than a base offense level 36 and a mitigating role adjustment received §5K1.1 reductions for substantial assistance. Sixty of the defendants with greater than a base offense level 32 and a mitigating role adjustment received §5K1.1 reductions.

Section 20 of the Appendix provides considerable data regarding the numbers of mitigating role adjustments among MONFY90 defendants with base offense levels greater than level 32 and level 36, and profiles those defendants by base offense level, criminal history, offense factors, and offender function.

B. Prison Impact[29]

1. Base Offense Level Cap Amendment to §2D1.1 Alone

Following is a summary of prison impact resulting from the change to §2D1.1 alone (not in connection with the definition amendment to §3B1.2). Defendants who received either an upward or downward departure were not included in the estimate of prison impact.

OPTION 1 (CAP AT BASE OFFENSE LEVEL 32)

16 defendants in the sample impacted	
Total impact on sample:	-643 months
Total impact on §2D1.1:[30]	-12,680 months
Median impact:	-38 or 43 months
Mean impact:	-40 months
Range of impact on individual:	-102 months to -15 months

---

[27] Source: MONFY90 data showing total offense levels for all §2D1.1 defendants receiving mitigating role adjustments. Acceptance of responsibility reduction was assumed to have been applied (in fact, it is applied in less than 75% of MONFY90 §2D1.1 cases).

[28] See note 27 supra.

[29] See section 21 of the Appendix for data provided in this subsection.

[30] Section 2D1.1 population included up to 317 defendants with mitigating role adjustments and base offense levels greater than 32 (assuming all received acceptance of responsibility -- in fact, only 75% of §2D1.1 do so). Total §2D1.1 prison impact is 317 times the mean impact.

OPTION 2 (CAP AT BASE OFFENSE LEVEL 36)

0 defendants in the sample had more than base offense level 36

Total impact on §2D1.1: Section 2D1.1 population included up to 63 defendants with mitigating role adjustments and base offense levels greater than 36 (assuming all received acceptance of responsibility -- in fact, only 75% of §2D1.1 do so). Total §2D1.1 prison impact would have been 63 times the mean impact on the sample, if a mean could have been determined.

2. Interaction of Amendment to §3B1.2 and Cap Amendment to §2D1.1

Following is a summary of prison impact resulting from the change to §3B1.2 alone (not in connection with the cap amendment to §2D1.1). Defendants who received either an upward or downward departure were not included in the estimate of prison impact.

Assumption 1 (Uncorroborated assertions assumed to be corroborated in defendant's favor):

26 defendants in the sample impacted
Total impact on sample: -1596 months
Total impact on §2D1.1:[31] -25,536 months
Median impact: 43-48 months
Mean impact: -61 months
Range of impact on individual: -195 months to -15 months

Assumption 2 (Uncorroborated assertions assumed to be corroborated in government's favor):

15 defendants in the sample impacted
Total impact on sample: -720 months
Total impact on §2D1.1:[32] -11,520 months
Median impact: -43 months
Mean: -48 months
Range of impact on individual: -84 months to 0 months

---

[31] Sample population was approximately 1/16 of the §2D1.1 (and guidelines referencing §2D1.1), §2D1.8, and §2D2.1 populations. Total prison impact is approximately 16 times the total impact on the sample population.

[32] Sample population was approximately 1/16 of the §2D1.1 (and guidelines referencing §2D1.1), §2D1.8, and §2D2.1 populations. Total prison impact is approximately 16 times the total impact on the sample population.

V. §2D1.8 (RENTING OR MANAGING A DRUG ESTABLISHMENT) (AMENDMENT 20)[33]

To assist the Commission in its consideration of Amendment 20, the Working Group reviewed the 66 single count case files identified by Monitoring as sentenced under §2D1.8. The Working Group profiled §2D1.8 drug defendants in terms of the role adjustments applied and the specific factors and offender functions that might impact on the Commission's consideration of amendment 20.

The following data are summarized below and in the attachment to this report.

* §2D1.8 defendants generally received mitigating role adjustments more frequently (24% of defendants) than the general population of §2D1.1 defendants (15% of defendants);

* §2D1.8 defendants owned the drugs in the offense in 29 percent of the cases, and did not own them in 55 percent of the cases (with the remainder of cases unknown);

* §2D1.8 defendants in general carried or possessed weapons more frequently than §2D1.1 defendants studied (25% of cases compared with 20%), were associated with coconspirators carrying weapons in more cases (15% of cases compared with 10%), and were not involved with force in fewer cases (60% compared with 80%);

* the offender functions for §2D1.8 defendants were varied, including passive participation in an offense, transporting drugs, renting premises for use in the offense, manufacturing controlled substances, and dealing relatively large quantities of drugs.

* relative to the general population of drug offenders, §2D1.8 defendants were more frequently passive participants (17% compared with 1% overall), gofers (14% compared with 2%), renters (26% compared with 2%), and grower/manufacturers (12% compared with 4%).

* median sentence imposed was 18 months for all §2D1.8 defendants, 21 months for no-adjustment defendants and the aggravating role defendant, and 3 months for mitigating role defendants, with the low sentence probation and the high sentence 41 months. (Compare with median sentence of 58 months for general population of drug defendants.)

---

[33] Data provided in this section are drawn from Section 22 of the Appendix.

- median offense level corresponding to the quantity with which §2D1.8 defendants were personally involved (see definitions above) was level 26 (the same as for all drug defendants).

- median base offense level imposed was level 16 for §2D1.8 defendants,[34] and level 26 for all drug defendants.

[34] This guideline currently provides for a single base offense level 16.

