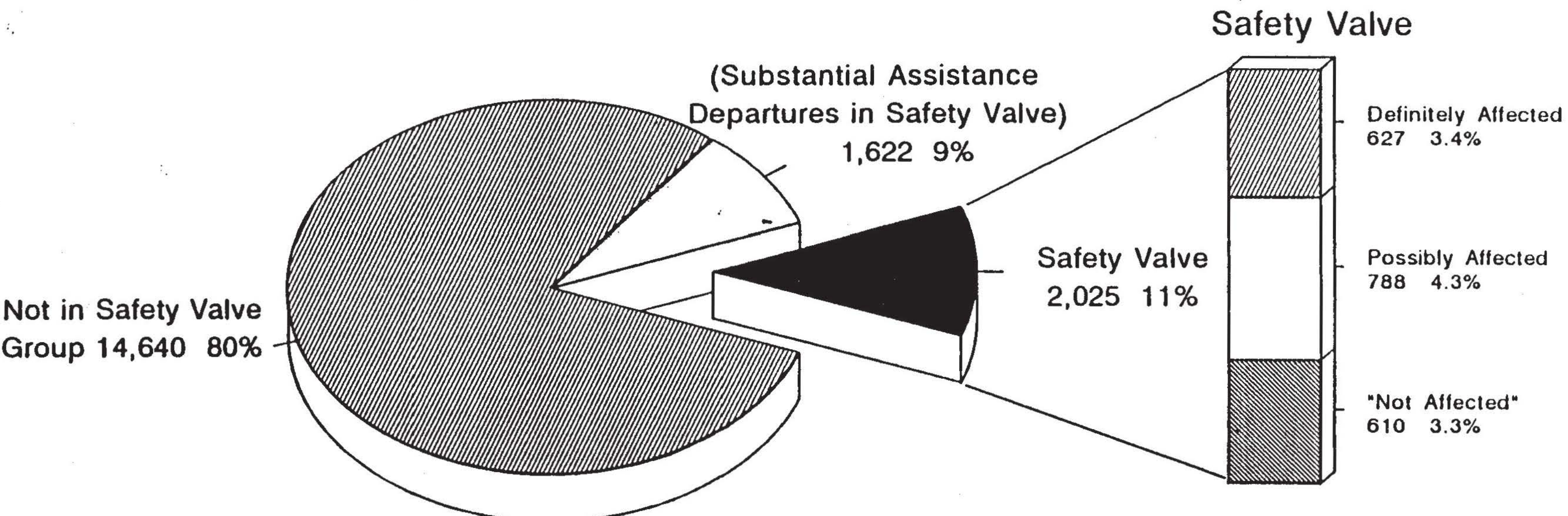
Figure A
IMPACT PROJECTION OF MANDATORY MINIMUM "SAFETY VALVE"*

Drug Cases Sentenced in FY 1993
(N=18,287)

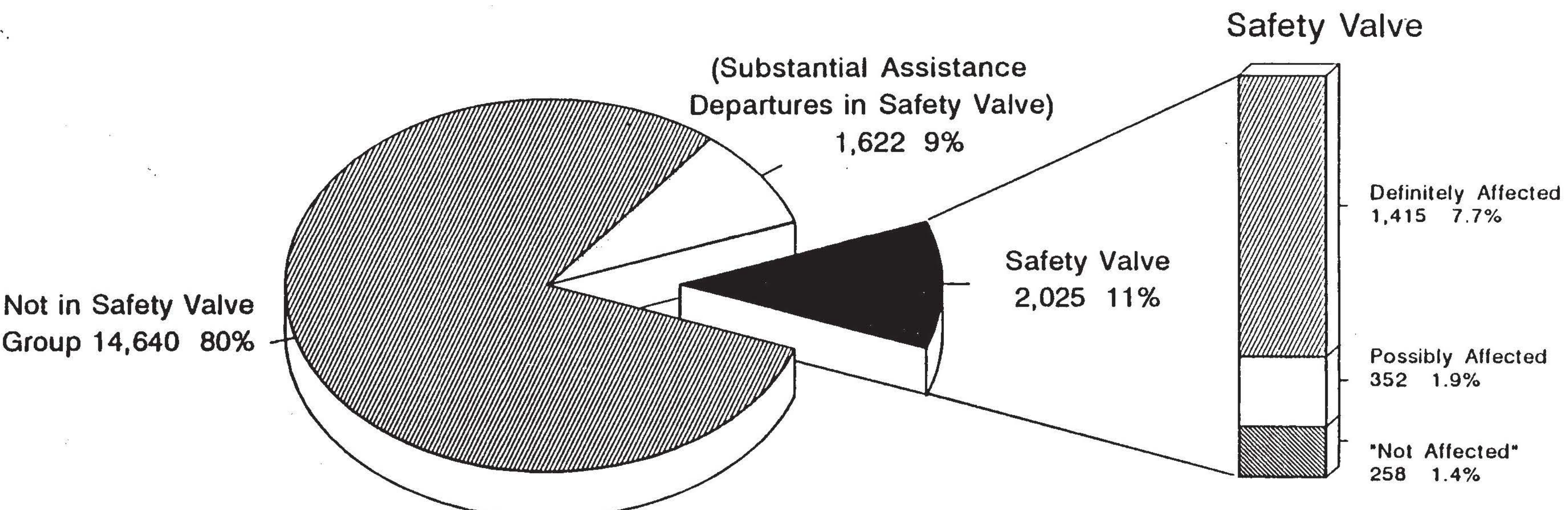


*Drug mandatory minimum cases with mitigating factors.

SOURCE: U.S. Sentencing Commission, 1993 Data File, MONFY93.

Figure B
IMPACT PROJECTION OF MANDATORY MINIMUM "SAFETY VALVE"*

— Modeled in Conjunction with 2-level Decrease for Safety Valve Defendants —



*Drug mandatory minimum cases with mitigating factors.

SOURCE: U.S. Sentencing Commission, 1993 Data File, MONFY93.

103D CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
103–460

MANDATORY MINIMUM SENTENCING REFORM ACT OF 1994

MARCH 24, 1994.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BROOKS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 3979]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3979) to amend title 18, United States Code, with respect to certain mandatory minimum sentences, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Mandatory Minimum Sentencing Reform Act of 1994".

SEC. 2. LIMITATION ON APPLICABILITY OF MANDATORY MINIMUM PENALTIES IN CERTAIN CASES.

(a) IN GENERAL.—Section 3553 of title 18, United States Code, is amended by adding at the end the following:

"(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act or section 1010 or 1013 of the Controlled Substances Import and Export Act, the court shall impose a sentence pursuant to guidelines established by the United States Sentencing Commission, without regard to any statutory minimum sentence, if the court finds at sentencing that—

"(1) the defendant does not have more than 1 criminal history point under the United States Sentencing Commission Guidelines Manual;

79–006

"(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant do so) in connection with the offense;

"(3) the offense did not result in death or serious bodily injury to any person;

"(4) the defendant was not an organizer, leader, manager, or supervisor of others (as determined under the United States Sentencing Commission Guidelines Manual) in the offense; and

"(5) no later than the time of the sentencing hearing, the defendant has provided to the Government all information the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. The fact that the defendant has no relevant or useful other information to provide shall not preclude or require a determination by the court that the defendant has complied with this requirement.".

(b) SENTENCING COMMISSION AUTHORITY.—

(1) IN GENERAL.—The United States Sentencing Commission (hereinafter in this section referred to as the "Commission") may—

(A) make such amendments as the Commission deems necessary to harmonize the sentencing guidelines and policy statements with this section and the amendment made by this section; and

(B) promulgate policy statements to assist in the application of this section and that amendment.

(2) PROCEDURES.—If the Commission determines it is necessary to do so in order that the amendments made under paragraph (1) may take effect on the effective date of the amendment made by subsection (a), the Commission may promulgate the amendments made under paragraph (1) in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that section had not expired.

(c) EFFECTIVE DATE AND APPLICATION.—The amendment made by subsection (a) shall apply to all sentences imposed on or after the 10th day beginning after the date of the enactment of this Act.

SEC. 3. DIRECTION TO SENTENCING COMMISSION.

The United States Sentencing Commission shall promulgate sentencing guidelines or amend existing sentencing guidelines with respect to cases where statutory minimum sentences would apply but for section 3553(f) of title 18, United States Code, to carry out the purposes of such section, so that the lowest sentence in the guideline range is not less than 2 years in those cases where a 5-year minimum would otherwise apply.

SEC. 4. SPECIAL RULE.

For the purpose of section 3582(c)(2) of title 18, United States Code, with respect to a prisoner the court determines has demonstrated good behavior while in prison, the changes in sentencing made as a result of this Act shall be deemed to be changes in the sentencing ranges by the Sentencing Commission pursuant to section 994(o) of title 28, United States Code.

EXPLANATION OF AMENDMENT

Inasmuch as H.R. 3979 was ordered reported with a single amendment in the nature of a substitute, the contents of this report constitute an explanation of that amendment.

SUMMARY AND PURPOSE

H.R. 3979, the Mandatory Minimum Sentencing Reform Act of 1994, is designed to refine the operation of certain mandatory minimum sentencing provisions applicable in federal drug trafficking cases. Specifically, the Act permit a narrow class of defendants, those who are the least culpable participants in such offenses, to receive strictly regulated reductions in prison sentences for mitigating factors currently recognized under the federal sentencing guidelines.

This approach will have two principal benefits for federal drug enforcement. The legislation will increase the effectiveness of existing controlled substance mandatory minimums by ensuring that

these penalties are directly targeted toward relatively more serious conduct. This, in turn, will send a clear signal about what conduct related to drug trafficking Congress considers most serious. At the same time stiff, crime-deterring penalties for all defendants convicted of controlled substance offenses will be preserved.

