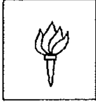

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March 11, 2014

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington DC 20002-8002

Att'n: Public Affairs

Dear Judge Saris,

Re: Proposed Amendments to the United States Sentencing Guidelines

Thank you for this opportunity to comment on the Commission's Proposed Amendments to the Sentencing Guidelines, 79 Fed. Reg. 3280 (January 17, 2014). I address only the first area identified for public comment: "Whether Any Changes Should be Made to the Drug Quantity Table Across Drug Types," and whether, if so, the Commission should make related changes to other provisions of the Guidelines Manual.

I will develop four points:

1) The drug sentencing guidelines should maintain their close link to drug quantities, and in that context, the proposal to reduce base offense levels for drug offenses by two levels across-the-board is much needed and well justified.

2) The new base offense level for very large drug quantities (tentatively set at amounts exceeding 450 Kg of cocaine and corresponding quantities of other drugs) is not justified and **should not be approved**. Instead, the highest base offense level determined by quantity alone should be established, as it is now, by 150 Kg or more of cocaine and corresponding quantities of other drugs. After the proposed two-level across-the-board reduction, that highest level determined by quantity alone would drop from level 38 to level 36.

3) **Conforming amendments to §2D1.1(a)(5) and§ 2D1.1(b)**, are necessary to meet the objective of the two-level reduction and preserve the coherence of Part 2D as a whole.

4) An additional change to §2D1.1 is needed to realize the goals of the Proposed Amendment. Specifically, §2D1.1(a)(5) must be amended to state that **"The drug quantity to be used in applying the Drug Quantity Table is the quantity for which the defendant is accountable under §1B1.3(a)(1)(A) (Relevant Conduct).**"

My discussion proceeds as follows. Part I summarizes the background and experience that inform my comments. Part II discusses why Part 2D base offense levels should remain linked to drug quantities and why the proposed two-level reduction is appropriate.

Part III explains why the Commission should not approve the proposal to introduce a new base offense level for drug quantities greater than the highest current levels.

Part IV identifies conforming amendments necessary in §2D1.1(a)(5) and in §2D1.1(b) to maintain coherence in accounting for mitigating role and certain specific offense characteristics.

Part V discusses why the proposed two-level adjustment will be inadequate to align the Drug Quantity Table with punishment levels that the Commission and Congress seek. Unnecessarily severe drug sentences often result from anomalous interactions between the Drug Quantity Table and certain Relevant Conduct provisions. Those anomalies will frustrate the objectives of the two-level reduction and prevent the Proposed Amendments from producing the desired changes in drug sentencing. Part V suggests a limited modification of §2D1.1(a)(5), in order to insure that the aims of the proposed two-level reduction are not defeated in this way.

I. Background

In my current position, I serve as the Robert B. McKay Professor of Law at New York University School of Law. My engagement with the project of federal sentencing reform began in the late 1970s, when the Federal Judicial Center commissioned me to study the implications of prosecutorial discretion for the sentencing reform proposals then under consideration.[1] After passage of the Sentencing Reform Act of 1984, I was privileged to serve for two years (1987-89) as a Consultant to the Commission during its start-up phase, when the initial iteration of the Guidelines was drafted. After the Guidelines went into effect, I was reappointed as a Consultant for approximately five years (1989-94). During this period, working with Commissioner Ilene H. Nagel and Commission staff, I studied the early implementation of the Guidelines and its implications for needed revision of Guidelines text, Commentary and Application Notes. We focused in particular on evaluating how prosecutorial charging and bargaining practices responded to the new system and affected the effort to reduce unwarranted disparities.[2]

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[1] See STEPHEN J. SCHULHOFER, PROSECUTORIAL DISCRETION AND FEDERAL SENTENCING REFORM (Federal Judicial Center, 1979).

[2] See ILENE H. NAGEL & STEPHEN J. SCHULHOFER, PLEA NEGOTIATIONS UNDER THE FEDERAL SENTENCING GUIDELINES: AN EMPIRICAL EXAMINATION OF THE POST-*MISTRETTA* EXPERIENCE (Final Report, Dec. 1994) (on file with the U.S. Sentencing Commission). Publically available presentations of that research include Stephen J. Schulhofer & Ilene H. Nagel, Plea Negotiations Under the Federal Sentencing Guidelines, 91 NW. U. L. REV. 1284

Because prosecutorial discretion presents a large challenge to the goals of sentencing reform, its interaction with the Guidelines was a substantial preoccupation in these early years of sentencing reform. That concern shaped key structural decisions, including most importantly the decision to tie base offense levels to the "real offense" rather than the offense of conviction, and accordingly to define in expansive terms (in what became §1B1.3) the "relevant conduct" used to determine the applicable guideline range.[3]

The commitment to disparity reduction likewise drove the decision to choose drug quantity as the key factor governing base offense levels in drug cases. Although it was well-understood that quantity is not the only factor, and usually not even the most important factor, in determining drug-offender culpability and dangerousness, the Commission was acutely aware that other indicia of culpability, such as organizational role, propensity for violence and the like, are subject to widely varying assessments. Drug quantity was seen as an appropriate proxy for culpability, dangerousness and the need to deter, because it provides a readily available, objectively measurable criterion of offense seriousness. Conversely, adjustments for aggravating and mitigating role were afforded more limited scope because of their inherent potential to generate unwarranted disparities.

The Commission did not, in this initial period, give special attention to the problem of excessive sentence severity. To the contrary, while Congress expressed its opposition to using a sentence of incarceration for the sole purpose of rehabilitation, Congress (and the Commission in turn) held the view that pre-Guidelines sentences for many offenses, most notably drug and white collar offenses, were *unduly lenient*.[4] Accordingly, reforms at that time sought to require appropriately severe sentences and to assure that these sentences would be imposed equally on all offenders, without regard to race, gender or economic class.

