Public Comment

Proposed Amendments

1995
VOLUME II

ATTACHMENT A

PART D - OFFENSES INVOLVING DRUGS

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

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

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

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

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

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below. Provided that if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role), the base offense level shall not exceed level 28.

(b) Specific Offense Characteristics

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

(2) If the use of a dangerous weapon (including a firearm) was threatened by the defendant, or the defendant induced or directed another participant to threaten the use of a dangerous weapon, increase by 3 levels.

(3) If a dangerous weapon (including a firearm) was actually brandished or displayed by the defendant, or the defendant induced or directed another participant to brandish or display a dangerous weapon, increase by 4 levels.

(4) If a firearm was actually discharged by the defendant, or the defendant induced or directed another participant to actually discharge a firearm, increase by 5 levels.

(5) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received bodily injury, or if the defendant induced or directed another participant to actually use a dangerous weapon and someone other than that participant received bodily injury, increase by 2 levels. This increase should be applied in addition to any other specific offense characteristic called for in subsections 2D1.1(b)(1) through (b)(4).

(6) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received serious bodily injury, or if the defendant induced or directed another participant to actually use a dangerous weapon and someone other than that participant received serious bodily injury, increase by 3 levels. This increase should be applied in addition to any other specific offense characteristic called for in subsections 2D1.1(b)(1) through (b)(4).

(7) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received permanent or life-threatening bodily injury, or if the defendant induced or directed another participant to actually use a dangerous weapon and someone other than that participant received permanent or life-threatening bodily injury, increase by 4 levels. This increase should be applied in addition to any other specific offense characteristic called for in subsections 2D1.1(b)(1) through (b)(4).

~~(2)~~ (8) If the defendant is convicted of violating 21 U.S.C. § 960(a) under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

DRUG QUANTITY TABLE

Controlled Substances and Quantity	Base Offense Level
(1) At least 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 30 KG of PCP, or at least 3 KG of PCP (actual); At least 30 KG of Methamphetamine, or at least 3 KG of Methamphetamine (actual), or at least 3 KG of "Ice"; At least 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 12 KG of Fentanyl; At least 3 KG of a Fentanyl Analogue; At least 30,000 KG of Marihuana; At least 6,000 KG of Hashish At least 600 KG of Hashish Oil.	**Level 34**
(2) At least 10 KG but less than 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); At least 10 KG but less than 30 KG of Methamphetamine, or at least 1 KG but less than 3 KG of Methamphetamine (actual), or at least 1 KG but less than 3 KG of "Ice"; At least 100 G but less than 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 4 KG but less than 12 KG of Fentanyl; At least 1 KG but less than 3 KG of a Fentanyl Analogue; At least 10,000 KG but less than 30,000 KG of Marihuana;	**Level 32**

At least 2,000 KG but less than 6,000 KG of Hashish;
At least 200 KG but less than 600 KG of Hashish Oil.

(3) At least 3 KG but less than 10 KG of Heroin **Level 30**
(or the equivalent amount of other Schedule I or II Opiates);
At least 15 KG but less than 50 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
At least 3 KG but less than 10 KG of Methamphetamine, or at least 300 G but less than 1 KG of Methamphetamine (actual), or at least 300 G but less than 1 KG of "Ice";
At least 30 G but less than 100 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 1.2 KG but less than 4 KG of Fentanyl;
At least 300 G but less than 1 KG of a Fentanyl Analogue;
At least 3,000 KG but less than 10,000 KG of Marihuana;
At least 600 KG but less than 2,000 KG of Hashish;
At least 60 KG but less than 200 KG of Hashish Oil.

(4) At least 1 KG but less than 3 KG of Heroin **Level 28**
(or the equivalent amount of other Schedule I or II Opiates);
At least 5 KG but less than 15 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
At least 1 KG but less than 3 KG of Methamphetamine, or at least 100 G but less than 300 G of Methamphetamine (actual), or at least 100 G but less than 300 G of "Ice";
At least 10 G but less than 30 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 400 G but less than 1.2 KG of Fentanyl;
At least 100 G but less than 300 G of a Fentanyl Analogue;
At least 1,000 KG but less than 3,000 KG of Marihuana;
At least 200 KG but less than 600 KG of Hashish;
At least 20 KG but less than 60 KG of Hashish Oil.

(5) At least 300 G but less than 1 KG of Heroin **Level 26**
(or the equivalent amount of other Schedule I or II Opiates);
At least 1.5 KG but less than 5 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
At least 300 G but less than 1 KG of PCP, or at least 30 G but less than 100 G of PCP (actual);
At least 300 G but less than 1 KG of Methamphetamine, or at least 30 G but less than 100 G of Methamphetamine (actual), or at least 30 G but less than 100 G of "Ice";

At least 3 G but less than 10 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 120 G but less than 400 G of Fentanyl;
At least 30 G but less than 100 G of a Fentanyl Analogue;
At least 300 KG but less than 1,000 KG of Marihuana;
At least 60 KG but less than 200 KG of Hashish;
At least 6 KG but less than 20 KG of Hashish Oil;

(6) At least 100 G but less than 300 G of Heroin **Level 24**
(or the equivalent amount of other Schedule I or II Opiates);
At least 500 G but less than 1.5 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
At least 100 G but less than 300 G of PCP, or at least 10 G but less than 30 G of PCP (actual);
At least 100 G but less than 300 G of Methamphetamine, or at least 10 G but less than 30 G of Methamphetamine (actual), or at least 10 G but less than 30 G of "Ice";
At least 1 G but less than 3 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 40 G but less than 120 G of Fentanyl;
At least 10 G but less than 30 G of a Fentanyl Analogue;
At least 100 KG but less than 300 KG of Marihuana;
At least 20 KG but less than 60 KG of Hashish;
At least 2 KG but less than 6 KG of Hashish Oil;

(7) At least 60 G but less than 100 G of Heroin **Level 22**
(or the equivalent amount of other Schedule I or II Opiates);
At least 300 G but less than 500 G of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
At least 60 G but less than 100 G of PCP, or at least 6 G but less than 10 G of PCP (actual);
At least 60 G but less than 100 G of Methamphetamine, or at least 6 G but less than 10 G of Methamphetamine (actual), or at least 6 G but less than 10 G of "Ice";
At least 600 MG but less than 1 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 24 G but less than 40 G of Fentanyl;
At least 6 G but less than 10 of a Fentanyl Analogue;
At least 60 KG but less than 100 KG of Marihuana;
At least 12 KG but less than 20 KG of Hashish;
At least 1.2 KG but less than 2 KG of Hashish Oil;

(8) At least 40 G but less than 60 G of Heroin **Level 20**
(or the equivalent amount of other Schedule I or II Opiates);
At least 200 G but less than 300 G of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);

At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
At least 40 G but less than 60 G of Methamphetamine, or at least 4 G but less than 6 G of Methamphetamine (actual), or at least 4 G but less than 6 G of "Ice";
At least 400 MG but less than 600 MG of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 16 G but less than 24 G of Fentanyl;
At least 4 G but less than 6 G of a Fentanyl Analogue;
At least 40 KG but less than 60 KG of Marihuana;
At least 8 KG but less than 12 KG of Hashish;
At least 800 G but less than 1.2 KG of Hashish Oil;
20 KG or more Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except anabolic steroids);
40,000 or more units of anabolic steroids.

