

# FAIRNESS IN SENTENCING ACT OF 2002

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HEARING  
BEFORE THE  
SUBCOMMITTEE ON CRIME, TERRORISM,  
AND HOMELAND SECURITY  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

**H.R. 4689**

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## FAIRNESS IN SENTENCING ACT OF 2002

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TUESDAY, MAY 14, 2002

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CRIME, TERRORISM,  
AND HOMELAND SECURITY  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to call, at 4:08 p.m., in Room 2141, Rayburn House Office Building, Hon. Lamar Smith [Chairman of the Subcommittee] presiding.

Mr. SMITH. The Subcommittee on Crime, Terrorism, and Homeland Security will come to order.

I'm going to recognize myself and other Members in just a minute for an opening statement.

And I do want to say—I guess, Mr. Roth, to you—that I hope our visual display here doesn't impede your delivery or your statement. I can't see your name, your sign, but we can still know who you are. And next time maybe we'll put this on the end. But it's too heavy to move right now, and I'm afraid we'll just have to talk over it, if that's all right.

Let me recognize myself for an opening statement.

Today, the Subcommittee on Crime, Terrorism, and Homeland Security will examine H.R. 4689, the Fairness in Sentencing Act of 2002. This legislation disapproves of an amendment to the Sentencing Guidelines submitted by the United States Sentencing Commission to Congress on May 1st, 2002. Such amendments take effect on November 1, if they are not disapproved by Congress.

H.R. 4689 is a straightforward piece of legislation. If you feel criminal penalties should relate to the amount of drugs involved in trafficking, you will like this legislation. If you favor treating 150 kilos the same as a half a kilo in a drug trafficking case, then you won't like this legislation.

H.R. 4689 disapproves of sections of amendment 4 that create a drug quantity cap for those persons convicted of trafficking in large quantities of drugs, if those persons also qualified for a mitigating role adjustment under the existing guidelines.

For example, a person convicted of trafficking 150 kilograms or more of cocaine who qualifies for the mitigating role adjustment would have their sentence reduced to the same level as someone who is convicted of trafficking a half a kilogram of cocaine.

On the table before us is a display of what those amounts look like when they are seized from drug traffickers. You can see what is represented are 150 kilos and one-half kilo of cocaine. These representations of cocaine contain no controlled substances or other

harmful or dangerous materials. The purpose is to show Members what these quantities actually look like, because sometimes just talking about numbers really doesn't give you a feel for the quantities involved.

The proposed amendment is a windfall for large drug traffickers. It gives drug dealers the incentive to move more drugs rather than less and is contrary to the consistent and long-standing congressional intent that drug quantity form the centerpiece of the guidelines in drug sentencing. It is common sense that the greater the drug quantity involved, the greater the harm to our Nation.

The Commission's reason for amendment, accompanying amendment 4, states that this amendment will only apply to 6 percent of all drug trafficking offenders. This would still, however, result in a less culpable defendant, one who moved fewer drugs, unfairly receiving a disproportionate sentence, compared to the more culpable defendant, one who moved more drugs.

Furthermore, the guidelines already offer opportunities for judges to reduce a defendant's sentence when circumstances warrant it. Besides the mitigating role reduction, there are also reductions for defendants who take responsibility for their crimes, who assist law enforcement agencies in the investigation or prosecution of others involved in the offense, and for those who are without a criminal record who are not a major player.

This is not the first time Congress has had to take action to disapprove of an attempt by the Sentencing Commission to reduce the penalties for drug-related crimes. In 1995, Congress disapproved of an amendment to equalize the penalties for crack and powder cocaine. That amendment also would have created gross sentencing disparities, just as the amendment before us does today.

It is the clear intent of Congress that there be an orderly gradation of sentences, based primarily upon the objective criterion of drug quantity. The proposed amendment to cap drug quantity is inconsistent with that congressional attempt and also, in my opinion, with the basic notions of fairness.

That concludes my opening statement.

And the gentleman from Virginia, Mr. Scott, is recognized for his

Mr. SCOTT. Thank you, Mr. Chairman.

And I appreciate the opportunity to hear testimony on the Fairness in Sentencing Act of 2000. Whether the bill reflects the principle of fairness is obviously in the eye of the beholder.

The primary rationale for the Commission's proposed amendment is to limit the level of unfairness in sentencing of certain low-level offenders.

The amendment would apply only to those who qualified for mitigation based on the fact that they played a minimal role, which is very hard to show in the crime under prosecution. Most of those who qualify for this consideration get little benefit from the transaction and may not even know the quantity or value of the drugs in the transaction. If it is a conspiracy case, the offender may not—may only be involved with a small amount of the total transaction but receive responsibility for the whole amount.

Mr. Chairman, I'm aware of a number of cases where those who qualified for the mitigating role reduction in a drug transaction end up being sentenced to not just a little but a lot more than those

who plan, execute, and profit from the transaction. It seems to me that if you have a minimal role in a 150-kilo operation, that ought not get sentenced a lot more than a person who is actually operating the entire—as the kingpin—a much lower amount.

I have several cases that I would like to make part of the record that will illustrate that.

The amount of disparity will be limited. Just as treating like offenders differently brings about disparities in sentencing, treating unlike offenders the same also brings about disparities.

And we're not talking about opening the prison gates as a result of this amendment. With an 8-to-10-year guideline, the continuing impact of any statutory minimum sentence, and other potential enhancements—such as obstruction of justice, which is routinely applied if a defendant testifies and is convicted—offenders who qualify for a mitigating role will still be punished more severely than common sense dictates.

The Sentencing Commission indicates that the guidelines' amendment would only affect 6 percent of the drug cases and result in an average reduction of about 1 month in a sentence the offender would already get, and those sentences are in the 10-year range.

Mr. Chairman, I really feel that this bill has a lot to do about very little in the total scheme of drug sentencing in this country. If this bill had anything to do with the notion of fairness to drug offenders, we would be directing the Sentencing Commission to address the multitude of unfairness that unfolds before the Federal courts today as a result of politically based mandatory minimums and other drug sentencing limitations, which even the Chief Justice of the Supreme Court has complained about, and about which the Judicial Conference of the United States has protested to Congress twelve times over the past few years, including references to mandatory minimums violating common sense.

I look forward to the testimony by witnesses. And I want to especially thank Judge Rosenbaum, who traveled a great distance and endured considerable inconvenience to be with us today.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Scott, for your opening statement.

Are there other Members who wish to make an opening statement? If not, I'll introduce the witnesses.

They are Mr. Charles Tetzlaff, general counsel, United States Sentencing Commission, Washington, DC; Mr. John Roth, section chief, U.S. Department of Justice; the Honorable James M. Rosenbaum, chief justice, United States District Court, Minneapolis, MN; and Mr. William G. Otis, former assistant U.S. attorney for the Eastern District of Virginia, from Arlington, VA.

We welcome you all and look forward to your testimony.

And, Mr. Tetzlaff, we'll begin with you.

**STATEMENT OF CHARLES TETZLAFF, GENERAL COUNSEL,  
UNITED STATES SENTENCING COMMISSION**

Mr. TETZLAFF. Thank you, Mr. Chairman. Chairman Smith, Ranking Member Scott, Members of the Subcommittee, I am Charles Tetzlaff and for the past one and a half years have been

general counsel to the Sentencing Commission. Prior to that, I was U.S. Attorney in the District of Vermont for approximately 8 years.

At the outset, let me just say that the commissioners, and particularly Chair Murphy, have asked me to express their sincere regrets for not being able to attend this hearing today. The commissioners had a long-standing commitment to meet with the Criminal Law Committee of the Judicial Conference of the United States in St Louis this week and, therefore, are unable to be in Washington, D.C.

The commissioners recognize that Congress has ultimate authority over Federal sentencing policy and welcome congressional oversight hearings such as this. Congressional oversight of the Commission's work is important, appropriate, and an essential component of the policymaking process established by the Sentencing Reform Act of 1984.

As you know, the Sentencing Reform Act requires the Commission to submit for congressional review all amendments to the Sentencing Guidelines by May 1st of any given year. We believe this year the Commission passed a package of amendments that reflects the Nation's new priorities, provides important sentencing tools to Federal law enforcement, and promotes fair and effective sentencing policy.

While the focus of today's hearing relates to but one of the numerous guideline amendments the Commission sent to Congress two weeks ago, before I address the specifics of that amendment, I want to put it in context, particularly in light of the Department of Justice's suggestion in its written testimony that the Commission's amendment relating to a mitigating role cap is the latest in a series of amendments to reduce Federal drug trafficking sentences.

You may not be surprised to hear that the Commission hears exactly the opposite suggestion from others in the criminal justice community; that is that the Commission does nothing but increase penalties, especially those related to drug trafficking.

The truth is, the Commission strives to follow the dictates of Congress when it established the Commission, that it establish policies and practices to carry out the statutory purposes of sentencing, considering such things as seriousness of the offense, respect for law and just punishment, protection of the public, avoiding disparity, individualizing sentences, and overall certainty and fairness.

The Commission has a statutory mandate to periodically review and revise guidelines in consultation with the various entities in the criminal justice system and to recommend modifications when appropriate.

During this latest amendment cycle, much of the Commission's attention and efforts were devoted to terrorism. Both Congress and the Commission reacted swiftly to the events occurring on 9/11. The USA PATRIOT Act was enacted into law on October 26, 2001, and in less than six months, working closely with the Department of Justice, the Commission passed a comprehensive package of amendments to the guidelines implementing the PATRIOT Act.

Although I will not list all of the many provisions contained in that amendment, among the most significant are appropriately se-

vere penalties for offenses committed against mass transportation systems and interstate gas or hazardous liquid pipelines, increased sentences for threats that substantially disrupt governmental or business operations or result in costly cleanup measures, expanded guideline coverage for bioterrorism offenses, and a new guideline for providing material support to foreign terrorist organizations.

Four of the other amendments submitted on May 1st were triggered by requests from the Department of Justice, and the Commission reviewed, particularly, guideline issues. These are more fully described in my written testimony, which I would request be appended to the record. But suffice it to say, whether that issue was a new amendment to address issues relating to the destruction of this Nation's cultural heritage resources or adjusting the three time repeat or career offender guideline, in no event could penalties be said to be reduced. This is equally true of Commission amendments in the areas of public corruption, official victims, and sex trafficking.

Indeed, as a result of its work on the cultural heritage amendment, as an example, the Commission has sent a letter to Congress, recommending that the statutory maximum sentences in two statutes, the Archaeological Resources Protection Act and the Native American Graves Protection and Repatriation Act, be increased to more appropriately provide for the harms involved.

