

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission

ACTION: Notice of a temporary, emergency amendment to sentencing guidelines and commentary.

SUMMARY: Pursuant to section 8 of the Fair Sentencing Act of 2010, Pub. L. 111–220, the Commission hereby gives notice of a temporary, emergency amendment to the sentencing guidelines and commentary. This notice sets forth the temporary, emergency amendment and the reason for amendment.

The specific amendment in this notice is as follows: An amendment regarding offenses involving crack cocaine (particularly offenses covered by §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and 2D2.1 (Unlawful Possession; Attempt or Conspiracy)) and to account for certain aggravating and mitigating circumstances in drug trafficking cases (particularly cases under §2D1.1) to implement section 8 of the Fair

Sentencing Act of 2010, Pub. L. 111–220.

DATE: The Commission has specified an effective date of November 1, 2010, for the emergency amendment.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4597.

SUPPLEMENTARY INFORMATION: The Commission must promulgate a temporary, emergency amendment to implement the directive in section 8 the Fair Sentencing Act of 2010, Pub. L. 111–220, by November 1, 2010. On September 8, 2010, the Commission published in the Federal Register a proposed amendment and issues for comment regarding the implementation of this directive. See 75 FR 54700 (September 8, 2010).

The temporary, emergency amendment set forth in this notice also may be accessed through the Commission’s website at www.ussc.gov.

AUTHORITY: 28 U.S.C. § 994(a), (o), (p), (x); section 8 of the Fair Sentencing Act of 2010, Pub. L. 111–220.

William K. Sessions III

Chair

FAIR SENTENCING ACT OF 2010

1. Amendment: Section 2D1.1(a)(5) is amended by adding at the end the following:

"If the resulting offense level is greater than level 32 and the defendant receives the 4-level ('minimal participant') reduction in §3B1.2(a), decrease to level 32."

Section 2D1.1(b) is amended by redesignating subdivisions (10) and (11) as subdivisions (13) and (16); by redesignating subdivisions (2) through (9) as subdivisions (3) through (10); by inserting after subdivision (1) the following:

"(2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by 2 levels.";

by inserting after subdivision (10), as redesignated by this amendment, the following:

"(11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by 2 levels.

(12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels.";

by inserting after subdivision (13), as redesignated by this amendment, the following:

"(14) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

- (A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;
- (B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;
- (C) the defendant was directly involved in the importation of a controlled substance;
- (D) the defendant engaged in witness intimidation, tampered with or destroyed

evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

- (E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,

increase by 2 levels.

- (15) If the defendant receives the 4-level ('minimal participant') reduction in §3B1.2(a) and the offense involved all of the following factors:

- (A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

- (B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

- (C) the defendant had minimal knowledge of the scope and structure of the enterprise,

decrease by 2 levels."

Section 2D1.1(c) is amended in subdivision (1) in the third entry by striking "4.5" and inserting "8.4"; in subdivision (2) in the third entry by striking "1.5" and inserting "2.8"; by striking "4.5" and inserting "8.4"; in subdivision (3) in the third entry by striking "500" and inserting "840"; by striking "1.5" and inserting "2.8"; in subdivision (4) in the third entry by striking "150" and inserting "280"; by striking "500" and inserting "840"; in subdivision (5) in the third entry by striking "50" and inserting "196"; by striking "150" and inserting "280"; in subdivision (6) in the third entry by striking "35" and inserting "112"; by striking "50" and inserting "196"; in subdivision (7) in the third entry by striking "20" and inserting "28"; by striking "35" and inserting "112"; in subdivision (8) in the third entry by striking "5" and inserting "22.4"; by striking "20" and inserting "28"; in subdivision (9) in the third entry by striking "4" and inserting "16.8"; by striking "5" and inserting "22.4"; in subdivision (10) in the third entry by striking "3" and inserting "11.2"; by striking "4" and inserting "16.8"; in subdivision (11) in the third entry by striking "2" and inserting "5.6"; by striking "3" and inserting "11.2"; in subdivision (12) in the third entry by striking "1" and inserting "2.8"; by striking "2" and inserting "5.6"; in subdivision (13) in the third entry by striking "500 MG" and inserting "1.4 G"; by striking "1" and inserting "2.8"; and in subdivision (14) in the third entry by striking "500 MG" and inserting "1.4 G".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 3 by inserting "Application of Subsections (b)(1) and (b)(2).—"