II. Quantity-Based Guidelines and the Proposed Two-Level Reduction

Quantity-based Guidelines. Today, many key assumptions shaping the initial Guidelines no longer apply with the same force. Fiscal circumstances and criminal justice policy priorities have changed substantially. The Department of Justice has warned that "budgets are finite [and] imprisonment is a power that should be used sparingly and only as necessary; . . . . greater prison spending [is] crowding out other crucial justice investments . . . . [The] public safety

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(1997); Ilene H. Nagel & Stephen J. Schulhofer, A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines, 66 SO. CAL. L. REV. 501 (1992); Stephen J. Schulhofer & Ilene H. Nagel, Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months, 27 AM. CRIM. L. REV. 231 (1989).

[3] See Stephen G. Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 HOFSTRA L. REV. 1 (1988).

[4] See Ilene H. Nagel, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J. Crim. L. & Criminology 883, 927 (1990); Schulhofer & Nagel, supra, 91 Nw. U. L. Rev. at 1285 n. 6.

achievements of the last 20 years are threatened unless reforms are instituted to make our public safety expenditures smarter and more productive."[5]

Nonetheless, the imperative to avoid unwarranted disparities, especially those associated with race, gender and economic class, has not changed. Accordingly, when statutory penalties are severe, as they are in drug cases, it remains crucial to rely, where possible, on objectively measurable criteria for fixing a sentence within the wide ranges authorized by statute. Although well-intentioned commentators repeatedly urge the Commission to decouple the drug guidelines from quantity, to date they have not offered substitute criteria capable of assuring consistent treatment of similarly situated drug offenders when statutory penalty ranges are wide. Apart from this point, of course, respect for Congressional intent requires reliance on drug quantity at the mandatory-minimum anchor points. But in any event, for structural reasons, **drug quantity should retain its central role in Guidelines sentencing**.

Quantity, however, is not an end in itself. It must always be understood as a proxy – an objective but necessarily imperfect proxy – for the concerns that matter in sentencing: culpability, dangerousness and the need to deter. And where quantity ceases to serve as a reliable proxy, as happens in particular at the highest drug-quantity levels, the Guidelines must continue to provide offsetting corrections, such as the §2D1.1(a)(5) mitigating-role adjustments.

The two-level across-the-board reduction. The proposed two-level reduction in Part 2D base offense levels is well-justified in this context. It is widely recognized, by the Department of Justice among others,[6] that the federal prison population places an undue strain on other budgetary priorities and that the existing Guidelines often call for unnecessarily long drug sentences – sentences that are penologically unjustified and contrary to congressional intent. Indeed, *the low end* of the applicable Guideline ranges at present (63 months and 121 months) is *higher* than the congressionally imposed mandatory minimums.

As initially promulgated, the Guideline ranges were set at these higher levels in order to assure that defendants entitled to the two-level reduction for Acceptance of Responsibility would not lose that benefit and see the Guidelines adjustment nullified by the statutory minimum. There was concern, in particular, that this effect could substantially reduce incentives to plead guilty because the system, by design, afforded few other sentencing advantages in exchange for a guilty plea. Prosecutors were not permitted to withhold a mandatory-minimum count in guilty plea cases, because DoJ guidelines in force at the time required prosecutors to charge every "readily provable" offense.[7] Judges were required to comply with the Guidelines, the authorized

[5] U.S. Dept. of Justice, Criminal Division Annual Report, pp. 3, 7 (letter from Jonathan J. Wroblewski to the Honorable Patti B. Sarris, July 11, 2013).

[6] Id.

[7] See U.S. DEP'T OF JUSTICE, PROSECUTOR'S HANDBOOK ON SENTENCING GUIDELINES AND OTHER PROVISIONS OF THE SENTENCING REFORM ACT OF 1984 (1987), at 43 (a guilty plea "should not be used as a basis for recommending a sentence that departs from the guidelines"); id. at 46-47 ("[R]eadily provable serious charges should not be bargained away. The sole legitimate ground for agreeing not to pursue a charge . . . is the existence of real doubt as to the ultimate provability of the charge"). For discussion of other Justice Department directives designed to implement and enforce this police, see Nagel & Schulhofer, supra, 66 So. Cal. L. Rev. at 506-12.

adjustments of Guideline ranges did not permit rewards for guilty pleas as such, and a guilty plea was not a permissible basis for departure from the properly calculated Guideline range.

Today these concerns no longer apply. Prosecutors have a greater degree of charging discretion, including discretion whether to charge a mandatory minimum,[8] the "safety-valve" provision affords formal relief from the statutory minimum in many cases, and judges have greater flexibility in deciding whether to sentence at levels higher or lower than the guideline range. With these sources of flexibility in place, placing the mandatory minimum *within* the guideline range, as now proposed (at levels 24 and 30), rather than below it, as at present (at levels 26 and 32), would not substantially reduce incentives to plead guilty, nor would it generate an unmanageable number of trials.

One immediately apparent shortcoming of the present anchor points at levels 26 and 32 is that they call for bottom-of-range sentences longer than the ones Congress itself mandated. But this flaw by itself might appear to have limited practical significance, because the bottom of the currently applicable guideline ranges (63 months and 121 months) is only slightly greater than the corresponding mandatory minimums (60 months and 120 months respectively).

A very large practical consequence of the level-26 and level-32 anchor points, however, is that reliance on these anchor points drives up virtually every drug sentence, all the way up and down the line from these levels, because of the appropriate structural commitment to smooth interpolation and extrapolation in cases involving lesser and greater quantities. The upshot is unnecessarily harsh drug sentencing all across the board. Because the present structure is costly, unjust and not necessary to maintain incentives for cooperation and acceptance of responsibility, **the two-level across-the-board reduction is well-justified and should be approved.**

III. The New Base Offense Level for Exceptionally Large Drug Quantities

The proposed two-level across-the-board reduction will bring the highest quantity-driven base offense level – the level currently triggered by 30 Kg of heroin, 150 Kg of cocaine, and 30,000 Kg of marijuana – down from level 38 to level 36. The Amendments propose introducing a new base offense level for even larger drug quantities, with the triggering amounts tentatively suggested as 90 Kg of Heroin, 450 Kg of cocaine, 90,000 Kg (90 metric tons) of marijuana, and similarly high quantities of other drugs. The proposal can be viewed in two ways – either as a new sentence *enhancement* for these very large quantities, or as a *carve-out* that exempts these very large quantities from the two-level reduction that would otherwise apply.