This year, the Commission also placed on its agenda the difficult issue of cocaine sentencing policy, in part because Federal cocaine sentencing policy continues to be criticized by many and in part because the Commission sensed a renewed interest by some Members of Congress in exploring possible changes to the penalty structure. After carefully considering all of the information available—including a review of the literature, an empirical review of the year 2000 data, State sentencing policies, public comment, and public testimony—the Commission firmly and unanimously concluded that the current penalty structure can be significantly improved to achieve more effectively the various congressional objectives.

Having reached that subsequent conclusion, the Commission faced the difficult threshold decision of determining how to proceed. The Commission seriously considered promulgating an amendment to the guidelines and submitting it for congressional review on May 1st, along with the other guideline amendments I have described. However, after consulting with a number of Members of Congress and their staff, and considering persuasive and helpful letters from Chairman Smith and several Members of the Subcommittee, as well as Ranking Member Conyers, the Commission unanimously agreed that at this time they can best facilitate congressional consideration of the proposed statutory and guideline changes by first submitting recommendations to Congress and then working with Congress to implement appropriate modifications to the penalty structure. The Commission expects to have those recommendations ready for Congress in the coming days.

Two of these amendments—I'm sorry. In addition to its work on cocaine sentencing policy, the Commission promulgated—a four-part amendment to the drug offense guidelines. Two of these amendments increased guideline penalties, one having to do with the use of crack houses and facilities for rave concerts, and the

other making an adjustment upwards in the type and weight of ecstasy pills.

The final part of this four-part drug amendment, the primary subject of today's hearing, modifies the primary drug trafficking guideline section 2D1.1 to provide a maximum base offense level of 30, which corresponds to 97 to 121 months imprisonment—that is, 8 to 10 years—for a first-time offense if the defendant receives a mitigating role adjustment under section 3B1.2.

Under this section, the guidelines provide a two- to four-level of reduction if the court makes a finding of fact that the defendant played a part in committing the offense that makes him substantially less culpable than the average participant.

In the drug context, mitigating role defendants typically perform relatively low-level trafficking functions, wield little authority in the drug trafficking organization, and have little or no control over the quantity of drugs attributable to their conduct. Many mitigating role offenders are couriers and mules whose highest trafficking function is transporting drugs at the direction of and for the profit of others. Other mitigating role defendants essentially work as manual laborers, loading or unloading drugs into storage or onto some mode of transportation. Gofers and lookouts also often qualify for mitigating role reductions, as well as individuals whose sole involvement in the drug offense is providing space or structure to further the offense. These defendants often have no knowledge of the full scope of the drug trafficking activity.

The guideline system, like the mandatory minimum penalties, recognizes that drug quantity as a measure of harm is a principal factor in determining the appropriate sentence for a drug offender. The Commission believes that other factors must also be taken into account in determining an appropriate sentence.

For the overwhelming majority of drug offenders, the drug quantity serves as a reasonable initial proxy, both for the harm caused by the offense and the trafficking function performed by the offender. In other words, offenders who perform higher trafficking functions—such as organizers, manufacturers, supervisors, and managers—tend to be held accountable under the guidelines for the largest quantities of drugs and offenders who perform lesser functions tend to be held accountable for smaller quantities. Thus, for the overwhelming majority of offenses, there does not appear to be any tension between the assignment of the offender's offense level based on drug quantity and the role of the offender.

The Commission has observed some anomalous results, however, for a limited number of offenders who perform trafficking functions widely considered to be low-level. These offenders, because of the unique nature of their function, are held accountable for exceptionally large drug quantities, which runs counter to their usual relationship between drug quantity and defendant culpability. As a result, these low-level offenders receive quantity-based penalties that exceed their culpability.

For example, as part of its study, the cocaine penalties for—the Commission conducted an intensive study of Federal cocaine cases sentenced in fiscal year 2000 and learned that powder cocaine offenders classified as renters, loaders, lookouts, enablers, and users on average were held accountable for greater drug quantities than

powder cocaine offenders classified as managers and supervisors or wholesalers. And couriers and mules were held accountable for almost as much powder cocaine as managers and supervisors and more than wholesalers.

In cases involving offenders such as these, there is a tension between using relatively large drug quantity as a proxy for the harm caused and the relatively low individual culpability of the defendant.

For some time, judges, practitioners, and others have expressed concern that we have not struck the right balance between these two competing concerns. They argue that as the initial determinant of offense seriousness—i.e., before other aggravated and mitigating sentence guideline adjustments are applied—quantity-based penalties in excess of 10 years imprisonment are inappropriately and unnecessarily long to achieve the purposes of sentencing as set forth in the sentencing format.

Indeed, as early as 1992, then-Chairman William W. Wilkins, Jr., who is the current chairman of the Criminal Law Committee of the Judicial Conference—

Mr. SMITH. Mr. Tetzlaff, I have to ask you if you could bring your comments to a conclusion. We're under the 5-minute rule, and you're over 7 minutes, so we'll need to conclude.

Mr. TETZLAFF. Very well, Chairman.

Mr. SMITH. Thank you.

Mr. TETZLAFF. I would just say parenthetically that, the Criminal Law Committee, I'm advised that, at its meeting yesterday in St. Louis, unanimously supported the Commission's mitigating role cap, as well as the other amendments submitted May 1st.

The other thing I want to stress is that the modest limitation that we believe has been applied, the Commission nevertheless ensures that the guideline penalties remain consistent with the mandatory minimum penalties even for the mitigating role defendants.

In conclusion, the Commission hopes that the information presented today, both orally and in my written testimony, will assist the Subcommittee's assessment of its work this amendment cycle and its review of the guideline amendments currently pending before Congress.

This Commission has strived to be responsive to the will of Congress and hopes to continue building upon its good working relationship with the Subcommittee.

Thank you very much.

[The prepared statement of Mr. Tetzlaff follows:]

PREPARED STATEMENT OF CHARLES TETZLAFF

Chairman Smith, Ranking Member Scott, members of the Subcommittee, I am Charles Tetzlaff and for the past one and one-half years I have served as the general counsel to the United States Sentencing Commission (the "Commission"). Prior to holding my current position, I had the privilege of serving almost eight years as the United States Attorney in Vermont.

The Commissioners, and in particular Chair Murphy, have asked me to express at the outset of my testimony their sincere regrets for not being able to attend this hearing today. The Commissioners have a long standing commitment to meet with the Criminal Law Committee of the Judicial Conference of the United States in St. Louis this week and therefore are unable to be in Washington, D.C.

The Commissioners recognize that Congress has ultimate authority over federal sentencing policy and welcome congressional oversight hearings such as this. Congressional oversight of the Commission's work is important, appropriate, and an es-

sential component of the policy making process established by the Sentencing Reform Act of 1984.

As you know, the Sentencing Reform Act of 1984 requires the Commission to submit for congressional review all amendments to the sentencing guidelines by May 1 of any given year. We believe this year the Commission passed a package of amendments that reflects the nation's new priorities, provides important sentencing tools to federal law enforcement, and promotes fair and effective sentencing policy. Today, I would like to highlight some of the Commission's most important achievements of the amendment cycle that ended just two weeks ago on May 1, 2002 and describe some of the specific guideline amendments currently under congressional review:

#### TERRORISM

Last year the Commission promulgated a guideline amendment that significantly increased the penalties for offenses involving nuclear, chemical, and biological weapons. The tragic events of September 11, 2001, prompted the Commission, like most government agencies, to alter its plans and make terrorism offenses its top priority once again this year. Congress should be commended for responding so quickly to the threat of terrorism by passing the USA PATRIOT Act. I believe the Commission also should be commended for its quick response. The USA PATRIOT Act was enacted into law on October 26, 2001, and in less than six months, working closely with the Department of Justice, the Commission passed a comprehensive package of amendments to the guidelines implementing the Act.

Although I will not list all of the many provisions contained in the amendment, among the most significant are appropriately severe penalties for offenses committed against mass transportation systems and interstate gas or hazardous liquid pipelines, increased sentences for threats that substantially disrupt governmental or business operations or result in costly cleanup measures, expanded guideline coverage for bioterrorism offenses, and a new guideline for providing material support to foreign terrorist organizations. The amendment ensures that attempts and conspiracies to commit terrorism offenses are punished as if the offense had been successfully completed and provides an encouraged upward departure in the guidelines' terrorism enhancement for appropriate cases. The amendment also authorizes lifetime supervision of an offender convicted of a federal crime of terrorism if that crime resulted in substantial risk of death or serious bodily injury.

#### CULTURAL HERITAGE RESOURCES

In response to concerns raised by the Department of Justice (particularly by the United States Attorney in Utah), the Department of Interior, many Native American tribes, and other interested groups, the Commission created a new guideline covering crimes committed against our cultural heritage resources. In light of September 11, the Commission concluded that the existing sentencing guidelines inadequately protected important national treasures such as national monuments and memorials, landmarks, parks, archaeological, historic and other cultural resources specifically designated by Congress for preservation. In addition to punishing for any pecuniary harm caused by an offense, the new guideline, §2B1.5 (Theft of, Damage to, Destruction of, Cultural Heritage Resources), includes five separate sentencing enhancements to account for aggravating conduct that often occurs in connection with these crimes, such as brandishing or using a dangerous weapon or disturbing human remains or sacred objects.

The Commission is concerned, however, that some of the most serious offenders will escape the full impact of this new guideline because several relevant offenses have statutory maximum penalties that in the Commission's view are too low. For example, the criminal provisions of the Archaeological Resources Protection Act of 1979 (16 U.S.C. § 470ee) ("ARPA") carry only a one or two year statutory maximum penalty for a first offense, depending on whether the value of the article exceeds \$500. Similarly, the criminal provisions of the Native American Graves Protection and Repatriation Act (18 U.S.C. § 1170) ("AGPRA") carry only a one year statutory maximum penalty, regardless of value. The Commission recently sent a letter to the House Judiciary Committee recommending that Congress increase the statutory maximum penalties for those offenses in order to allow the new guideline to have its full effect. The Commission hopes that the Subcommittee will support that recommendation.