H.R. 3979 also will foster greater coordination between mandatory minimum sentencing and other key reforms instituted by Congress in the Sentencing Reform Act of 1984. At present, statutory minimums and the federal sentencing guidelines, which is the other primary source of sentencing law, do not always operate in a satisfactorily integrated manner. Ironically, due to the current operation of mandatory minimums, mitigating factors that are recognized in the guidelines and generally are considered in drug cases do not apply to the least culpable offenders except in rare instances. By taking a step toward correcting this anomaly, H.R. 3979 builds on other reforms enacted over the last decade that have dramatically increased the consistency, rationality, and, therefore, effectiveness of federal sentencing laws.

Committee Vote

On March 17, 1994, a reporting quorum being present, the Committee on the Judiciary offered H.R. 3979 reported to the full House by a recorded vote of 26 yeas to 9 nays.

Subcommittee Action

H.R. 3979, the mandatory Minimum Sentencing Reform Act of 1994, was favorably reported by the Subcommittee on Crime and Criminal Justice on March 11, 1994, by a recorded vote of 8 yeas to 5 nays.

Background

During the 1980's, Congress enacted a series of far-reaching reforms aimed at strengthening the consistency, rationality, and effectiveness of federal sentencing. The first building block in this process was the Sentencing Reform Act of 1984. This legislation extensively overhauled sentencing at the federal level by abolishing early parole and release, limiting "good-time" credit in prison, and directing the promulgation of an essentially mandatory system of federal sentencing "guidelines" to be issued by a newly-created United States Sentencing Commission.

Since 1984, Congress has also enacted statutory penalties, commonly called "mandatory minimums," the aim of which was to provide a meaningful floor in sentences for certain serious federal controlled substance and weapons-related offenses. With respect to drug trafficking, the Anti-Drug Abuse Act of 1986 [1] established two basic tiers of mandatory minimums for drug-trafficking—a five-year and a ten-year imprisonment penalty. Under that Act, these minimum penalties are triggered exclusively by the type and quantity of controlled substance involved in the offense. Deliberations in the House and Senate indicate a general congressional desire to link the Act's minimum penalties and specified drug quantities

[1] Pub. L. No. 99-570, 100 Stat. 3207 (1986).

such that "kingpin" traffickers would be subject to the ten-year minimum sentence and "middle-level" traffickers would be subject to the five-year minimum sentence.[2] The Omnibus Drug Abuse Act of 1988[3] broadened the reach of this approach by covering conspiracies to commit the offenses targeted by the 1986 Act with the same five and ten year penalties applicable to the object offenses. The 1988 Act also established a five-year minimum prison sentence for simple possession of five or more grams of "crack" cocaine.

When the United States Sentencing Commission promulgated the first set of sentencing guidelines in 1987, it constructed the guidelines for drug offense sentences around the mandatory minimum framework Congress had adopted in the 1986 and 1988 Acts. Thus, guideline sentences for offenses involving drug quantities that would trigger a mandatory minimum equate with a guideline sentence of at least that length. For offenses involving drug quantities greater than those that trigger a mandatory minimum, and/or for offenses in which the defendant was more culpable than a typical offender (e.g., because the defendant used a weapon, had a prior criminal record or took a leadership role in the offense), guideline sentences progressively increase from the congressionally-set minimums to account for these greater indicia of offense and/or offender seriousness.

In cases in which the guideline sentence is higher than the mandatory minimum, any applicable mitigating factors recognized by the guidelines (i.e. acceptance of responsibility, reduced role in the offense) will operate to provide a proportionally lower sentence than would apply to a similarly situated offender who lacked these mitigating characteristics. Ironically, however, for the very offenders who most warrant proportionally lower sentences—offenders that by guideline definitions are the least culpable—mandatory minimums generally operate to block the sentence from reflecting mitigating factors. This, in turn, means that these least culpable offenders may receive the same sentences as their relatively more culpable counterparts.

Aware of the potential for conflict in some cases between mitigating factors recognized in the guidelines and mandatory minimums, Congress directed the Sentencing Commission to conduct a comprehensive analysis of this and related issues through legislation enacted in 1990.[4] In its ensuing report,[5] the Sentencing Commission concluded that by limiting the effect of mitigating factors, mandatory minimums did in some cases lead to instances in which offenders who markedly differed in seriousness nonetheless received similarly severe sentences. The Commission recommended a greater integration between the guidelines and mandatory minimums.

On July 28, 1993, the Subcommittee on Crime and Criminal Justice held a hearing to further explore whether egregious cases existed that might illuminate narrow instances in which current

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[2] See. H.R. Rep. No. 845, 99th Cong., 2d Sess., Pt. 1 at 11–17 (1986) (reporting on essentially identical penalty provisions as those contained in the 1986 Act); 132 Cong. Rec. S. 14,300 (Sept. 30, 1986) (statement of Sen. Byrd).

[3] Pub. L. No. 100–690, 102 Stat. 4181 (1988).

[4] Pub. L. No. 101–647, Sec. 1703, 104 Stat. 4846 (1990).

[5] U.S. Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (Aug. 1991).

mandatory minimum penalties should be eased. As a result of this hearing, there was consensus that a modification of existing law was warranted. Based upon information presented at the hearing, it became clear that the integrity and effectiveness of controlled substance mandatory minimums could in fact be strengthened if a limited "safety valve" from the operation of these penalties was created and made applicable to the least culpable offenders.

The Committee believes that the approach taken in H.R. 3979 permits greater integration between sentencing guideline mitigating factors and mandatory minimums for the least culpable offenders and that the legislation will assist in improving the certainty, toughness, and proportionality of federal sentencing.

To ensure an actual sentence reduction for those convicted of offenses covered by the legislation, H.R. 3979 also includes a specific directive to the Sentencing Commission to amend the Sentencing Guidelines. The Committee recognizes that among defendants who will be eligible for consideration under proposed section 3553(f) and who are now subject to a five year minimum there may be some modest differences in culpability or seriousness that may warrant slightly different guideline ranges. The Committee intends that the Commission implement its directive so that the guideline range applicable to the least culpable defendants eligible under subsection (f) goes no lower than two years.

For example, under the present guideline structure, defendants involved with drug quantities that would trigger a mandatory five year minimum, who played a "minimal" role in the offense, and who warranted the maximum credit for acceptance of responsibility would fall within this least culpable subcategory. Guideline ranges for other offenders would be expected to increase progressively, in proportion to indicia of increased culpability or seriousness, from the floor of the two year guideline range.

Finally, the Committee intends this legislation to be applied retroactively. It specifically extends section 994(o) of Title 28 to reduce the guideline range for those already incarcerated under a mandatory minimum penalty. Section 994 requires that the Commission "shall specify in what circumstances and by what amount the sentence of prisoners serving terms of imprisonment for the offense may be reduced." Courts may permit a reduction for currently incarcerated defendants if the reduction is consistent with the Commission's pronouncements. Thus, this bill merely extends currently codified law in providing that the safety valve may be applied retroactively, with the additional requirement that the court find that a defendant who is subject to the potential sentence reduction has demonstrated good behavior while in prison.

SECTION-BY-SECTION ANALYSIS

SECTION 1

Short title: Mandatory Minimum Sentencing Reform Act of 1994.

SECTION 2

Section 2(a) directs courts to impose a sentence pursuant to the federal sentencing guidelines, without regard to any statutory mandatory minimum sentences that would otherwise apply, in certain

limited circumstances. For this section to be applicable, the mandatory minimum at issue must be for an offense under section 401, 404, or 406 of the Controlled Substance Act (21 U.S.C. §§ 841, 844 and 846 respectively) or section 1010 or 1013 of the Controlled Substance Import and Export Act (21 U.S.C. §§ 960 and 963 respectively), and the court must find that five specific criteria are satisfied.

Defendants seeking to benefit from this section (1) may not have more than one criminal history point under the Sentencing Guidelines; (2) may not have used violence or credible threats of violence in committing the offense; (3) the offense must not have resulted in the death or serious bodily injury of any person; (4) during the offense, the defendant may not have been an organizer, leader, manager, or supervisor of other persons, as those terms are defined by the Sentencing Guidelines; and (5) by the time of sentencing, the defendant must have fully assisted the Government by providing all relevant information regarding the offense. A defendant who genuinely lacks knowledge of relevant information because of his or her limited role in the offense will not be precluded from benefiting from the exception if the court determines that the defendant has otherwise complied with the paragraph's requirements.

Subsection (b) provides that the Sentencing Commission may make such amendments to the Sentencing Guidelines and promulgate such policy statements as are necessary to harmonize the guidelines with the changes effected by H.R. 3979. In addition, this section provides the Commission with the authority to make any such changes on an expedited basis, in accordance with procedures established under section 21(a) of the Sentencing Act of 1987, as though the authority granted under that provision had not expired.

Subsection (c) provides that section 3553(f) of title 18 will apply to sentences imposed on or after the 10th day beginning after the date of the Act's enactment.

SECTION 3

Section 3 directs the Commission to promulgate sentencing guidelines or amend existing guidelines so that the lowest sentence in the guideline range that would apply to defendants meeting proposed section 3553(f)'s criteria will be at least two years in the case of defendants now subject to a five year minimum.

SECTION 4

Section 4 provides a rule of application for sentencing changes brought about by the Act. The Act applies the approach in section 994 of title 28, pertaining to sentence reductions under the sentencing guidelines for currently incarcerated offenders, to provide retroactive application of the Act. For a prisoner to benefit from this Act, a court must find that the prisoner has demonstrated good behavior while incarcerated.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activi-

ties under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT OPERATIONS OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Operations were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 3979 will have no significant inflationary impact on prices and costs in the national economy.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill H.R. 3979, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 22, 1994.

Hon. JACK BROOKS,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 3979, the Mandatory Minimum Sentencing Reform ACt of 1994, as ordered reported by the House Committee on the Judiciary on March 17, 1994, CBO estimates that implementation of H.R. 3979 would result in savings in prison operating costs of the federal government totaling $15 million to $20 million over the 1997–1999 period. The full effect of the bill would not be felt until about 10 years after enactment, at which point savings are likely to be in the range of $40 million to $50 million annually at current prices. These savings would occur only if appropriations were reduced accordingly. Enactment of this bill would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply.