The perspective to be chosen on this point might seem important, because enhancement implies a new, harsher sentence range, while a carve-out merely implies a limited preservation of the status quo. From either of these perspectives, however, **exceptional treatment of such especially large quantities is inappropriate; it would have unintended and in some instances perverse sentencing consequences.**

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[8] See Eric Holder, Jr., Memorandum to the United States Attorneys and Assistant Attorney General for the Criminal Division, "Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases," Aug. 12, 2013.

I elaborate below on four distinct flaws in this proposal – it lacks an adequate empirical basis; it is irrelevant to sentencing the most culpable offenders; it will aggravate, for no apparent reason, the sentences of mid- to low-level offenders; and it overlooks the arbitrariness of quantity-based distinctions among large drug conspiracies.[9]

A. *Empirical basis.* I am aware of no data establishing an empirical basis for a carve-out or quantity-driven enhancement in the case of extra-large drug quantities. To the contrary, as explained below, this is a context where drug quantity in such large amounts (e.g., 450 Kg of cocaine or 90 metric tons of marijuana) serves as a particularly poor proxy for the concerns that should underlie all sentencing judgments – culpability, dangerousness and the need to deter.

B. *Irrelevance to sentencing of the most culpable offenders.* The first point to stress with regard to appropriate sentencing judgments is that the large-quantity proposal is unnecessary and irrelevant to sentencing the most culpable drug offenders. The drug amounts that currently trigger the highest quantity-driven offense level (for example, 150 Kg of cocaine or 30 metric tons of marijuana) are already vastly greater than any individual drug dealer would handle on a single occasion. Any offender with substantial responsibility for moving such quantities will inevitably be part of an organization engaged in repeated transactions. As a result, any offender with a substantial role in the organization will inevitably face upward adjustments of at least 7 or 8 levels,[10] and these adjustments will raise the base offense level to the maximum of 43, even if the initial quantity-determined offense level is 36 rather than 38. At level 43, such offenders – the only ones for whom a carve-out or new enhancement might be justified – will face the guideline sentence of life imprisonment, regardless of whether the guideline calculation proceeds from a starting point of 36 or 38. In short, for the most culpable offenders, the proposed enhancement or carve-out is simply irrelevant.

C. *Inappropriate sentence enhancement for low-level offenders.* To be sure, the large-quantity proposal will not boost the applicable range for the very least culpable among the participants in a conspiracy, because those who qualify for Minimal Role have their base offense level capped by §2D1.1(a)(5). But the large-quantity proposal will nonetheless matter, sometimes substantially, for various low-level co-conspirators. This is so for several reasons. First, the cap is available only to defendants who qualify for *minimal* role; if their participation is "minor" but not "minimal," the large-quantity proposal would raise their base offense level by one step.[11] Second, in a large drug conspiracy, many non-supervisory participants cannot qualify for any mitigating role adjustment at all; in such cases, the §2D1.1(a)(5) is unavailable, and the

[9] Additionally, by passing up the opportunity to reduce the number of quantity-determined drug offense levels, the proposal is in tension with the Justice Department's support for "consideration of a simpler guideline system" with "fewer grid cells, and less complex guideline formulas." U.S. Dept. of Justice, Criminal Division Annual Report, p. 8 (letter from Jonathan J. Wroblewski to the Honorable Patti B. Sarris, July 11, 2013).

[10] The guideline calculation is straightforward: Such an organization will inevitably use firearms (a two-level enhancement) and premises for distribution (another two-level enhancement). And because an organization of this scale will almost inevitably involve at least five participants, any offender who has a supervisory role will face an additional enhancement of three or four levels, for a total upward adjustment of at least 7 or 8 levels.

[11] If the highest quantity-based offense level is 36, a minor participant initially placed at this level would be entitled to a 3-level reduction, placing him at level 33. If the proposed new base offense level of 38 is approved for extra-large quantities, the minor participant would be entitled to a 4-level reduction, placing him at level 34.

large-quantity proposal would raise the base offense level of these ordinary, non-supervisory sellers by two steps – *a 25% (four-year) increase* in their bottom-of-range sentence.[12]

Paradoxically, mitigating role relief can actually become *less* available, without any change of the non-supervisor's real involvement, when the scope of an alleged drug conspiracy expands. This is because mitigating role is a *relative* concept, providing "adjustments for a defendant who [is] substantially less culpable *than the average* participant."[13] In the largest organizations, a low-ranking member who plays no supervisory role will nonetheless have many ordinary street sellers below him. As a result, when the prosecution presents the court with the overall organizational ladder, this low-ranking non-supervisor will not be placed on the lowest rung. Such a mid- to low-level offender therefore cannot qualify for any role adjustment; that relief is limited to *below-average* offenders. The result accordingly will be a severe sentence for a defendant whose culpability is quite low – perhaps not as low as that of the very least culpable participant in his own organization but quite low compared to that of mid-level offenders in smaller conspiracies. In short, the new offense level for extra-large quantities would have unjust and unintended effects on low-level offenders, because the mitigating role adjustment of §2D1.1(a)(5) affords only limited relief from the undue impact of applying the Drug Quantity Table in such cases.

United States v. Turnquest[14] is one of many reported cases illustrating this problem. The organizational ladder printed in the court's opinion (see Appendix A, infra) provides a concrete picture of how the limitations of §2D1.1(a)(5) arise. Eighteen defendants were convicted of conspiracy to distribute crack cocaine. The court gave the leader and three managers an upward adjustment for aggravating role; five other defendants (drivers, procurers and smaller sellers) received a downward adjustment for mitigating role. The remaining nine defendants in the middle of the organizational ladder (suppliers and larger sellers who were not supervisors) received no role adjustment either way, placing some of them at level 40, despite very limited personal involvement.[15]

D. *Arbitrariness of quantity-based distinctions among large drug conspiracies.* The inappropriateness of the sentencing outcomes discussed above is compounded by the relatively arbitrary character of the quantity calculation in large drug investigations. Typically, the prosecution proceeds by estimating the average weekly sales of the criminal organization and

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[12] The bottom-of-range sentence for a first offender increases from 188 months at level 36 to 235 months at level 38. And low-level, non-supervisory sellers almost certainly face, in addition, increases of at least 4 levels because their co-conspirators presumably use weapons and maintain premises for distribution. As a result, under the proposed new base offense level for extra-large quantities, low-level, non-supervisory sellers, if not "minor" participants, in practice will be placed at level 42 (38 + 4), producing a guideline range – for a first offender – of 360 months to life.