#### CAREER OFFENDERS

In April 2000, the Commission promulgated a guideline amendment in response to statutory changes made to 18 U.S.C. § 924(c) (relating to possession, brandishing,

or use of a firearm during a crime of violence or drug trafficking offense). Legislation the previous year modified the existing five year penalty to provide a new tiered statutory mandatory minimum penalty structure for possessing, brandishing, or discharging a firearm with statutory maximum penalties of life imprisonment.<sup>1</sup>

The Commission responded by incorporating the mandatory minimum penalties into the firearms guideline, § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), and amending the career offender guideline. Pursuant to the mandate to the Commission in section 994(h) of Title 28, United States Code, the career offender guideline is designed to ensure that certain three-time repeat or “career” offenders receive a sentence of imprisonment “at or near the maximum term authorized.” At the time, the Commission responded to the legislation by specifying that a conviction under 18 U.S.C. §§ 924(c) and 929(a) can qualify as a “prior crime of violence or prior controlled substance offense” for purposes of that guideline, but deferred the much more complicated issue of whether convictions under those provisions can qualify as instant offenses for purposes of triggering the career offender guideline.

The Commission revisited the issue this year and concluded that to be fully in compliance with 28 U.S.C. § 994(h), and to be responsive to a specific request from the Department of Justice, section 924(c) and 929(a) offenses should qualify as instant offenses for purposes of triggering the career offender guideline. Because of the interaction of the guidelines and the statutory scheme, by necessity the amendment is somewhat complex, but the Commission is confident that it meets the congressional intent behind the career offender provision to sentence these offenders at or near the statutory maximum penalty.

#### PUBLIC CORRUPTION

In response to another request from the Department of Justice, the Commission amended the guidelines to ensure that offenses involving public corruption of foreign officials are penalized as severely as domestic public corruption offenses. This amendment also complies with the mandate of a multilateral treaty entered into by the United States, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In part, this Convention requires signatory countries to impose comparable sentences in both domestic and foreign bribery cases.

#### OFFICIAL VICTIMS

In response to a request from the Federal Bureau of Prisons (“BOP”), the Commission expanded application of the official victim guideline enhancement, § 3A1.2. This enhancement provides a three level increase (an approximate 37 percent increase) for offenses in which the victim is a law enforcement officer or corrections officer. BOP advised the Commission that the federal prisons use a variety of employees, contractors, and volunteers to supervise inmates, and not just corrections officers. The Commission responded by amending the guideline to cover an assault of any prison official authorized to act on behalf of the prison, effectively overruling *United States v. Walker*, 202 F.3d 181 (3d Cir. 1999) (holding a prison food service employee not a “corrections officer” and therefore official victim enhancement not applicable).

#### SEX TRAFFICKING

The Commission also promulgated an amendment that ensures severe sentences for commercial sex acts such as the production of child pornography or prostitution, specifically targeting offenders who use fraud to entrap victims. The amendment makes several specific changes to § 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) to address more adequately the new offense at 18 U.S.C. § 1591 created by the Victims of Trafficking and Violence Protection Act of 2000.

#### DRUGS

This year the Commission also placed on its agenda the difficult issue of cocaine sentencing policy, in part because federal cocaine sentencing policy continues to be criticized by many, and in part because the Commission sensed a renewed interest by some members of Congress in exploring possible changes to the penalty structure. In the course of its work this year, the Commission (i) reviewed the findings from recent literature on specific issues such as the addictiveness of cocaine and the consequences of prenatal cocaine exposure; (ii) conducted an extensive empirical

<sup>1</sup>See the Act to Throttle the Criminal Use of Guns, Pub. L. 105–386 (1999)

study of federal cocaine offenders sentenced in fiscal year 2000 and compared those results with the findings in the Commission's 1995 special report to Congress on federal cocaine sentencing policy;<sup>2</sup> (iii) surveyed state sentencing policies; (iv) considered public comment on the appropriateness of current federal cocaine sentencing policy; and (v) heard testimony at three separate public hearings from the medical and scientific communities, federal and local law enforcement officials, including the Department of Justice, criminal justice practitioners, academics, and civil rights organizations.

After carefully considering all of the information available, the Commission firmly and unanimously concluded that the current penalty structure can be significantly improved to achieve more effectively the various congressional objectives outlined in the Sentencing Reform Act of 1984, the Anti-Drug Abuse Act of 1986 (which established the current mandatory penalties for most major drugs of abuse),<sup>3</sup> and the 1995 legislation<sup>4</sup> disapproving the prior Commission's guideline amendment addressing cocaine sentencing.<sup>5</sup>

Having reached that substantive conclusion, the Commission faced the difficult threshold decision of determining how best to proceed. The Commission seriously considered promulgating an amendment to the guidelines and submitting it for congressional review on May 1 along with the other guideline amendments I have described. After consulting with a number of members of Congress and their staff and considering persuasive and helpful letters from Chairman Smith, and several members of the Subcommittee as well as Ranking Member Conyers, the Commission unanimously agreed that at this time they can best facilitate congressional consideration of the proposed statutory and guideline changes by first submitting recommendations to Congress, and then working with Congress to implement appropriate modifications to the penalty structure. The Commission expects to have those recommendations ready for Congress in the coming days.

In addition to its work on cocaine sentencing policy, the Commission promulgated a four part amendment to the drug offense guidelines that was submitted for congressional review on May 1, 2002. The first part of the amendment significantly increases penalties for certain offenders convicted under 21 U.S.C. § 856 (Establishment of Manufacturing Operations). That statute originally was enacted to target defendants who maintain, manage, or control so-called "crack houses," but more recently has been applied to defendants who facilitate drug use at commercial dance clubs frequently called raves. *This amendment increases that maximum base offense guideline sentencing range from 21–27 months to 63–78 months for a first-time offender who had no participation in the underlying controlled substance offense other than allowing use of the premises.*

The Commission determined that the existing maximum base offense level did not adequately reflect the culpability of offenders who knowingly and intentionally facilitate and profit, at least indirectly, from the trafficking of illegal drugs, even though they may not participate directly in the underlying controlled substance offense. *The Commission believes that this penalty increase will prove to be an important tool for federal law enforcement and was promulgated in direct response to a specific request from the Department of Justice.*

The second part complements the Commission's guideline amendment effective November 1, 2001, that significantly increased penalties for ecstasy trafficking in response to a generally expressed congressional directive. The Commission received information from the Drug Enforcement Administration suggesting that certain commentary to the drug trafficking guideline no longer accurately reflected the type and weight of ecstasy pills typically trafficked and consumed. Because this inaccuracy could result in underpunishment in some cases, the Commission modified the commentary to reflect that ecstasy usually is trafficked and used as MDMA in pills weighing approximately 250 milligrams.

The third part of the amendment clarified that the two level reduction provided in the primary drug trafficking guideline for defendants who meet the "safety valve" criteria set forth at 18 U.S.C. § 3553(f)(1)–(5) and reproduced in § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) applies regardless of whether the defendant is convicted under a statute that carries a mandatory minimum term of imprisonment.

<sup>2</sup>USSC, 1995 Special Report to Congress: Cocaine and Federal Sentencing Policy (as directed by section 2800006 of Public Law 103–322) (Feb. 1995).

<sup>3</sup>See Pub. L. 99–570, 100 Stat. 3207 (1986).

<sup>4</sup>See Pub. L. 104–38, 109 Stat. 334 (1995).

<sup>5</sup>That amendment, among other things, would have equalized the quantity-based sentencing guideline penalties for crack cocaine offenses with the sentencing guideline penalties for powder cocaine offenses.

The final part of this drug amendment, the primary subject of today's hearing, modifies the primary drug trafficking guideline, §2D1.1, to provide a maximum base offense level of 30 (which corresponds to 97 to 121 months imprisonment—or eight to ten years—for a first-time offense) if the defendant receives a mitigating role adjustment under §3B1.2 (Mitigating Role). Under §3B1.2, the guidelines provide a two to four level reduction if the court makes a finding of fact that the defendant played “a part in committing the offense that makes him substantially less culpable than the average participant.”<sup>6</sup>

In the drug context, mitigating role defendants typically perform relatively low level trafficking functions, wield little authority in the drug trafficking organization, and often have no control over the quantity of drugs attributable to their conduct. Many mitigating role offenders are couriers and mules whose highest trafficking function is transporting drugs at the direction of and for the profit of others. Other mitigating role defendants essentially work as manual laborers, loading or unloading drugs into storage or onto some mode of transportation. Gophers and lookouts also often qualify for mitigating role reductions, as well as individuals whose sole involvement in the drug offense is providing space or structures to further the offense. These defendants often have no knowledge of the full scope of the drug trafficking activity.

The guidelines system (like the mandatory minimum penalties) recognizes that drug quantity—as a measure of harm—is a principle factor in determining the appropriate sentence for a drug offender. But the Commission believes that other factors must also be taken into account in determining an appropriate sentence. For the overwhelming majority of drug offenders, the drug quantity serves as a reasonable initial proxy both for the harm caused by the offense and the trafficking function performed by the offender. In other words, offenders who perform higher trafficking functions, such as organizers, manufacturers, supervisors, and managers, tend to be held accountable under the guidelines for the largest quantities of drugs, and offenders who perform lesser functions tend to be held accountable for smaller quantities. Thus, for the overwhelming majority of offenses, there does not appear to be any tension between the assignment of the offender's offense level based on drug quantity and the role of the offender.

The Commission has observed some anomalous results, however, for a limited number of offenders who perform trafficking functions widely considered to be low level. These offenders, because of the unique nature of their function, are held accountable for exceptionally large drug quantities, which runs counter to the usual relationship between drug quantity and defendant culpability. As a result, these low level offenders receive quantity-based penalties that exceed their culpability.

For example, as part of its study of cocaine penalties the Commission conducted an intensive study of federal cocaine cases sentenced in fiscal year 2000 and learned that powder cocaine offenders classified as “renters, loaders, lookouts, enablers, users, and others” on average were held accountable for greater drug quantities (7,320 grams) than powder cocaine offenders classified as managers and supervisors (5,000 grams) or wholesalers (2,500 grams). And couriers and mules were held accountable for almost as much powder cocaine (4,900 grams) as managers and supervisors, and more than wholesalers.

In cases involving offenders such as these, there is a tension between using relatively large drug quantity as a proxy for the harm caused and the relatively low individual culpability of the defendant. For some time judges, practitioners, and others have expressed concern that we have not struck the right balance between these two competing concerns. They argue that as the initial determinant of offense seriousness (*i.e.*, before other aggravating and mitigating sentencing guideline adjustments are applied), quantity-based penalties in excess of ten years imprisonment are inappropriately and unnecessarily long to achieve the purposes of sentencing as set forth in the Sentencing Reform Act of 1984.

As early as 1992, then Chairman William H. Wilkins, Jr., who is the current chairman of the Criminal Law Committee of the Judicial Conference of the United States (“CLC”), moved to adopt an amendment to the guidelines that would have limited the impact of drug quantity for certain mitigating role defendants. The amendment failed 3 to 2, primarily because the two commissioners who voted against it wanted to decrease further the impact of drug quantity on the penalties for these offenders. This year the Commission received public comment from a number of sources—including the CLC of the Federal Judicial Conference, the Commission's standing advisory committee, the Practitioners' Advisory Group, and the American Bar Association—again urging us to adopt some version of a “mitigating role cap.”