H.R. 3979 would require the federal courts to waive statutorily mandated minimum sentences when sentencing individuals convicted of less serious drug trafficking or possession offenses if the individuals are non-violent, low-level participants in the drug offense and have no prior serious criminal record. The courts would still be required to impose sentences that are consistent with U.S.

Sentencing Commission guidelines. This, in cases where the guidelines require a sentence that is grater than the statutorily mandated minimum, this bill would have no effect. According to the U.S. Sentencing Commission, each year approximately 150 individuals would be eligible for this downward adjustment. An additional 750 individuals would meet the eligibility conditions in terms of the type of offense committed and past criminal record, but the commission does not have sufficient data to determine whether their minimum sentences under the bill would be shorter than the current mandatory minimum sentences.

Under current law, mandatory minimum sentences are either five or ten years, depending on the quantity of drugs involved in the offense. Enactment of this bill could reduce both of these minimum sentences by approximately 50 percent. The annual cost of incarcerating an inmate is about $20,000. For purposes of this estimate, CBO assumed that 500 to 700 prisoners would be eligible for the sentence reduction each year, that about 50 percent of this group would otherwise serve close to five years and the other half would otherwise serve close to 10 years, and that these prisoners would receive the maximum applicable reduction in sentence. On this basis, CBO estimates that five years after enactment of this bill, the government would save about $15 million annually for the custody and care of prisoners. After 10 years, savings would total between $40 million and $50 million annually at current prices.

H.R. 3979 also would make prisoners who are currently serving sentences and who meet the criteria provided in this bill for sentence reduction eligible for early release, if a federal court finds that the prisoner has demonstrated good behavior while in prison. As a result, additional savings in prison costs could be realized. However, at this time CBO cannot estimate how many prisoners would receive a reduction in sentence and what the resultant savings would be.

In addition to savings in costs for the custody and care of prisoners, this bill would result in savings to the federal prison construction budget to the extent that additional prison space would not have to be build. In the long-term, the number of federal prisoners could be reduced by 3 percent. As a result, up to 3 percent of federal prison space in the long-term would become available each year if this bill were enacted.

Because this bill does not mandate that state courts adopt the provisions in this bill, CBO estimates that enactment of H.R. 3979 would not affect the budgets of states or localities.

If you wish further details on the estimate, we will be pleased to provide them. The CBO staff contact is Susanne Mehlman, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER, *Director.*

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 3553 OF TITLE 18, UNITED STATES CODE

§ 3553. Imposition of a sentence

(a) * * *

* * * * * * *

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act or section 1010 or 1013 of the Controlled Substances Import and Export Act, the court shall impose a sentence pursuant to guidelines established by the United States Sentencing Commission, without regard to any statutory minimum sentence, if the court finds at sentencing that—

(1) the defendant does not have more than 1 criminal history point under the United States Sentencing Commission Guidelines Manual;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was a not an organizer, leader, manager, or supervisor of others (as determined under the United States Sentencing Commission Guidelines Manual) in the offense; and

(5) no later than the time of the sentencing hearing, the defendant has provided to the Government all information the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. The fact that the defendant has no relevant or useful other information to provide shall not preclude or require a determination by the court that the defendant has complied with this requirement.

○

Congressional Record dated Sunday, August 21, 1994
House Section

P.L. 103-322
108 Stat. 1796
9/13/94

[CR Page H-8823]

TITLE VIII-APPLICABILITY OF MANDATORY MINIMUM PENALTIES IN CERTAIN CASES

Sec. 80001. Limitation on applicability of mandatory minimum penalties in certain cases.

(a) In General.--Section 3553 of title 18, United States Code, is amended by adding at the end the following new subsection:

"(f) Limitation on Applicability of Statutory Minimums in Certain Cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 961, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

"(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

"(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

"(3) the offense did not result in death or serious bodily injury to any person;

"(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848; and

"(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

(b) Sentencing Commission Authority.--

(1) In general.--(A) The United States Sentencing Commission (referred to in this subsection as the "Commission"), under section 994(a)(1) and (p) of title 28--

(i) shall promulgate guidelines, or amendments to guidelines, to carry out the purposes of this section and the amendment made by this section; and

(ii) may promulgate policy statements, or amendments to policy statements, to assist in the application of this section and that amendment.

(B) In the case of a defendant for whom the statutorily required minimum sentence is 5 years, such guidelines and amendments to guidelines issued under subparagraph (A) shall call for a guideline range in which the lowest term of imprisonment is at least 24 months.

(2) Procedures.--If the Commission determines that it is necessary to do so in order that the amendments made under paragraph (1) may take effect on the effective date of the amendment made by subsection (a), the Commission may promulgate the amendments made under paragraph (1) in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that section had not expired.

(c) Effective Date and Application.--The amendment made by subsection (a) shall apply to all sentences imposed on or after the 10th day beginning after the date of enactment of this Act.

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
(202) 273-4500
FAX (202) 273-4529

July 13, 1994

MEMORANDUM

TO: Chairman Wilkins
Commissioners
Senior Staff

FROM: Phyllis J. Newton
Staff Director

SUBJECT: Agenda — July 26, 1994, Commission Meeting

After consultation with the Chairman, the following agenda is proposed for the **Tuesday, July 26, 1994**, Commission meeting that will begin at **10:00 a.m.** in the Commissioner's conference room:

1. Minutes

2. Retroactivity Considerations

3. Crime Bill Update

4. Drugs→Violence Task Force

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UNITED STATES SENTENCING COMMISSION
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COMMISSION MEETING
7/26/94
AGENDA ITEM

July 7, 1994

MEMORANDUM

TO: Chairman Wilkins
Commissioners

FROM: Phyllis J. Newton
Staff Director

SUBJECT: Commission Meeting Minutes

Attached is a copy of the draft minutes for the Commission meeting on June 27, 1994 for your consideration at the Commission meeting on July 26, 1994.

Attachment

cc: Senior Staff

Minutes of the June 27, 1994,
United States Sentencing Commission Business Meeting

The meeting was called to order at 10:06 a.m. by William W. Wilkins, Jr. in the conference room of the United States Sentencing Commission. The following Commissioners, staff, and guest participated:

William W. Wilkins, Jr., Chairman
Julie E. Carnes, Commissioner
Michael S. Gelacak, Commissioner
A. David Mazzone, Commissioner
Gary Katzmann, Ex Officio Commissioner
Phyllis J. Newton, Staff Director
Peter Hoffman, Principal Technical Advisor
Susan Katzenelson, Director, Office of Policy Analysis
Kent Larsen, Director of Communications
Andy Purdy, Chief Deputy General Counsel
Win Swenson, Deputy General Counsel/Legislative Counsel
Gordon Waldo, Research Expert
Vicki Portney, Representative, Criminal Division, Department of Justice

Commissioner Ilene H. Nagel participated via telephone conference call.

Chairman Wilkins introduced Probation Officers Ellen S. Moore, (M.D. GA) and Walter P. Matthews (D. DE), both on temporary assignment to the Commission.

Motion was made by Commissioner Carnes to adopt the minutes of the May 3, 1994, meeting. Passed unanimously.

Commission Priorities for 1994-1995

Staff Director Newton reviewed her memorandum of June 9, 1994, containing a priority ranking of the Commission's suggested activities for 1994-1995. She stated that implementation of the 1994 crime bill directives and amending the drug guidelines are the projects with the highest priority. Most other priority projects listed, such as ASSYST, the Automated Judgment and Commitment Order programs, the Real Offense Conduct Module, and the Substantial Assistance Working Group, are well underway. She solicited comments and requests.

Commissioner Nagel made the following suggestions: contracting an independent study on crack cocaine to supplement the Commission's own required study; submitting a preliminary report on the just punishment study; submission of a preliminary report on the crime mix project; proposing a schedule for submission of preliminary reports to be used in the just punishment study; appointing task forces on geriatric offenders and food and drug offenses. Commissioner Nagel noted that the Cohen and Blumstein studies would be useful research

tools for examining criminal career trajectories, especially when preparing reports to Congress.

Motion made by Commissioner Mazzone to ratify the priorities as proscribed and submitted by staff as the 1994-1995 priorities for the Commission. Passed unanimously.

Crime Bill Update

Legislative Counsel Swenson, reporting on the Crime Bill, stated that Senator Biden and Representative Brooks have drafted a "Chairmen's Mark" as the vehicle for moving crime legislation forward. The present draft includes a required Commission study on crack, a safety valve provision, and revocation legislation. Also, other than the House version of a three strikes provision, the draft does not contain mandatory minimum provisions. Mr. Swenson stated that although the conferees have convened to reconcile differences between the House and Senate versions, only opening statements have been given. The Racial Justice Act appears to be a point of contention, stalling quick action on the Crime Bill. The conferees probably will not meet before mid-July.

Drugs Violence Task Force

Dr. Waldo reported on the Drugs Violence Task Force and distributed its agenda for the upcoming initial meeting. The Task Force's ex-officio members are Senator Edward M. Kennedy, Attorney General Janet Reno, Dr. Lee P. Brown, Director of the Office of National Drug Control Policy, Congressman Robert C. Scott, Peter B. Edelman, Counselor to the Secretary of the Department of Health and Human Services, and H. Talbot "Sandy" D'Alemberte, President of Florida State University. Most of the members of the Task Force will attend the Drugs Violence Task Force Meeting on June 29-30, 1994, to be held in the Thurgood Marshall Federal Judiciary Building.

Revised Commentary to §2D1.1

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

The proposed commentary amendment addresses the issue of upward departures for drug quantities in excess of that for level 38.

Chairman Wilkins suggested that the language "on the basis of an extraordinarily large quantity of controlled substance" and the brackets around "of up to 2 levels" be deleted in order de-emphasize quantity, focusing on the extraordinary case instead of the extraordinary amount. Commissioner Nagel recommended deleting the language "of up to 2 levels" in order to provide judges more discretion.

Motion made by Commissioner Nagel to pass the amendment as follows:

"19. In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least 10 times the minimum quantity required for level 38."

Passed unanimously.

