AMENDMENT 4 - OFFENSES RELATING TO METHAMPHETAMINE: STAFF ANALYSIS

OVERVIEW

The Methamphetamine Trafficking Enhancement Act of 1998 increased the statutory mandatory minimum penalties for methamphetamine offenses by cutting in half the quantity of the pure substance and methamphetamine mixture that trigger the separate five- and ten-year mandatory minimums. Congress took this action on the heels of 1997 Commission amendments to the drug guidelines that, in turn, responded to congressional directives enacted the prior year.

The new mandatory minimum quantities are :

5-year minimum: 5 grams of methamphetamine or 50 grams of methamphetamine mixture
10-year minimum: 50 grams of methamphetamine or 500 grams of methamphetamine mixture

In response to this legislation, the Commission published two options for amending the drug guidelines and two issues for comment regarding methamphetamine penalties.

POLICY OPTIONS

This legislation does not require the Commission to amend the guidelines. Its enactment presents to the Commission the issue of whether to conform the quantities of methamphetamine-actual and Ice in the Drug Quantity Table to the amended triggering quantities in the statute.

The new quantities triggering a mandatory minimum for the methamphetamine substance itself (methamphetamine-actual) are now equal to those for crack cocaine, an objective, expressly advocated by some sponsors of the legislation.

In 1997, at the direction of Congress, the Commission reviewed methamphetamine penalties and, in response, modified the Drug Quantity Table for methamphetamine-mixture offenses. The coincidental result of that modification is that the Drug Quantity Table for mixture is already aligned with the new mandatory minimum thresholds.

Both options published by the Commission amend the Drug Quantity Table to correspond it with the new mandatory minimum thresholds but present alternative methods of determining the quantity derived contribution to methamphetamine sentences. The first option only corresponds the Drug Quantity Table to the mandatory minimum thresholds. The second option modifies current guideline practice for calculating methamphetamine penalties by providing a single, uniform methodology for determining the quantity of methamphetamine for purposes of determining the offense level.

If the Commission does not act on either option, the mandatory minimums established by Congress will trump the guidelines at sentencing but the impact of the Congressional increase will be limited and not experienced throughout the remainder of the Drug Quantity

AMENDMENT OPTIONS PUBLISHED

OPTION 1.

Amend the quantities in the Drug Quantity Table in §2D1.1 for methamphetamine substance (i.e., methamphetamine-actual) and "Ice" to conform them to the quantities that now trigger the statutory 5- and 10-year mandatory minimums.

Analysis

Since the March 10 briefing materials, the amendment language has been slightly modified by removing the language increasing penalties for Phenylacetone/P2P, when possessed for the purpose of manufacturing methamphetamine. Separation of this portion of the amendment from that dealing with the methamphetamine-actual decision permits a more focused deliberation. The P2P issue is described later.

Public comment received on the proposed methamphetamine amendments either recommends no change (Families Against Mandatory Minimums (FAMM), Mr. William Boman a private citizen associated with FAMM, and the Practitioner's Advisory Group (PAG)) or supports this option (Judicial Conference of the United States, Committee on Criminal Law (CLC), U.S. Department of Justice, Criminal Division (DOJ), Federal Public and Community Defenders Organization (FPDO), and Mr. Joseph R. Meiss, a private citizen).

This option appears consistent with the apparent intent of Congress, inasmuch as some advocates of the legislation justified its adoption based in part on the Commission's failure, in its 1997 amendments, to directly enhance the penalties for methamphetamine-actual.

Option 1 is more straightforward in its implementation as it does not modify the current practice in guideline 2D1.1 of distinguishing between methamphetamine-actual and -mixture.

It is estimated that this option, if implemented, would affect 58.7 percent of the 907 methamphetamine-actual offenders sentenced during 1998. Average sentences for those affected would increase from 90 months to 116 months and require 220 additional prison beds within five years of implementation and 658 beds within ten years. Total long term impact is estimated at 998 beds within 30 years of implementation.