(9) At least 20 G but less than 40 G of Heroin **Level 18**
(or the equivalent amount of other Schedule I or II Opiates);
At least 100 G but less than 200 G of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
At least 20 G but less than 40 G of Methamphetamine, or at least 2 G but less than 4 G of Methamphetamine (actual), or at least 2 G but less than 4 G of "Ice";
At least 200 MG but less than 400 MG of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 8 G but less than 16 G of Fentanyl;
At least 2 G but less than 4 G of a Fentanyl Analogue;
At least 20 KG but less than 40 KG of Marihuana;
At least 5 KG but less than 8 KG of Hashish;
At least 500 G but less than 800 G of Hashish Oil;
At least 10 KG but less than 20 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except anabolic steroids);
At least 20,000 but less than 40,000 units of anabolic steroids.

(10) At least 10 G but less than 20 G of Heroin **Level 16**
(or the equivalent amount of other Schedule I or II Opiates);
At least 50 G but less than 100 G of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";

At least 100 MG but less than 200 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 4 G but less than 8 G of Fentanyl;
At least 1 G but less than 2 G of a Fentanyl Analogue;
At least 10 KG but less than 20 KG of Marihuana;
At least 2 KG but less than 5 KG of Hashish;
At least 200 G but less than 500 G of Hashish Oil;
At least 5 KG but less than 10 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except anabolic steroids);
At least 10,000 but less than 20,000 units of anabolic steroids.

(11) At least 5 G but less than 10 G of Heroin **Level 14**
(or the equivalent amount of other Schedule I or II Opiates);
At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice";
At least 50 MG but less than 100 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 2 G but less than 4 G of Fentanyl;
At least 500 MG but less than 1 G of a Fentanyl Analogue;
At least 5 KG but less than 10 KG of Marihuana;
At least 1 KG but less than 2 KG of Hashish;
At least 100 G but less than 200 G of Hashish Oil;
At least 2.5 KG but less than 5 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except anabolic steroids);
At least 5,000 but less than 10,000 units of anabolic steroids.

(12) Less than 5 G Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 12**
Less than 25 G Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
Less than 5 G of PCP, or less than 500 MG of PCP (actual);
Less than 5 G of Methamphetamine, or less than 500 MG of Methamphetamine (actual), or less than 500 MG of "Ice";
Less than 50 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
Less than 2 G of Fentanyl;
Less than 500 MG of a Fentanyl Analogue;
At least 2.5 KG but less than 5 KG of Marihuana;
At least 500 G but less than 1 KG of Hashish;
At least 50 G but less than 100 G of Hashish Oil;

At least 1.25 KG but less than 2.5 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except anabolic steroids);
At least 2,500 but less than 5,000 units of anabolic steroids;
20 KG or more of Schedule IV substances.

(13) At least 1 KG but less than 2.5 KG of Marihuana **Level 10**
At least 200 G but less than 500 G of Hashish;
At least 20 G but less than 50 G of Hashish Oil;
At least 500 G but less than 1.25 KG of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except anabolic steroids);
At least 1,000 but less than 2,500 units of anabolic steroids;
At least 8 KG but less than 20 KG of Schedule IV substances.

(14) At least 250 G but less than 1 KG of Marihuana; **Level 8**
At least 50 G but less than 200 G of Hashish;
At least 5 G but less than 20 G of Hashish Oil;
At least 125 G but less than 500 G of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except anabolic steroids);
At least 250 but less than 1,000 units of anabolic steroids;
At least 2 KG but less than 8 KG of Schedule IV substances;
20 KG or more of Schedule V substances.

(15) Less than 250 G of Marihuana; **Level 6**
Less than 50 G of Hashish;
Less than 5 G of Hashish Oil;
Less than 125 G of Secobarbital (or the equivalent amount of other Schedule I or II Depressants) or Schedule III substances (except anabolic steroids);
Less than 250 units of anabolic steroids;
Less than 2 KG of Schedule IV substances;
Less than 20 KG of Schedule V substances.

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PART B - ROLE IN THE OFFENSE

Introductory Commentary

This Part provides adjustments to the offense level based upon the role the defendant played in committing the offense. The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), i.e., all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction.

~~When an offense is committed by more than one participant, §3B1.1 or §3B1.2 (or neither) may apply. Section 3B1.3 may apply to offenses committed by any number of participants.~~

For §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role) to apply, the offense must involve the defendant and at least one other participant, although that other participant need not be apprehended. When an offense has only one participant, neither §3B1.1 nor §3B1.2 will apply. In some cases, some participants may warrant an upward adjustment under §3B1.1, other participants may warrant a downward adjustment under §3B1.2, and still other participants may warrant no adjustment. Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply to offenses committed by any number of participants.

Sections 3B1.1 (Aggravating Role) and 3B1.2 (Mitigating Role) authorize an increase or decrease in offense level for a defendant who has an aggravating or mitigating role, respectively, in the offense conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Sections 3B1.1 and 3B1.2 are designed to work in conjunction with §1B1.3, which focuses upon the acts and omissions in which the defendant participated (i.e., that the defendant committed, aided, abetted, counseled, commanded, induced, procured or willfully caused) and, in the case of a jointly undertaken criminal activity, the acts and omissions of others in furtherance of the jointly undertaken criminal activity that were reasonably foreseeable.

For example, in a controlled substance trafficking offense, the Chapter Two offense level for Defendant A, who arranged the importation of 1000 kilograms of marihuana and hired a number of other participants to assist him, is level 28. The same Chapter Two offense level applies to Defendant B, a hired hand whose only role was to assist in unloading the ship upon which the marihuana was imported; Defendant C, a hired hand whose only role was as a deckhand on that ship; and Defendant D, a hired hand whose only role was to act as a lookout for that unloading. Defendant E, who

purchased the marihuana from Defendant A and resold it, acting alone, also receives the same Chapter Two offense level. Although the quantity of marihuana involved for each of these defendants (and thus the Chapter Two offense level) is identical, courts traditionally have distinguished among such defendants in imposing sentence to take into account their relative culpabilities (based on their respective roles). Defendant A logically would be seen as having the most culpable role because he organized the importation and recruited and managed others. Defendants B, C, and D logically would be seen as having substantially less culpable roles. Defendant E, who acted alone, would receive no role adjustment. Consistent with these principles, §§3B1.1 (Aggravating Role and 3B1.2 (Mitigating Role) are designed to provide the court with the ability to make appropriate adjustments in offense levels on the basis of the defendant's role and relative culpability in the offense conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).

The fact that the conduct of one participant warrants an upward adjustment for an aggravating role, or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating role. For example, Defendant F plans a bank robbery and hires Defendant G, who commits the robbery. Both defendants plead guilty to bank robbery, and each has a Chapter Two offense level of 24. Defendant G may be less culpable than Defendant F, who will receive an upward adjustment under §3B1.1 for employing Defendant G. Nevertheless, Defendant G does not have a minimal or minor role in the robbery because his role is not substantially less culpable than that of a defendant who committed the same robbery acting along.

(Historical Note omitted.)

§3B1.1 Aggravating Role

Based on the defendant's role in the offense, increase the offense level as ~~follows:~~follows (Apply the Greatest):

(a) If the defendant was an organizer or leader of ~~a criminal activity that involved five or more participants or was otherwise extensive~~ the offense and the offense involved at least four other participants, increase by 4 levels.