Informational Items

COMMISSION NEWSLETTER
The staff will submit a prototype newsletter for the Commissioners' consideration. Staff Director Newton stated that a newsletter would be created only when newsworthy items occurred, probably on a semi-quarterly basis. Director of Communications Larsen explained that the newsletter would contain information that otherwise would not be available in other Commission publications, such as a list of ongoing projects and working groups' progress. Chairman Wilkins suggested calling the publication a "Summary of Commission Activities." Approval was given to continue working on a prototype.

REPORT SUMMARY PROJECT
Staff Director Newton stated that the staff has been developing a model summary of working group and research reports in an effort to have the Commission's research work reach a wider audience. She solicited comments on the project. Approval was given to continue working on the model summary.

SENTENCING GUIDELINES IN SPANISH
Staff Director Newton presented a copy of the sentencing guidelines printed in Spanish.

RESEARCH REFERENCE CATALOG
Staff Director Newton presented a copy of the Commission's 1994 "Research Reference Catalog." The catalog lists and describes the Commission's available publications, data, and information services.

RETROACTIVITY
Staff Director Newton stated that issues of retroactivity need to be brought before the July Commission meeting. She asked whether Commissioners had research or other requests that the staff should consider in preparation for the July meeting.

Commissioner Nagel recommended that groups affected by amendments to the Commission's retroactivity policy be invited to submit comments. This group should include a representative from the Clinton administration to comment on President Clinton's position on retroactive application of the safety valve and other provisions.

With regard to retroactivity of the new level 38 provisions, Commissioner Nagel suggested that figures on the number and nature of cases affected by the proposed retroactivity amendments be distributed to interested parties. Staff Director Newton stated that staff

would distribute these figures and collect comments before the July 27, 1994, Commission meeting.

BOP/USSC Report

The Commissioners voted unanimously to submit to Congress the "Report to Congress on the Maximum Utilization of Prison Resources," a joint informational report prepared by the Commission and the Bureau of Prisons.

Chairman Wilkins thanked Margaret Smith for her in-depth memorandum on the commentary to USSG §2D1.1.

Chairman Wilkins adjourned the meeting into executive session at 10:54 a.m.

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July 12, 1994

MEMORANDUM

TO: Chairman Wilkins
Commissioners

FROM: John R. Steer
General Counsel

SUBJECT: Amendments to be Considered for Retroactive Listing

The Commission has indicated that it will consider, at its July 26 meeting, three amendments for possible retroactive listing under policy statement §1B1.10(d). These amendments are as follows:

- Amendment 505, effective November 1, 1994, unless nullified by Congress.

  This amendment modifies USSG §2D1.1(c) to reduce the highest quantity-determined offense level from level 42 to level 38.

- Amendment 506, effective November 1, 1994, unless nullified by Congress.

  This amendment modifies the definition of "offense statutory maximum" in Application Note 2 to USSG §4B1.1 (Career Offender) to mean the statutory maximum prior to any enhancement based on prior record.

- Amendment 371, effective November 1, 1991.

  This amendment, in relevant part, promulgated USSG §2D1.11 relating to the possession of listed chemicals with intent to manufacture a controlled substance, etc. (i.e., violations of 21 U.S.C. §§ 841(d), 960(d)). Defendants potentially affected by retroactive designation of this amendment are those who, pursuant to circuit law, were sentenced by applying the drug trafficking guideline (§2D1.1), thereby producing substantially higher offense levels and sentencing ranges.

The Policy Analysis unit has estimated the impact of amendments 505 and 506 (see attached memorandum). Last year, Policy Analysis estimated that 21 defendants might be impacted if amendment 371 was made retroactive. An updated impact estimate was not prepared for this amendment; however, it should be expected that the current number is the same or less. The attached letter from Julie Stewart indicates that there are at least some defendants currently serving terms of imprisonment who could petition the court for a reduction in sentence if amendment 371 was made retroactive.

Criteria customarily considered by the Commission in assessing amendments for retroactive designation are discussed in the background commentary to §1B1.10. A copy of this commentary also is appended for your ready reference.

Please let me know if additional information is desired.

Attachments

12 July 1994

TO: Phyllis Newton
Staff Director

FROM: John Scalia
Office of Policy Analysis

SUBJ: Impact Assessment of Amendments Considered for Retroactivity

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Attached is the impact assessment of the amendments considered for retroactivity this amendment cycle. It is important to note that the assessment describes the maximum impact that would be felt if all cases eligible were to be re-sentenced according to the retroactive amendment.

The summary table presents the number of defendants impacted by making the amendment retroactive, the average minimum time-to-be-served pre- and post- a change in policy for the defendants impacted, the average reduction in months from the sentence originally imposed for the cases impacted, and the average percent reduction from the sentence originally imposed for the cases impacted.[1]

A methodology similar to the Commission's prison impact model was employed to make these estimates. Because of the lack of data describing guideline application, defendants sentenced prior to FY 1991 were not included in the analyses. Therefore, the analyses may underestimate the maximum impact of making the amendments retroactive.

For amendment 505 to §2D1.1, cases sentenced from 1991 through 1993 were considered for analysis. As reported during the amendment cycle, 662 cases sentenced during FY 1993 were identified as being affected by the amendment. During FYs 1992 and 1991, an additional 457 and 244 cases, respectively, were identified as being affected by the amendment. Additionally, cases sentenced during FY 1994 were projected from the FY 1993 data at a one to one ratio.

For amendment 506 to §4B1.1, cases sentenced from 1991 through 1993 were considered for analysis. Cases sentenced during FY 1993 were reviewed to determine the number of cases affected by the amendment. Of the 596 eligible cases (drug defendants classified as career offenders), 72, or 12.1 percent, were identified as being affected by the amendment. During each of FYs 1992 and 1991 there were 408 eligible cases. If the same percentage of eligible cases were affected during each of FYs 1992 and 1991, we could infer that an additional 98 cases would be affected by the amendment. Additionally, cases sentenced during FY 94 were projected from FY 93 at a one to one ratio.

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1. An impacted case is defined as one in which the defendant would still serving a portion of the sentence imposed as of November 1, 1994, the effective date of the new amendments.

Overall Impact Resulting from Retroactive Amendments

Amendment	Number Impacted	Minimum Time-to-be Served		Change	
		Current	Proposed	Months	Percent
#505: §2D1.1	1,931	207.0	161.5	-45.5	-22.0
#506: §4B1.1	231	179.8	145.8	-34.0	-19.0

Families Against Mandatory Minimums

F O U N D A T I O N

June 21, 1994

RE: Retroactivity of Amendment 371

Honorable William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
One Columbus Circle, NE #2-500
Washington, D.C. 20002-8002

Dear Judge Wilkins:

Last summer, the Commission considered a handful of amendments for retroactivity including amendment 371 that created guideline Sec. 2D1.11 and related amendments Sec. 2D1.12 and 2D1.13. The amendment was not approved for retroactivity last year. This summer I urge the Commission to consider it again.

During the past year, FAMM has received several letters from inmates who would qualify for the retroactive application of 2D1.11. Their cases illustrate the sentencing disparity caused by not making 2D1.11 retroactive.

Jerry Westfall is an inmate at Sheridan prison in Oregon. He is serving a 78 month sentence for possession of 1,000 grams of ephedrine (a precursor chemical.) He was sentenced under 2D1.1 in February of 1991, to the low end of the guideline range. If he were sentenced today under guideline Sec. 2D1.11, he would receive 27-33 months for the same amount of precursor chemical.

Kevin Grice, another inmate from FPC Sheridan, is serving a 97 month sentence for precursor chemicals. If he were able to benefit from the new guideline Sec. 2D1.11, his sentence would be 41 months.

Failure to make Sec. 2D1.11 retroactive has created a new problem of unwarranted sentencing disparity between those who "possess" precursor chemicals and those who "manufacture" the chemical drugs.

Last year's retroactive amendment 484, concerning the commentary/application notes of Sec. 2D1.1, clarifies the inner-circuit conflict regarding mixture or substance. As a result, waste water is not to be included in the total weight of manufacturing methamphetamine. But because 2D1.11 was not made retroactive, a defendant caught in the act of cooking methamphet-amine, is likely to receive a lesser sentence than the defendant caught with mere possession of precursor chemicals (21 USC 941(d)).

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Congress determined in 841(d) and 960(d) that possession of chemicals warrants less severe punishment than does other more advanced efforts to manufacture or traffick in narcotics. The Commission confirmed this distinction by establishing Sec. 2D1.11 effective November 1, 1991.

The retroactivity of amendment 371 will effect very few cases but could make a significant difference in sentence for those effected. Eligible cases could also be readily identified. Thus, retroactivity for this amendment fits squarely within the criteria set forth by the Commission as factors to be considered in selecting amendments for retroactivity (see third paragraph of Sec. 2D1.10.)

With these arguments in mind, I urge the Commission to make amendment 371 (Sections 2D1.11, 2D1.12, 2D1.13) retroactive.

Sincerely,

Julie Stewart
President

JAS/st
CC: All Commissioners

Class B misdemeanor is any offense for which the maximum authorized term of imprisonment is more than thirty days but not more than six months; a Class C misdemeanor is any offense for which the maximum authorized term of imprisonment is more than five days but not more than thirty days; an infraction is any offense for which the maximum authorized term of imprisonment is not more than five days.

2. *The guidelines for sentencing on multiple counts do not apply to counts that are Class B or C misdemeanors or infractions. Sentences for such offenses may be consecutive to or concurrent with sentences imposed on other counts. In imposing sentence, the court should, however, consider the relationship between the Class B or C misdemeanor or infraction and any other offenses of which the defendant is convicted.*

Background: *For the sake of judicial economy, the Commission has exempted all Class B and C misdemeanors and infractions from the coverage of the guidelines.*

Historical Note: Effective June 15, 1988 (see Appendix C, amendment 6). Amended effective November 1, 1989 (see Appendix C, amendment 81).

§1B1.10. Retroactivity of Amended Guideline Range (Policy Statement)

(a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the guidelines listed in subsection (d) below, a reduction in the defendant's term of imprisonment may be considered under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (d) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement.

(b) In determining whether a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect at that time.

(c) *Provided*, that a reduction in a defendant's term of imprisonment may, in no event, exceed the number of months by which the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered.