[13] U.S. Sentencing Guidelines, §3B1.1, Application Note 3(A) (emphasis added).

[14] 724 F.Supp.2d 531 (E.D. Pa. 2010). The role-based quantity adjustments of §2D1.1(a)(5) were not in effect at the time of *Turnquest*, but the court's analysis of mitigating role eligibility remains applicable to the problem discussed in text above; because many of the co-defendants were denied any mitigating-role adjustment at all, §2D1.1(a)(5) would not have been available to them in any event.

[15] See Appendix A, infra. See also the discussion of co-defendant Malik Bland, text at notes 31-33 infra.

then multiplying that weekly amount by the number of weeks covered by the period under indictment.[16] Thus *the difference between a 200 Kg cocaine conspiracy and a 600 Kg cocaine conspiracy often will not be a difference in the size or geographical scope of the organization but only a difference in the choice of the dates that frame the indictment.*[17] And this difference in turn typically reflects little more than the fortuities of the evidence available to date the illegal activity, tactical decisions about how long to leave an informant under cover, or even discretionary choices about the degree of leverage the prosecutor seeks to deploy as a basis for plea bargaining. Moreover, the Proposed Amendment would incentivize prosecutors to expand the duration of an alleged conspiracy, simply to reach the extra-large quantity levels that the new categories would make relevant. As a result, the Amendment could, paradoxically, *increase* the sentencing exposure of lower-level participants (while remaining irrelevant to the sentencing exposure of supervisors and leaders, who wind up at level 43 in any event). Other anomalies of this nature could readily arise but apparently have not yet been adequately explored by the Commission.

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In sum, the proposed carve-out or enhancement for extra-large quantities will prove irrelevant in the cases where a carve-out or enhancement would be appropriate and instead will almost certainly increase sentence severity and arbitrary sentencing distinctions among lower-level offenders for whom severe sentences are least warranted. **The new level 38 base offense level for exceptionally large drug quantities should not be approved.**

IV. Conforming Amendments

The "mitigating-role cap." Under §2D1.1(a)(5), the base offense level under the Drug Quantity Table is reduced for offenders who receive a mitigating role adjustment, but only when their Drug Table offense level is at least 32, and the amount of that adjustment increases when the Drug Table offense level rises to 34, 36 or 38. Because the Amendments do not propose to apply the two-level across-the-board reduction to these anchor points in §1(a)(5), the benefit of the two-level reduction will in effect be neutralized in many of the very cases where the reduction is most appropriate – those involving offenders who receive an adjustment for mitigating role. The patterns are odd and (in my judgment) inexplicable. Offenders who currently have a pre-adjustment Drug Table level of 36 currently drop – after the §1(a)(5)

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[16] See, e.g., United States v. Turnquest, 724 F.Supp.2d 531 (E.D. Pa. 2010) (drug quantity calculated on basis of "length of involvement in the conspiracy per week multiplied by the amount of drugs attributable to the conspiracy per week"); United States v. Rosario, 51 F.Supp.2d 900 (N.D. Ill. 1999) (same); United States v. Blount, 940 F.Supp. 720, 728 (E.D. Pa. 1996) ("the most sensible and logical method of calculating the quantities . . . is to multiply the daily average by the time period of [defendants'] involvement in the conspiracy.")

[17] A quantity difference can also reflect a difference in the size or geographical scope of the two conspiracies; the period under indictment could be the same for both, but the territory controlled by one could be three times larger. Even in this instance, however, the difference between large and extra-large quantities almost always has no bearing on the appropriate sentence for *non-supervisory* participants. In the larger organization, supervisors may indeed be more culpable, but as explained above, any offender at the supervisory level will face a level 43 sentence (life) regardless of whether he supervises 15 sellers or only five. *Below* the supervisory level, ordinary sellers or distributors will typically have similar responsibilities in a contained territory, even when the one in the larger organization has a larger hierarchy of supervisors above him.

adjustment – to level 33; after the Proposed Amendment, the same offenders would have a pre-adjustment Drug Table level of 34 and would drop – after the §1(a)(5) adjustment – to level 31, and thus would indeed receive a two-level reduction compared to their current position. But offenders at levels 34 and 38 will receive only a net reduction of one level, and offenders who currently have a pre-adjustment Drug Table level of 32 will be placed – after the §1(a)(5) adjustment – at level 30: *the same level after the Proposed Amendment that they occupy now.*[18]

The Proposed Amendments should be modified to apply a two-level reduction to each of the 32-34-36-38 anchor points in §1(a)(5).

Specific Offense Characteristics. Many of the specific offense characteristics enumerated in §2D1.1(b) are tied to anchor points at level 26 or above. A two-level reduction in these anchor points is not necessarily appropriate across-the-board, regardless of context. For example, the minimum offense level of 26, provided under §1(b)(3) for importation by use of special means of transport or expertise, remains appropriate; it should not be reduced. Such conduct will, in any event, typically involve quantities in excess of both the current and newly proposed quantity levels sufficient to trigger level 26. A minimum level of 26 is neither anomalous nor unjust.

In contrast, §§1(b)(13)(C) & (D) specify minimum offense levels of 27 and 30 respectively for certain conduct that endangers minors or otherwise poses a risk of harm to life or the environment. In these instances, the Guideline structure reflects a risk/harm-based enhancement to quantity-driven offense levels. Unless the two-level reduction is applied to these anchor points in §§1(b)(13)(C) & (D), the Proposed Amendments will in effect make the enhancement for special risk or harm as much as two levels *greater* than at present. Carving out these anchor points from the policy of two-level reductions will significantly impair the coherence of the Guideline structure. **The Proposed Amendments should be modified to apply a two-level reduction to the existing level 27 and level 30 anchor points in §§1(b)(13)(C) & (D).**

V. The Drug Quantity Table interacts with "relevant conduct" (§1B1.3) in ways likely to frustrate the objectives of the proposed two-level reduction.