(b) If the defendant was a manager or supervisor ~~(but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive~~ of at least four other participants in the offense, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor ~~in any criminal activity other than~~

~~described in (a) or (b)~~ of at least one other participant in the offense, increase by 2 levels.

Commentary

Application Notes:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.

   In an unusual case, a person may be recruited by a criminally responsible participant for a significant role in the offense (i.e., a role that is typically held by a criminally responsible participant), but the person recruited may not be criminally responsible because the person recruited (1) is unaware that an offense is being committed, (2) has not yet reached the age of criminal responsibility, or (3) has a mental deficiency or condition that negates criminal responsibility. In such a case, an upward departure to the offense level that would have applied had such person been a criminally responsible participant may be warranted. For example, a person hired by a defendant to solicit money for a charitable organization who was unaware that the charitable organization was fraudulent, a person duped by a defendant into driving the getaway car from a bank robbery who was unaware that a robbery was being committed, or a child recruited by a defendant to assist in a theft would meet the criteria for the application of this provision.

2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

   A "manager" or "supervisor" means a person who managed or supervised another participant, whether directly or indirectly.

~~3. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.~~

3. In the case of a defendant who would have merited a minor or

minimal role adjustment but for the defendant's supervision of other minor- or minimal-role participants, do not apply an adjustment from §3B1.1 (Aggravating Role). For example, an increase for an aggravating role would not be appropriate for a defendant whose only function was to offload a large shipment of marihuana and who supervised other offloaders of that shipment. Instead, consider this factor in determining the appropriate reduction, if any, under §3B1.2 (Mitigating Role). For example, in the case of a defendant who would have merited a reduction for a minimal role but for his or her supervision of other minimal-role participants, a reduction for a minor, rather than minimal, role might be appropriate. In the case of a defendant who would have merited a reduction for a minor role but for his or her supervision of other minimal- or minor-role participants, no reduction for role in the offense might be appropriate.

The interaction of §§3B1.1 and 3B1.2 is to be addressed in the manner described above. Thus, if an adjustment from §3B1.1 is applied, an adjustment from §3B1.2 may not be applied.

* * *

§3B1.2. Mitigating Role

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

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

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

Commentary

Application Notes:

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

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

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

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

1. (A) Minimal Role. For subsection (a) to apply, the defendant must --

(1) be substantially less culpable than a person who committed the same offense without the involvement of any other participant;

(2) ordinarily have all of the characteristics listed in Application Note 2(a)-(d); and

(3) no be precluded from receiving this adjustment under Application Notes 3-5.

(B) Minor Role. For subsection (b) to apply, the defendant must --

(1) be substantially less culpable than a person who committed the same offense without the involvement of any other participant;

(2) ordinarily have most of the characteristics listed in Application Note 2(a)-(d); and

(3) no be precluded from receiving this adjustment under Application Notes 3-5.

(C) The difference between a defendant with a minimal role and a minor role is one of degree, and depends upon the presence and intensity of the types of factors described in Application Note 2(a)-(d).

(D) For the purposes of this section, the "same offense" means the offense conduct (and Chapter Two offense level) for which the defendant is accountable under §1B1.3 (Relevant Conduct). The determination of whether a defendant is substantially less culpable than a person who committed the same offense without the involvement of any other participant requires a comparative assessment. In a drug trafficking offense, for example, the role and culpability of a defendant who was hired as a lookout for a drug transaction would be compared with the role and culpability of the seller of the same quantity of the controlled substance who acted alone. Similarly, the role and culpability of a defendant who was hired to unload a shipment of marihuana would be compared with

that of an importer of the same quantity of marihuana who acted alone. "Participant" is defined in the Commentary to §3B1.1 (Aggravating Role).

Examples:

(1) Defendant A was hired by an unindicted participant to assist in unloading a ship carrying 1,000 kilograms of marihuana (having a Chapter Two offense level of Level 32). Defendant A had no decision-making authority, was to be paid $2,000, had no supervisory authority over another participant, and performed only unsophisticated tasks. The appropriate comparison of relative culpability is with a defendant who, acting alone, imported the same quantity of marihuana (such a defendant would receive a Chapter Two offense level of Level 32 and no aggravating or mitigating role adjustment). On the basis of this comparison, Defendant A is a substantially less culpable participant.

(2) Defendant B was hired by Defendant C to commit an assault on Defendant C's former business partner. Defendant B was told when and where to find the victim alone, was instructed how to proceed, was to be paid $3,000 to commit the offense, had no supervisory authority over another participant, and performed only unsophisticated tasks. Although Defendant B may be less culpable than Defendant C, Defendant B is not a substantially less culpable participant than a defendant who, acting alone, committed the same assault offense. Therefore, although Defendant C receives an aggravating role adjustment for employing Defendant B, Defendant B does not receive a mitigating role adjustment.

(E) Defendants who qualify as substantially less culpable participants usually will fall into one of the following categories:

(1) a defendant who facilitates the successful commission of an offense but is not essential to that offense (e.g., a lookout in a drug trafficking offense);

(2) a defendant who provides essentially manual labor that is necessary to the successful completion of an offense (e.g., a loader or unloader of contraband, or a deckhand on a ship carrying contraband); or

(3) a defendant who holds or transports contraband for the owner of the contraband (such defendants provide a buffer that reduces the likelihood of the owner being apprehended in possession of the contraband).

(F) Because the determination of whether a defendant qualifies for a mitigating (minimal or minor) role adjustment requires a comparative judgment, the Commission recognizes that it will be heavily depending upon the facts of each case.

2. The following is a list of characteristics that ordinarily are associated with a mitigating role:

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

(B) the total compensation or benefit to the defendant was ~~very~~small in comparison to the total profit typically associated with offenses of the same type and scope;

(C) the defendant did not supervise other participant(s); and

(D) the defendant performed only unsophisticated tasks.

In addition, although not determinative, a defendant's lack of knowledge or understanding of the scope and structure of the criminal activity or of the activities of other participants may be indicative of a mitigating role.

3. If the defendant received an adjustment from §3B1.1 (Aggravating Role), an adjustment for a minimal or minor role is not authorized.

4. With regard to offenses involving contraband (including controlled substances, a defendant who --

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

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

(C) financed any aspect of the offense; or

(D) transported contraband.

shall not receive a mitigating role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, or owned, or for that aspect of the offense

that the defendant financed or transported because, with regard to those acts, the defendant has acted as neither a minimal nor a minor participant.

Thus, for example, a defendant who sells 100 grams of cocaine and who is held accountable under §1B1.3 (Relevant Conduct) for only that quantity is not eligible for a mitigating role adjustment. In contrast, a defendant who sells 100 grams of cocaine, but who is held accountable under §1B1.3 for a jointly undertaken criminal activity involving five kilograms of cocaine, if otherwise qualified, may be considered for a mitigating role adjustment in respect to that jointly undertaken criminal activity, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendant sold.

However, if a defendant's sale, negotiation, ownership, financing or transportation of contraband occurs under such circumstances so that the defendant is significantly less culpable than those defendants subject to subsections 4(A) through (D) above, the court may consider a downward departure.

Thus, for example, when transportation is a single episode or when conduct occurs primarily because of a familial-type relationship (father-son, boyfriend-girlfriend) between another participant and the transporter, a downward departure may be appropriate.