(d) Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 379, 380, 433, 454, 461, 484, 488, 490, and 499.

Commentary

Application Note:

1. *Although eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) of this section, the amended guideline range referred to in subsections (b) and (c) of this section is to be determined by applying all amendments to the guidelines (i.e., as if the defendant was being sentenced under the guidelines currently in effect).*

Background: Section 3582 (c)(2) of Title 18, United States Code, provides: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

This policy statement provides guidance for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 98-225, 98th Cong., 1st Sess. 180 (1983).

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 306). Amended effective November 1, 1990 (see Appendix C, amendment 360); November 1, 1991 (see Appendix C, amendment 423); November 1, 1992 (see Appendix C, amendment 469); November 1, 1993 (see Appendix C, amendment 502).

§1B1.11. Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b) (1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

(2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.

Drug Cases With Base Offense Levels Greater Than 38
by
Fiscal Year of Sentencing

Year	All Cases	Cases w/5K1.1
1991	274	70
1992	502	170
1993	721	294
Total	1,497	534

SOURCE: U.S. Sentencing Commission, 1991, 1992, 1993 Data Files, MONFY91, MONFY1992, MONFY1993.

7/15

John,

This is the district-based distribution of cases that might qualify for retroactivity considerations (re: Amendment #505). - S.K.

Amendment #505, §2D1.1

DISTRICT	Frequency	Percent
Massachusetts	2	0.1
Puerto Rico	40	2.1
New York East	112	5.8
New York South	30	1.6
New Jersey	21	1.1
Penn. East	160	8.3
Penn. Mid	1	0.1
Penn. West	2	0.1
Maryland	18	0.9
N Carolina East	18	0.9
N Carolina Mid	10	0.5
N Carolina West	11	0.6
South Carolina	22	1.1
Virginia East	88	4.6
Virginia West	10	0.5
W Virginia North	2	0.1
Alabama North	3	0.2
Alabama Mid	13	0.7
Alabama South	117	6.1
Florida North	106	5.5
Florida Mid	118	6.1
Florida South	286	14.8
Georgia North	16	0.8
Georgia Mid	40	2.1
Georgia South	42	2.2
Miss. North	4	0.2
Miss. South	23	1.2
Texas North	28	1.5
Texas East	26	1.3
Texas South	61	3.2
Texas West	58	3.0
Kentucky East	2	0.1
Kentucky West	2	0.1
Michigan East	15	0.8
Michigan West	1	0.1
Ohio North	1	0.1
Ohio South	8	0.4
Tennessee East	3	0.2
Tennessee West	10	0.5
Illinois North	13	0.7
Illinois Cent	2	0.1
Illinois South	7	0.4
Arkansas East	1	0.1
Iowa North	3	0.2
Iowa South	10	0.5
Minnesota	6	0.3
Missouri East	1	0.1
Missouri West	9	0.5
Arizona	49	2.5
California North	3	0.2
California East	5	0.3
California Cent	64	3.3
California South	120	6.2
Hawaii	24	1.2
Nevada	1	0.1
Oregon	10	0.5
Washington West	6	0.3
Colorado	2	0.1
New Mexico	14	0.7
Oklahoma North	5	0.3
Oklahoma West	25	1.3
Utah	1	0.1
Dist of Columbia	20	1.0

Amendment #506, §4B1.1

DISTRICT	Frequency	Percent
Maine	14	6.1
Vermont	2	0.9
Penn. East	8	3.5
Penn. Mid	2	0.9
Penn. West	4	1.7
N Carolina Mid	8	3.5
N Carolina West	4	1.7
Virginia West	9	3.9
Florida North	10	4.3
Florida Mid	8	3.5
Florida South	8	3.5
Georgia North	22	9.5
Georgia Mid	4	1.7
Georgia South	4	1.7
Texas South	7	3.0
Kentucky East	4	1.7
Michigan East	8	3.5
Ohio North	4	1.7
Tennessee East	4	1.7
Tennessee West	4	1.7
Illinois North	14	6.1
Illinois Cent	6	2.6
Illinois South	4	1.7
Indiana South	4	1.7
Wisconsin West	6	2.6
Arkansas East	4	1.7
Minnesota	7	3.0
Missouri West	14	6.1
Montana	4	1.7
Nevada	2	0.9
Oregon	2	0.9
Kansas	4	1.7
New Mexico	4	1.7
Dist of Columbia	16	6.9
Guam	2	0.9

July 26, 1994

Memorandum

TO: Commissioners
Staff Director

FROM: John Steer

SUBJECT: Memorandum from Judge Barry dated 7/21/94

With respect to amendment 371 (Regarding precursor chemicals, effective November 1, 1991), this memorandum (page 5) raises the concern that identifying defendants eligible for application of this amendment could pose considerable difficulty. FAM has stated that such defendants "could be readily identified." FAM appears to be correct. The identification of defendants eligible for application of §§2D1.11, 2D1.12, and 2D1.13 is based on statute of conviction. (§1B1.2, Applicable Guidelines). Section 2D1.11, 2D1.12, and 2D1.13 apply to a small number of identifiable statutory subsections; thus, identification of defendants eligible for consideration under this amendment should be straightforward.

With respect to the purpose of amendment 371, this memorandum (page 6) raises the question as to whether creating a new guideline "lowers, per se, previous calculations." By crating a new guideline specifically designed for precursor chemicals, the Commission, in effect, lowered the guideline ranges significantly for case in which the court previously had used in §2D1.1. Thus, the purpose of making this amendment retroactive would reduce the disparity between defendants sentenced prior to November 1, 1991 and on or after November 1, 1991 (the effective date of this guideline).

COMMITTEE ON CRIMINAL LAW
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Honorable Richard P. Matsch
Honorable David D. Noce
Honorable Stephen V. Wilson
Honorable Mark L. Wolf

Honorable Maryanne Trump Barry
Chair

July 21, 1994

Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Chairman Wilkins:

As Chair, and on behalf, of the Committee on Criminal Law of the Judicial Conference of the United States, I am submitting the following position paper on the potential retroactivity determination of certain amendments. We appreciate the Commission's invitation to submit a response on this issue.

We have set out the factors used in our analysis, and then we discuss the potential retroactivity of each amendment. In summary, subject to the comments below, we conclude that the factors predominate in favor of retroactivity for amendment # 505. Regarding the other two amendments, while we find some factors which indicate against retroactivity, we do not specifically oppose their retroactivity, and defer to the Commission's judgment.

I. Factors Considered in Determining Retroactivity of Amendments

The Committee considered two factors that the Commission has indicated at a recent meeting are important for determining the retroactivity of amendments: (1) The number of defendants affected (which we understand to mean, a number large enough to not be "isolated cases," yet small enough not to be burdensome to the courts); and (2) The ease or difficulty in identifying affected defendants.

In addition, the commentary to § 1B1.10 lists three additional factors: (1) The difficulty or ease of retroactive application; (2) The magnitude of change to the guideline range (an amendment would generally not be designated as retroactive unless it results in at least six months change; and (3) The purpose of the amendment.

The Committee's recommendations, particularly as to the retroactive application of amendment #505, are predicated on our understanding that under 18 U.S.C. §3582 (c)(2) and policy statement 1B1.10, any reduction in the term of imprisonment for an eligible defendant is made solely at the discretion of the court. Some defendants who were sentenced within a guideline range lowered by subsequent amendment should continue to serve the originally-imposed term. For example, judges may not have reached questions of aggravating factors for offenders who were already at high offense levels because of the amount of drugs involved. For offenders like these, reduction of the sentence should not be mandatory simply because of a later guideline amendment.

II. Amendment # 505 (Capping drug table at level 38)

Number of defendants. The Commission estimates that 1,931 defendants would be affected by this amendment, from FY 91 through FY 94, and that sentences would be reduced on the average of 45.5 months. There may be additional defendants from prior years.

Ease/Difficulty in Identifying Defendants. This amendment lends itself especially well to identification of defendants who would potentially qualify for sentence reduction if it were to be made retroactive. It would be easy to determine which defendants received an original BOL of either level 40 or 42. This is a particularly strong point for retroactivity of this amendment. No further judgments or determinations would be necessary.

Application. Application should be relatively easy. If the BOL was 40, the resulting offense level would be lowered by 2 levels. If it was 42, it would be lowered by 4 levels. There are certain factors that might complicate application to some extent, however. For example:

1. The defendant may want to argue for a sentence at a different point in the range than originally imposed, which may require a hearing. The Commission may be able to avoid this relatively minor problem by stating that either the same point in the range should be used, or it could reintroduce the range-limit it excluded this past year from 1B1.10, at least for this amendment.

2. Some defendants may argue that other, non-retroactive but "clarifying" amendments (e.g. the "clarification" of § 1B1.3) should be used as well if they, too, directly concern drug amount calculation, in recomputing their BOL. While the one-amendment approach adopted this year for 1B1.10 generally precludes this argument

("....all other guideline decisions remain unaffected") the argument might appear plausible, since both this amendment and that to § 1B1.3 directly concern the computation of the drug amount (BOL). Again, the Commission might avoid this by simply stating that the drug amount established at sentencing should be retained in applying this amendment.

3. Some defendants may have already received a departure, which may complicate application. For example, some defendants (perhaps 1/3, by estimate) of the group who had BOLs of 40 or 42 received a departure under §5K1.1. The issue would be, should the defendant receive a further departure, with the BOL having been lowered from 40 or 42 to 38? This would require some case-by-case analysis for the courts, especially in districts or courts where the 5K departure is a standard departure of a certain number of levels. It is the Committee's sense that in most cases where a defendant has already received a downward departure, no further reduction due to a guideline amendment would be appropriate. The Commission might help courts avoid reconsideration of these cases by adding to the application notes accompanying 1B1.10 commentary stating that a sentence adjustment due to an amended guideline is not generally expected for defendants whose original sentence was a departure below the then-applicable guideline range.

While potentially affecting the application, we do not view these factors as necessarily mitigating against retroactivity if the concerns mentioned above are properly addressed.