In the absence of adjustment, the Proposed Amendments are unlikely to yield all of the intended moderation in the length of drug sentences, because of anomalous interactions between the Drug Quantity Table and the definitions of "relevant conduct." This problem arises because in drug cases, the foreseeability component of "relevant conduct" (§1B1.3(a)(1)(B)) severs the usual links between the largest harms on the one hand and the greatest criminal responsibility or

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[18] Currently, a minor or minimal participant initially at level 34 receives a 3-level adjustment to level 31. After the proposed two-level reduction, the same offender is placed initially at level 32 and receives a 2-level reduction, ending at level 30 – only one level lower than at present. Similarly, a minor or minimal participant initially at level 38 receives a 4-level adjustment to level 34. After the proposed two-level reduction, the same offender is placed initially at level 36 and receives a 3-level adjustment, ending at level 33 – again, only one level lower than at present. Finally, a minor or minimal participant initially at level 32 receives a 2-level adjustment to level 30. After the proposed two-level reduction, the same offender is placed initially at level 30 and receives no §1(a)(5) adjustment, ending at the same level 30 as before the two-level changes to the Drug Quantity Table.

dangerousness on the other. I discuss three dimensions of this problem – the tension between congressional intent and the foreseeability test's application in drug cases; previous Commission efforts to mitigate this tension and why they have not fully succeeded; and a straightforward step that would avoid the difficulties and align the Drug Quantity Table calculations with appropriate conceptions of offense severity and offender responsibility.

A. *Tension between congressional intent and the foreseeability test as applied to drug quantities.* It is crucial to recall the reasons for attributing importance to drug quantity. Congress made no judgment that drug quantity is important for its own sake. Rather, Congress reasonably assumed that a defendant responsible for vast drug quantities would be a "kingpin," that a defendant responsible for more moderate quantities would be an important dealer, and that a defendant responsible only for small, street-level quantities would be far less culpable. In this light, drug quantity offers a valuable criterion for sentencing for two interrelated reasons: First, it is a readily available proxy for culpability, dangerousness and need to deter. Second, because drug quantity is objectively measurable, it is less likely to generate unwarranted disparity in the treatment of similarly situated offenders.

Unfortunately, the foreseeability test tends to collapse these quantity-based distinctions between kingpins, middle managers and street sellers, because it makes all of them responsible for the same foreseeable quantities distributed by their organization.[19]

To be sure, federal law has traditionally held that a defendant can be convicted of crimes foreseeably committed by a co-conspirator in furtherance of the conspiratorial objective, whether or not such crimes were intended or actually foreseen at the time of the conspiratorial agreement. *United States v. Pinkerton*, 328 U.S. 640 (1946). Though controversial,[20] *Pinkerton* liability is of course well settled in the federal courts. But *Pinkerton* authorized conviction of merely foreseeable substantive offenses in a context where broad sentencing discretion was presupposed. Moreover, Congress made no judgment to impose severe drug sentences merely on the basis of foreseeability. To the contrary, the principal drug offense, 21 U.S.C. §841(a) punishes drug possession only when coupled with *intent to distribute*. Similarly, criminal convictions for aiding and abetting or for conspiracy (18 U.S.C. §2 and 21 U.S.C. §846) both require proof of *a purpose* to aid or facilitate the conduct in question.[21]

[19] For detailed discussion, see Stephen J. Schulhofer, Rethinking Mandatory Minimums, 28 Wake Forest L. Rev. 199, 210-13 (1993); Stephen J. Schulhofer, Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity, 29 Am. Crim. L. Rev. 833, N853-57 (1992).

[20] The Model Penal Code and many prominent state court decisions reject *Pinkerton* liability for foreseeable but unintended acts of co-conspirators. See Model Penal Code and Commentaries, Comment to §2.06(3) at 307 (1985); State v. Stein, 27 P.3d 184 (Wash. 2001); People v. McGee, 399 N.E.2d 1177, 1181-82 (N.Y. 1979).

[21] With respect to aiding and abetting, see United States v. Hicks, 150 U.S. 661 (1893); United States v. Peoni, 100 F.2d 401 (2d Cir. 1938 (L. Hand, J.), Model Penal Code §2.06(3)(a). With respect to conspiracy, see Direct Sales Co. v. United States, 319 U.S. 703, 710-13 (1943); United States v. Falcone, 311 U.S. 205 (1940); United States v. Heras, 609 F.3d 101 (2d Cir. 2010); United States v. Blankenship, 970 F.2d 283 (7th Cir. 1992).

Despite the importance of intent to distribute in drug offenses, the Guideline provision defining Relevant Conduct was necessarily cast in general terms applicable across all offense categories; the current complexity of the Guidelines would have been multiplied many times over if the Guideline Manual had provided distinct definitions of Relevant Conduct for distinct offenses. Nonetheless, the generally serviceable terms of §1B1.3 produce unique difficulties when used to ascertain the quantities used in the Drug Quantity Table. Indeed, it is no exaggeration to observe that §1B1.3 drives a large wedge between Drug Quantity Table calculations and plausible conceptions of offender dangerousness and desert because §1B1.3 includes not only conduct aided, abetted or otherwise *intentionally* furthered[22] (§1B1.3(a)(1)(A)); but also conduct of others that is *reasonably foreseeable* in furtherance of the "jointly undertaken criminal activity." (§1B1.3(a)(1)(B).

This second component ("foreseeablilty"), however appropriate in the context of sentencing generally, unfortunately overrides the salient features of drug quantity that make it suitable as a sentencing criterion.