~~[5. A defendant who is entrusted with a quantity of contraband for purposes of transporting such contraband (e.g., a courier or mule) shall not receive a minimal role adjustment for the quantity of contraband that the defendant transported. If such a defendant otherwise qualifies for a mitigating role adjustment, consideration may be given to a minor role adjustment.]~~

~~[6. A defendant who possessed a firearm or directed or induced another participant to possess a firearm in connection with the offense shall not receive a minimal role adjustment. If such a defendant otherwise qualifies for a mitigating role adjustment, consideration may be given to a minor role adjustment.]~~

4~~5~~. If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of

cocaine (an offense having a Chapter Two offense level of 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

~~86.~~ Consistent with the overall structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating role adjustment. In determining whether a mitigating role adjustment is warranted, the court should consider all the available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In weighing the totality of the circumstances, a court is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

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

This section provides an adjustment for a defendant who has a minor or minimal role in the offense. To qualify for a minor or minimal role adjustment, the defendant must be substantially less culpable than a hypothetical defendant who committed the same offense without the involvement of any other indicted or unindicted participant. In a large scale offense that cannot readily be committed by one person, the above comparison would be made to a small number of equally culpable participants who committed the offense without additional assistance. In an offense involving importing, transporting, or storing contraband (including controlled substances), the defendant's relative culpability is to be assessed by comparison with a participant who owned the same type and quantity of contraband because, in an offense involving contraband that is committed without the involvement of any other participant, the person committing the offense will be the owner of the contraband.

* * *

~~**§3B1.4.** In any other case, no adjustment is made for role in the offense.~~

~~Commentary~~

~~Many offenses are committed by a single individual or by individuals of roughly equal culpability so that none of them will receive an adjustment under this Part. In addition, some participants in a criminal organization may receive increases under §3B1.1 (Aggravating Role) while others receive decreases under §3B1.2 (Mitigating Role) and still other participants receive no adjustments.~~

44. Proposed Amendment #44 - **Money Laundering**

The PAG strongly supports the proposed amendments to §§ 2S1.1-2S1.2, pertaining to money laundering offenses. The amendment would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds. While the amendment constitutes a much needed reform, we believe that the underlying objective of the amendment, achieving "real offense" sentencing, could best be achieved by the PAG's proposed modifications which are referenced in the Additional Issue for Comment section of the proposed amendment.

Initially, the need for some amendment to the existing money laundering guidelines is substantial. The money laundering statutes, 18 U.S.C. §§ 1956 and 1957, are quite expansive. Indeed, the Department of Justice in its policy statement, dated October 1, 1992, recognized that the statutes are "extraordinarily broad," and that they "apply to the movement of funds derived from most serious federal crimes and a larger number of state crimes, as well." In our experience, the statutes have been applied in relatively minor fraud and other cases in which the defendant merely deposited the proceeds of illegal activity into his or her bank account. See, e.g., United States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991) (Affirming conviction under 18 U.S.C. § 1956 where state official deposited into his personal checking account a $3000 check representing a bribe). Furthermore. defense attorneys from around the country have informed the PAG that certain prosecutors are using the statute to prosecute state misdemeanor offenses (e.g., prostitution, gambling) as federal money laundering and, as such, exposing defendants to significant prison sentences for crimes which would have otherwise resulted in the defendants receiving probation.

Furthermore, as noted by the Money Laundering Working Group, the money laundering statute, 18 U.S.C. § 1956, has been used by prosecutors to "up the ante" in selected cases despite the fact that the charged financial transaction offenses do not differ substantially from the underlying unlawful activity. Money Laundering Working Group, "Explanation of Draft Amendments to §§ 2S1.1 through 1.4" at 1 (November 10, 1992) (footnote omitted). Also, as the Money Laundering Working Group recognized, the existing guideline's high base offense level assumed that large scale, sophisticated money laundering would be the norm. The experience of the PAG is that money laundering counts are often added to other cases to increase prosecutorial leverage and obtain harsher sentences. Accordingly, from the perspective of the PAG, the most important aspect of the proposed amendments is that they significantly reduce the potential for actual or threatened sentence manipulation through charging practices.

Unfortunately, based on the Department of Justice's suggested revisions to the proposed amendment, it would appear that the

Department is intent on maintaining its ability to control sentencing exposure through the charging decision. The Department's proposal to increase the base offense levels in § 2S1.1(a)(2) and (3) by four levels would perpetuate a system in which defendants facing a money laundering charge would be exposed to a greater sentence despite the fact that they did little, if anything, more than commit the underlying offense. We urge the Commission to reject the Department's position because, as the Working Group noted, where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same as for the underlying offense." Id.

Indeed, in order to achieve the Commission's stated goal of "tying offense levels more closely to the underlying conduct that was the source of the illegal proceeds," we recommend that the Commission make the following modifications to the proposal:

First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level in proposed § 2S1.1(a)(2) or (3). This offense level then would be increased by any specific offense characteristics under proposed § 2S1.1(b). To achieve this result, we suggest deleting from the instruction in § 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (2).

Without this modification, the proposed guideline, at least in certain situations, would perpetuate the inequitable system of having the sentence based on the charging decision rather than by the defendant's actual conduct. For example, in a situation where the defendant through illegal gambling obtains $150,000 in proceeds and deposits those proceeds in the bank, the defendant (assuming he was not running a gambling business) would be subject to a base offense level of 6, if charged under the federal gambling statutes. See U.S.S.G. § 2E3.1(a)(2). However, if that same defendant were charged with money laundering, his or her guideline level under the proposed amendment would be 15. See § 2S1.1(a)(3) (base offense level of 8 plus 7 levels based on § 2F1.1). Because the proposed amendment instructs the sentencing judge to "apply the greatest" guideline level, the defendant would receive a nine point enhancement based entirely on the charging decision.

Second, the proposed amendment would eliminate reliance on the table found in § 2S1.1(b)(2) and substitute reliance on the fraud table found in § 2F1.1, despite the substantial difference between loss in a fraud case and the value of funds involved in a money laundering transaction. While we understand the Commission's desire to use the fraud table in order to promote uniformity and consistency in economic crime cases, the attempt to equate the

value of funds in a money laundering transaction and the loss involved from fraud is without any basis in logic. Fraud offenses almost invariably involve loss to a victim; and it is this loss which is the driving force behind the table. See § 2F1.1(b). Money laundering offenses involve financial transactions which do not involve loss to a discrete victim; and, at least under the current Guidelines, it is the value of the funds involved in the transaction which is the driving force behind the table. See § 2S1.1(b)(2).

In addition to the difference in the "victim," the two offenses are completely different in terms of the amount of funds generally involved. While money laundering typically involves relatively large sums of money, fraud comes in all shapes and sizes: using a counterfeit telephone credit card to make long distance telephone calls or a scheme to fraudulently collect on a $5 million dollar insurance policy. See, e.g., United States v. Smith, 13 F.3d 1421, 1428 (10th Cir. 1994) (Noting that money laundering counts should not be grouped for sentencing with wire fraud counts "because there are different victims and separate and distinct losses.")