(A) Application of Subsection (b)(1).—" before "Definitions";

by inserting "in subsection (b)(1)" after "weapon possession"; by striking "adjustment" and inserting "enhancement"; by striking "his" and inserting "the defendant's"; and by adding at the end the following:

"(B) Interaction of Subsections (b)(1) and (b)(2).—The enhancements in subsections (b)(1) and (b)(2) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. See §1B1.1 (Application Instructions), Application Note 4(A). However, in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply."

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 8 in the last paragraph by striking "(2)" and inserting "(3)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10(B) in the first paragraph by striking "(Except Cocaine Base)" after "Differing Controlled Substances"; and by striking the sentence beginning "To determine".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10(C) by striking "(Except Cocaine Base)" after "Differing Controlled Substances"; and in subdivision (C)(iii) by striking "five kilograms of marihuana" and inserting "2 grams of cocaine base"; by inserting ", and the cocaine base is equivalent to 7.142 kilograms of marihuana" after "16

kilograms of marihuana"; and by striking "21" and inserting "23.142".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 by striking subdivision (D); and by redesignating subdivision (E) as subdivision (D).

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10(D), as redesignated by this amendment, in the table captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*" in the line referenced to Cocaine Base by striking "20 kg" and inserting "3,571 gm".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 18 by striking "(2)" and inserting "(3)", and by striking "(4)" and inserting "(5)";

in Note 19 by striking "(10)" and inserting "(13)" in both places;

in Note 20 by striking "(10)" and inserting "(13)" in both places;

in Note 21 by striking "(11)" and inserting "(16)" each place it appears;

in Note 23 by striking "(6)" and inserting "(7)" each place it appears;

in Note 25 by striking "(7)" and inserting "(8)" in both places;

and in Note 26 by striking "(8)" and inserting "(9)" in both places.

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

- "27. Application of Subsection (b)(11).—Subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant. Such conduct is covered by §3C1.1 (Obstructing or Impeding the Administration of Justice) and, if applicable, §2D1.1(b)(14)(D).
28. Application of Subsection (b)(12).—Subsection (b)(12) applies to a defendant who knowingly maintains a premises (i.e., a ‘building, room, or enclosure,’ see §2D1.8, comment. (backg'd.)) for the purpose of manufacturing or distributing a controlled substance.

Among the factors the court should consider in determining whether the defendant ‘maintained’ the premises are (A) whether the defendant held a possessory interest in (e.g., owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.

Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or

principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

29. Application of Subsection (b)(14).—

(A) **Distributing to a Specified Individual or Involving Such an Individual in the Offense (Subsection (b)(14)(B)).**—If the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(14)(B), the individual is not a ‘vulnerable victim’ for purposes of §3A1.1(b).

(B) **Directly Involved in the Importation of a Controlled Substance (Subsection (b)(14)(C)).**—Subsection (b)(14)(C) applies if the defendant is accountable for the importation of a controlled substance under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), *i.e.*, the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance.

If subsection (b)(3) or (b)(5) applies, do not apply subsection (b)(14)(C).

(C) Pattern of Criminal Conduct Engaged in as a Livelihood (Subsection (b)(14)(E)).—For purposes of subsection (b)(14)(E), ‘pattern of criminal conduct’ and ‘engaged in as a livelihood’ have the meaning given such terms in §4B1.3 (Criminal Livelihood).”.