B. *Commission efforts to mitigate this tension.* Over the years, the Commission has recognized this problem and taken a variety of steps to mitigate it. Early on, in *Amendment No. 78* (effective November 1989), the Commission clarified the Application Notes to §1B1.3, in order to explain that in a conspiracy case, the "foreseeable" conduct for which a conspiracy defendant is accountable "is not necessarily the same for every participant" and that regardless of the scope of the entire conspiracy, each participant is responsible only for foreseeable conduct that furthers his "jointly undertaken criminal activity." Amendment No. 78 sought to insure that a defendant convicted of participation in a large on-going conspiracy would be responsible only for the part of the conspiratorial activity that he himself agreed to jointly undertake.[23]

However, Amendment No. 78 has had a mixed reception in the courts. In a Second Circuit decision, Judge Jon Newman, one of the judiciary's leading experts on the Guidelines, wrote that "[t]he Commission may have thought that the standard of "reasonable foreseeability" created a narrower test [...] but, if that was its view, it was mistaken."[24] In other decisions, the circuits appear divided on this point.[25] It therefore remains an open question whether

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[22] In federal law, aiding and abetting requires proof of a deliberate intention to assist or encourage. See note 21 supra.

[23] See, e.g., Amendment No. 78, Illustration (e) (November 1989) (defendant J, who helps off-load a single shipment of marihuana, is not accountable for prior or subsequent shipments imported by his co-conspirators, if their acts were not reasonably foreseeable in connection with the shipment that J himself off-loaded).

[24] United States v. Joyner, 924 F.2d 454, 458 (2d Cir.1991).

[25] Some Second Circuit decisions cite *Joyner* with approval, e.g. *United States v. Martinez*, 101 F.3d 684 (2d Cir. 1996), while others seem to reject it, e.g., *United States v. Perrone*, 936 F.2d 1403, 1416, *clarified on reh'g*, 949 F.2d 36 (2d Cir. 1991) ("conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced by the law of conspiracy"). Decisions in other circuits that apparently accept the *Joyner* view include *United States v. Edwards*, 945 F.2d 1387, 1396 (7th Cir. 1991) ("the limiting principle underlying conspiracy law and the Guidelines is essentially one and the same"); *United States v. LaFraugh*, 893 F.2d 314, 317 (11th Cir. 1990). In contrast, decisions that seem to reject it (and thus hold that accountability is narrower under the Guidelines than under the law of conspiracy) include *United States v. Swiney*,

Amendment No. 78's concept of "jointly undertaken criminal activity" succeeds in its intention to narrow the scope of the conduct for which a conspirator would be accountable under ordinary conspiracy principles. But in any event, that concept at most can narrow only slightly the scope of §1B1.3 because under any interpretation of the Guidelines standard, a defendant remains accountable not only for his jointly undertaken criminal activity itself, but also for any conduct of others in furtherance of *that* activity, whether or not intended or foreseen, so long as it is reasonably foreseeable.

In short, the foreseeability concept alone is typically sufficient to collapse ordinary, common sense distinctions between low-level sellers and their supervisors and leaders, because the drug trade by its very nature makes it foreseeable that jointly undertaken activity typically will require importers, managers and middlemen further up the chain in order to further that jointly undertaken activity and make it possible.[26] And the general mitigating role adjustments cannot compensate for this problem because of the imbalance between the large upward adjustments that result from drug quantity enhancements and the very limited downward adjustments permitted for defendants who play only a minimal role in an offense.[27]

Amendments No. 748, No. 668 and earlier Amendments addressed this problem more directly, by providing (in what is now §2D1.1(a)(5)) a "mitigating role cap" for the lowest-level offenders.[28] But the role cap also fails to fully address the problem, for several reasons. First,

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203 F.3d 397, 405 (6th Cir. 2000) ("the scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced by the law of conspiracy"); *United States v. Evbuomwan*, 992 F.2d 70, 73 (5th Cir. 1993) (same); *United States v. LaCroix*, 28 F.3d 223, 227 (1st Cir. 1994) (same). See also *United States v. Collado*, 975 F.2d 985, 997 n. 10 (3d Cir. 1992) (collecting cases on both sides of the issue and concluding that "we need not decide whether the standard for accomplice attribution described in the relevant conduct provision is the same as or narrower than the *Pinkerton* standard.").

The Commentary and Illustrations for §1B1.3 continue to make clear that the narrower conception of jointly undertaken criminal activity is the one intended, but do not appear to address the split in the case law.

[26] See Schulhofer, supra, 29 Am. Crim L. Rev., at 855-56. Section 1B1.3, Illustrations (c) (3) and (5) – (8) seek to distinguish between small sellers who operate independently and those who coordinate efforts. In the former case the scope of the jointly undertaken criminal activity would indeed be narrow, but that is equally true of the scope of their conspiratorial agreement; on a proper understanding of conspiracy law, independence and absence of a shared stake in a common venture precludes finding a broad conspiratorial agreement. Kotteakos v. United States, 328 U.S. 750 (1946); United States v. Torres-Ramirez, 213 F.3d 978, 981-82 (7th Cir. 2000). Conversely, when a defendant has been properly convicted under a broadly worded conspiracy count, the fact of conviction necessarily represents a finding of a mutuality of interest and a common stake in the wider range of conspiratorial activity. United States v. Morris, 46 F.3d 410, 416 (5th Cir. 1995); United States v. Bruno, 105 F.2d 921 (2d Cir.), *rev'd on other grounds*, 308 U.S. 921 (1939). In short, the premise of Illustrations (c) (3) and (5) – (8) (namely that jointly undertaken criminal activity can be narrow) is correct but insufficient to distinguish that concept from the scope of a properly proved conspiracy. And conversely a broad conspiracy, once properly proved, takes the fact pattern out of the independence posited by Illustration (c) (5) and automatically brings it within the broad scope of the mutually undertaken activity posited by Illustration (c) (8).

[27] See Schulhofer, supra, 29 Am. Crim L. Rev., at 856-57.

[28] Amendment No. 748 was adopted pursuant to congressional direction in the Fair Sentencing Act of 2010, Pub. L. 110-220, §7(1).

offenders at relatively low levels of the organization often get no role reduction at all, because – as discussed above[29] – there are too many participants below them on the organizational ladder. These offenders see their responsibility *enhanced* by the "foreseeable" acts of others but get no reduction to reflect the fact that they themselves neither committed nor intended the relevant conduct in question.[30] Thus, their failure to qualify for any mitigating role has a doubly aggravating impact at sentencing. Not only do such mid- to low-level offenders fail to obtain the 2-level or 4-level reduction, but they then become ineligible for the Quantity Table adjustment under the role-cap provision of §2D1.1(a)(5).