This difference in the amount of funds involved in each crime and in the nature of the "victim" of each crime makes any reliance on the fraud table ill-advised, and the PAG recommends that the Commission not eliminate the table currently found in § 2S1.1(b)(2), but rather use this table rather than the fraud table as the basis for the adjustments called for in the amendment, §§ 2S1.1(a)(2-3), 2S1.2(1)(1-2). This table should be used in connection with the amendment's proposed lower base offense level in light of the Money Laundering Working Group's recognition that low dollar amount, unsophisticated cases are prosecuted under this statute. In the event that the Commission believes that the existing table is inadequate, a revised money laundering table should be employed.

Third, if the Commission nevertheless determines to incorporate the fraud table into the money laundering guidelines, then the amendment should be revised so that the base offense level in § 2S1.1(a)(3) is the same as the base offense level for fraud and deceit § 2F1.1. The PAG strongly disagrees with the suggestion in the Synopsis of Proposed Amendment that the additional two points are required because money laundering typically involves more than minimal planning. As previously noted, our experience is that most money laundering cases involve little more than the deposit of allegedly criminally derived proceeds into a bank account. Indeed, where there is actual money laundering, and not just a bank deposit, the proposed amendment includes a two point adjustment. See § 2S1.1(b)(1). If the base offense level in § 2S1.1(a)(3) is not changed to 6, then the guideline will continue to produce inequitable and irrational sentences. For example, where a defendant commits a $1600 mail fraud and deposits the

proceeds in a savings account, the defendant could be charged with mail fraud and/or money laundering. As a mail fraud case, the defendant's base offense level is 6; but, as a money laundering case under the currently proposed amendment, the base offense level is 8.

Fourth, the proposed guideline amendments fail to recognize the unique nature of the money laundering sting provisions of 18 U.S.C. § 1956(a)(3). Under that section the crime is completed if a defendant with the intent (1) to promote specified unlawful activity; (2) to conceal or disguise property believed to be the proceeds of specified unlawful activity; or (3) to avoid a CTR requirement, engages n a financial transaction with property represented by a law enforcement official to be the proceeds of specified unlawful activity. This section has been used in an ever increasing number of undercover sting operations in which federal agents attempt to engage in money laundering activities and represent that their money comes from unlawful sources. This obviously provides continued opportunities for sentence manipulation given that the government controls the "value of funds" involved in the transaction and exacerbates the problem of using the elevated offense levels which would be dictated by the fraud table. The Ninth Circuit recently held, in the context of a drug case, that sentencing manipulation/entrapment provided the basis for a downward departure, see United States v. Staufer, 38 F.3d 1103 (9th Cir. 1994); however, there is little uniformity among the courts on this subject.

In order to prevent such guideline manipulation in sting cases and to promote uniformity in this area of the law, we suggest that the Commission include the following statement as Application Note 6.

> If a defendant is convicted in an undercover sting, pursuant to 18 U.S.C. § 1956(a)(3), and the Court finds that the government agent influenced the "value of funds" involved in the transaction in order to increase the defendant's guideline level, a downward departure may be warranted.

45. Proposed Amendment #45 - **Supervised Release (Chapter 5, Part D)**

The PAG urges the Commission to amend the supervised release Guidelines to permit greater consideration of the individual defendant's need for supervision after imprisonment, to permit greater judicial flexibility in the imposition of supervised release and to relieve the growing burden on judicial resources devoted to supervising defendants.

The PAG favors amending §5D1.1(a) by providing for a mandatory period of supervised release only when required by statute. In all other cases, supervised release would be optional with the court.

Section 5D1.1 would read as follows:

(a) "The court shall order a term of supervised release to follow imprisonment when required by statute.

(b) The court may order a term of supervised release to follow imprisonment in any other case."

As to the term of supervised release, the PAG favors amending §5D1.2 by providing for a term of "at least one year but not more than three years" in subsection (a) and by changing §5D1.2(b) by providing for a length of supervised release of up to one year for a defendant convicted of a class C, D, or E felony or a class A misdemeanor and at least one but not more than three years for a defendant convicted of a class A or B felony. This would require the Commission to recommend to Congress that 18 U.S.C. § 3583(b) be amended to effectuate these changes in §5D1.2(b).

In other words, the PAG supports reducing the terms of supervised release across the board and making supervised release mandatory only where required by statute.

46. Proposed Amendment #46 - **Implementing the Total Sentence of Imprisonment**

Amendment 46 sets forth two options regarding the revision and clarification of Guidelines § 5G1.3(c). The PAG strongly supports the need for both revision and clarification of this guideline, and finds some aspects of both options which are worthy on inclusion in an amendment to the section. The PAG therefore supports passage of an amendment which incorporates aspects of both options under consideration.

The need for revision and clarification of 5G1.3(c) is compelling. As it currently reads, the Guideline is complicated, confusing, and complex. Use of 5G1.3(c) is difficult, and even more problematic to explain to the defendants whose time in prison turns on its operation. Because of its ambiguity under certain circumstances, the current Guideline may also lead to incorrect applications with the end result of sentencing disparity. Because of the inherent complexity of the issue, it is likely impossible to draft a guideline to address all potential sentencing scenarios with specificity. Nevertheless, aspects of both Option 1 and Option 2 present constructive steps toward minimizing the problem.

Both Option 1 and Option 2 of Amendment 46 use a grouping methodology (as if the offenses were federal offenses for which sentences were being imposed at the same time) to arrive at an appropriate total punishment. The PAG agrees with this general approach in those cases in which such calculations can be performed with some confidence. On the other had, the number of instances in which the prior undischarged term of imprisonment arises from a state offense which has no obvious federal analogue or a federal offense where there is insufficient information available to apply the grouping rules is likely to be large, and suggests the need for flexibility beyond the grouping approach.

Option 2 draws a distinction between cases in which the prior undischarged term of imprisonment arises from a federal guidelines sentence and those which do not. Only as to the latter category of cases is the court permitted the flexibility to depart from the grouping approach to use "any reasonable method to determine" the appropriate sentence. Although the grouping rules may apply more easily to prior undischarged terms of imprisonment arising from a guidelines sentence, it seems unlikely that this will always be true. Because the grouping methodology may not always be possible or lead to appropriate results when applied to a prior guidelines sentence, the better approach would seem to be to retain the "any reasonable method" flexibility afforded to other cases involving undischarged terms of imprisonment. In other words, the approach in Option 2 of distinguishing between prior guidelines sentences and other prior undischarged sentences may be inferior to the Option 1 approach of treating all undischarged terms of imprisonment under one category and approach.

Option 1 also includes an improved explanation of the process, a step by step guide, and better examples of how the guideline should be applied. These aspects of Option 1 appear helpful, and should be included in an amendment to 5G1.3(c).

While the clarity and greater simplicity in option 1 described above favors that option over Option 2, other aspects of option 1 may either be unnecessary or reintroduce confusion into the process. For example, Option 1 introduces the concept of "partially concurrent sentences," in which the precise sentence to be served is not clear until the occurrence of some event in the future. Although it is possible that the flexibility afforded by the possibility of such sentences may be helpful in unusual circumstances, it is difficult to picture why nearly any result could not be achieved through the use of either entirely concurrent or entirely consecutive sentences. This is particularly so if it is not considered a "departure" to impose a sentence either longer or shorter than the guidelines range to achieve an appropriate total term of imprisonment under 5G1.3. In short, it is unclear whether "partially concurrent sentences" which commence at a date to be determined in the future are needed to achieve the purposes of this guideline.