AMENDMENT 18(A) -- Substitute Proposal

§3B1.2. Mitigating Role

* * *

Commentary

Application Notes:

1. *This section provides a downward adjustment in offense level for a defendant who has a minimal role (4-level reduction) or a minor role (2-level reduction) in the criminal activity for which the defendant is accountable under §1B1.3 (Relevant Conduct). In cases falling between (a) and (b), a 3-level reduction is provided.*

2. *To determine whether a defendant warrants a mitigating (minimal or minor) role adjustment requires an assessment of the defendant's role and relative culpability in comparison with the other participants in the criminal activity for which the defendant is accountable pursuant to §1B1.3 (Relevant Conduct). The fact that the conduct of one participant warrants an upward adjustment for an aggravating role (§3B1.1) or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating (minimal or minor) role. See definition of "participant" in note 1 of §3B1.1.*

3. ***[Option A** -- This section does not apply if the defendant individually possessed a firearm (or directed or induced another participant to possess a firearm) in connection with the criminal activity.*

   ***[Option B** -- This section does not apply if a firearm was possessed in connection with the offense.]*

4. *Subsection (a) (4-level reduction) applies to a defendant who plays a minimal role in concerted activity. To qualify for a minimal role adjustment under subsection (a), the defendant plainly must be one of the least culpable of the participants in the criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating (minimal or minor) role listed in application note 6. In addition, although not determinative, a defendant's lack of knowledge or understanding of the scope and structure of the criminal activity and of the activities of others may be indicative of a minimal role (4-level reduction).*

5. *To qualify for a minor role adjustment under subsection (b) (2-level reduction), the defendant plainly must be one of the less culpable participants in the criminal activity, but have a role that cannot be described as minimal.*

6. ***The following** is a non-exhaustive list of characteristics that ordinarily are associated with a **mitigating** (minimal or minor) role:*

   *(a) **the defendant performed only unskilled, and unsophisticated tasks;***

   *(b) **the defendant had no decision-making authority or responsibility;***

   *(c) **total compensation to the defendant was small in amount [(i.e., value of $1,000 or less)], generally in the form of a flat fee; and***

   *(d) **the defendant did not exercise any supervision over other participant(s).***

7. *With regard to offenses involving contraband (including controlled substances), a defendant who*

   (a) sold, or negotiated the terms of the sale of, the contraband;

   (b) had an ownership interest in any portion of the contraband; or

   (c) financed any aspect of the criminal activity

   shall not receive a mitigating (minimal or minor) role ~~with respect to~~ adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, or owned, or for that aspect of the criminal activity that the defendant financed because, with regard to those acts, the defendant has acted as neither a minimal nor a minor participant. For example, a street dealer who sells 100 grams of cocaine and who is held accountable under §1B1.3 (Relevant Conduct) for only that quantity shall not be considered for a mitigating (minimal or minor) role adjustment. In contrast, a street dealer who sells 100 grams of cocaine, but who is held accountable, pursuant to §1B1.3, for a jointly undertaken criminal activity involving 5 kilograms of cocaine may, if otherwise qualified, be considered for a mitigating (minimal or minor) role adjustment, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendant sold.

8. *A defendant who transports a quantity of contraband (e.g., a courier or mule, not an offloader or deckhand),*

   ***[Option A** -- shall not receive a minimal role (4-level) adjustment for that quantity of contraband that the defendant transported. If such a defendant otherwise qualifies for a role adjustment, consideration may be given to a minor role (2-level) adjustment.]*

   ***[Option B** -- shall not receive a minimal role (4-level) adjustment for that quantity of contraband that the defendant transported. ~~If such a defendant transported contraband on a single occasion, and otherwise qualifies for a role adjustment (see e.g., notes 6 and 7), c~~ Consideration may be given to a minor role (2-level) adjustment, if the defendant establishes that he transported contraband on a single occasion, that he neither sold nor had an ownership interest in any portion of the contraband, and that he otherwise qualifies for a role adjustment (see e.g., notes 6 and 7).]*

   ***[Option C** -- shall not receive a mitigating (minimal or minor) role adjustment for that quantity of contraband that the defendant transported.]*

9. *Consistent with the structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating (minimal or minor) role adjustment. In determining whether a mitigating (minimal or minor) role adjustment is warranted, the court should consider all of the available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In weighing the totality of the circumstances, a court may consider a defendant's assertion of facts that supports a mitigating role adjustment. However, a court is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.*

[Background would remain unaltered, as follows:

Background: This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.]

Attachment 1

November 10, 1992

To: Sharon Henegan

From: Ronnie M. Scotkin

Subject: Amendments to §§2D1.1 and 2D1.2

Attached are five amendments to §2D1.1 and §2D1.2 and the reasons for the amendments. Included are changes in response to staff comments. The amendments include a) the definition of cocaine base, b) the definition of mixture or substance, c) calculating the guidelines for a protected location when the location is determined by law enforcement officials, d) an amendment to note 12 of §2D1.1 concerning the use of the terms "and" or "or" and, e) the use of dry weight for calculating the weight of marihuana plants.

cc: Newton
Steer
Hoffman

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

Issue: This amendment would address the definition of "mixture or substance" (see discussion in the reason for amendment). There has been a split in the circuits over this issue.

Amendment: The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 1 by inserting the following at the end:

> "Mixture or substance does not include uningestible, unmarketable portions of drug mixtures; i.e., materials that have to be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the creme liqueur in a cocaine/creme liqueur mixture, fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance.".

Reason for Amendment: This amendment is designed to resolve the split among the circuits as to the meaning of the term "mixture or substance." These cases involved two related issues. One scenario involves a controlled substance bonded to, or suspended in, another substance. The controlled substance is not usable until it is separated from the other substance. Examples of this type of situation include cocaine hidden in cream liqueur or cocaine mixed with beeswax and formed into a statue. The second scenario involves the waste water from an illicit laboratory used to manufacture a controlled substance or chemicals confiscated before the chemical processing of the controlled substance is completed. The waste product is water or chemicals used to wash out impurities or to form a precipitate (the precipitate, in some cases, being the controlled substance). Typically, a small amount of controlled substance remains in the waste water. Often, the amount of controlled substance remaining is too small to quantify and is listed a trace amount (no weight given) by DEA in their reports. This waste water is not usable. The chemicals seized prior to the end of processing are also not usable in that form and further processing must take place before they can be used.