Reported cases illustrate the large drug-quantity consequences of the foreseeability test in contexts where the role cap of §2D1.1(a)(5) affords no relief. In United States v. Turnquest,[31] for example, co-defendant Malik Bland was held responsible for quantities of crack cocaine distributed by co-defendants over the entire 147 week period when he was deemed a co-conspirator. Yet Bland had spent three-quarters of this time (at least 107 weeks) incarcerated, with no conceivable capacity for assisting in this activity himself.[32] And although the court characterized Bland as "a *street seller* (a more minor role),"[33] it denied him any mitigating role adjustment because many smaller street sellers ranked lower on the organizational ladder. Reported cases provide numerous other examples of this inappropriate and unnecessary expansion of sentencing exposure.[34]

The anomalies resulting from the imbalance of upward and downward adjustments is compounded by the fact that the more culpable leaders typically are the ones who can provide the most information to prosecutors and who therefore qualify for the largest Substantial Assistance reductions. Adjustments for substantial assistance are perfectly appropriate, of course. However, their interaction with the foreseeability test can have inappropriate, and indeed perverse, consequences because the foreseeability test places low-level offenders with little information to offer at the same base offense level as their organizational superiors. The "big fish" then get the biggest sentencing concessions, while mid-level and lower-level sellers face the full force of a long quantity-driven sentence. The existing safety-valve and mitigating-role cap provisions address a part of this problem but leave much of it without any solution within the

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[29] See text at note 15 supra.

[30] If such conduct is intended, the defendant is accountable for it, without regard to the foreseeability test, under the terms of §1B1.3(a)(1)(A).

[31] 724 F.Supp.2d 531 (E.D. Pa. 2010).

[32] Bland joined the conspiracy in October 2003; a week later he was arrested, and he then spent more than two years in jail, before being released and rejoining the conspiracy. The court's opinion indicates that Bland was released sometime in 2006, without specifying the exact date of release. His active involvement (assuming a release date of January 1, 2006) lasted at most only 38 weeks out of the 147 weeks for which he was held accountable. Compare United States v. Rosario, 51 F.Supp.2d 900 (N.D. Ill. 1999) (refusing to hold co-conspirators accountable for drugs distributed during periods when they were incarcerated).

[33] 724 F.Supp.2d at 542.

[34] For a sampling of such cases, see Appendix B, infra.

terms of the Guidelines themselves. Under those circumstances, the Drug Quantity Table does not yield the intuitively plausible pyramid of liability that Congress intended, with the longest sentences for the worst offenders. Instead, it yields an inverted pyramid, with stiff sentences for minor players and more modest punishment for insiders who can cut favorable deals.[35]

In such cases, judges sentencing low-level offenders must either follow the Guidelines, at the cost of imposing unjust, unnecessarily severe sentences, or disregard the Guidelines in order to achieve the result that they know common sense requires. Neither outcome should be acceptable in a well-tuned Guidelines system.

C. *The appropriate solution.* In order insure that the Proposed Amendments succeed in producing the sentencing changes that the Commission intends, §2D1.1(a)(5) should be amended to state that **"The drug quantity to be used in applying the Drug Quantity Table is the quantity for which the defendant is accountable under §1B1.3(a)(1)(A) (Relevant Conduct)."**

This approach to the problem narrowly targets only the unwanted impact of the foreseeability test on *drug-quantity determinations*. It preserves all of the justifiable and important vehicles that currently exist under the Guidelines for identifying conduct and circumstances for which a drug offender should be accountable, specifically:

• all acts and omissions (including distribution of drug quantities) that the defendant committed personally or aided and abetted (§1B1.3(a)(1)(A));
• all acts and omissions (including distribution of drug quantities) that the defendant intentionally conspired to commit or facilitate, because such acts and omissions are attributable to a defendant under §1B1.3(a)(1)(A) on the basis of ordinary aiding-and-abetting principles;[36]
• all non-quantity acts and omissions that were foreseeable (§1B1.3(a)(1)(B)) or part of a common scheme or plan ((§1B1.3(a)(2)); and
• all harm resulting from the defendant's relevant conduct (§1B1.3(a)(3)).

Thus, a defendant's relevant conduct, for purposes of identifying relevant Part 2D specific offense characteristics, would fully include, as it does now, all quantities for which a defendant is accountable under §1B1.3(a)(1)(A). Likewise, through the application of §1B1.3(a)(1)(B), a defendant would remain accountable, just as he or she is now, for the foreseeable acts of others, in furtherance of jointly undertaken criminal activity, when – for example – those acts result in:

• death or injury (§2D1.1(a)(1)-(4));
• possession of a weapon (§2D1.1(b)(1));

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[35] See, e.g., United States v. Brigham, 977 F.2d 317, 318 (Easterbrook, J., noting "inverted sentencing," in which "[t]he more serious the defendant's crimes, the lower the sentence – because the greater his wrongs, the more information and assistance he has to offer to a prosecutor."). Judge Easterbrook was discussing mandatory minimums but the dynamic is largely the same under the Guidelines, to the extent that judges believe they should seek to impose a sentence within the Guideline range.

[36] See Model Penal Code §2.06(3)(a)(ii) (Proposed Official Draft, 1962); Model Penal Code and Commentaries, Comment to §2.06(3) at 307 (1985).

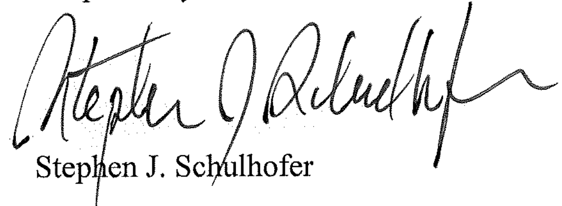
• threats of violence (§2D1.1(b)(2));
• bribery (§2D1.1(b)(11));
• maintenance of premises (§2D1.1(b)(12));
• hazardous chemical discharge (§2D1.1(b)(13)(A));
• involvement of minors (§2D1.1(b)(13)(B)-(D)); and the like.