Application note 8 of Option 1 expands the application of the guideline beyond defendants who have prior undischarged terms of imprisonment to include some defendants who have been released from imprisonment. The class of such defendants, however, is quite small--only those who have completed a term of imprisonment for an offense committed after the completion of the instant offense and have completed the term of imprisonment before sentencing on the instant offense. Under these narrow circumstances, 5G1.3(b) and (c) would continue to apply even though there is no longer a prior undischarged term of imprisonment.

The difficulty with application note 8, however, is that it does not go far enough. The underlying difficulty, particularly in cases under 5G1.3(b), is that it is unfair for a defendant to be imprisoned twice for the same underlying conduct. But this unfairness is not limited to instances in which the defendant happens to still be serving time for the prior offense. Although note 8 to Option 1 addresses the unfairness of imposing a consecutive sentence simply because the defendant has been released from prison, it does so under narrow circumstances which have no apparent nexus to the underlying unfairness. That is, the preconditions set forth in note 8 are essentially irrelevant. All defendants should receive credit for prior terms of imprisonment, without regard to whether or not they have completed their sentence.

Finally, a shortcoming of both Option 1 and Option 2 is that neither addresses the question of what to do with cases falling within both 5G1.3(a) and (b). The current guideline requires

consecutive sentencing for any offense committed while serving a term of imprisonment or after sentencing but before commencement of the term of imprisonment. This is true, even if the undischarged term of imprisonment resulted from conduct fully taken into account in the determination of the offense level for the instant offense. This could lead to considerable unfairness in cases driven largely by relevant conduct. For example, a defendant who is sentenced for a drug offense which included numerous distributions over a long period of time and who then commits an additional minor distribution may receive a consecutive sentence out of all proportion to the severity of the offense. Although the appropriate aggregate sentence for offenses committed while in prison or after sentencing may often call for a completely consecutive sentence, a better approach would be to permit the same "any reasonable method" flexibility in these cases as well.

In conclusion, the PAG agrees there is a need for amendment to Guideline 5G1.3(c). An amendment incorporating certain items from each option as well as a few additional provisions would provide needed guidance in this difficult area. If the Commission does not believe that the approach we suggest (incorporating certain items from each option) is the way to proceed, we support Option 1 overall, as opposed to Option 2.

* * *

[END OF COMMENTS]

On behalf of the Practitioners' Advisory Group, thank you for allowing us to comment on the Proposed Amendments and Issues for Comment and we look forward to working with the Commission during this amendment cycle.

Sincerely,

Fred Warren Bennett
Chairman
Practitioners' Advisory Group

cc: Commissioner Michael S. Gelacak, Vice Chairman
Commissioner A. David Mazzone, Vice Chairman
Commissioner Wayne A. Budd
Commissioner Julie E. Carnes
Commissioner Michael Goldsmith
Commissioner Deanell R. Tacha

COMMENTS ON PROPOSED SENTENCING GUIDELINE AMENDMENTS OF JANUARY 6, 1995

Amendment 35(A) §3B1.1

I commend the Commission for its efforts to clarify the language regarding the aggravating role adjustment. In particular, deletion of the term "otherwise extensive" will make the guideline more understandable and more apt to result in like sentences for like offenders.

It would also be helpful to include definitions of "organizer," "leader," "manager," and "supervisor." The present statement in Application Note 2 that a manager means a person who managed is not terribly helpful. Definitions would help to distinguish between organizers and managers/supervisors and in deciding when a person became a manager or supervisor. Very often low level participants are called upon to pass along instructions to other low level participants. It should be made clear that this does not constitute managing or supervising, if the participants are otherwise at equal levels or participation.

Also, some further explanation in Application Note 1 of what constitutes a "significant role" would be helpful. For example, what about the secretary, who unaware that it is part of a check kiting scheme, deposits checks for her boss. Can her boss, the check kiter, receive a two level increase as a manager or supervisor? On the one hand, the offense could not have been committed without the checks having been deposited, on the other this is a purely ministerial role which the defendant could easily have accomplished himself.

Amendment 35(B) --§3B1.2

I support this amendment and, again, applaud the Commission's efforts at clarifying the minor or minimal role adjustment.

I suggest including some examples in Application Note 1(E) relating to other than drug offenses.

Also, I urge the Commission to change Application Note 1(B)(2) which requires that the defendant have "most" of the characteristics listed in Note 2 A-D to be eligible for a minor role adjustment. The word "most" implies that the defendant must meet three of the four characteristics listed in Application Note 2. But, Application Note 2 also contains another potential characteristic which could be a factor, even if the defendant only met one or two of those listed in A-D. I suggest the B(2) be changed to read "ordinarily have **one or more** of the characteristics listed in Application Note 2(a)-(D);"

Amendment 39 -- §2D1.1

I support the concept of this proposed amendment which limits the time period to be used in determining the quantity of controlled substances with which a defendant was involved. I support either a 30-day time frame (option 1), or use of the largest quantity involved on any one occasion (option 2), **provided that the latter is limited to a specific period of time as well.** I suggest 30 days.

The Commission's proposed use of a 12-month or 6-month "snapshot" will not achieve the Commission's goal of reducing the impact of law enforcement decisions as to the number of "buys" made before an arrest. Further, the 30-day limit conforms with the DEA's priority classification scheme which was in effect at the time the mandatory minimum legislation was being considered. This indicates that, in their considered judgment, drug amounts during such a time frame are indicative of the defendant's overall drug involvement.

Amendment 40 -- §2D1.1

I support the use of the weight of the actual controlled substance to determine the guideline range. This will greatly reduce disparity in sentencing in drug cases.

However, I object to Note A(1) and (2) which sets forth rebuttable presumptions of 75% and 50% as the appropriate net weights. **These presumptions seem appropriate for cocaine and methamphetamine, but are too high for heroin offenses. The Parole Commission uses a figure of 50% purity with large quantities of heroin (over two kilograms) and scales it downward to 40% for 200 grams or more and 17% for less than 28.35 grams. This seems more realistic, given that street heroin is usually no more than 5-20% pure.**

Also, I suggest that the language in Application Note 1 be changed as follows:

> This is the weight to be used **as a starting point** in calculation of the base offense level from the drug quantity table.

There may be many reasons why the weight found in DEA Form 7 should not be the ultimate weight to be used in the guideline calculations. (i.e. relevant conduct considerations)

Amendment 46

I support Option 1 as it is both clearer and broader, including, as it does, state as well a federal offenses. I suggest, however, that the Commission broaden the language of §5G1.3 to include offenses for which the defendant has pled or been found guilty, but not yet been sentenced.

Also, I suggest that the Commission add an application note explaining the interaction between §5G1.3 and §2J1.7, which provides a three-level enhancement if a defendant is charged with committing another offense while on release (18 U.S.C. §3147).

Submitted by:

Richard Crane
Attorney at Law
615-298-3719

028 - 95

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
UNITED STATES PROBATION OFFICE

JOHN R. LONG
CHIEF U.S. PROBATION OFFICER

Second Floor
130 North Royal Street
Alexandria 22314
703-557-2357

Suite 1
320-B Charles Dimmock Parkway
Colonial Heights 23834
804-526-1806

Suite 100
10500 Battleview Parkway
Manassas 22110
703-330-7110

Room 300, Post Office Bldg.
101 25th Street
Newport News 23607
804-245-0803

Suite 200, U.S. Courthouse
600 Granby Street
Norfolk 23510
804-441-6673

P.O. Box 597
Richmond 23205
804-771-2317

March 6, 1995

REPLY TO : Manassas

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Comment

Dear Sir:

In response to the 1995 proposed amendments to the sentencing guidelines, please accept the following comments.