Magnitude of resulting change. The change this amendment would make to prior sentences with base offense levels (BOLs) of 40 and 42 would be very significant. There is a difference of approximately 30 months between the minimums of each single level of change at the high levels of the chart.

Purpose. The purpose of this amendment clearly is to reduce dependency of sentences on drug amount, which has been urged by nearly everyone, including the judiciary (and in testimony by Judges Broderick and Wolf).

Conclusion. The factors point toward a recommendation of retroactivity of this amendment, in our opinion. The purpose, to minimize the effect of the sole factor of drug amount, is important and has been repeatedly urged by many observers, including the judiciary. Moreover, it would be relatively easy to identify potentially affected defendants; it can be applied with relative ease; the estimated number of defendants affected is not extremely high; and the reduction in 2 or 4 levels at the high end of the chart makes a significant difference in sentence computation. On the other hand, it should be clear that a sentence reduction is not automatic, and may be declined for those defendants who already received a §5K1.1 departure or whose cases involved other aggravating factors.

III. Amendment # 506 (Defining Statutory Maximum for Career Offender Table)

Number of defendants. The Commission estimates that 231 cases might be affected by this amendment from FY 91 through FY 94, and that the sentences would be reduced by an average of 34 months. Additional defendants may be affected from prior years.

Ease/Difficulty of Identifying Defendants. Only those defendants who were sentenced as career offenders would be potentially eligible, and that determination would be relatively easy to identify. (Moreover, it can be anticipated that nearly all defendants sentenced as career offenders might ask for application of this amendment.) However, identifying which ones received an offense level based on an enhanced, rather than pure, statutory maximum for the instant offense would require careful review of the basis for the offense level determination. Presumably, only career offenders who received an offense level of 34 or 37 pursuant to § 4B1.1 (i.e. statutory maximums of over 20 years) would be eligible, but some of those offense levels might have been due to high drug amounts rather than prior convictions. Moreover, it could be assumed that most prisoners sentenced as a career offender would at least attempt to receive the benefit of this amendment, if it were to be made retroactive.

Application. Once the defendants who received an elevated offense level due to an enhancement of the statutory maximum based on a prior conviction are identified, the actual application of this amendment would be fairly simple. For example, if the offense level should have been 34 (statutory maximum of 25 years or more) based on drug amount, but was elevated to 37 (because the statutory maximum became life, due to a prior conviction), then the total offense level would be reduced by 3 levels.

Magnitude of Change. It should be noted that this amendment does not affect career offender status, itself. That status is based on the three criteria listed in § 4B1.1. Thus, it does not affect the fact that such defendants will have a Category VI criminal history. It only reduces the offense level assigned pursuant to the chart in § 4B1.1, to whatever level would be assigned for the non-enhanced statutory maximum. Most, if not all, cases subject to statutory enhancement based on prior convictions are 21 USC 841 offenses, where the lowest, non-enhanced statutory maximum is 20 years. Therefore, the most enhancement which would have been made would have been from level 32 to either 34 or 37, certainly a significant difference (level 32 (VI) is 210-262, and level 37 (VI) is 360-life)

Purpose. This is where arguments for retroactivity are particularly weak on this amendment. Neither the Federal Register nor the final form of the amendment refer to any circuit splits or previous ambiguity or disparity in application of the statutory maximum tables. Without evidence that retroactivity may be needed to equalize disparate past practice, and with no strong policy reason to shorten the sentences of recidivist offenders, the case for retroactivity of this amendment is weak.

Moreover, this amendment was supposedly passed to ensure implementation consistent with prior congressional intent (i.e., when Congress passed the implementing statute for career offenders (28 USC § 994(h)), the enhancement provisions of 21 USC 841 based on prior convictions did not yet exist). That is not to say, however, that the plain meaning of the terms "statutory maximum" should not be given the other possible interpretation (of the actual, operative (albeit enhanced) statutory maximum), which most likely a current Congress would intend.

Conclusion. Given the above analysis, and the fact that there is no great concern to shorten the sentences of recidivists who fit the career offender criteria, we find no compelling reasons to make this amendment retroactive, particularly in light of some of the complications involved in its application. However, we do not believe that retroactive determination would be overly burdensome, and we defer to the Commission's judgment.

IV. Amendment # 371 (Regarding precursor chemicals, effective November 1, 1991)

Number of defendants. The Commission estimated potential application of this amendment to only 21 or fewer defendants. The letter from Families Against Mandatories cites anecdotal evidence of two defendants who would be affected, and admits there would be "very few cases" affected. The commentary to § 1B1.10 notes that the legislative history to the enabling statute expressed the belief that courts should not be burdened with retroactive sentence modifications where the change affected only "isolated cases". However, we would not oppose retroactivity on this factor, alone.

Ease/Difficulty in Identifying Defendants. While FAM states that affected cases "could be readily identified", we believe that identification of qualified defendants could pose problems. Most data banks will presumably not be able to retrieve affected defendants by the type of drug (we discovered this with the LSD amendment), although the Commission can identify certain drug types for certain years. Generally, the courts will not be able to systematically identify all cases involving precursor elements, and will have to await motions for this amendment's application.

(It should be noted, that motions for application of this amendment could be anticipated from all defendants involved with methamphetamine or other cases in which precursor chemicals were even potentially involved in the sentence determination.)

Application. It is not clear how the amendment directly changes sentences. Prior to the amendment, which basically added the § 2D1.11 table for precursor chemicals, most courts used § 2D1.1 for the estimated amount of finished product. The amendment provides for use of § 2D1.11, except that manufacturing cases would use the greater of that and § 2D1.1. One circuit used § 2D1.10, which adds 3 levels

to the 2D1.1 chart amount. For defendants sentenced in that circuit the amendment should constitute a reduction. For all others, the courts would need to apply the § 2D1.11 chart and compare it to the base offense level determined at sentencing to see what, if any, change results.

The procedure for determining which defendants may qualify for the amendment would be complicated by the fact that precursor chemicals are rarely listed by name and amount in the PSR (usually the PSR cites the government's estimate for amount of finished product which could be produced by the chemicals). Actual documentation of what chemicals were possessed in what amounts will need to be obtained (available from search or lab reports).

Moreover, precursor chemicals are usually possessed in combination. Therefore, the court would have to perform equivalency determination of considerable complexity (see p. 108, 1993 manual).

These complications in application could conceivably require new factual hearings regarding the more precise calculations of precursor chemicals required for use of § 2D1.11 than were previously needed, where the estimate of resulting finished produce was no doubt usually used, with the § 2D1.1 chart.

Magnitude of Change. The two examples cited by FAM would, presumably, result in a 40 or 50-month reduction in sentence, if this amendment were applied. Effects of this amendment would vary, case-to-case.

Purpose. The purpose of this amendment was to make the drug guideline more comprehensive for certain (precursor and essential) chemicals used in the manufacture of controlled substances. It set up a chart specific to these chemicals. It did not lower, per se, previous calculations of the chemicals.

Conclusion. The potential difficulties in both identifying defendants and in applying it, the lack of any pressing policy consideration to effect a retroactive change here, and the small number of defendants affected are factors favoring non-retroactivity of this amendment. Moreover, we find no compelling reasons to recommend retroactivity. However, if this amendment were to be made retroactive, the burden on the courts would not be overwhelming, and thus we do not specifically oppose retroactivity, but defer to the Commission's judgment.

Sincerely.

Maryanne Trump Barry

U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, D.C. 20530

July 26, 1994

Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Wilkins:

This letter responds to your request for the views of the Department regarding whether guideline amendments 505, 506, and 371 should be made retroactive.

In our letter of April 22, 1994, the Department opposed adoption of amendment 505, which amends the drug-trafficking guideline, §2D1.1, to reduce the upper limit of the Drug Quantity Table from level 42 to 38, and amendment 506, which changes the definition of "offense statutory maximum" in the career offender guideline, §4B1.1, to mean the statutory maximum prior to any enhancement based on prior criminal record. The Department remains opposed to the adoption of these amendments and is opposed to their retroactive application as well.

Amendment 371, effective November 1, 1991, promulgated a new guideline §2D1.11 relating to the unlawful distribution, importation, exportation, and possession of listed chemicals. Based on analysis thus far, the Department cannot support the retroactive application of amendment 371. First, there is a legal question as to whether retroactive application is appropriate under Section 3582(c)(2) of Title 18, United States Code, as amendment 371 appears to create a new guideline range rather than lower an existing range. Second, we agree with Judge Barry who, on behalf of the Committee on Criminal Law of the Judicial Conference, noted that retroactive application would be complicated by the fact that presentence reports previously prepared in the absence of §2D1.11 would not necessarily have specified relevant guideline factors. Finally, more analysis is needed to determine to what extent previous sentences would be affected if amendment 371 were to be applied retroactively.

For the reasons set forth above, the Department is opposed to retroactive application of each of the three amendments.

Sincerely,

Jo Ann Harris
Assistant Attorney General

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JEFFREY PLOTKIN
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DEBORAH R. WINOGRAD

July 22, 1994

BY FEDERAL EXPRESS

Phyllis J. Newton, Staff Director
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Ms. Newton:

Thank you for offering the New York Council of Defense Lawyers (the "NYCDL") the opportunity to comment on the question of whether three previously promulgated amendments to the sentencing guidelines should be made retroactive and applied to previously sentenced defendants.

The NYCDL believes that the amendments under consideration should be eligible for retroactive application. We believe that this would be fair, since without retroactive application defendants who were sentenced under the "old" guidelines at issue would serve significantly harsher sentences than those defendants convicted of similar conduct but sentenced after the adoption of the amendments.

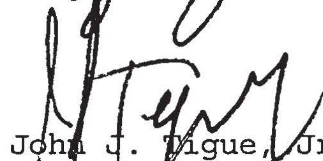
We believe that the Commission's decision to amend the guidelines under consideration is a reflection that sentences under those guidelines were too high: we believe that it is thereafter unfair to continue to enforce sentences imposed under the sentencing regime that the Commission has subsequently determined to be too harsh. The NYCDL therefore endorses the retroactive application of these particular amendments. This position is limited to these three proposals. Our response would be substantially different should the Commission attempt to seek retroactive application of guidelines to increase previously

imposed sentences, assuming such application were legally permissible.