In respect to the first issue, the 2nd, 3rd, 9th, and 11th Circuits have decided not to count the uningestable, unusable portions of a drug mixture. See U. S. v. Acosta, 963 F.2d 551 (2d Circ. 1992)) ("...the uningestable, unmarketable portions of drug mixtures should not be counted." Acosta differentiated the case from the decision in Chapman v. U.S., 111 S. Ct. 1919 (1991) by stating, "In stark contrast to the decision in Chapman, the 'mixture' here was useless because it was not ready for distribution..."). See also U.S. v. Salgado-Molina, 1992 WL 113613 (2nd Cir.) (following Acosta); U.S. v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991); U.S. v. Bristol, 964 F.2d 1088 (11th Cir. 1992) (follows Rolande-Gabriel); U.S. v. Robins, 1992 WL 139342 (9th Cir.); U.S. v. Rodriquez, 1992 WL 228872 (3rd Cir.).

In contrast, the 1st Circuit decided to count the entire weight of a suitcase constructed of cocaine bounded to acrylic material (U.S. v. Mehecha-Anofre, 936 F.2d 623 (1st Cir. 1991)), cert. denied, 1991 WL 194039; U. S. v.Lopez-Gil, 965 F.2d 1124 (1st Cir. 1992).[1]

In respect to the second issue,[2] the 6th Circuit decided not to weigh the unfinished chemical mixture in U.S. v. Jennings 945 F. 2d 129 (6th Cir. 1991), ("...there is no question that the contents of the Crockpot was a "mixture that contained a detectable amount of methamphetamine. However, interpreting the statute to this case would produce an illogical result and be contrary to the legislative intent underlying the statute.").

In contrast, the 5th Circuit decided that waste water containing a detectable amount of controlled substance was a "mixture or substance" for purposes of the guidelines (U. S. v. Baker, 883 F.2d 13 (5th Cir. 1989), cert. denied, 110 S. Ct. 517, U.S. v. Butler,

---

[1] In U. S. v.Lopez-Gil, 965 F.2d 1124 (1st Cir. 1992), a case involving cocaine mixed in with the fiberglass used to make a suitcase, the court followed the decision in Mahecha-Anofre and weighed the whole suitcase. But, in the dissent, Senior Circuit Judge John R. Brown stated, "I strongly dissent to the full court's refusal to hear en banc 'the suitcase issue.'" ... In my small voice, I again dissent to the failure of the First Circuit to vote to overturn its prior holding...Carrier mediums that cannot be digested, inhaled or otherwise consumed, but still significantly increase the weight of the controlled substance, have no place in drastically affecting the number of years a person must serve in prison."

[2] Cases involving the second issue generally involved convictions for the manufacture of controlled substances (including attempts and conspiracies), whereas cases involving the first issue, as discussed above, generally involved convictions for importation or possession of controlled substances with intent to distribute. The cases involving laboratories differ from the importation cases in that the final controlled substance is not always present, either because law enforcement officers entered the laboratory before production of the controlled substance was completed or after production was finished and most of the controlled substance was already removed from the site. The statute clearly contemplates the weight of the finished product. The guidelines also reflect the intent to use the weight of the finished product and this intent is reflected in Application Note 12 to §2D1.1 which states:

> Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

It is clear, from both the statute of conviction (manufacture) and the above application note, that the focus is on the finished product and not any intermediary amounts. Waste water and chemicals formed in the middle of processing are generally not usable for consumption. Additionally, to weigh these products instead of the final product produces the anomalous result that a person with a finished product would receive a lower guideline range than someone with waste water or chemicals from an uncompleted process.

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

Issue: This amendment would provide that in the case of marihuana that has a significant moisture content, and is therefore not usuable in such form, the court should exclude the weight of the moisture content in assessing the weight of the marijuana.

Amendment: The Commentary to §2D1.1 captioned "Application Notes" is amended by inserting the following additional note:

"16. In the case of marihuana that has a significant moisture content, the court should approximate the weight of the marihuana without such moisture content.".

Reason for Amendment: With respect to marihuana, there have occasionally been cases in which the marihuana seized has a significant moisture content (e.g., a bale of marihuana left in the rain, a bale of marihuana dropped overboard from a boat, recently harvested marihuana that has not had time to have been dried). In such cases, including the moisture content can substantially inflate the weight of the marihuana for a factor that bears no relationship to the scale of the offense or the marketable form of the marihuana. This amendment addresses this issue.

Commentary

* * *

Application Notes:

* * *

2. *If (A) an offense was committed at or near a protected location, and such location was determined by law enforcement agents rather than by the defendant, or (B) if an offense technically qualifies under this section, but it is clear that the defendant's conduct did not create any increased risk for those whom the statute was intended to protect, a downward departure may be warranted. In such cases, the court should consider sentencing the defendant as if the offense had not involved a protected location.*

Option 4

§2D1.2. **Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy**

* * *

(b) Special Instruction

(1) If the offense was committed at or near a protected location, but such location was determined by law enforcement agents rather than by the defendant, apply §2D1.1, rather than this section, to such conduct.

Commentary

* * *

Application Notes:

* * *

2. *Subsection (b)(1) applies where the location of a drug transaction was chosen by law enforcement agents, rather than by the defendant. Application of §2D1.1, rather than this guideline, to the controlled substances involved in that transaction avoids the potential for the guideline range to be an artifact of the government's choice of the location of the transaction.*

Appendix B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, DC 20001

GEORGE E. MacKINNON
UNITED STATES CIRCUIT JUDGE

November 2, 1992

Honorable William W. Wilkins, Jr.
U.S. Sentencing Commission
1331 Pennsylvania Ave., N.W., Suite 1400
Washington, D.C. 20004

Dear Billy,

I came away from the Sentencing Institute in Tallahassee with one idea. When a kingpin in a drug conspiracy accepts responsibility and turns in all of his confederates and gets a low sentence, it is hardly justice to throw the book at the accomplices and give them sentences far in excess of the bargain that the kingpin made. It would seem to me that the guidelines should provide in such circumstances that the sentencing judge would have a considerable discretion to mitigate the guidelines with respect to some of the accomplices.

Sincerely,

George

George E. MacKinnon

cc: Hon. A. David Mazzone
John Steer, General Counsel
Phyllis Newton

ZEDECK ADVISORY GROUP, INC.
PHARMACOLOGY-TOXICOLOGY
CONSULTING PRACTICE
245 EAST 80TH STREET, NEW YORK, NY 10021
(212) 734-0564 FAX: (212) 86

March 6, 1992

Guidelines Comment
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Commissioners:

I am writing to you with the hope of clarifying what appears to be inconsistencies in the terminology found within the statutes and guidelines relevant to cocaine and its derivatives.