Issue for Comment (Issue) #1:

HIV exposure: HIV related assault could be sanctioned through 2A2.2, Aggravated Assault, and/or 2A3.1 - 3.4.

Infectious bodily fluids should be defined expressly as a dangerous weapon.

HIV-infected bodily fluid should be included in the definition of "permanent or life-threatening bodily injury".

Other infections, e.g., hepatitis, should be included in "bodily injury" or "serious bodily injury" depending on the strain.

Issue #2:

Minor Assault: Add a cross-reference to 2A2.2, Aggravated Assault, for victim under 16 with substantial bodily injury.

Issue #3:

Involuntary Manslaughter: Raise the levels to 16 and 14, respectively, thereby insuring that a person convicted of this offense goes to jail. A person who takes a life, even "involuntarily", should face a harsh penalty. We have heard

from families for years the absurdity of a drug dealer facing mandatory time while someone who takes a life could, conceivably, walk away with community confinement.

Proposed Amendment (Amend.) #4

Kidnapping: Prefer option 1, which is more in line with 1B1.2.

Issue #5:

Aggravated Sexual Abuse: Prefer no enhancement for more than one assailant. 2A3.1 is adequate with its fairly comprehensive SOCs. Other aggravating factors can be handled through departures.

Amend. #6:

Death of the Victim: Prefer option 2, which will be more efficient.

Amend. #7:

Adequacy of Criminal History Category: Not sure if the additional application notes are necessary in light of existing 4A1.3, but the addition to 4A1.3, itself, is appropriate.

Issue: The offense levels in 2A are adequate as are.

Amend. #8:

Counterfeit Bearer Obligations: Prefer option 1, which seems to ensure uniform application and is more conforming to other guidelines, e.g., 2D1.1.

Issue: Enhancement should be modeled after that in 2D1.1.

Amend. #9:

2D1.1: Prefer option 1, as 2D1.1 already contains a cross-reference if death occurs.

Issue: No additional SOCs are needed. DOJ cannot realistically expect the Commission to add a point for every conceivable (or inconceivable) sentencing factor. This is why departures were built in, as a "failsafe."

Issue #10A:

Contraband in Prison: 2P1.2 is adequate as is.

Issue #10B:

844/841 in federal prison: 844 should reference to 2P1.2; 841 should go to 2D1.2 if the defendant distributed or PWID.

Issue #11:

Protected locations: Current enhancement is adequate.

Issue: 2D1.2 is fine as is; this BOL would be used infrequently. Let the Court depart downward if this becomes a sentencing factor.

Amend. #12:

2D1.2: This amendment is appropriate in order to conform the guideline to statute, and also to eliminate the problem with LSD vis a vis 2D1.1.

Amend. #13:

Flask/Equipment: As is, this amendment is problematic. There seems to be only a hair's breadth of difference between the two. If there is to be a distinction between intent and belief, make it a clean and clear distinction. As is, this will be a nightmare to deal with in the field.

Amend. #14:

Vulnerable Victim/Civil Rights: Prefer option 2. Option one tries to squeeze too much into 3A1.1 and 2H1.1.

Amend. #15:

Firearms: Agree.

Issue: No, there should not be an enhanced OL.

Amend. #16:

Firearms: Prefer option 2; BOL of 12 appears appropriate for transferring firearm to a juvenile.

Issue #17:

Firearms: The focus should be on the most dangerous firearms.

Issue #18:

2K2.4: Prefer the second approach with the departure provision.

Issue #19:

Firearms: The OLs and definitions are adequate as are.

Amend. #20:

Prefer option 2; if a "two bit burglar" happens to take a gun or marijuana as part of a house burglary, he should not automatically face a higher OL. Give the Court the discretion depending on the circumstances of the offense.

Amend. #21:

Firearms/Explosives: Agree.

Issue #22A:

Alien Smuggling: Yes, the OLs should be increased under 2L1.1, and can be accomplished by SOCs or by cross-reference to the more serious offense, e.g., aggravated assault, manslaughter.

Issue #22B:

Reentry: Current levels are appropriate. No, three misdemeanors do not equal a felony - a person who possesses marijuana on three occasions should not face the same penalty as a person who distributes cocaine.

Amend. #22C:

Immigration: No! This change is too convoluted. Why not add a SOC of 2 points for injury caused by the defendant and cross-reference if death or sexual assault occurs? Also, there may be a problem re the injury. What if a harbored alien breaks his leg fleeing INS? Will we hold the defendant accountable for this ("if any person sustained bodily injury")?

Amend. #22D:

Immigration: No, the top of the guideline range is sufficient.

Issue #23A, Amend. #23B:

Immigration: This proposed amendment is acceptable, except for SOCs (b)(2) - (b)(4). These are overkill! Again, DOJ is trying to build in every obscure scenario into the guidelines, when the departure avenues are built in in anticipation of such cases.

Issue #24:

Terrorism: These cases would be so rare, it seems unnecessary to create another guideline. Chapter Five is adequate to cover any such cases.

Issue #25A:

Juvenile: These cases can best be handled through Chapter Five departures.

Amend. #25B:

Juvenile: This amendment is not appropriate! Prefer to give the Court the discretion to depart, particularly since the age difference may be only four years in these cases, e.g., 21 year old employing 17 year old who may be just as sophisticated or dangerous as his employer.

Issue #26A:

Street gangs: A street gang enhancement could be built into 3B1.1, Aggravating Role.

Amend. #26B:

Street gangs: Prefer to see an enhancement built into 3B1.1.

Issue #27A:

Elderly Victims: The guidelines provide adequate sanctions for crimes involving elderly victims. 2F1.1, 3A1.1, and other guidelines provide for elderly status. And, as always, the Court is given latitude to depart in particularly aggravating cases.

Amend. #27B:

Elderly Victims: This change is appropriate.

Issue #27C:

Elderly Victims: Current victim-related adjustments are adequate. Rebuttable presumption of age will carry its own set of difficulties, e.g., What if the defendant and the victim are the same or close to the same age?

Issue #28:

Career Offender: No action is necessary; 5G1.1 addresses this adequately.

Amend. #29:

Safety Valve: 5C1.2 is okay as is, but may need some clarification down the road; e.g., If a defendant receives an enhancement per 3C1.2, can he still qualify for 5C1.2? (this was a hotline question last fall); If a police officer shoots a codefendant, is the defendant held accountable for this injury, and, thus, precluded from 5C1.2?

Amend. #30:

Restitution: Agree.

Amend. #31A:

Supervised Release: Agree.

Amend. #31B:

Supervised Release: Agree, but clarify if this exception applies to 3565(b) only and not 3583 - this will undoubtedly be raised in the field.

Amend. #32:

App. A/ Guideline Titles: Agree.

Amend. #33:

2D1.1: Prefer option A, which appears to most closely conform to legislative intent. This is still a lot of time to serve!

Amend. #34:

2D1.1: Definitely agree where the defendant qualifies for a minimal role; not so sure where the defendant is a minor participant. Minor participants, in some cases, still handle a lot of drugs.