We would ask you to distribute this letter to the members of the Commission. Although we do not currently intend to attend the meeting on July 26 in person, if the Commission believes that our input in person would be helpful to its decision-making process, we would be glad to send a representative. Please feel free to call either one of us if you have any questions, or if there is any further information we can provide to you.

Respectfully yours,

Marjorie J. Peerce (212) 223-0200



John J. Tigue, Jr. (212) 880-9450

Co-Chairpersons
NYCDL Sentencing Guidelines Committee

MJP:cah

cc: John Steer, Esq.

JOHN STEER

THE CATHOLIC UNIVERSITY OF AMERICA

Columbus School of Law
Office of the Faculty
Washington, D.C. 20064
(202) 319-5140

July 15, 1994

The Honorable William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1 Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Dear Judge Wilkins:

The Commission has indicated that it will consider, at its July 26, 1994 meeting, three Amendments (Amendments 505, 506 and 371) for possible retroactive listing under policy statement §1B1.10(d).

I will be out of the country during the week of July 23-30, 1994 and I will be unable to attend the Commission meeting.

However, on behalf of the Practitioners' Advisory Group, I am writing this letter to respectfully recommend that the Commission vote at its July 26, 1994 meeting in favor of making Amendments 505, 506 and 371 retroactive.

The criteria which has been customarily considered by the Commission in assessing amendments for retroactive designation are discussed in the background commentary to §1B1.10. Among the factors that have been considered by the Commission have been the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively.

Based on this criteria, the Practitioners' Advisory Group respectfully submits that Amendments 505, 506 and 371 easily qualify for retroactive application:

> Amendment 505: This amendment lowers the top of the Drug Quantity Table from level 42 to level 38. The impact of this amendment will range from 0-4 levels depending upon the application of the specfic offense characteristics in §2D1.1 and the adjustments in Chapter 3. According to the impact assessment

prepared by Mr. John Scalia of the Office of Policy Analysis, the overall impact resulting from retroactive application of Amendment 505 would be up to a 45.5 month reduction for certain prisoners.

Amendment 506: This amendment amends the term "offense statutory maximum" in §4B1.1 to mean the statutory maximum prior to any enhancement based on prior criminal record. According to Mr. Scalia's analysis, the overall impact resulting from retroactive application of Amendment 506 would be a reduction in sentence of up to 34 months for some federal prisoners.

Amendment 371: This amendment was made effective November 1, 1991 and relates to the possession of precursor chemicals with intent to manufacture. According to the letter dated June 21, 1994 from Ms. Julie Stewart, President of FAMM, it would appear that inmates would benefit anywhere from 51 months (inmate Jerry Westfall) to 56 months (inmate Kevin Grice) if Amendment 371 is made retroactive.

The maximum sentence reduction for any prisoner under any of these three proposed Amendments for retroactivity would be less than 60 months. In terms of the "difficulty of applying of the amendment retroactively" I can speak from firsthand knowledge that §1B1.10 has not proved to be difficult in application for the federal courts. I had a successful Motion made pursuant to 18 U.S.C. §3582(c)(2) last November in the United States District Court for the District of Maryland and the matter was handled without even the necessity of a formal court hearing. It was handled by Motion and a consent Order of Court. In a lot of these cases, the Office of the United States Attorney for the various Districts will not even oppose sentence reductions for prisoners in those cases where the Commission has decided to make an amendment retroactive. In short, motions for a sentence reduction under 18 U.S.C. §3582(c)(2) have not been time-consuming or burdensome to federal courts.

I respectfully urge the commission to vote at its July 26, 1994 meeting to give retroactive application to Amendments 505, 506, and 371.

With warmest personal regards, I am

Sincerely,

Fred Warren Bennett
Associate Professor of Law

cc: All Commissioners

Chron

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June 30, 1994

Honorable Janet Reno
Attorney General of the United States
Department of Justice
Tenth and Constitution Avenue, N.W.
Washington, D.C. 20530

Dear Madam Attorney General:

Pursuant to its responsibility under 28 U.S.C. § 994(a), the Commission expects to consider at its July 26 meeting whether any of three promulgated amendments that lower guideline ranges should be made retroactive in respect to previously sentenced defendants.[1] The three amendments that the Commission will consider are:

- Amendment 505 (effective November 1, 1994 if acceptable to Congress), amending §2D1.1 to lower the top of the Drug Quantity Table from level 42 to level 38;

- Amendment 506 (effective November 1, 1994 if acceptable to Congress), amending the term "offense statutory maximum" in §4B1.1 to mean the statutory maximum prior to any enhancement based on prior criminal record;

- Amendment 371 (effective November 1, 1991), promulgating §2D1.11 relating to the possession of precursor chemicals with intent to manufacture.

A staff memorandum and letter containing additional information about these amendments is enclosed for your information. Commission staff are currently analyzing the number and case characteristics of previously sentenced defendants that potentially

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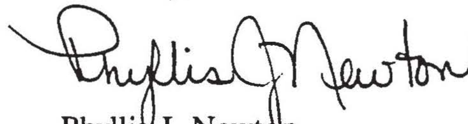
[1]Formal notice of this matter and a request for comment were published in the May 5, 1994 Federal Register (59 F.R. 23608).

could be eligible for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) and Commission policy statement §1B1.10 should the Commission make these amendments retroactive.

Because of the importance of this matter, the Commission would welcome the written views of the Department of Justice, as well as your participation in the July 26 meeting. The meeting is presently scheduled for 10 a.m. in the Commission's offices.

In the interim, should you have any questions regarding these amendments or the retroactivity process, please feel free to contact John R. Steer, the Commission's General Counsel, at (202) 273-4520.

Sincerely,



Phyllis J. Newton
Staff Director

Enclosure

June 14, 1994

To: John Steer
Peter Hoffman

From: Ronnie Scotkin

Subject: Retroactivity

Following is a list of amendments that may reduce the guideline range in certain cases. The first number refers to the amendment number as sent to Congress. The number in brackets refers to the amendment number as it will appear in Appendix C.

3. [505] §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses))

This amendment lowers the top of the Drug Quantity Table from level 42 to level 38.

Recalculation of the offense level for these cases would not seem to pose undue difficulty. The impact of this amendment will range from 0-4 levels depending upon the application of the specific offense characteristics in §2D1.1 and the adjustments in Chapter Three.

4. [506] §4B1.1 (Career Offender)

This amendment defines the term "offense statutory maximum" in §4B1.1 to mean the statutory maximum prior to any enhancement based on prior criminal record. This amendment will have a substantial impact on defendants sentenced under second offender statutes. For example, under this amendment, the offense level for a second offender under 21 U.S.C. § 841(b)(1)(C) would be level 32 (210-262 months) rather than level 34 (262- 327 months).

Recalculation of the offense level for these cases would not seem to pose undue difficulty. The impact of this amendment is generally 2-3 levels.

GUIDELINE ISSUE	CIRCUIT DECISIONS	COMMISSION AMENDMENT
§2D1.11 (Listed Chemicals) Is §2D1.1 the appropriate guideline to apply for convictions under 21 U.S.C. § 841(d) (listed chemicals)?	**Yes (Fifth, Sixth, Ninth)** United States v. Leed, 981 F.2d 202, 207 (5th Cir. 1993) (post-amendment) United States v. Kingston, 922 F.2d 1234 (6th Cir. 1990) United States v. Cook, 938 F.2d 149 (9th Cir. 1991) **No (Second, Tenth, Eleventh)** United States v. Perrone, 936 F.2d 1403, 1419 (2d Cir. 1991) (apply §2D1.10) United States v. Voss, 956 F.2d 1007, 1009-11 (10th Cir. 1992) (post-amendment; apply §2X5.1) United States v. Hyde, 977 F.2d 1436, 1440 (11th Cir. 1992) (apply §2X5.1)	**Amendment 371** adds new guideline §2D1.11 to provide an appropriate guideline for offenses involving 21 U.S.C. § 841(d). (Effective November 1, 1991.)
§2F1.1(b)(2) (More than Minimal Planning Adjustment); §3B1.1 (Aggravating Role) Can a sentencing court apply both the adjustment for §3B1.1 (Aggravating Role) and an adjustment for more than minimal planning (e.g., under §2F1.1 (Fraud and Deceit))?	**Yes (First, Third, Fourth, Seventh, Eighth, Tenth)** United States v. Balogun, 989 F.2d 20, 24 (1st Cir. 1993) United States v. Wong, 3 F.3d 667 (3d Cir. 1993) United States v. Curtis, 934 F.2d 553 (4th Cir. 1991) United States v. Boula, 932 F.2d 651, 655 (7th Cir. 1991) United States v. Willis, 997 F.2d 407 (8th Cir. 1993) United States v. Kelly, 993 F.2d 705 (9th Cir. 1993) United States v. Smith, No. 93-3159 (10th Cir. Jan. 6, 1994) **No (Sixth)** United States v. Romano, 970 F.2d 164 (6th Cir. 1992) (§3B1.1(a)) United States v. Chichy, 1 F.3d 1501 (6th Cir. 1993) (§3B1.1(c))	**Amendment 497** clarifies §1B1.1 (Application Instructions) to provide that adjustments from different guideline sections are applied cumulatively unless otherwise stated. (Effective November 1, 1993.)

Recalculation of the offense level for these cases would not seem to pose undue difficulties. The impact of this amendment on the offense level would be two levels.

Policy Analysis staff were unable to estimate the impact if this amendment were made retroactive. It seems likely that the number of affected cases would be fairly small.

1991

396. §2D1.1 (Unlawful Manufacturing, Exporting, Importing, or Trafficking)

This amendment changes the equivalency for certain Schedule III controlled substances. It also clarifies the imposition of caps on lower-schedule controlled substances.

tabled

Recalculation of the offense level for these cases would not seem to pose undue difficulties. It is estimated the impact of this amendment would be two to four levels for cases involving changes in the Schedule III equivalencies. This amendment could have a significant impact on the offense level in cases involving the imposition of caps.