I am a consultant in the areas of pharmacology and toxicology. Much of my work involves advising attorneys in various areas of litigation concerned with chemicals and drugs. Some of this work has involved drugs of abuse and I have assisted in cases wherein it became necessary, not only to discuss the pharmacology of such agents, but also to review analytical data of samples seized by law-enforcement agencies.

In becoming involved in cases concerning the alkaloid cocaine and its derivatives, it has become necessary for me to explain to attorneys the differences among cocaine salts, cocaine base, and crack. Many attorneys from different states have turned to me for assistance since I am the scientist (referred to as the "chemist") who was involved in the case United States v. Jackson, 768 F. Supp. 97 (S.D.N.Y. 1991). I believe there is much confusion among the defense attorneys, prosecutors and judges as to what is meant by the terminology used in the statutes and guidelines.

Much of the confusion centers around the use of the words cocaine, cocaine base and crack. They appear to mean different things in different places and, scientifically, are not being used accurately. The statutes are not

consistent with the sentencing guidelines and I believe that minor changes in terminology would resolve the problems and simplify and make more consistent the sentencing of those found guilty of trafficking in cocaine and its derivatives.

Title 21, United States Code, Section 812, Schedule II(a)(4) lists "Coca leaves except coca leaves and extracts of coca leaves from which cocaine, ecgonine, ... or their salts ...; cocaine, its salts, ... Since the salt forms of cocaine are derived from the base form of cocaine, this section clearly implies that the word cocaine when used in the statute denotes the base.

Title 21, United States Code, Section 841(b)(1)(A)(ii)(II) lists "cocaine, its salts, optical and geometric isomers, and salts of isomers." This use of the word cocaine clearly defines it as a base; the addition of "its salts" leaves no room for doubt that cocaine refers to the base form. The first inconsistency occurs in the following subsection (iii) which first uses the phrase "cocaine base." Cocaine is the base form and to denote the base form one merely needs to say cocaine. This inconsistency appears in other places within Section 841.

The problem of interpretation of the word cocaine becomes very evident in the Sentencing Guidelines-Drug Quantity Table and in the Drug Equivalency Tables. The Quantity Tables list cocaine and cocaine base separately, the amounts always in a ratio of 100:1 in each of the Base Offense Levels. Possession of cocaine carries a lighter sentence than does possession of cocaine base. There is no mention of cocaine salts, e.g., cocaine hydrochloride. Again, using cocaine and then cocaine base to mean two different things is incorrect. I would guess the Commission intended cocaine in the Drug Quantity Table to mean cocaine salts, but this was neither specified nor accomplished.

To further complicate matters, the Drug Equivalency Tables use both the term cocaine and the term cocaine base ("crack"). This is the first use of the word "crack" and it is used to define or modify cocaine base. This is completely confusing. First, we have the usual inconsistency of finding the word cocaine and then the words cocaine base which, as noted above, are synonymous. Again, there is no reference to cocaine salts although I believe the Commission intended cocaine salts where the word cocaine was used. Second, crack and cocaine base, as

used in the Drug Equivalency Tables, are not synonymous. Cocaine (base) appears as a powdery or crystalline form, while crack, which contains cocaine (base) as the active ingredient, generally is less pure and is a hardlike, chunky material.

If the Commission intended to include any material which can be smoked in the term cocaine base ("crack"), this was not accomplished since the Drug Equivalency Tables list both cocaine and cocaine base ("crack"), each of which can be smoked. To add one additional complication, coca paste, containing the sulfate salt form of cocaine, is also smokeable.

In summary, the word cocaine and cocaine base are being used to denote different substances when, in fact, they are identical. The use of "its salts" in the statute and not in the guidelines leaves one to guess what is meant by cocaine in the Quantity and Drug Equivalency Tables. The use of the word "crack" to define or modify cocaine base in the Drug Equivalency Tables confuses the use of the word cocaine even further.

I believe the following few suggestions would correct all of the above inconsistencies.

1. Only use the single word cocaine when referring to the base form of cocaine and do not use the words cocaine base.

2. Use the term cocaine salts when referring to the non-base form of cocaine.

3. If the heavier sentence was meant to apply to all smokeable forms of cocaine, use the terms cocaine or crack or coca paste; each should be further defined to distinguish their physical forms.

4. If the lighter sentence was meant to apply to cocaine salts, specifically cocaine hydrochloride, it should so state.

While I have highlighted specific sections of the various statutes and guidelines, I believe the improper use of the terms relevant to cocaine may exist in other sections of the statutes or in other sections of the Federal Sentencing Guidelines Manual.

I hope this information will be useful to the Commission and to the attorneys and judges who will need

to resolve future cases. Please feel free to call or write for any additional information.

Sincerely yours,

Morris S. Zedeck

Morris S. Zedeck, Ph.D.

Attachment D

MITIGATING ROLE ADJUSTMENTS

Proposed Amendment to § 3B1.2:

§ 3B1.2(c) No mitigating role adjustment under this section shall be applied to a defendant whose offense level is determined in part by reference to the drug quantity table in § 2D1.1 or the chemical quantity table in § 2D.11 where the relevant conduct for the drug or chemical amounts consists only of the drugs or chemicals in the defendant's actual possession.