By addressing the relevant-conduct problem in this limited fashion, the Commission can insure that anomalous Drug Quantity Table calculations do not offset the intended effects of the much-needed two-level across-the board reduction in Part 2D base-offense levels. Sweeping conceptions of foreseeability should not be permitted to result in unnecessarily severe drug sentences that are wasteful and disproportionate to culpability, dangerousness and the need to deter.

* * * *

Thank you again for this opportunity to comment on your important work.

Respectfully submitted,



Stephen J. Schulhofer

Attachments:

Appendix A: Culpability Chart from U.S. v. Turnquest, 724 F.Supp.2d 531, 544 (E.D. Pa. 2010).

Appendix B: Drug Quantity Table Calculations Based on Foreseeability

APPENDIX A

KAREEM SMITH CRACK COCAINE GANG

(Cooperator / Culpability: out of 18)
(Offense Level / Criminal History Category)

Leader (+4)

Kareem Smith

2 / 1
41 / VI
Sent: 168 mos.

Suppliers (no role adjustments)

Robert Williams	Antoine Alieea	James Robinson
_ / 2 40 / III	_ / 2 40 / I	7 / 4 35 / VI Sent: 132 mos.

Principal Managers (+3)

Jamal Turnquest	Darryle Dunbar	Landrum Thompson (+2)
_ / 5 43 / I	3 / 8 40 / V Sent: 90 mos.	1 / 6 40 / II Sent: 84 mos.

Principal Sellers

D. Muhammad	V. Garvin	M. Bland	E. Lecount	S. Bernard	K. Baldwin
_ / 11 Forcible Medication	8 / 13 34 / VI Sent: 60 mos.	_ / 9 40 / I	10 / 10 35 / VI Sent: 84 mos.	4 / 7 35 / IV Sent: 66 mos.	9 / 12 33/ V Sent: 72 mos.

Straight Sellers

D. Spratt (-4 minimal role)	D. Carter (-2 minor role)	J. Nunley (-2 minor role)
6 / 15 28 / VI Sent: 48 mos.	11 / 14 25 / III Sent: 51 mos.	12 / 16 31 / III Sent: 54 mos.

Drivers/Motel Procurers (minimal role)

J. Yurth (-4 minimal role)	M. Martin (-4 minimal role)
13 / 17 21 / I Sent: 36 mos.	5 / 18 29 / IV Sent: 6 mos. Probation

APPENDIX B

Drug Quantity Table Calculations Based on Foreseeability

The following are illustrative cases in which Drug Quantity Table calculations for mid-level and low-level drug conspirators were based on large drug quantities with which the defendants were not directly involved, but for which they were held accountable on the basis of "reasonable foreseeability."

United States v. Ball, 2013 WL 4483500 (D.D.C. 2013). Defendants Ball, Thurston, and Jones were tried together with others and convicted of multiple crack sales, but all three were acquitted of conspiracy. Ball was convicted of distributing 11.6 grams, Thurston was convicted of distributing 1.7 grams, and Jones was convicted of distributing approximately 1.8 grams. Each defendant's sentencing guidelines range was calculated on the basis of a total of 1.5 kilograms of crack involved in the conspiracy.

United States v. Figueroa, 2011 WL 2790465 (E.D. Pa July 15, 2011). Two dealers who had personally distributed small quantities were held responsible for a foreseeable total of 936 grams of crack cocaine distributed by the conspiracy.

United States v. Turnquest, 724 F.Supp.2d 531 (E.D. Pa. 2010). Several low-ranking suppliers, sellers and procurers were held accountable for the entire amount of crack distributed during the period of their association with the conspiracy, regardless of the amounts with which they were personally involved. Co-defendant Malik Bland, characterized by the court as "a *street seller* (a more minor role)," was held responsible for crack distributed by the conspiracy during the entire 147 week period when he was deemed a co-conspirator, even though he had spent three-quarters of this time (at least 107 weeks) incarcerated, with no conceivable capacity for assisting in the conspiracy's activity.

United States v. Hamilton, 356 F.Appx. 345 (11th Cir. 2009). A defendant who distributed 560 grams of crack cocaine was held accountable for a foreseeable total of 4.5 kg.

United States v. Blount, 940 F.Supp. 720 (E.D. PA 1996). A prison guard who had smuggled six packages of drugs into a prison was held accountable for the total amount of drugs brought into the prison by many others during period of his involvement. On the facts presented, a sentencing court might possibly have supported accountability under §1B1.3(a)(1)(A), on the basis that the defendant arguably had intentionally *aided and abetted* a wider conspiracy. But the *Blount* court rested defendant's accountability for the larger amounts only on the basis of reasonable foreseeability.

United States v. Fogel, 38 F.3d 1219 (9th Cir. 1994). Several "mules" who each were involved in "no more than three or four of the alleged 26 trips made in the larger [marijuana importation] conspiracy" were held accountable for importation by all the other conspirators, which totaled 1000 kg.

United States v. Reaves, 811 F.Supp. 1106 (E.D. Pa 1993). A defendant directly responsible for distributing 700 grams of cocaine was held accountable for over 500 kilos distributed by the conspiracy.

United States v. Brigham, 977 F.2d 317 (7th Cir.1992). A low-level driver received a 120-month sentence, while the kingpin received only 84-month sentence because of substantial assistance.

United States v. Evans, 970 F.2d 663, 676-78 & n.19 (10th Cir.1992). Four underlings received terms of 210 months, 292 months, 295 months and life, respectively, while several more responsible organizers who had provided substantial assistance received sentences of mere probation or supervised release.

United States v. Edwards, 945 F.2d 1387, 1400 (7th Cir.1991). The court held that "an insubstantial supplier" to a conspiracy that had distributed over 10 kg of heroin could be sentenced on the basis of all quantities that were foreseeable to him during the period of his involvement, regardless of the amounts for which he was personally responsible.