Issue: No! This is too convoluted and would be much too cumbersome in the field.

Amend. #35A:

Role: Agree, but the language may be problematic. It could be argued that less must be done to qualify for a 4 point enhancement, which is driven by number of participants, than for a 3 point enhancement, which is driven by number of participants supervised.

Amend. #35B:

Role: Thank goodness we finally get rid of 3B1.4 and the 3 point intermediate enhancement at 3B1.2! Notes 1(A)(1) and 1(B)(1) are confusing and notes (1)(D) and the examples don't provide much relief. Please make these more clear. Note 4 is also a difficult read. Regarding the last paragraph of the notes, please stay away from hypotheticals. This amendment is somewhat confusing - please simplify.

Amend. #36:

2D1.1: 2D1.1 and 2D1.11 are fine as are. The Court can depart or cross-reference as needed. However, the rebuttable presumption regarding firearms is appropriate. Regarding 3B1.1, prefer option 2.

Issue: This is much too convoluted! Again, why try to build in every possible set of circumstances, when a more generic enhancement, combined with a departure if warranted, serves the purpose more efficiently.

Amend. #37:

2D1.1: Agree, this seems like a more realistic approach.

Issue #38:

Powder/crack: Yes, the ratio should be reduced, but not sure by how much.

Amend. #39:

2D1.1: No, this skews reality. Someone who sells 1 kilo a week for a year is a 52 kilo dealer, not a 4 kilo dealer (if 30 day standard is used).

Amend. #40:

2D1.1/purity: The table is adequate as is. The Commission may want to include threshold levels in the commentary as an issue for departure, e.g., anything below 15% or above 85% purity.

Amend. #41:

2D1.1/pills: This amendment appears to create more equity in assessing offense level.

Amend. #42:

Re hash/hashish oil: Agree.
Re marijuana and moisture content: Agree.
Re khat, LAAM, d/l-meth: Agree.
Re weapon: Agree with rebuttable presumption.
Re negotiated amount: Agree unless actual weight is higher or defendant was not capable of producing.
Re reasonable foreseeability: Agree.
Re 50% lab capacity: Agree.
Re PWID and personal use: Prefer the second approach with the rebuttable presumption that all amounts are for sale. Otherwise, not only will defendants be encouraged to be loose with the truth, but prosecutors may also feel open to manipulate facts, particularly if a larger scale dealer pleads guilty and cooperates.

Re protected location: What is "no increased risk"?
Re 2D1.8: Agree.

Amend. #43:

2D1.1: Prefer neither option. Prefer the simplicity of the present 2D1.1. Why complicate the matter?

Amend. #44:

Consolidation of 2S1.1, 2S1.2: Agree, this would make life easier in the field.

Issue: Yes, this table seems more reflective of real money laundering offenses. Prefer the approach that applies the highest base offense level. Also agree that if a government agent manipulates transactions in order to increase guidelines, a downward departure may be warranted.

Issue #45:

Supervised Release: No. A term of supervised release after a defendant has served a year in prison is appropriate. Also, the Court has the option to terminate supervision after one year. Further, if restitution is to be made a mandatory condition of supervision, the field will need the time on supervision to enforce this condition, particularly where payments are necessarily small because of payment capacity.

Amend. #46:

5G: Prefer option 2. This option is much more practical and will be much more attractive to the Courts. "Partially concurrent" would be difficult to implement between the Courts and BOP.

Thank you for the opportunity to comment on these issues and proposed amendments. It means a lot to us in "the trenches" that our input was requested.

Sincerely,

Carla Coopwood

Carla G. Coopwood
Senior U.S. Probation Officer

CGC/lwk

cc: John R. Long, CUSPO
Alexandria, Virginia

029 - 95

A PROPOSAL TO HAVE FEDERAL SENTENCING GUIDELINES ADJUSTED BY LOWERING BASE OFFENSE LEVELS (THIS PROPOSAL IS TARGETED AT AMENDMENT #44)

SUBMITTED TO :
UNITED STATES SENTENCING COMMISSION

SUBMITTED BY:
THEODORA GARZA
CONCERNED AMERICAN and
STUDENT AT THE UNIVERSITY OF TEXAS
IN SAN ANTONIO, TEXAS
FEB.15th,1995

SUMMARY

The present existence of mandatory minimum sentences imposed by Congress in 1987 for even the smallest federal drug violations has failed to reduce crime during its practice in federal courts. These mandatory sentences have kept **non-violent offenders** in prison for more time than violent criminals convicted of other offenses. Federal Judges are no longer allowed to use their discretion when passing sentences on to convicted offenders, and these minimums group all of the accused into one group where individual circumstances are not allowed to be taken into consideration. It is unjust for **legitimate business people**, such as car dealers or realtors to sell a car or a home to a person who unbeknownst to them is a drug dealer, and for the car dealer or realtor to later be prosecuted for money laundering, and consequently stand convicted on a drug offense. The American Business Sector are not trained D.E.A. agents. They are Americans who tried to follow in the path of the American Dream, and tried to run their business to the best of their knowledge.It is extremely **unconstitutional** to force such people to serve lengthy jail terms. It is a waste of taxpayer's money, and a waste of these people's lives. Additionally, the law has been poorly drafted, and while these mandatory minimum sentences are excellent political tools, they are **unconstitutional** and have failed to reduce drug crimes.

The United States Sentencing Commission should work to bring about changes in a failed system. The Commission should make recommendations to Congress for necessary revisions on federal sentencing guidelines to restore judicial discretion as well as fairness and sanity. The nation needs a more rational, pragmatic approach. It is simply not right for all accused persons to be thrown into one single category, where they must all face the same harsh sentences. Distinctions have to be made between non-violent offenders who were not directly involved in the drug business in any way , and offenders who have a history of violence. Base offense levels need to be lowered in order to avoid the imposition of an automatic lengthy jail term where individual circumstances were not taken into consideration.

PROBLEMS WITH THE CURRENT SENTENCING GUIDELINES

There are several factors that cause the current sentences to be **unfair, unconstitutional, race biased, expensive,** and **a failure in general**. Prisons have become **grossly overcrowded** and violent criminals are being released in order to make room for those labeled as drug offenders.

1. The present mandatory sentences don't make distinctions for non-violent drug offenders. Small time offenders (**gofers and mules**), and **offenders such as money launderers,** some of whom have **never even seen drugs in their lives,** must face the same **harsh sentencing** as big ringleaders, and sometimes harsher sentences. Many of the people who stand convicted of money laundering were not involved in the selling of drugs in any way. They had no culpable intent.They simply sold an item to a person who later on was convicted of being a drug dealer. Many times these drug dealers are facing long sentences, and in turn decide to produce a "story" for prosecutors whereupon they inform the prosecutor of a business person who was willing to sell them an item without exposing them as being involved in illegal activity. The **true criminals are granted reduced sentences,** and legitimate, hard working business people's lives are ripped apart, and they must face the horrible reality of their inhumane sentences. **Prosecutors are cutting deals with** high-level traffickers, even those that are **animalistic thugs**. These violent thugs are used to testify against the "ignorant" car-dealers, or realtors, or accountants, and on and on. The word ignorant is used here to again emphasize that these business people were unaware that they were selling an item or providing a service to a drug dealer. Until these people stand convicted of such a