<sup>6</sup>USSG §3B1.2 (Mitigating Role), comment. (n. 3).

After carefully considering all of the comments received, including Chairman Smith's letter, *the Commission unanimously, and I stress unanimously, concluded that for this category of least culpable offenders, a base offense sentencing guideline range of 97 to 121 months is sufficient to meet the purposes of sentencing and strikes an appropriate balance between basing penalties on the quantity of drugs and the role of the offender.*

Furthermore, the Commission believes that this is a modest limitation on the impact of drug quantity on sentences. *The Commission ensured that the guideline penalties remain consistent with the mandatory minimum penalties even for mitigating role defendants.* With this amendment, a mitigating role defendant who is found responsible for a drug quantity sufficient to trigger a ten year mandatory minimum penalty still will receive a base offense level that corresponds to the ten year mandatory minimum penalty. Other aggravating adjustments in the trafficking guideline (e.g., the weapon enhancement at §2D1.1(b)(1)) and general aggravating adjustments in Chapter Three of the guidelines still can operate to increase the defendant's offense level above level 30. The defendant's criminal history score also can further increase the defendant's sentence. Finally, although the Commission intends for this amendment to have a meaningful benefit for those defendants for which it applies, the Commission estimates that this "mitigating role cap" will apply in only *six percent* of cases sentenced under the primary drug trafficking guideline, resulting in a *slight reduction of one month in average sentences from 72 to 71 months—or 1.4 percent—for all offenders sentenced under the guideline.*

#### CONCLUSION

The Commission hopes that the information presented today assists the Subcommittee's assessment of its work this amendment cycle and its review of the guideline amendments currently pending before Congress. In the few short years since this Commission was appointed on November 15, 1999, they have increased penalties significantly for offenses such as electronic copyright infringement, identity theft, cell phone cloning, sexual offenses against children, human trafficking, college scholarship fraud, terrorism, money laundering, fraud and theft, methamphetamine and amphetamine manufacturing, ecstasy trafficking, stalking and domestic violence, GHB offenses, firearms offenses, offenses involving nuclear, chemical and biological weapons, and many others. This Commission has strived to be responsive to the will of Congress and hopes to continue building upon its good working relationship with the Subcommittee.

Mr. SMITH. Thank you, Mr. Tetzlaff.  
Mr. Roth?

#### **STATEMENT OF JOHN ROTH, ASSET FORFEITURE AND MONEY LAUNDERING SECTION, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE**

Mr. ROTH. Thank you, Chairman Smith, Ranking Member Scott, and Members of the Subcommittee.

My name is John Roth. I come to you as a career Department of Justice prosecutor. I prosecuted drug crimes as an assistant U.S. attorney in two different districts, in the Eastern District of Michigan in Detroit and the Southern District of Florida in Miami, before I came to Washington, where I was the chief of the Narcotic and Dangerous Drug Section for 2½ years, and now in my present position as the chief of the Asset Forfeiture and Money Laundering Section. It's truly a privilege to be here, and I do thank you for the opportunity.

We oppose the Sentencing Commission's changes with regard to section 2D1.1. We do so because we think that they'll result in a sentencing scheme that fails to reflect the seriousness of the conduct involved, will produce wildly disparate sentences between cases or even in the same case, and will ignore the modern reality of drug trafficking as it's practiced in the United States today.

Large-scale drug trafficking organizations, and these are the type that the Department of Justice strives to target and to prosecute,

are able to function only as a result of the individuals who contribute to their success. A large-scale trafficking organization is necessarily complex and dependent on dozens of individuals, each with his or her own role.

Each member of a conspiracy—those who supply the drugs, who smuggle the drugs, who pilot the boats, fly the planes, the financiers, the chemical suppliers, the transportation specialists, the enforcers who provide the muscle, those who provide organizational and logistical support, those who facilitate the communication, and those who launder the money—each one of them contributes to the success of a complex organization in his or her own way.

The kingpins and the managers involve these people out of necessity. They are necessary to an effective, functioning criminal organization. Without the support of these individuals, these conspiracies simply could not happen.

The net effect of the Sentencing Commission's guideline change is to allow individuals with a minor but necessary role in large drug organizations to escape the consequences of their actions. Under the Commission's plan, for example, an individual who is a minor but not a minimal participant in a scheme to import, say, 100 kilograms of cocaine—and that's got a domestic wholesale value of something along the lines of \$2 million, a retail value far in excess of that, and enough for hundreds of thousands of users—assuming that he has accepted responsibility for his actions and qualified for the safety valve, will be sentenced only to about 4 years. A minimal participant would receive a little over 3 years. And under the Commission's guidelines as proposed, it didn't matter whether it was a case involving 100 kilos or 150 kilos or five kilos or a 1,000 kilos; the sentence would be the same regardless, assuming they met these criteria.

Under the Commission's scheme, mitigation is double counted. First, there is reduction to a level 30 cap and, then a second reduction is taken for role in the offense, either a two-level or a four-level reduction. We think this goes too far. Drug trafficking is a serious crime. And the harm to society as a result of drug trafficking is significant and should be punished appropriately.

Currently, the system—we recognize that those who are less culpable should be punished less severely, and the current system does that. Minor participants receive a two-level reduction from a standard sentence, and a minimal participant receives a four-level reduction. These benefits right now are considerable.

In the 100 kilogram case that I talked about, this translates into a reduction of about 2 or 3 years for a minor participant, and a minimal participant would have a 10-year sentence reduced to between 6 and 7 years.

The guideline change is going to make it more difficult for prosecutors to attack large organizations. Dismantling criminal organizations typically requires the cooperation and testimony of somebody on the inside of the organization. This is especially true with sophisticated and well-insulated criminal organizations. The Commission's guideline change is going to make it more difficult to convince less culpable members of a conspiracy to aid the Government or provide evidence in assistance to the Government.

And I'd like to illustrate this with a real life example that I had when I was in Miami. I was working with the DEA and the FBI on a multi-ton Colombian cocaine transportation ring. We had information that one of the members was going to transport a tour bus with about 200 kilograms of cocaine secreted inside it. It was going to go from Los Angeles to New York.

We were able to develop evidence of where the bus was. We were able to stop it, search it, and confront the driver with the evidence of the 200 kilos. We were able to convince the driver to continue on that journey to New York, because we didn't know who it was that he was going to deliver the cocaine to in New York.

And the only reason that he'd cooperate with us is because he realized that notwithstanding his perhaps minor role in the entire organization, he still faced a significant sentence. If we lose that ability to convince these minor players to testify and to cooperate and to provide evidence, we lose the ability to go after the kingpins. And to me, that is the single most significant problem with the Commission's actions.

Moreover, the Commission's change submitted to Congress would create disparities in sentences. One factor, the defendant's role in the offense, will be responsible for an enormous sentencing reduction. Unfortunately, this is one of the most subjective factors within the guidelines. A judge is going to have to be forced to determine in each case whether an individual is a minor participant. And that's vaguely defined in the guidelines as someone who is, quote, "less culpable than most other participants but whose role could not be described as minimal," end quote.

There is great confusion over what that single phrase means, yet that single factor is going to have an enormous impact on someone's sentence. For individuals trafficking in excess of 150 kilograms of cocaine, or at the top of the guideline range, that can result in a 12-level reduction. It's perhaps the biggest single reduction that you can have in the Sentencing Guidelines.

Even in the same case, a few seemingly small facts—the difference in the amount of money being paid or a slight difference in the degree of knowledge about the participation of others, for example—will have a great and disproportionate impact on the sentences of the defendants within the conspiracy.

A defendant's role in the conspiracy is going to become the single most important fact, even more important than drug quantity. It will depart from the quantity-based system Congress established when it wrote the Controlled Substances Act and will differ from the way we sentence every other type of crime, whether it's fraud, theft, or violent crime.

That concludes my remarks, Mr. Chairman. On behalf of the men and women who prosecute serious narcotics cases for the United States, I thank you for the opportunity.

[The prepared statement of Mr. Roth follows:]

PREPARED STATEMENT OF JOHN ROTH

Chairman Smith, Ranking Member Scott, and Members of the Subcommittee, my name is John Roth. I am a career Department of Justice prosecutor, and serve as the Chief of the Asset Forfeiture and Money Laundering Section. I prosecuted drug crimes as an Assistant United States Attorney in Detroit, Michigan and Miami, Florida for almost 13 years before coming to Washington, first as the Chief of the

Narcotic and Dangerous Drug Section in the Criminal Division for two and a half years and now in my current position. I have prosecuted and supervised the prosecution of hundreds of drug cases in the course of my career. I appreciate the invitation to speak with you today, and to offer the committee some insight into the effects on the investigation and prosecution of federal drug cases of Sentencing Guideline amendments recently submitted to Congress.

At your request, we have reviewed the Sentencing Commission's revisions to section 2D1.1 of the Sentencing Guidelines. If Congress permits these amendments go into effect, they would cap the Sentencing Guideline base offense level at 30 for any defendant who also is found to have a mitigating role in an offense. This level 30 cap means that a qualifying defendant whose offense involved a tremendous quantity of drugs—for example, 150 or more kilograms of cocaine, which produces a base offense level of 38 under the Guidelines—would be treated in the same manner as one whose offense involved a significantly smaller quantity—3.5 to 5 kilograms of that drug, which produces a base offense level of 30. The level 30 cap also means that from the standpoint of drug quantity the worst defendants—those involved in the largest conspiracies distributing the largest quantities of drugs—would receive the biggest break.

We oppose the Sentencing Commission's changes. We do so because they will result in a sentencing scheme that fails to reflect the seriousness of the conduct, will produce wildly disparate sentences between cases or even within the same case, and will ignore the modern reality of drug trafficking crimes in the United States today.

Large scale drug trafficking organizations—the type that the Department strives to target and prosecute—are able to function only as a result of the individuals who contribute to their success. A large scale trafficking organization is necessarily complex and dependent on dozens of individuals, each with his or her own role. Each member of the conspiracy—those who supply the drugs, those who smuggle the drugs, those who pilot the boats and fly the planes, the financiers, the chemical suppliers, the transportation specialists, those who provide the muscle to protect the operation, those who provide organizational and logistical support, those who facilitate the communication and those who launder the money—each contributes to the success of the organization in his or her own way. The kingpins and the managers involve these people because they are necessary to an effectively functioning criminal organization. Without the support of these individuals, these conspiracies would fail.