Commentary

1. *This section applies when a defendant is convicted of an offense for which the drug quantity table in § 2D1.1 or the chemical quantity table in § 2D1.11 is applicable and the relevant conduct consists exclusively of the amount of drugs or chemicals in the defendant's actual possession. Because the actual possession of drugs or chemicals is essential to drug or chemical trafficking, no mitigating adjustment is available to the defendant when the relevant conduct of the drug or chemical amounts consists of only the drugs or chemicals in the defendant's actual possession. This provision prevents a mitigating adjustment for a courier or mule when the only drug or chemical amounts which can be proved are the amounts in the actual possession of the defendant, regardless of the number of other participants.*

2. *This provision should not result in a mitigating adjustment for other participants simply because actual possession of drugs or chemicals is limited to one person. For example, if two persons agree to carry drugs or chemicals between cities; but, at the time of arrest, only one of the persons is in actual possession of drugs or chemicals, the defendant in constructive possession is not entitled to a mitigating adjustment. Similarly, when one person provides the money to purchase drugs or chemicals intended for later distribution, that person is not entitled to a mitigating role adjustment simply because the drugs or chemicals are discovered in the actual possession of another person. In these examples, each defendant is equally culpable and neither deserves a mitigating adjustment.*

3. *When the relevant conduct for the drug or chemical amounts consists of drug or chemical amounts greater than the amount in the defendant's actual possession, a mitigating role is possible. In no event, however, may a defendant receive a*

mitigating adjustment which lowers the offense level below that applicable for the amount of drugs or chemicals in the defendant's actual possession

Reason for Amendment: This amendment clarifies that a courier or mule cannot receive a mitigating adjustment when the amount of drugs or chemicals within the scope of relevant conduct is only the amount of drugs or chemicals in the defendant's actual possession.

==========

895 F. 2d 1016 (5th Cir. 1989); U. S. v. Mueller, 902 F.2d 336 (5th Cir. 1990); U. S. v. Walker, 1992 WL 81528 (5th Cir.); (all following Baker).

The directions in the statute[3] and the guideline[4] are to use the weight of any mixture or substance containing a detectable amount of controlled substance in determining the sentence. Congress chose this method of weighing controlled substances for specific reasons. According to a House report:

> "The committee strongly believes that the Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs. After consulting with a number of DEA agents and prosecutors about the distribution patterns for these various drugs, the Committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. The Committee's statement of quantities is of mixtures, compounds or preparations that contain a detectable amount of the drug - these are not necessarily quantities of pure substance. One result of this market-oriented approach is that the Committee has not generally related these quantities to the number of doses of the drug that might be present in a given sample. The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing or distribution chain." U.S. House, "Narcotics Penalty and Enforcement Act of 1986," 99:2, Report 99-845, part L, pp.11-12.

Clearly, by using this approach, Congress equated certain amounts of a mixture containing a controlled substance as indicative of the role of an individual in the drug hierarchy. High purity drugs would generally be seen at the top of the distribution hierarchy and would be "cut" as the drugs moved down the distribution chain with the lowest purity drug usually sold at street level[5]. The scheme set up by Congress supposedly took the interaction between weight and purity into account in establishing the sentences.

---

[3] 21 U.S.C. §841(b)(1)(B) states, for example, an offense involving "...100 grams of a mixture or substance containing a detectable amount of heroin" shall be punished to a term of imprisonment which may not be less than five years.

[4] The note at the end of the Drug Quantity Table to §2D1.1 states, "Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance."

[5] For example, heroin smuggled into the country generaaly is about 76% pure, while street level heroin is usually about 7% pure.

Consequently, the position of the circuits that have concluded that uningestible, unmarketable portions of drug mixtures that have to be separated from the controlled substance before the controlled substance can be used are not to be counted appears to be the better reading of the intent of the statute and clearly is more compatible with the overall logic of the guidelines. This amendment adopts this position.

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

Commentary

* * *

Application Notes:

1. *"Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. § 841. Mixture or substance does not include uningestible, unmarketable portions of drug mixtures; i.e., materials that have to be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the creme liqueur in a cocaine/creme liqueur mixture, fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance.*

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

Issue: Whether the definition of "cocaine base" should include more than "crack." There has been a split in the circuits as to this issue.

Amendment: Section 2D1.1(c) is amended by adding the following additional note at the end:

> For the purposes of this section, "cocaine base" means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine HCl and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

Reason for Amendment: There is a conflict in the courts as to the meaning of the term "cocaine base" as used in the statute (21 U.S.C. § 841(b)) and in the sentencing guidelines (§2D1.1). It is clear that the term "cocaine base" includes "crack." The legislative history clearly illustrates Congress' intent to target "crack"[1] but Congress' use of the scientific term "cocaine base" in

---

[1] There does not seem to be any legislative history in the form of House or Senate reports accompanying the Anti-Drug Abuse Act of 1986 that discuss the meaning of cocaine base. There are, however, statements from the Senate floor that appeared in the Congressional Record indicating the focus of the legislation to be "crack" cocaine.

> Senator Chiles "In addition, title I addresses the widespread emergence of crack cocaine in this country. As one who has introduced several bills addressing this lethal drug, I am very pleased that the Senate bill recognizes crack as a distinct and separate drug from cocaine hydrochloride with specified amounts of 5 grams and 50 grams for enhanced penalties." Congressional Record, September 30, 1986, p. S27180.
>
> Senator Bumpers "The recent introduction of 'crack' cocaine, an even more potent and dangerous substance, into the drug market has allowed that percentage [drug use] to spiral upwards." Congressional Record, September 30, 1986, p. S27185.
>
> Senator D'Amato "The Crack and Cocaine Meaningful Penalties Act [an earlier bill introduced by D'Amato] subjects the first-time offender, who traffics in 100 grams of cocaine and 1 gram of crack to a maximum prison term of twenty years and a fine of $250,000...
>
> This bill creates, for the very first time, a special penalty applicable to crack. Because crack is so potent drug dealers need to carry much smaller quantities of crack than cocaine powder." Congressional Record, June 20, 1986, p. S14822.

Additionally, a Senate report focuses specifically on "crack" cocaine. It includes testimony by Charles R. Schuster, Ph.D., Director, National Institute on Drug Abuse; by Robert Byck, M.D., Professor of Psychiatry and Pharmacology, Yale University School of Medicine; and David L. Westrate, Assistant Administrator for Operations, Drug Enforcement Administration attesting to the

the statute has led to uncertainty in the courts[2] as to whether

---

dangers of "crack" cocaine. Other forms of cocaine base are not mentioned. See U. S. Senate, "'Crack' Cocaine," Hearing before the Permanent Subcommittee on Governmental Affairs, 99:2, Senate Hearing no. 99-929.