OPTION 2

Option 2 also corresponds the methamphetamine-actual quantities in the Drug Quantity Table to the mandatory minimums. It is distinguished from option 1 by the elimination of the distinction between methamphetamine-actual and methamphetamine-mixture with the result that all methamphetamine offenses will generally be sentenced based on the weight of pure methamphetamine.

There are two exceptions to this general rule. The first exception would continue the guideline

presumption that "Ice" methamphetamine is 100 percent pure, even though in reality it is typically only 80-90 percent pure. Thus, if the offense involved "Ice", the weight of the entire "Ice" mixture would be used. The second exception would address the situation in which the purity of the methamphetamine-mixture in a given case is not known or readily determinable. To handle the contingency of unknown purity, the guidelines could establish a presumptive purity of, perhaps, 50 percent to be used only when purity is unknown.

Adoption of this option also requires the Commission to select a presumptive purity of the methamphetamine-mixture in those cases in which the purity cannot be determined. Purity levels of 20, 40, and 50 percent have been offered. A purity of 30 percent was not presented because of difficulties in crafting quantity ranges for this value.

Analysis

Since the March 10 briefing materials, the amendment language has been slightly modified, as above, by removing the language increasing penalties for Phenylacetone/P2P, when possessed for the purpose of manufacturing methamphetamine.

This option was proposed as a means of possibly addressing the unexpected finding mentioned in the report that methamphetamine-actual cases represent the minority of methamphetamine cases; the majority being the less severely punished methamphetamine-mixture cases.

Both PAG and DOJ commented in opposition to this option citing its complexity and the likelihood of increased litigation if approved. The FPDO cited the difficulty in establishing a presumptive purity as reason for their opposition.

This option, if selected, presents the Commission with the more difficult decision of assigning a presumptive purity level for cases in which the purity is unknown. Selection of the presumptive purity requires the Commission to determine whether to establish the purity based on actual data or for purely policy concerns.

A data based assignment of presumptive purity could be tied, for example, to the national level reported by the Drug Enforcement Administration. This would most approximate the national experience at a specific point in time. However, it would be subject to continuing modification as purity levels of street drugs rise and fall. The FPDO raises the issue that presumptive purity may need to be established with greater geographic and temporal specificity, further complicating the decision. Alternatively, the Commission could disregard data findings and establish the purity level solely on policy grounds (*e.g.*, the level could be set to reflect the relative harm associated with methamphetamine trafficking which may result regardless of the purity of the substance involved).

The presumptive purity assigned greatly affects the estimated sentencing and prison impact of the amendment. If the purity would be set at 10 percent (as are the mandatory minimums), no impact to current methamphetamine-mixture cases would result. If set at 50 percent as described in the report, the impact to sentences and the Bureau of Prisons would be dramatic. The findings reported below assume the 50 percent purity assumption. If a presumptive purity of 25 percent

were selected, the impact on the prison population would be approximately halved.

Unlike option 1, this option, if implemented would affect both methamphetamine-actual cases, because of its conformity to the mandatory minimum thresholds, and the methamphetamine-mixture cases. The latter are affected because they are presently sentenced as if the drug involved was 20 percent pure and it is assumed that the purity of substance involved is greater than that level.

It is estimated that this option would affect 77.9 percent of the 2,234 methamphetamine offenders sentenced during 1998. For purposes of this analysis, the presumptive purity attributed to all methamphetamine-mixture cases was 50 percent. Average sentences for those affected would increase from 86 months to 122 months and require 1,034 additional prison beds within five years of implementation and 2,836 beds within ten years. Total long term impact is estimated at 4,613 beds within 30 years of implementation.

ISSUES FOR COMMENT PUBLISHED

Both issues for comment pertain to enhancing penalties associated with precursor chemicals used in the manufacture of methamphetamine. The issues, though pertaining to different substances, present a similar policy decision. Like the amphetamine issue, which the Commission decided not to pursue, penalty enhancements for precursor chemicals are contained in pending legislation. During the last session, the Senate Judiciary Committee approved an amended version of S.486, the Methamphetamine Anti-Proliferation Act of 1999. The House Judiciary Committee has not acted on any similar legislation at this time.