The net effect of the Sentencing Commission's Guideline change is to allow individuals with a minor but necessary role in large drug organizations to escape the consequences of their actions. Under the Commission's plan, for example, an individual who is a minor, but not a minimal, participant in a scheme to import 100 kilograms of cocaine—with a domestic wholesale value of two million dollars, a retail value far in excess of that, and enough for hundreds of thousands of users—who accepted responsibility for his actions and who qualifies for a safety valve reduction, would be sentenced to a range between 46 and 57 months—around four years. A minimal participant would receive a sentence in the range of 37 to 46 months—a little over three years. An even more serious defendant—one whose offense involved 150 kilograms or more of cocaine—would receive a sentence reduction to these same levels. In the absence of the amendment, a minor participant in the 150 kilogram offense (who accepted responsibility and who qualifies for the safety valve reduction) would have been sentenced to 108 to 135 months of imprisonment, and a minimal participant to 87 to 108 months. In the view of the Department of Justice, a reduction of the magnitude provided in the amendment—more than 50 percent—results in sentences that do not sufficiently reflect the seriousness of such criminal conduct; nor do the resulting sentences sufficiently deter those who would willingly contribute to the success of drug organizations. Drug trafficking is a serious crime. The harm to society as the result of drug trafficking is significant, and it deserves to be punished appropriately.

We recognize that those who are less culpable should be punished less severely, and the current guideline system adequately provides for this. Minor participants receive a two level reduction from the standard sentence, and minimal participants receive a four level reduction. These benefits are considerable. In the 100 kilogram cocaine case I spoke of earlier, this translates into a reduction of about two to three years on a ten year sentence. A minimal participant would have a ten year sentence reduced to between six and seven years. Under the Commission's scheme, a mitigating role is "double counted:" first, with a reduction to the level 30 cap for drug quantity, and then with an additional reduction of two or four levels for the mitigating role in the offense. This goes too far.

As prosecutors, we focus on attacking entire organizations. It is insufficient just to take out the leaders, and it is insufficient just to take out the soldiers. We must

root out the entire organization in order to dismantle it. Dismantling criminal organizations typically requires the cooperation and testimony of an insider. This is especially true with criminally sophisticated and well insulated organizations. The Commission's guideline changes would make it more difficult to convince less culpable members of the organization to provide evidence. Let me illustrate this with a real life example. In Miami I was working with the DEA and FBI, investigating a multi-ton Colombian cocaine transportation ring. We had information that one of the members was to drive a tour bus loaded with 200 kilograms of cocaine from Los Angeles to New York. We were able to stop and search the bus and confront the driver. We were able to convince the driver to continue on this journey and deliver the bus to the New York end of the operation, thereby exposing a part of the group we were not aware of. The driver understood that notwithstanding his minor but critical role, he faced a significant penalty if he decided not to cooperate. Every experienced agent and prosecutor could give you a dozen similar examples. The ability to move up the hierarchy of the organization and identify its facilitators is critical to our success, and the Commission's actions would make our job more difficult.

Moreover, the Commission's change submitted to Congress would create disparities in sentences. One factor, the defendant's role in the offense, will be responsible for an enormous sentencing reduction, yet this is one of the most subjective factors in the Guidelines. A judge will be forced to determine in each case whether an individual is a minor participant, which is vaguely defined as someone who "is less culpable than most other participants, but whose role could not be described as minimal." There is great confusion over what that phrase means, yet that single factor will can have an enormous impact on an individual's sentence. For individuals trafficking in excess of 150 kilograms of cocaine, who are at the top end of the guideline range, it can result in an adjustment of 12 levels, which takes them from a 188–235 month range to a 51–63 month range (after taking into account the safety valve reduction). It is perhaps the single biggest adjustment in the entire guidelines manual, a bigger difference than if a person were trafficking 149 kilograms of cocaine (level 36) instead of just 500 grams (level 26—a 10-level difference).

A finding of whether a defendant was a minor participant often turns on only a few facts and, because of the necessarily vague definition, will vary from judge-to-judge. As a result, we predict there will be great disparity between judges. In the everyday practice of law, similarly situated defendants will receive vastly disparate sentences. Such disparity is inevitable in any system in which general guidelines are applied to a set of facts, but the degree of disparity will be magnified under the Commission's proposal.

Even in the same case, a few seemingly small facts—the difference in the amount of money being paid, or a slight difference in the degree of knowledge about the participation of others, for example—will have a great and disproportionate impact on the sentences of defendants within the same conspiracy. A defendant's "role" in the conspiracy will become the single most important fact in sentencing—even more important than the quantity of drugs involved. It will depart from the quantity-based system Congress established when it enacted the Controlled Substances Act, and it will differ from the way we sentence every other type of crime, whether it is fraud, theft, or violent crime.

Finally, Mr. Chairman, I note that the Commission's action is the latest in a series of amendments to reduce the severity of federal drug trafficking sentences. In 1992, the Commission changed the definition of "relevant conduct" for jointly undertaken activity, which had the net effect of lowering drug conspiracy sentences. In 1994, the Commission reduced the highest offense level for trafficking offenses from a level 42, for drug crimes involving, for example, a quantity in excess of 1,500 kilograms of cocaine, to a level 38, thereby punishing offenses involving 150 kilograms of cocaine in the same manner as those involving 1,500 kilograms of cocaine. In 1995, the Commission instituted the "safety valve" reduction which, in addition to allowing a defendant to be sentenced without regard to a statutory mandatory minimum, allowed in certain serious drug cases a further two level reduction in the offense level. This carefully crafted safety valve amendment resulted in a proportionate decrease in sentence for a significant group of defendants whose reduced culpability justified lower penalties. Just last year, the Commission once again reduced the drug sentencing guideline by extending that two level reduction to less serious drug crimes (*i.e.*, less than 500 grams of cocaine).

On behalf of the men and women who investigate and prosecute federal drug crimes, it is truly a privilege to be here, and I would like to thank the Subcommittee for the opportunity to share my views. Mr. Chairman, that completes my prepared remarks. I would be happy to answer any questions that you may have at this time.

Mr. SMITH. Thank you, Mr. Roth, for your testimony.

Judge Rosenbaum?

**STATEMENT OF THE HONORABLE JAMES M. ROSENBAUM,  
CHIEF JUDGE, UNITED STATES DISTRICT COURT, MIN-  
NEAPOLIS, MN**

Judge ROSENBAUM. Chairman Smith, Ranking Member Scott, Members of the Committee, it is a pleasure and may I say it's an honor for me to be present before you.

I would like to suggest, Mr. Chairman, with all respect, that the proposal contains a serious confusion. It confuses office boys and assembly-line workers with chairmen of the board, and that ought not to be perpetuated.

Let me give you a little bit about my own background. I began as a trial attorney and worked as a municipal prosecutor for many years. In 1981, I was appointed United States attorney for the District of Minnesota, where I carried my own caseload. I served under Rudy Giuliani, who headed the criminal division; William French Smith; and under Edward Meese, attorney general while I served. In 1985, President Reagan honored me by placing me on the United States district court.

After 17 years, I tell you as I am sitting here, sir, I am no bleeding heart. But I also want to tell you that my comments do not necessarily reflect those of the Judicial Conference, although I sit on the Judicial Conference of the United States.

I will also tell you that I have spoken with Judge Sim Lake, who heads the Sentencing Committee of the Judicial Conference's Committee on Criminal Law, which I now understand unanimously supported these proposals. Judge Lake sits in Texas, and shares the same views which I'm expressing, and was also appointed by President Reagan.

Let me focus on why I think the proposal is not appropriate. It orients, and I think it ought to, the inquiry for very low-level, for minimal or bit players, away from the entire conspiracy crime and focuses only on the perpetrator.

There are four reasons why I believe this is proper. It reflects properly who the minimal and minor participants actually are. Second, it measures fairly the real part that they play. Third, these are people who derive minimal profits. They do not derive profits from the proceeds of the enterprise; they're pieceworkers. Fourth, the net effect is extraordinarily small.

Let me focus then with you on the first of these. Who are these people? They are inevitably minnows. As Mr. Roth just pointed out, the goal of the Department of Justice, and appropriately so, is to find the sharks, to find the major players. But when you cast a wide net, you pick up minimal or bit part players. These are the people that they pick up on the wire taps. These are the people that, when they sweep in, are in the room. These are the people who may be blocks away simply doing visual monitoring. Or they may be people that they pick up at the border who have swallowed or are carrying drugs. Frequently, they are drivers or couriers. These are the women whose boyfriends tell them, "This week you're going to get a FedEx package, and give it to me when it arrives. Your house is where we're mailing it. If you do that, I'll give you some money for the kids, and I'll give you \$150 bucks for food."

That's who we're talking about. We're not talking about kingpins. For prosecutors, these are the throwaways. These are the minimal cases.

I also want to tell you, with all respect to Mr. Roth, that these sentencing changes do not change the mandatory minimums. His truck driver would not be affected by—or his tour bus driver is simply not to be affected by this program. The mandatory minimums will remain in effect.

Let's also talk about their role, the second factor. Their role in the offense, these people do not set up the deal.

I have never seen a minor or minimal role player who knew where the drugs came from or, most of the time, where they were going. Other than by personal relationships, they do not know what is going on in the deal other than they're doing their piecework job. They do a task and then they go on to something else, most of the time their regular life.

They do not, number three, proceed in the proceeds. They do not have a share in the distribution. When the deal is done with the 500 or 150 kilos, they still get their \$500 or their \$1,000. Nothing else comes to them. Many of them are addicted and take their pay, frankly, in users' quantities. That's all there is. But instead, they're being sentenced as though they were running the entire enterprise.

Fourth, let's take a look at the effect. And the effect, I will tell you, is small. You can take a look at the material, which I think has copiously been supplied by Mr. Tetzlaff and the Commission, but basically the proposed category sentencing does not end the inquiry.

And to suggest that that puts a cap looks, I think, the wrong way. Points added for firearms, obstruction, violence, or injury would all be added on the top. And again, the mandatory minimums are not going away.

So let me then focus just if I can on a couple of sentences.

Mr. Chairman, Members of the Committee, this is what I do for a living. I face criminals, bad people who need to be sentenced. I've been doing it for 17 years, and let me tell you what I'm looking at.

Here's a young man who is 19 years old. He was hired to drive a car from Seattle to Minnesota. He didn't know and doesn't know, I believe as I'm sitting here, until he was convicted, what he was carrying, how much he was carrying, or where it was in the vehicle. It made no difference to him whether he was carrying one kilo, or five, or 20, hidden in the car. And if he would have looked and found where it was, and the people who were his controllers would have found that out, he would have been facing possible death himself.