The Commentary to §2D1.1 captioned "Background" is amended by inserting after the paragraph that begins "For marihuana plants" the following:

" The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111–220.

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.”;

in the paragraph that begins "Specific Offense Characteristic" by striking "Specific Offense Characteristic (b)(2)" and inserting "Subsection (b)(3)";

by inserting after the paragraph that begins "The dosage weight" the following:

" Subsection (b)(11) implements the directive to the Commission in section 6(1) of Public Law 111–220.

Subsection (b)(12) implements the directive to the Commission in section 6(2) of Public Law 111–220.";

in the paragraph that begins "Subsection (b)(10)(A)" by striking "(10)" and inserting "(13)";

in the paragraph that begins "Subsections (b)(10)(C)(ii)" by striking "(10)" and inserting "(13)";

and by adding at the end the following:

" Subsection (b)(14) implements the directive to the Commission in section 6(3) of Public Law 111–220.

Subsection (b)(15) implements the directive to the Commission in section 7(2) of Public Law 111–220."

Section 2D1.14(a)(1) is amended by striking "(11)" and inserting "(16)".

Section 2D2.1(b) is amended by striking "References" and inserting "Reference"; by striking subdivision (1); and by redesignating subdivision (2) as subdivision (1).

The Commentary to §2D2.1 captioned "Background" is amended by striking "five" and

inserting "three"; and by striking the last paragraph.

Section 2K2.4 captioned "Application Notes" is amended in Note 4 by inserting after the first paragraph the following:

"A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under §2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense."

The Commentary to §3B1.4 captioned "Application Notes" is amended in Note 2 by adding at the end as the last sentence the following: "For example, if the defendant receives an enhancement under §2D1.1(b)(14)(B) for involving an individual less than 18 years of age in the offense, do not apply this adjustment."

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 7 by adding at the end the following new paragraph:

"Similarly, if the defendant receives an enhancement under §2D1.1(b)(14)(D), do not apply this adjustment."

Reason for Amendment: This amendment implements the emergency directive in section 8

of the Fair Sentencing Act of 2010, Pub. L. 111–220 (the "Act"). The Act reduced the statutory penalties for cocaine base ("crack cocaine") offenses, eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine, and contained directives requiring the Commission to review and amend the guidelines to account for specified aggravating and mitigating circumstances in certain drug cases. The emergency amendment authority provided in section 8 of the Act required the Commission to promulgate the guidelines, policy statements, or amendments provided for in the Act, and to make such conforming changes to the guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law, not later than 90 days after the date of enactment of the Act.

First, the amendment amends the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to account for the changes in the statutory penalties made in section 2 of the Act. Section 2 of the Act reduced the statutory penalties for offenses involving manufacturing or trafficking in crack cocaine by increasing the quantity thresholds required to trigger a mandatory minimum term of imprisonment. The quantity threshold required to trigger the 5-year mandatory minimum term of imprisonment was increased from 5 grams to 28 grams, and the quantity threshold required to trigger the 10-year mandatory minimum term of imprisonment was increased from 50 grams to 280 grams. See 21 U.S.C. §§ 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3).

To account for these statutory changes, the amendment conforms the guideline penalty structure for crack cocaine offenses to the approach followed for other drugs, i.e., the base offense levels for crack cocaine are set in the Drug Quantity Table so that the statutory minimum penalties correspond to levels 26 and 32. See generally §2D1.1, comment. (backg'd). Accordingly, using the new drug quantities established by the Act, offenses involving 28 grams or more of crack cocaine are assigned a base offense level of 26, offenses involving 280 grams or more of crack cocaine are assigned a base offense level of 32, and other offense levels are established by extrapolating upward and downward. Conforming to this approach ensures that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionally reflected throughout the Drug Quantity Table.