[2] The Ninth Circuit, in U.S. v. Shaw, 936 F.2d 416, stated:

> Nothing in the legislative history indicates that the Senate version intended a different meaning for "cocaine base." Indeed, statements made by sponsors of the legislation in both houses indicate concern primarily with the crack epidemic, and they describe crack as cocaine that is smoked rather than snorted...
>
> Of particular importance to this case, we have seen no statements indicating an interpretation of "cocaine base" as cocaine that contains a hydroxylion. Nor have we seen any statements indicating that "cocaine base" refers to cocaine that is a "base" for chemistry purposes. We conclude that neither Congress nor the Sentencing Commission intended the term "cocaine base" to be defined by the presence of a hydroxylion or by its testing basic rather than acidic.
>
> Instead, we conclude that Congress and the Commission must have intended the term "cocaine base" to include "crack" or "rock cocaine," which we understand to mean cocaine that can be smoked, unlike cocaine hydrochloride.

In contrast, the Second Circuit stated in U.S. v. Jackson (1992 WL 133326), "Expert testimony in this case established that there was a clear definition of 'cocaine base' in the scientific community. It is that meaning that Congress intended Section 841(b) to have."

The First Circuit, in U.S. v. Lopez-Gil, 965 F. 2d 1130, stated :

> The government contends that "cocaine base" as used in Barnes and Shaw is not equated with "crack," but rather includes crack. We find the government's contention to be unfounded for two reasons. First, both the Barnes and Shaw courts, along with the other courts cited above, did not distinguish between cocaine base and crack. While they might not have explicitly held cocaine base equals crack, a complete, rather than selective reading of the opinion compels the conclusion that that was indeed the courts' meaning.
>
> Second the government has not introduced any evidence of the existence of a new derivative/form of cocaine base that is separate and distinct from crack, nor are we aware of any. Our understanding is that there are two forms of cocaine that people use: one is cocaine, which is generally snorted, and the other is crack, which is generally smoked. While there exists a wide variety of each type according to purity, quality, and grade, the cocaine user has the option of using either cocaine or crack, not a third variation.
>
> We conclude that "cocaine base" means "crack" for purposes of 21 U.S.C. § 841(b) and the Sentencing Guidelines.

Later the First Circuit, in an en banc opinion, revised this portion

cocaine base in forms other than crack should be subject to the enhanced penalties provisions of 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B).[3]

Congress probably did not use the term "crack" in the statute because, like the terms "pot" for marijuana and "crank" for "methamphetamine," "crack" is a street name and is therefore generally not considered suitable for legislation. In its attempt to identify crack in more scientific terms, Congress used the term cocaine base, probably not realizing that although crack is a form of cocaine base,[4] the term cocaine base includes more than crack.

---

of the decision and adopted a "scientific definition" meaning similar to that of the Second Circuit. United States v. Lopez-Gil, 965 F.2d 1124 (1st Cir. 1992) amended, No. 90-2059 (1st Cir. May 14, 1992) (enbanc)

In one lower court decision in the U. S. District Court for the Southern District of Florida (U.S. v. Reyes (782 F. Supp.609 (S.D. Fla. 1992)) the court decided the term "cocaine base" includes more than "crack" because of the language in the statute. The court stated:

> ...both provisions [the statute and the guidelines] clearly use the term "cocaine base," raising a strong inference that Congress meant something more than just 'crack' since Congress could easily have said "crack," or listed substance names, if it so desired.

In another decision from the same circuit, in U.S. v. Vistoli-Ferroni (783 F.Supp. 1367, 1368), the court stated:

> When Congress and (the sentencing commission [sic]) prescribed enhanced penalties for "cocaine base," as opposed to cocaine hydrochloride, its intent was to punish those who manufactured, sold, and possessed crack more severely. This is quite clear from the legislative history...There is no indication that Congress intended to create much stiffer penalties for the base form of cocaine at issue in this case, which cannot be injected, smoked, or sniffed directly, and which can be converted into cocaine hydrochloride as easily as into crack.

[3] 21 U.S.C. 841(b)(1)(A) imposes a mandatory minimum sentence of ten years' imprisonment for cases involving 50 grams or more of a mixture or substance containing cocaine base or 5 kilograms of cocaine. 21 U.S.C. 841(b)(1)(B) imposes a mandatory minimum sentence of five years' imprisonment for cases involving 5 grams or more of a mixture or substance containing cocaine base or 500 grams of cocaine.

[4] The terms "crack," "free-base cocaine," and "cocaine base" seem to be used interchangeably throughout the discussions. For example, Senator D'Amato states "Crack--or rock, as it is also known--is smokeable freebase cocaine" (Congressional Record - Senate, June 20,1986, p. 14822.

In U.S. v. Shaw (936 F.2d 415) the court stated:

Non-crack cocaine base is, like crack, a base; chemically, they have the same formula. In contrast, cocaine HCl (powder cocaine) is a salt and has a different chemical formula. Both non-crack cocaine base and crack are "smokeable." That is, they have a much lower melting point than cocaine HCl and therefore can be smoked. Non-crack cocaine base and crack differ from each other in their appearance and their place in the cocaine processing hierarchy. Non-crack cocaine base, until recently, was generally not seen in this country. It is the state cocaine exists in immediately before it is processed into cocaine HCl. One theory for the appearance of non-crack cocaine base in this country is that the tighter controls on the exporting of the chemicals necessary to process non-crack cocaine base into cocaine HCl has moved this part of the processing to this country. There has been no indication that non-crack cocaine base has ever been sold for the purpose of smoking it. Indeed, its appearance as a powder would preclude it being sold at the 100 milligram level at which crack is sold.[5]

Crack is a street level drug produced at fairly low levels in the

---

> The legislative history of 21 U.S.C. §841(b) is consistent with the Commission's interpretation [cocaine base includes "crack"]. Congress amended § 841(b) in the Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570, §1002(2), 100 Stat. 3207, 3207-2, which was an omnibus act incorporating a number of more specific bills. The Senate and the House each had a version of the bill to amend 21 U.S.C. §841(b). The House version provided tougher penalties for 'cocaine freebase,' H.R. 5394, 99th Cong., 2d Sess. §101 (1986), while the Senate version provided penalties for 'cocaine base,' S.2878, 99th Cong., 2d Sess. §1002, 132 Cong.Rec. S13649 (daily ed. Sept.25, 1986). Congress ultimately enacted the Senate version by incorporating it into H.R. 5484, which became the Anti-Drug Abuse Act of 1986. See 132 Cong.Rec. H11219-20 (daily ed. Oct. 17, 1986).