But he drove the vehicle. He got picked up. Hidden in the bumper were 15 kilos of methamphetamine. Minnesota does not need methamphetamine, and he rightfully should go to jail.

But I will tell you, he is right now facing the same 121 to 239 months that he would otherwise have gotten from someone else. He is also bound by the mandatory, statutory minimum of 10 years. There's really no difference for him.

A young woman named VMD, for our purposes, she made phone calls under the directions of her boyfriend. He gave her instructions and told her what to do. Her apartment was used by him to process

and store cocaine. Everything she did was his, none of it was hers, and he gave her money for her kids and bought her Christmas presents. She has presently been found to be a minor participant. And under the guidelines, she was rated at a 27 and faced approximately 7 to 9 years.

Mr. SMITH. Judge Rosenbaum, we're over 7 minutes. Could you conclude your testimony?

Judge ROSENBAUM. I will conclude in one more second.

Mr. SMITH. Okay.

Judge ROSENBAUM. I appreciate very much your courtesy, and I urge you to seriously think about these matters as I know you will. And I thank you so much for the opportunity to be heard.

[The prepared statement of Mr. Rosenbaum follows:]

PREPARED STATEMENT OF JAMES M. ROSENBAUM

Dear Mr. Chairman and Members of the Committee:

As a small and probably improper preface to my testimony, please permit me to say that my grandfather was an immigrant tailor who came to this great nation and settled in Minnesota, almost 90 years ago. His son and my father served in the U.S. Army, and sold building products in Minneapolis. They are both gone now, but if they could see their son and grandson testifying today, they would know that miracles actually come to pass.

It is a great honor to testify before this distinguished committee. I have come to speak in favor of the United States Sentencing Commission's proposed guideline amendment to set a minimal or minor participant's base offense level at 30 points.

Please let me tell you a bit about my own background. I have practiced trial law since 1969. Beginning in 1972, I was a municipal prosecutor for St. Louis Park, Minnesota. I also did some criminal defense work. In 1981, I was appointed United States Attorney for the District of Minnesota, by President Ronald Reagan. As U.S. Attorney, I prosecuted my own caseload as well as supervised the office. In 1985, almost 17 years ago, President Reagan appointed me to the federal bench. I am no bleeding heart. I also should tell you that even though I am a member of the Judicial Conference of the United States, the views I express are mine and do not necessarily represent adopted Conference policy.

Mr. Chairman, I have spoken to Judge Sim Lake, the distinguished jurist who chairs the Sentencing Guideline Subcommittee of the Judicial Conference's Committee on Criminal Law. Judge Lake, as you know, is also a Reagan appointee, and sits in Houston, Texas. Judge Lake's, and his Subcommittee's, comments favoring this change are already a part of this Committee's records, I believe. But it is fair to say this distinguished Texas jurist shares the views I express. They are also shared by a substantial number of other sitting federal judges who have previously served as United States Attorneys.

With this background, I would like to focus on the proposed modification: the Sentencing Commission's proposal reorients the sentencing inquiry, for bit players, away from the quantity of drugs in the entire crime, and instead toward the perpetrator. I believe this is proper.

Let me provide four reasons why this is so. First, the change better reflects who these minor and minimal participants are; second, it more properly measures the real part these defendants play in the overall drug trafficking schemes; third, these defendants derive relatively minimal proceeds from the crime; and, fourth, the effect of the change, if adopted, is slightly lower sentences for less-culpable defendants.

First, who are these "minimal" or "minor" participants? The answer is, they are almost inevitably minnows. Prosecutors always cast their nets at sharks, but in catching them, they often also get a few small fry used by the sharks. Minor or minimal participants, in my experience, are frequently lookouts, couriers, or those who allow their homes to be used to store, receive, or distribute drugs. These defendants virtually always come to the attention of investigators by way of wiretaps of the real targets of the investigation, their arrests at the scene while performing laboring jobs as part of the deal, or acting as couriers for people they seldom actually know.

They are the women whose boyfriends tell them, "A package will be coming by mail or from a package delivery service in the next two weeks. Keep it for me, and I'll give you \$200, or maybe I'll buy you food for the kids." Or they are drug couriers who either swallow, wear, or drive drugs from one place to another. And they fre-

quently have no idea what they are carrying or receiving, and if they have an idea of what, they usually don't know how much.

For prosecutors these are peripheral cases. Prosecutors want to get the source and the distributor. Minimal or minor participants are simply conduits. But under the present Guidelines, the sentencing decision is driven by the quantity of drugs in the overall deal. And this does not at all reflect the minor or minimal participant's reality. They never set the drug quantity. If they did, they wouldn't be minor or minimal participants.

Second, let's look at their roles. A minor or minimal participant doesn't set up the deal. I have never seen such a defendant who knew where the drugs were ultimately from or where they ultimately went. They usually don't know, except by instruction, or maybe personal relationship, the people for whom they are carrying or receiving the drugs. And their involvement is episodic. That means they do a task, for a set fee and for a set period of time. Then they are off, living their lives. The major players never discuss the whole deal with them, nor do they involve minimal or minor players in any aspect of the planning.

Third, as to proceeds, I have never seen a minor or minimal participant who gets a cut of the profits. Minimal and minor participants do piece work. What they get is a fixed fee: "Drive this car from Los Angeles to Minneapolis for \$500." "Let us use your garage or loading dock; we'll give you either a quantity of drug, or forgive you what you owe, or you'll get X-number of dollars." Or, as I suggested before, "I'll buy you some food, and here's \$100 for clothes for the kids." It's not a pretty world.

Fourth, and finally, let's look at the effect. As an initial matter, the Commission's statistics indicate we are talking about somewhere around 6% of all drug trafficking offenders. Furthermore, the proposed category 30 does not end the sentencing inquiry; it begins it. Judges will still add points for firearms, obstruction, violence or injury (although it seems improbable that a person who uses a weapon or who injures another would even be considered for minor or minimal status in the first place). And, of course, the Guidelines' categorical enhancement for criminal history is unaffected. This means that if the person has a record, his penalty is enhanced, under any circumstances. And the worse the record, the greater the enhancement.

Let me give you a few examples of the effects of this change, if adopted. And remember, under the present guideline, it is the quantity of drugs in the whole scheme that drives the sentence. The judge only looks at the defendant, after all the scheme's drugs have been accounted for. This means drugs which were gotten or distributed by other people are included before the defendant's role is considered. The following examples are all pulled from recent cases in the District of Minnesota.

Let's consider JMC, who has been charged with a drug offense. According to the complaint, he carried a cooler containing drugs from a pickup truck, into a hotel. He has no prior record, but faces a 10-year mandatory minimum, because of the weight of the drugs in the cooler. If convicted, he could be sentenced to 121–293 months, or 10–23 years, depending on his role in the offense and drug quantity. With the proposed amendment, he would likely be at level 26–28 instead, and face a guideline sentence of 63–97 months. Regardless of that, however, he still faces the 10-year mandatory minimum.

MLV is facing sentencing before me. I will actually impose this sentence in the next few weeks. He is 19 years old and has no prior convictions. He has been convicted of driving 15 pounds of methamphetamine from Washington state to Minnesota. He didn't know where the drugs were hidden, the kind of drugs they were, or the quantity. He got \$500 for riding with a friend. They knew they were ferrying a "load car." But that's all they knew. He is presently facing the same 121–293 months I just described for JMC. Under the proposal, he could face 63–97 months, or between 5 and 8 years. And again he is still bound by the 10-year mandatory minimum. Again, there is virtually no difference.

Now, let me tell you about VHD. This young woman made phone calls under the direction of her boyfriend, each according to his instruction. She allowed her apartment to be used to store and process cocaine. None of her activities were independent, and she got no percentage of the deals. She was found to be a minor participant. Under the present Guidelines she was rated at a level 27, and subject to a sentence of 87–108 months, or 7–9 years. Under the proposed amendment, she would have had a base level of 25 and faced 57–71 months, or between 5–6 years.

HAG is a young woman who was recruited and directed by the organizer and main distributor of a St. Paul, Minnesota, drug ring. She suffers from clinical depression and is chemically dependent. She purchased cellular phones for the primary organizers and assisted with the storage and distribution of drugs. She had a criminal history category II, because of 2 prior convictions for theft and careless driving. Without the change in guidelines, her base offense level was 36. The presentence investigation concluded she was entitled to a reduction for minor partic-

ipant. Her guideline range was 121–151 months, or 10–13 years, after reductions for role and acceptance. With the proposed guideline change, her range would instead be 63–78 months, or between 5–7 years.

Like many of these defendants, ST accepted drug packages and once acted as a courier for a large quantity of controlled substances, by driving a truck from California to Minnesota. This drug- and gambling-addicted individual received small quantities of drugs and money for his assistance in the drug conspiracy. He said he wanted to break away from the primary drug dealers in the ring, but was roped in by the money and drugs, and heard stories about how they hurt or killed people who owed them money. His base offense level was 38, which resulted in a guideline range of 108–135 months, or 9–11 years, after reductions for role, acceptance, and the safety valve. With the change in the guidelines, his range would instead be 46–57 months, or between 4–5 years.

At the request of her cousin, MGA accepted \$2,000 for accepting a package. This was the extent of her involvement in the conspiracy at issue. This made her a minimal participant entitled to a 4-point reduction. With no prior criminal convictions and a starting offense level of 34 based on drug quantity, her guideline range was 57–71 months, or 5 to 7 years, after reductions for role, acceptance, and safety valve. Under the proposed change, her range would instead be 37–46 months, or 3–4 years.

DLL—an individual with no prior criminal convictions—also faces sentencing before me. He transported drugs from California to Minnesota for his cousin. He knew he was transporting drugs, but not the type or quantity. He was paid \$3,500 to \$5,000 per trip. Under the current guidelines, his base offense level is 36, reduced to 29 after reductions for safety valve, role, and acceptance, resulting in a range of 87–108 months, or between 7–9 years. With the change in the guidelines, his total sentence would be 46–57 months, or between 4–5 years.

AC had no criminal history and once acted as a courier in the drug conspiracy charged. She was recruited to drive a large shipment of drugs to Minnesota. Her base offense level was 36 before reductions for role (as a minimal participant), safety valve, and acceptance, resulting in a guideline range of 70–87 months, or 6–7 years. Under the new guideline, her range would instead be 37–46 months, or 3–4 years.