To provide a means of obtaining a single offense level in cases involving crack cocaine and one or more other controlled substances, the amendment also establishes a marihuana equivalency for crack cocaine under which 1 gram of crack cocaine is equivalent to 3,571 grams of marihuana. (The marihuana equivalency for any controlled substance is a constant that can be calculated using any threshold in the Drug Quantity Table by dividing the amount of marihuana corresponding to that threshold by the amount of the other controlled substance corresponding to that threshold. For example, the threshold quantities at base offense level 26 are 100,000 grams of marihuana and 28 grams of crack cocaine; 100,000 grams divided by 28 is 3,571 grams.) In the commentary to §2D1.1, the amendment makes a conforming change to the rules for cases involving both crack cocaine and one or more other controlled

substances. The amendment deletes the special rules in Note 10(D) for cases involving crack cocaine and one or more other controlled substances, and revises Note 10(C) so that it provides an example of such a case.

Second, the amendment amends §2D1.1 to add a sentence at the end of subsection (a)(5) (often referred to as the "mitigating role cap"). The new provision provides that if the offense level otherwise resulting from subsection (a)(5) is greater than level 32, and the defendant receives the 4-level ("minimal participant") reduction in subsection (a) of §3B1.2 (Mitigating Role), the base offense level shall be decreased to level 32. This provision responds to section 7(1) of the Act, which directed the Commission to ensure that "if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32".

Third, the amendment amends §2D1.1 to create a new specific offense characteristic at subsection (b)(2) providing an enhancement of 2 levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence. The new specific offense characteristic responds to section 5 of the Act, which directed the Commission to "ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense."

The amendment also revises the commentary to §2D1.1 to clarify how this new specific

offense characteristic interacts with subsection (b)(1). Specifically, Application Note 3 is amended to provide that the enhancements in subsections (b)(1) (regarding possession of a dangerous weapon) and (b)(2) may be applied cumulatively. However, in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply.

In addition, the amendment makes a conforming change to the commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to address cases in which the defendant is sentenced under both §2D1.1 (for a drug trafficking offense) and §2K2.4 (for an offense under 18 U.S.C. § 924(c)). In such a case, the sentence under §2K2.4 accounts for any weapon enhancement; therefore, in determining the sentence under §2D1.1, the weapon enhancement in §2D1.1(b)(1) does not apply. See §2K2.4, comment. (n. 4). The amendment amends this commentary to similarly provide that, in a case in which the defendant is sentenced under both §§2D1.1 and 2K2.4, the new enhancement at §2D1.1(b)(2) also is accounted for by §2K2.4 and, therefore, does not apply.

Fourth, the amendment amends §2D1.1 to create a new specific offense characteristic at subsection (b)(11) providing an enhancement of 2 levels if the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense. The new specific offense characteristic responds to section 6(1) of the Act, which directed the Commission "to ensure an additional increase of at least 2 offense levels if . . . the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection

with a drug trafficking offense".

The amendment also revises the commentary to §2D1.1 to clarify how this new specific offense characteristic interacts with the adjustment at §3C1.1 (Obstructing or Impeding the Administration of Justice). Specifically, new Application Note 27 provides that subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant because such conduct is covered by §3C1.1.

Fifth, the amendment amends §2D1.1 to create a new specific offense characteristic at subsection (b)(12) providing an enhancement of 2 levels if the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance. The new specific offense characteristic responds to section 6(2) of the Act, which directed the Commission to "ensure an additional increase of at least 2 offense levels if . . . the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856)".

The amendment also adds commentary in §2D1.1 at Application Note 28 providing that among the factors the court should consider in determining whether the defendant "maintained" the premises are (A) whether the defendant held a possessory interest (e.g., owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises. Application Note 28 also provides that manufacturing or

distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses of the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

Sixth, the amendment amends §2D1.1 to create a new specific offense characteristic at subsection (b)(14) that provides an enhancement of 2 levels if the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved one or more of five specified factors. The new specific offense characteristic responds to section 6(3) of the Act, which directed the Commission "to ensure an additional increase of at least 2 offense levels if . . . (A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and (B) the offense involved 1 or more of the following super-aggravating factors:

- (i) The defendant--
 - (I) used another person to purchase, sell, transport, or store controlled substances;
 - (II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and
 - (III) such person had a minimum knowledge of the illegal enterprise

and was to receive little or no compensation from the illegal transaction.