This legislation is aimed principally at the problems associated with domestic methamphetamine manufacturing operations. In the version passed by the Senate, the Commission would be instructed to promulgate necessary guideline amendments to carry out each of the directives as soon as practicable using specially authorized "emergency amendment authority."

ISSUE 1

The Commission invited comment on whether it should change the Drug Equivalency Table in §2D1.1, relating to Phenylacetone/P2P, when possessed for the purpose of manufacturing methamphetamine.

Phenylacetone/P2P, listed under the Code of Federal Regulations as a Schedule II substance, is also a precursor for the production of methamphetamine. Under the guidelines, this substance has been tied to methamphetamine-mixture penalties. An adjustment to the penalty level may have been warranted when the prior Commission modified methamphetamine-mixture in 1997, however, this issue was not raised at that time.

According to DEA, since the use of ephedrine reduction method for producing methamphetamine began in the late 1980's, the use of Phenylacetone/P2P to produce methamphetamine has declined. Last year, no federal cases were sentenced for use of this substance.

ISSUE 2

The Commission invited further comment as to whether it should change the Chemical Quantity Table in §2D1.11, relating to any chemical referenced in that table that is used to manufacture methamphetamine and, if so, to what level. An increase may be warranted in order to reflect the increased harm associated with methamphetamine offenses.

The Chemical Quantity Table identifies regulated chemicals used in the manufacture of controlled substances. According to information supplied by the Drug Enforcement Administration, 4 of 23 List I chemicals and 4 of 7 List II chemicals cataloged in the Chemical Quantity Table are used in the production of methamphetamine.

During 1998, there were a total of 45 cases sentenced under §2D1.11. Of these, 33 (73.3%) involved a chemical precursor to methamphetamine.

Analysis

As penalties for an illegal substance increase it is consistent with the proportionality goal of the guidelines to also examine the penalty structure for regulated chemicals used in the manufacturing process. In the instance of methamphetamine, DEA reports that it is the most prevalent controlled substance clandestinely manufactured in the United States. A total of eight chemicals in the Chemical Quantity Table (four each in List I and List II) and one chemical from the Drug Equivalency Table (P2P) are associated with methamphetamine production. If left unchanged, as penalties for methamphetamine increase, offenses involving precursor chemicals proportionally decline in severity.

While methamphetamine may be the most prevalent clandestinely manufactured substance, very few cases are sentenced for that offense conduct under §2D1.11. An explanation may be that, under the guidelines, a cross reference from §2D1.11 to §2D1.1 will occur if the offense involved the unlawful manufacturing of a controlled substance and if the resulting offense level under §2D1.1 is greater. For this assessment, the quantity of precursor chemical is converted to the quantity of methamphetamine that would be produced from that chemical. Because the methamphetamine quantity calculation in §2D1.1 would generally result in a higher sentence, it is likely that most cases are then sentenced as methamphetamine offenses. Informal discussion with Probation Officers indicate that, in offenses involving clandestine laboratories, this scenario is not uncommon.

These issues were addressed by only the FDPO and DOJ. The FDPO indicated that they saw no need for action on these issues at this time. In contrast, the Department of Justice feels that an increase in sentences is appropriate and expressed a willingness to work with the Commission on this task.

The Commission may wish to defer action on these issues in light of S.486 and the pending House legislation. In S.486, the Commission is instructed to establish, in a very specific manner, new penalty levels for two of the four List I chemicals associated with methamphetamine production (ephedrine and pseudoephedrine) and one List I chemical associated with amphetamine production

(phenylpropanolamine). The Commission is also instructed to review other List I chemicals and to increase penalties to reflect the dangerous nature of such offenses and the extreme dangers associated with methamphetamine and amphetamine offenses. On the issue of Phenylacetone/P2P, this legislation is silent.

The Commission decided not to review amphetamine penalties due, in part, to this same pending legislation. Additionally, though dissimilar in many ways, the past Commission experience with the telemarketing amendments indicates that anticipating the intent of Congress can be problematic.