ERR acted as a courier/collections agent in a drug trafficking conspiracy. It did not appear that he had any discretionary power in the decision-making process or leadership in the conspiracy. Like DLL, he had a criminal history category 1, and his base offense level was 36. Under the new guideline, it would start at 30. After reductions for acceptance and role, his new guideline sentence would be 57–71 months, or between 5 and 6 years.

Twenty-one-year-old JAP traveled from Minneapolis to Los Angeles to visit friends and attend a party. At the party, he arranged to bring Methamphetamine back to Minneapolis. He was arrested at the airport carrying multiple packets of methamphetamine taped to his body under his clothing. This methamphetamine weighed approximately 1.71 kilograms. In exchange for agreeing to act as a mule for a single smuggling transaction, the defendant was categorized as a level 34 offender, resulting in a range of 57–71 months, or 5–6 years, after reductions for role, acceptance, and safety valve. Under the change, he would have had a range of 37–46 months, or 3–4 years.

RCK entered the United States from Amsterdam. An examination of his luggage revealed two pairs of footwear that appeared heavier than normal; further examination revealed 1.55 KG of heroin. He awaits sentencing before me. Under the current guidelines, his range is 70–87 months, or 6–7 years, after reductions for acceptance and safety valve. With the change, he would still face 57–71 months, or 5–6 years.

EPR was friends with a drug courier, and was asked to travel with him as a second driver. According to the courier, the defendant was not aware of the drugs in the car. His sentence is pending before me. His guideline range is 151–293 months, or 13–24 years. With the change, it would be 78–121 months, or 7–10 years, but he would still face the 10-year mandatory minimum.

RBH had no priors and once transported drugs for his co-defendant who arranged the drug deal, driving a vehicle containing 1+ KG of methamphetamine from his co-defendant's residence to a hotel. His range was 70–87 months, or 6–7 years, and he was sentenced to 70 months. He wasn't subject to the mandatory minimum because of the safety valve. Under the amendment, his range would instead be 46–57 months, or 4–5 years.

Like many of these individuals, FDD was one of the drivers in the course of a drug distribution chain and had no criminal history. (His defense counsel maintained that his participation in the offense constituted short-term, aberrant behavior in his otherwise law-abiding lifestyle.) Therefore, the presentence investigation considered him a minor participant in the drug trafficking conspiracy. Under the cur-

rent guidelines, his base offense level was 34. Under the change, it would be 30, and after reduction for role, his sentence would be 78–97 months, or between 7 and 8 years.

Members of the Committee, you have a most serious responsibility. I know you will consider this issue carefully. Let me offer you this last thought. There is certainly a quantity of evil afoot in the land, but there are still common people who make very stupid decisions. The present sentencing system sentences minor and minimal participants who do a day's work, in an admittedly evil enterprise, the same way it sentences the planner and enterprise-operator who set the evil plan in motion and who figures to take its profits.

Please consider giving the judiciary the chance to do the job for which it was chosen and designated by the Constitution to perform. We work with this system, and those who operate in it every day of our lives. Please give us the tools to make it more fair and just.

Thank you for this opportunity to share my experience and views.

Mr. SMITH. Thank you, Judge Rosenbaum.

Mr. Otis?

**STATEMENT OF WILLIAM G. OTIS, ESQ., ADJUNCT PROFESSOR OF LAW, GEORGE MASON UNIVERSITY SCHOOL OF LAW, ARLINGTON, VA**

Mr. OTIS. Thank you very much, Mr. Chairman, Ranking Member Scott. It's a pleasure to appear at this——

Mr. SMITH. Is the mike on?

Mr. OTIS. Did you hear that? Okay.

It's a pleasure to appear at this hearing and to appear at any hearing at which the little red light is in front of the judge and not just in front of me. [Laughter.]

I also appreciate the opportunity to talk with you about the proposed drug trafficking amendment to the guidelines that would reduce or cap sentencing for participants who qualify for a mitigating role adjustment. Because the amendment is excessive, ill-conceived, and inconsistent with the guideline's central purpose of ensuring fairness while protecting the public, it should be rejected.

The amendment before you would change the guideline establishing the base offense level for those who manufacture, import, and traffic in illegal drugs. For participants deemed minor or minimal, it would cap sentencing at level 30, no matter how many dozens or hundreds of kilograms were headed for the streets. In addition, it would add an application note effectively requiring a further decrease from two to four levels. This means that the base offense level would always be reduced to 28 at most and in some cases to 26, yielding a sentence in the lowest criminal history category of between 5 and 6½ years.

By contrast, the current maximum base offense level is 38. In the same criminal history category, and likewise adjusted four levels downward for minimal participation, that yields a sentence of roughly 14 years. The sentencing reduction this amendment would reduce is, in other words, enormous. Such a remarkable scaling back of drug sentences is unnecessary as well as excessive because the guidelines already provide ample authority for more nuanced and targeted mitigation in a case where it is truly warranted.

First, we should remember that as things stand now, a defendant can be sentenced only for the amount of drugs he actually knew about or that was reasonably foreseeable to him. This is not a gotcha system we have. Defendants are liable only for what they knew or had ample reason to know they were getting into.

Second, the judge is permitted to sentence anywhere within a range that varies by 25 percent from top to bottom. In almost three-quarters of drug trafficking cases, defendants already receive sentences at the very bottom point of their range.

Third, the judge may grant another major benefit by finding that the defendant has accepted responsibility for his crime, a finding most likely to be made, and in practice quite frequently is made, for those whose culpability was relatively minor to begin with.

Fourth, the judge has effectively unreviewable authority to reduce the sentence yet further by finding that the defendant was a minor or a minimal player.

As a lawyer who dealt with dozens if not hundreds of these sentencings, I can tell you that these mitigating role adjustments are granted giving the defendant the benefit of every doubt, even if the doubt has to be cobbled together with a certain degree of creativity.

Fifth, if the defendant is exceptional for any reason the Sentencing Commission did not adequately consider, he already qualifies for a downward departure with or without the Government's acquiescence. As we speak, downward departures from the guidelines on this basis, combined with Government-sponsored departures, are given in an astonishing 43 percent of all drug trafficking cases.

Finally, and to be more specific, in many such cases the defendant himself holds the key to a massive mitigation of his sentence if he is willing to assist the authorities in the investigation or prosecution of others involved. The Commission's proposed amendment, however, decreases sentences to the point that the incentive for a low-level player to help catch the bigger fish is all but decimated, particularly in light of the risks to which a cooperating defendant is exposed.

In other words, the amendment is likely to produce the twin evils of less information being furnished to investigators and fewer substantial assistance motions for those who most deserve them. With so many avenues of mitigation already built into the system, there is no occasion for an amendment that, for high quantity offenses, will brew an unappetizing beverage you might call "legalization light." Defendants who involve themselves with the largest amounts of drugs will guzzle down the benefits of a free ride for exactly the excess—that excess that makes their crimes so dangerous.

Quantity has always been the driving force of the sentencing system not because the system is oblivious but precisely because it understands that quantity is the best measure of social harm.

Today's table full of drugs is tomorrow's inventory at 100 middle schools. And just as bad, big-time dealers' recruitment of subordinates will become that much easier as word spreads in the drug world, as it will, that sentences for underlings have been eviscerated.

Be clear this is not an amendment that will reduce drugs or drug use. It will only reduce the penalties for these things, and thus create a perverse system of incentives that stands on its head the guidelines' central purpose of protecting the public.

Instead of asking the public to bear the risks to effective drug enforcement that this one-size-fits-all step toward leniency will create, perhaps it's time to ask the drug dealer to bear the risks of his own criminal choices and to do what the other 99 percent of the population has to do: Go out and get an honest job.

If he is unwilling to do even that, it's not up to the Sentencing Commission to generate more opportunities for leniency than the many the system already gives him.

[The prepared statement of Mr. Otis follows:]

## PREPARED STATEMENT OF WILLIAM G. OTIS

Thank you, Mr. Chairman, for the opportunity to speak with the Sub-Committee about the proposed drug trafficking amendment to the Sentencing Guidelines that would reduce or "cap" sentencing for participants who qualify for a mitigating role adjustment. Because the amendment is excessive, ill-conceived and inconsistent with the Guidelines' central purpose of ensuring fairness while protecting the public, it should be rejected.

The amendment before you would change the guideline establishing the base offense level for manufacturing, importing and trafficking illegal drugs. For participants deemed minor or minimal, it would cap sentencing at level 30. In addition, it would add an application note effectively requiring a further decrease of from 2 to 4 levels. This means that the base offense level would always be reduced to 28 at most, and could be reduced to 26, yielding a sentence in the lowest criminal history category of between 5 and 6 ½ years. By contrast, the current maximum base offense level is 38. In the same criminal history category, that yields a sentence of roughly 20 years. The sentencing reduction this amendment would produce is, in other words, enormous.

Such a gargantuan scaling back of drug sentences is, moreover, unnecessary, because the Guidelines already provide ample authority for more nuanced and targeted mitigation in a case where it is truly warranted.

FIRST, we should understand that, as things stand now, a defendant can be sentenced only for the amount of drugs he actually knew about or that was reasonably foreseeable to him. This is not a "gotcha!" system; defendants are liable only for what they knew or had ample reason to know they were getting into.

SECOND, the judge is permitted to sentence anywhere within a range that varies by roughly 25% from top to bottom. In almost three-quarters of drug trafficking cases, defendants ALREADY receive sentences at the very bottom point of their range.

THIRD, the judge may grant another major benefit by finding that the defendant has taken responsibility for his crime – a finding most likely to be made, and in practice frequently made, for those whose culpability was relatively minor to begin with.

FOURTH, the judge has effectively unreviewable authority to reduce the sentence yet further by finding that the defendant was a minor or minimal player. As a lawyer who dealt with dozens if not hundreds of these sentencings, I can tell you that these mitigating role adjustments are granted giving the defendant the benefit of every doubt – even if the doubt has to be cobbled together with a certain degree of creativity.

FIFTH, if the defendant falls outside the "heartland" of typical offenders for a reason the Sentencing Commission did not adequately consider, he already qualifies for a downward departure with or without the government's acquiescence. As we speak, downward departures on this basis, combined with government-sponsored departures, are given in an astonishing 43%

of all drug trafficking cases.

FINALLY, and to be more specific, in many such cases, the defendant himself holds the key to a massive mitigation of his sentence if he is willing to assist the authorities in the investigation or prosecution of others involved. The Commission's proposed amendment, however, decreases sentences to the point that the incentive for a low-level player to help catch the bigger fish is all but decimated, particularly in light of the risks to which a cooperating witness is exposed. In other words, the amendment is likely to produce the twin evils of less information being furnished to investigators, and fewer substantial assistance motions for those who most deserve them.