[5] According to Dr. Charles R. Schuster, Director, National Institute on Drug Abuse, testifying before the Senate permanent Subcommittee on Investigations, Committee on Governmental Affairs (see above), p.15.

> Previously, cocaine was generally purchased in lots of at least a gram for a price around $100. Crack, on the other hand, is packaged and marketed in small vials that were designed to hold eyeglass or watch parts. Each small vial holds one dose, which sells, roughly, for around $10. This packaging is very important since it reduces the price barrier that prohibited young children from being able to purchase the drug in the past.

Dr. Robert Byck, Professor of psychiatry and Pharmacology at the Yale University School of Medicine, testifying at the same hearing (p. 20), stated:

> It was as though Ray Kroc had invented the opium den, because what we have here is the fast food solution. It is not that McDonald's hamburgers are necessarily better, although I am sure that they are better to some people, it is the fact that they are already prepared, they are ready to go, and they come in a little package. Here suddenly, we have cocaine available in a little package, in unit dose, available at a price that kids can pay initially.

drug hierarchy, generally at or near street level. It is a form of cocaine free base[6] usually made by combining cocaine HCl and sodium bicarbonate. Crack produces a quicker, shorter, more intense high than cocaine powder because of its route of administration (smoking rather than snorting). This is followed by a deep "low" that can cause the user to crave more crack.[7] This pattern of highs and lows is theorized to cause an immediate craving for more crack and makes it theoretically more dangerous than cocaine HCl.

It is clear from reviewing the Congressional Record, hearings, and various articles that the intent of the legislation was to target "crack" cocaine and not all cocaine base. This amendment would address the problem created by the various interpretations by the courts by expressly providing that cocaine base, as used in the guidelines, means crack cocaine.

---

6 "The free-base form of cocaine known as crack,...is produced by combining cocaine hydrochloride with either baking soda or ammonia and water, thereby eliminating the dangers associated with traditional free-base manufacture." National Drug Enforcement Policy Board, Report to Congress on Crack Cocaine.

"In traditional free-basing, cocaine hydrochloride is mixed with baking soda or ammonia, and then with water, and ether. The ether evaporates to produce a powdery white cocaine base, which is smoked in a water pipe or sprinkled on a tobacco or marijuana cigarette and smoked.

Heating free-base that is not completely dry and therefore contains ether can result in a explosion. Ether is not used to make crack. Rather, crack is made from either baking soda or ammonia. Crack is safe from explosion since no ether is used." (Statement of David L. Westrate, Assistant Administrator for Operations, Drug Enforcement Administration before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, Senate Hearing 99-929, 99:2, July 15, 1986.)

7 According to Dr. Charles R. Schuster, Director, National Institute on Drug Abuse, testifying before the Senate permanent Subcommittee on Investigations, Committee on Governmental Affairs (see above):

> There are several reasons why crack has become so popular. It appears that the role of smoking as the drug's route of administration is more important than its purity. Crack doesn't require the use of elaborate paraphernalia. It is usually smoked in a simple glass pipe. This appeals to many buyers of crack who are first time users of cocaine. It sells for a lower unit price, which attracts younger and less affluent street customers. To the experienced user, an attractive aspect of crack is its rapid effect. These users know when it is smoked, cocaine's onset of action is more rapid then when it is snorted.

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

Issue: The issue addressed in this amendment involves the phraseology used in Application Note 12 of §2D1.1. The phraseology used in Note 1 "did not intend to produce and was not reasonably capable of producing" literally means that the court must find that both of the above prongs apply before excluding that portion of the quantity from consideration. If this is what the Commission intended, no change is required. On the other hand, if the Commission intended that a finding on either prong result in that portion of the quantity being excluded from consideration, this amendment would address this issue.

Amendment: The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 12 by deleting "did not intend to produce and was not reasonably capable of producing" wherever it appears and inserting in lieu thereof "was not reasonably capable of producing, or otherwise did not intend to produce,".

Reason for Amendment: This amendment clarifies the meaning of the Commentary to this guideline.

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

* * *

Commentary

* * *

12. *Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.*

If the offense involved both a substantive drug offense and an attempt or conspiracy (e.g., sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant ~~did not intend to produce and was not reasonably capable of producing~~was not reasonably capable of producing, or otherwise did not intend to produce, the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant ~~did not intend to produce and was not reasonably capable of producing~~was not reasonably capable of producing, or otherwise did not intend to produce.

* * *

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

* * *

(c) DRUG QUANTITY TABLE

* * *

For the purposes of this section, "cocaine base" means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

* * *

§2D1.2. Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

Issue: The issue addressed in this amendment involves the situation in which controlled substances were sold at a "protected location," but the location of the drug transaction was determined by law enforcement authorities, rather than by the defendant. The purpose of the amendment is to provide that, in such cases, the defendant is not penalized for the location of the sale.

Four options are shown below. Option 1 would address this issue as a downward departure consideration. Option 2 would address this issue by a downward departure in a somewhat different form suggested by the Third Circuit in Unites States v. Rodriguez (91-1252, 4/17/92). Option 3 combines Options 1 and 2. Option 4 addresses this issue in the guideline itself.

Option 1

Amendment: The Commentary to §2D1.2 captioned "Application Note" is amended by inserting the following additional note:

"2. If an offense was committed at or near a protected location, and such location was determined by law enforcement agents rather than by the defendant, a downward departure may be warranted. In such case, the court should consider sentencing the defendant as if the offense had not involved a protected location.";

and in the caption by deleting "Note" and inserting "Notes".

Option 2

Amendment: The Commentary to §2D1.2 captioned "Application Note" is amended by inserting the following additional note:

"2. If an offense technically qualifies under this section, but it is clear that the defendant's conduct did not create any increased risk for those whom the statute was intended to protect, a downward departure may be warranted. In such case, the court should consider sentencing the defendant as if the offense had not involved a protected location.",

and in the caption by deleting "Note" and inserting "Notes".