Policy Analysis staff were unable to estimate the impact if this amendment were made retroactive. It seems likely that the number of affected cases would be fairly small, but the impact of the change in an affected case could be substantial.

371. §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical); §2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment); and §2D1.13 (Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements; Presenting False or Fraudulent Identification to Obtain a Listed Chemical)

tabled Wilson 5th Cir.

Amendment 371 added three new guidelines to the manual, effective on November 1, 1991. The Commission has not addressed the issue of retroactivity for this amendment in previous amendment cycles. Recent cases show a split in the courts concerning the proper guideline to apply for convictions under 21 U.S.C. § 841(d)(1), (2), (g)(1), and § 960(d)(1) and (2) previous to the inception of §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical). Including this amendment under §1B1.10 (Retroactivity) would provide a means to address sentence disparities arising from this conflict.

There were no guidelines to cover convictions under the above statutes between the passage of the authorizing legislation for these offenses in November 1988 and the enactment date of

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June 15, 1994

MEMORANDUM

TO: Susan Katzenelson

FROM: John Steer

SUBJECT: Analysis of Potentially Retroactive Guideline Amendments

Attached is a memorandum from Ronnie Scotkin identifying two of the six amendments recently promulgated by the Commission as candidates for possible retroactivity listing under §1B1.10. In preparation for the planned July 26 Commission meeting, we need an analysis by your shop.

Speaking only for myself, I would like to see a more detailed profile of likely affected cases, as well as a prison impact assessment, assuming all eligible defendants received the maximum reduction.

For example, I would like to know:

1) Mean and median sentence reductions, assuming all defendants got the maximum permissible reduction;

2) defendant role in the offense;

3) whether defendant received a weapon enhancement or §924(c) conviction;

4) for the amendment reducing drug quantity offense level, a breakdown by Criminal History Category, including career offender;

5) distribution of affected defendants by judicial district.

Others might have an interest in demographic information such as race, sex, age, or national origin. In the case of the career offender amendment, there may be a desire to know the nature of the current (probably all drugs) and prior convictions. I suspect there will be little enthusiasm, however, for making this amendment retroactive, so it may not be worthwhile to pull cases to examine the nature of prior convictions.

Attachment

cc: Phyllis J. Newton

To: John Steer
From: Teri Cortese & Andrea Mayer
Subject: §4B1.1
Date: July 5, 1994

The cases listed below are all in accordance with United States v. Moralez, 964 F.2d 677 (7th Cir.), cert. denied, 113 S.Ct. 293 (1992). All of the cases support this general proposition:

> Multiple penalties for a single criminal transaction are not necessarily impermissive where Congress manifests its intent that enhancement of penalty is proper. However, utilizing prior sentences to (1) determine the mandatory minimum under 21 U.S.C. §841 and (2) calculate §4B1.1 does **not** constitute double counting. The guidelines are not a separate, statutory provision, rather they are intended to provide a narrow sentencing range within the range authorized by statute for the offense of conviction. If the courts didn't apply the career offender provision Congressional intent would be thwarted.

Each Circuit is represented below except the First, Eighth and Eleventh Circuits. These courts have not been confronted with this issue. From my research these cases appear to constitute the universe of cases. If you need further research, please do not hesitate to ask.

- United States v. Howard, 998 F.2d 42 (2d Cir. 1993).

- United States v. Amis, 926 F.2d 328 (3rd Cir. 1991).

- United States v. Jackson, 995 F.2d 1064 (4th Cir.), cert. denied, 114 S.Ct. 354 (1993).

- United States v. Sanchez, 988 F.2d 1384 (5th Cir.), cert. denied, 114 S.Ct. 217 (1993).

- United States v. Stewart, 951 F.2d 351 (6th Cir.), cert. denied 113 S.Ct. 344 (1992).

- United States v. Saunders, 973 F.2d 1354 (7th Cir. 1992), cert. denied, 113 S.Ct. 1026 (1993).
  United States v. Alvarez, 914 F.2d 915 (7th Cir. 1990), cert. denied, 111 S.Ct. 2057 (1991).

- United States v. Sanchez-Lopez, 879 F.2d 559 (9th Cir. 1989);
  United States v. O'Neal, 937 F.2d 1319 (9th Cir. 1990).
  United States v. Pettit, 933 F.2d 1017 (9th cir. 1991).
- United States v. Smith, 984 F.2d 1084 (10th Cir.), cert. denied, 114 S.Ct. 204 (1993).

- United States v. Garrett, 926 F.2d 1005 (D.C. Cir. 1992).
  United States v. Spencer, 1994 WL 263668 (June 17, 1994).

(CITE AS: 1992 WL 105503 (7TH CIR.(ILL.)))

UNITED STATES of America, Plaintiff-Appellee,
v.
Pablo C. MORALEZ, also known as "Paul", Defendant-Appellant.
No. 90-3661.
United States Court of Appeals,
Seventh Circuit.
May 20, 1992.

Before CUDAHY and COFFEY, Circuit Judges, and WOOD, Jr, Senior Circuit Judge.

COFFEY

*1 Pablo Moralez appeals his conviction and sentence for possession with intent to distribute marijuana. He challenges the sufficiency of the evidence, the trial court's failure to conduct a suppression hearing, certain evidentiary rulings, his sentence, and his trial counsel's performance. We affirm.

I.

On March 21, 1990, a federal grand jury returned an indictment against Pablo Moralez and his son, Gilbert Moralez, charging each of them with one count of possession with intent to distribute marijuana, in violation of 21 U.S.C. s 841(a)(1). Father and son proceeded to trial on July 18, 1990. [FN1]

At trial, Illinois State Trooper Todd Trautvetter testified that on February 28, 1990, he was traveling northbound on Interstate 57 with his patrol dog towards his assigned state police district in the Chicago area when he began pacing a 1985 grey Chevrolet Blazer with Texas license plates. After determining that the vehicle was speeding and that the driver was not wearing his seat belt, Trautvetter activated his flashing lights and pulled the Blazer over to the side of the road. The driver produced a Texas diiver's license for Pablo C. Moralez, which was verified by Trooper Trautvetter as valid. According to the officer, Pablo Moralez was evasive when answering questions and became more nervous the longer he was questioned.

Trooper Trautvetter's suspicions were aroused, and he asked the defendant for consent to search the vehicle; the defendant responded, "Sure." The trooper asked the defendant two more times whether he could search the Blazer, and the defendant again replied, "Sure." Trautvetter then informed Moralez that he would be using his police dog to assist him in searching the vehicle. While searching the exterior of the Blazer, the canine showed particular interest in the tailgate area. The trooper observed two spare tires in the tailgate area, and after removing one of them from the Blazer, he noticed that the tire was unusually heavy. In addition, the canine became noticeably excited after sniffing the tire, and at this time the officer asked the defendant whether he could remove the tire from the rim; the defendant again replied, "Sure." After several unsuccessful attempts at prying the tire from the rim, Trooper Trautvetter asked the defendant whether he could take the tire to a gas station for the removal of the tire from the rim, and the defendant consented. The defendant and his son accompanied Trautvetter to the gas station, and when the tire was pried from the rim, Trooper Trautvetter discovered ten freezer bags containing marijuana. The trooper discovered five more packages of marijuana

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in the second spare tire. The contents of both sets of packages amounted to 29½ pounds of marijuana. Gary Havy, a forensic scientist specializing in latent fingerprints for the Illinois State Police, testified that the defendant's fingerprint was on one of the freezer bags that contained marijuana.

The jury found Moralez guilty of one count of possession of marijuana with intent to distribute. On November 28, 1990, the district court sentenced the defendant to serve 100 months of imprisonment to be followed by a period of supervisory release of four years, and imposed a special assessment of $50.

II.

*2 The defendant raises the following arguments on appeal: (1) the evidence presented at trial was insufficient to sustain his conviction; (2) the trial judge erred in refusing to conduct a suppression hearing on the constitutionality of the search of the vehicle; (3) the prosecutor improperly argued during closing argument that the defendant owned the vehicle that contained the marijuana; (4) the application of the career-offender section of the SENTENCING GUIDELINES to the defendant's sentence resulted in a double enhancement of his punishment; and (5) his trial counsel's assistance was constitutionally deficient.

III.

A. Sufficiency of Evidence

The defendant contends that his conviction should be reversed because the mere presence of marijuana in the vehicle he was driving, combined with his fingerprint on a bag of marijuana, was insufficient to sustain his conviction. A defendant attacking the sufficiency of the evidence has a heavy burden, and "[o]nly where the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt, may an court overturn the verdict." United States v. Redwine, 715 F.2d 315, 319 (7th Cir.1983), cert. denied, 467 U.S. 1216 (1984) (citation and quotation omitted). Furthermore, all reasonable inferences must be drawn in favor of the government. United States v. Douglas, 874 F.2d 1145, 1151 (7th Cir.), cert. denied, 110 S.Ct. 126 (1989).

Moralez was charged with possession of marijuana with the intent to distribute in violation of 21 U.S.C. s 841(a)(1). The elements of the crime are (1) knowing possession of marijuana, and (2) an intent to distribute it. As to the first element, knowing possession of marijuana, evidence at trial demonstrated that the defendant was driving a vehicle that contained two spare tires filled with marijuana packets weighing a total of 29 1/2 pounds. In addition, a forensic scientist identified the defendant's fingerprint on one of the marijuana freezer bags. Thus, a jury could reasonably infer that the defendant knowingly possessed the marijuana. In a case similar to the one before us, this court ruled that a defendant apprehended by police as he was attempting to unlock the door of a car containing cocaine was in possession of the drugs. United States v. Garrett, 903 F.2d 1105 (7th Cir.), cert. denied, 111 S.Ct. 272 (1990). The facts in the case before us are even more incriminating than the facts in Garrett, because unlike the defendant in Garrett, Moralez was actually in complete control and possession of the vehicle while driving the car in which the marijuana was discovered.

As to the second element, intent to distribute the marijuana, the fact that the defendant was in possession of approximately 30 pounds of marijuana would

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