- (ii) The defendant--
 - (I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;
 - (II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;
 - (III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or
 - (IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.

- (iii) The defendant was involved in the importation into the United States of a controlled substance.

- (iv) The defendant engaged in witness intimidation, tampered with or

destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.

- (v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood."

The amendment also revises the commentary to §2D1.1 to provide guidance in applying the new specific offense characteristic at §2D1.1(b)(14). Specifically, new Application Note 29 provides that if the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(14)(B), the individual is not a "vulnerable victim" for purposes of subsection (b) of §3A1.1 (Hate Crime Motivation or Vulnerable Victim). Application Note 29 also provides that subsection (b)(14)(C) applies if the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance. Subsection (b)(14)(C), however, does not apply if subsection (b)(3) or (b)(5) (as redesignated by the amendment) applies because the defendant's involvement in importation is adequately accounted for by those subsections. In addition, Application Note 29 defines "pattern of criminal conduct" and "engaged in as a livelihood" for purposes of subsection (b)(14)(E) as those terms are defined in §4B1.3 (Criminal Livelihood).

The amendment also revises the commentary in §3B1.4 (Using a Minor To Commit a Crime) and §3C1.1 (Obstructing or Impeding the Administration of Justice) to specify how those

adjustments interact with §2D1.1(b)(14)(B) and (D), respectively. Specifically, Application Note 2 to §3B1.4 is amended to clarify that the increase of two levels under this section would not apply if the defendant receives an enhancement under §2D1.1(b)(14)(B). Similarly, Application Note 7 to §3C1.1 is amended to clarify that the increase of two levels under this section would not apply if the defendant receives an enhancement under §2D1.1(b)(14)(D).

Seventh, the amendment amends §2D1.1 to create a new specific offense characteristic providing a 2-level downward adjustment if the defendant receives the 4-level ("minimal participant") reduction in subsection (a) of §3B1.2 (Mitigating Role) and the offense involved each of three additional specified factors: namely, the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense when the defendant was otherwise unlikely to commit such an offense; was to receive no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and had minimal knowledge of the scope and structure of the enterprise. The specific offense characteristic responds to section 7(2) of the Act, which directed the Commission to ensure that "there is an additional reduction of 2 offense levels if the defendant—

- (A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;
- (B) was to receive no monetary compensation from the illegal transaction;
and
- (C) was motivated by an intimate or familial relationship or by threats or

fear when the defendant was otherwise unlikely to commit such an offense."

Eighth, to reflect the renumbering of specific offense characteristics in §2D1.1(b) by the amendment, technical and conforming changes are made to the commentary to §2D1.1 and to §2D1.14 (Narco-Terrorism).

Ninth, the amendment amends §2D2.1 (Unlawful Possession; Attempt or Conspiracy) to account for the changes in the statutory penalties for simple possession of crack cocaine made in section 3 of the Act. Section 3 of the Act amended 21 U.S.C. § 844(a) to eliminate the 5-year mandatory minimum term of imprisonment (and 20-year statutory maximum) for simple possession of more than 5 grams of crack cocaine (or, for certain repeat offenders, more than 1 gram of crack cocaine). Accordingly, the statutory penalty for simple possession of crack cocaine is now the same as for simple possession of most other controlled substances: for a first offender, a maximum term of imprisonment of one year; for repeat offenders, maximum terms of 2 years or 3 years, and minimum terms of 15 days or 90 days, depending on the prior convictions. See 21 U.S.C. § 844(a). To account for this statutory change, the amendment deletes the cross reference at §2D2.1(b)(1) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under the drug trafficking guideline, §2D1.1.