Option 3

Amendment: The Commentary to §2D1.2 captioned "Application Note" is amended by inserting the following additional note:

"2. If (A) an offense was committed at or near a protected location, and such location was determined by law enforcement agents rather than by the defendant, or (B) if an offense technically qualifies under this section, but it is clear that the defendant's conduct did not create any increased risk for those whom the statute was intended to protect, a downward departure may be warranted. In such cases, the court should consider sentencing the defendant as if the offense had not involved a protected location.",

and in the caption by deleting "Note" and inserting "Notes".

Option 4

Amendment: Section 2D1.2 is amended by inserting the following additional subsection:

"(b) Special Instruction

(1) If the offense was committed at or near a protected location, but such location was determined by law enforcement agents rather than by the defendant, apply §2D1.1, rather than this section, to such conduct.".

The Commentary to §2D1.2 captioned "Application Note" is amended by inserting the following additional note:

"2. Subsection (b)(1) applies where the location of a drug transaction was chosen by law enforcement agents, rather than by the defendant. Application of §2D1.1, rather than this guideline, to the controlled substances involved in that transaction avoids the potential for the guideline range to be an artifact of the government's choice of the location of the transaction.";

and, in the caption, by deleting "Note" and inserting "Notes".

Option 1

§2D1.2. **Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy**

* * *

Commentary

* * *

Application Notes:

* * *

2. *If an offense was committed at or near a protected location, and such location was determined by law enforcement agents rather than by the defendant, a downward departure may be warranted. In such case, the court should consider sentencing the defendant as if the offense had not involved a protected location.*

* * *

Option 2

§2D1.2. **Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy**

* * *

Commentary

* * *

Application Notes:

* * *

2. *If an offense technically qualifies under this section, but it is clear that the defendant's conduct did not create any increased risk for those whom the statute was intended to protect, a downward departure may be warranted. In such case, the court should consider sentencing the defendant as if the offense had not involved a protected location.*

Option 3

§2D1.2. **Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy**

* * *

DRUG OFFENSES

In general, the drug guidelines appear to be working well. There are however, a few areas in which amendments are needed.

Mitigating role adjustments: In light of the current scope of "relevant conduct" under § 1B1.3, we urge the adoption of a rule against mitigating role adjustments for a defendant who has been held responsible under the definition of relevant conduct only for the quantity of controlled substances in which he or she actually trafficked. Such a rule recognizes that a role reduction is not appropriate when the measure of the defendant's involvement in the offense is not increased by the conduct of others. That is, he or she cannot be considered a minor or minimal participant as to his or her own conduct. A proposed guideline amendment is attached as Attachment D.

Removal of Caps on Drug Tables for Schedule I and II Depressants and Schedule III, IV, and V Substances: The Department of Justice recommends that the Commission remove the current limitations on sentences for the distribution of Schedule III, IV, and V controlled substances and Schedule I and II depressants so that violations involving large quantities of these drugs will result in greater sentences. In our view, the current provisions, which limit sentences to those applicable to 20 kilograms of the substances involved regardless of how much greater the actual quantities may be, are inconsistent with the overall approach of the guidelines.

Guideline § 2D1.1 provides that a violation involving 20 kilograms or more of a Schedule I or II depressant or Schedule III substance results in offense level 20 (33-41 months for a defendant in the lowest criminal history category). The first problem with the guideline is that a defendant who violates the law by selling hundreds of kilograms of a Schedule I or II depressant or Schedule III substance would be treated in the same manner as a defendant who sells 20 kilograms. Schedule I and II depressants are serious drugs of abuse and include, for example, methaqualone (Schedule I) and glutethimide (recently moved to Schedule II from Schedule III), which is used with codeine preparations as a heroin substitute. Schedule III substances include codeine preparations such as Tylenol or aspirin with codeine. The Department has prosecuted cases involving far larger quantities than 20 kilograms. If the current guideline reflects the concern that the guidelines should establish an offense level commensurate with the statutory maximum available, the guideline could still provide a much greater offense level for violations involving large quantities of Schedule I and II depressants, which are subject to a maximum 20-year term of imprisonment, 21 U.S.C. § 841(b)(1)(C). Although the maximum term of imprisonment for offenses involving Schedule III substances is five years, 21 U.S.C. § 841(b)(1)(D), offenses

involving multiple transactions may be prosecuted in multiple counts, with the five-year maximum applicable to each count.

Another problem with this guideline is that it treats Schedule I and II depressants as equivalent to Schedule III substances for sentencing purposes. However, Congress has treated these substances very differently by subjecting violations involving Schedule I and II substances to a 20-year maximum prison term, as compared to five years for Schedule III substances. Removing the current limit of level 20 for these substances would permit the higher statutory maximum for Schedule I and II substances to operate in cases involving large quantities.

Guideline § 2D1.1 also places an artificial limitation on sentences involving Schedule IV substances (level 12 for 20 kilograms or more) and Schedule V substances (level 8 for 20 kilograms or more). Again, larger quantities of these drugs should result in longer sentences. This approach would be consistent with the operation of the drug guidelines for substances such as heroin and cocaine. The extension of the guidelines for quantities of more than 20 kilograms of Schedule I and II depressants and Schedule III, IV, and V substances would correct an unfortunate message the guidelines currently send to would-be violators -- that they may as well engage in large-scale violations since they may do so with impunity beyond 20 kilograms.

Anabolic steroids: The Department regards sentences for anabolic steroids to be inadequate in comparison with those for other Schedule III substances. We will outline our specific concerns in this area in the near future.

ENVIRONMENTAL CRIMES

The Department of Justice urges the Commission to adopt guidelines for determining fines for environmental offenses by organizations. At present, there are no fine schedules applicable to the sentencing of organizational defendants who commit criminal violations of the environmental statutes. The adoption of such guidelines is essential to the Sentencing Reform Act's goal of uniformity in sentencing.

The Commission has convened an advisory group on environmental crimes, which has been meeting for a number of months. We look forward to working with the advisory group to fill this gap in the current sentencing guidelines for environmental offenses as expeditiously as possible. We would also be pleased to work with the Commission to consider possible revisions to the guidelines applicable to individual defendants in environmental cases.