With so many avenues for mitigation already built into the system, there is no occasion for an amendment that would not merely go well beyond what we have now, but, for high-quantity offenses, would in effect brew an unappetizing beverage you might call "legalization lite." Dealers who involve themselves with the most excessive amounts of drugs – in other words, those least warranting sympathy – would guzzle down the benefits of having the sentencing system create a free ride for exactly the excess that makes their crimes so dangerous. This is not an amendment that will reduce drugs or drug use; it will reduce only the PENALTIES for those things, and thus create a perverse system of incentives that stands on its head the Guidelines' central purpose of protecting the public.

Instead of asking the public to bear the risks to effective drug enforcement that this one-size-fits-all step toward leniency will create, perhaps it's time to ask the drug dealer to bear the risks of his own criminal choices and do what the other 99% of the population already does – give up the pipedream of a quick buck and get an honest job. If he is unwilling to do even that, it's not up to the Sentencing Commission to generate more opportunities for leniency than the many the system already gives him.

Mr. SMITH. Thank you, Mr. Otis.

Judge Rosenbaum, let me address my first question to you, and tell me if what I'm saying is not the case.

In all the examples that you gave, it's my understanding that the individuals involved were actually convicted of knowing they were trafficking in drugs or were convicted of knowingly being engaged in conspiring to traffic in drugs. They're not necessarily the innocents that we might sometimes think they are, even though they are minor players. And in all but one instance of those cases that you gave, I think they were trafficking in between 50 and 150 kilos when they were convicted.

My question is this, going back to one of the examples that you gave—I think it was the example of the girlfriend, you said, given \$200, just deliver this package or receive this package or whatever. If that's all there was to it, I don't think she would have been convicted under any prosecution discretion that I'm aware of today. And as I say, in all these instances, the prosecutors were required to prove beyond a reasonable doubt that they knowingly were engaged in drug trafficking.

So I guess my question to you is that, the examples that you gave, these are individuals who knew what they were doing, were convicted of knowingly trafficking in drugs, and were not just innocent bystanders. Would you disagree with that statement?

Judge ROSENBAUM. It's a wonderful question and well-framed, Mr. Smith, Representative Smith, Chairman. May I touch a couple of pieces?

Mr. SMITH. Sure.

Judge ROSENBAUM. First of all, none of them were skipping Sunday school, okay? They were all convicted of crimes that they committed. They knew what they were doing. They were, except for the 19-year-old, most of them over 21, and they understood what they were doing.

Okay,

I don't think I had 150 kilos in any of the cases, but I just don't have the numbers—

Mr. SMITH. I think they were all—except for one, I think they would have—going by the Sentencing Guidelines, I think they would have involved 50 to 150 kilos.

Judge ROSENBAUM. That may be, but on the sentencing guideline factors, because a lot of them have kickers in them for cocaine or for other chemicals that are upgraded and score.

They all did the crime that they did. In each case—and the reason I'm responding, that I raised my concerns—these were people who were not involved in the decision of the quantities that they were dealing with, and in almost every case they didn't know the quantities that they were dealing with.

If somebody says I will let you use my garage to store stuff, they don't know what's stored in it. They don't select the quantity that's stored there.

The young woman received a box at her home. It was not for her to open that box. I can assure you, knowing what I know of her relationship with her boyfriend, she would never have done so. But she knew the box contained drugs, because she knew that's what her boyfriend did.

Mr. SMITH. Okay, thank you, Judge.

Mr. Otis, let me ask you, it seems to me that if you're knowingly convicted of trafficking or conspiring to traffic, you probably know that there's a difference between—what do we have?—a half a kilo here and 150 kilos, whether you're driving it, whether you've got it on your back, whether you've got it in your car, whether you're delivering it in one form or the other. What kind of a message are we sending to the individual, say, who's been convicted of a half a kilo, who's sharing a jail cell with someone convicted of 150 kilos, and they had the same sentence? What kind of message is being delivered there to the person that was trafficking in a half a kilo?

Mr. OTIS. I think the message is clear. There are a couple of messages, both of which are unfortunate. One is that you're—one is that we are going to have, in effect, just what I was saying in my testimony, legalization light.

The excess just disappears. It disappears for sentencing purposes. There is no additional penalty. That's what happens when you have a cap; it means it goes away.

The other message we're sending, a message to defendants, is that: Well, why not? Why not affiliate yourself with a big enterprise?

The message we're sending to the big fish drug dealers is to recruit more people, because word will be out on the street that it doesn't make any difference how much you're involved with, you're just going to get sentenced for that.

Mr. SMITH. Okay, thank you, Mr. Otis.

Mr. Roth, let me go back to you. You mentioned in your testimony that, as I think we all know, the current sentencing guideline system already provides for a lesser punishment for minor players, minor participants. Given that we already have those reductions in the current system, why do we need the proposal by the Sentencing Commission?

Mr. ROTH. You're exactly correct. I mean, currently individuals, if they are qualified for the safety valve—and by the way, according to our research, in those cases of level 32 or above, which is really what we're talking about here, the very large cases, about 61 percent of the individuals would qualify for the safety valve, so there would be no mandatory minimum. But in any event, you'd get a two-level reduction for the safety valve; you would get a three-level reduction for acceptance of responsibility, assuming you did sell; and you would get either a two- or four-level acceptance of responsibility for role.

So already you're talking about a significant reduction—for a minimal participant, for example, if my math is correct, that's a nine-level reduction.

Mr. SMITH. Mr. Roth, one more question before my time is up. You say in your testimony that the proposed amendment would depart from the quantity-based system Congress established when it enacted the Control Substances Act, and it will differ from the way we sentence every other type of crime, whether it is fraud, theft, or violent crime. What did you mean by that?

Mr. ROTH. Well, for example, if you have a fraud case, the first thing that you do, because it's a quantity-based system, you would look at the fraud table and understand how much the victim lost

or how much the defendant was responsible for stealing. And there would be a table just like there is on a drug table, and from that you would do the calculations, just like in the—currently in the drug context.

Mr. SMITH. Okay, thank you, Mr. Roth.

The gentleman from Virginia, Mr. Scott, is recognized for his questions.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Rosenbaum, regardless of whether you get the pluses or the minuses, if someone's caught up in this, does the mandatory minimum apply?

Judge ROSENBAUM. Mandatory minimums absolutely apply, and that's the reason, ultimately, if there's larger quantities or you're dealing at this moment in crack cocaine also, you kick right into the mandatory minimums under any circumstance.

Mr. SCOTT. Is proof of the amount required? If you know you've got some drugs and then they weight it, did you have to know it was 150 as opposed to 10 or whatever they had stored in your—if you knew they were storing some drugs, you didn't know how much, do you have to—you get caught with 150, but you only though it was 10.

Judge ROSENBAUM. Basically, as I understand it right now, it is quantity driven, and they look at what they call real offense conduct. They consider all of it that's reasonably foreseeable.

Mr. SCOTT. Well—

Judge ROSENBAUM. I guess if you have a garage, a great deal of material is reasonably foreseeable.

Mr. SCOTT. The way I understand they add these up, if you were transporting the half, and your buddy is transporting 150, the conspiracy has got 150.

Judge ROSENBAUM. You've got 150 and a half.

Mr. SCOTT. And does that mean that the one who knew he was carrying a half gets sentenced in the 150-and-a-half conspiracy?

Judge ROSENBAUM. Worse than that, the person who is financing it is the one who makes the profits, regardless of which one is transporting it.

Mr. SCOTT. So everybody gets sentenced the same?

Judge ROSENBAUM. Yes, sir.

Mr. SCOTT. Can the prosecutor challenge the mitigating role of designation?

Judge ROSENBAUM. Only when they're breathing oxygen. [Laughter.]

Mr. SCOTT. And so even if there is a mitigating role reduction, the kingpin and the mule are going to be getting the same—subject to the same mandatory minimum?

Judge ROSENBAUM. Let me be fair, Mr. Otis was also correct. It is addressed to the sound discretion of the court. But I think you get a picture of the fact that the judges actually understand that this discretion matters when 6 percent of criminal defendants, basically maybe two a year, in my case, would—and I do criminal cases and drug cases every day. Maybe one, maybe two a year are getting the minor or minimal roles. But that is because, basically, we do take a look at what people are really doing. These are the small ones; these are unusual.

Mr. SCOTT. And in real life, we're trying—I suppose the point of all this is to reduce supply. Is there any meaningful reduction in supply by taking somebody off the street corner who is a—or a mule, and giving them 1, 5, 10 or 20 years? Is there any meaningful reduction in supply based on the differential number of years they may get?

Judge ROSENBAUM. Congressman Scott, I am never and am not now in favor of anything like legalization. But you know, and so does everyone else here, that the quantity is up, the purity is up, and the prices are down. Whatever we're doing, that's the net result. And I'll leave it to the economists to tell you what the deterrent effect is.

Mr. SCOTT. Well, not only deterrent effect, but I mean the effect. I mean, if you take somebody—eliminate one mule, is not the mule going to be replaced the next day in that operation?

Judge ROSENBAUM. They are fungible.

Mr. SCOTT. Now, if you get a kingpin, you might be doing something. We're talking about minimal roles.

In just an overall scheme of things, one of the things that the Sentencing Commission—that's just Commission. One of the things that the Sentencing Commission is supposed to do is to add some rationality to sentencing, so things of reasonably similar culpability get reasonably similar sentences.

What kind of crimes get you 10 years to serve?

Mr. TETZLAFF. Well, first of all, the most serious, Representative Scott, obviously are those that require a mandatory minimum. I think the Commission is—

Mr. SCOTT. Outside of drugs, what do you have to go to get 10 years to serve? Murder? What do you get for murder?

Mr. TETZLAFF. Well, you can get—yes, 30 or life, and sometimes—

Mr. SCOTT. You can get life. I mean, what for—for just one run of the—what's the mandatory minimum for murder?

Mr. TETZLAFF. I don't know as there is any mandatory minimum for—

Mr. SCOTT. You shoot somebody in a bar, what are you going to probably serve?

Mr. TETZLAFF [continuing]. Other than if you said it's either life or a death sentence.

Mr. SCOTT. What's the mandatory minimum?

Mr. TETZLAFF. For?

Mr. SCOTT. Murder.

Mr. TETZLAFF. Murder? I would say life.

Mr. SCOTT. Mandatory minimum?

Mr. TETZLAFF. In other words—

Mr. SCOTT. Is there a mandatory minimum for life—for murder?

Mr. TETZLAFF. I'm shown here that for second degree, murder it is 135 to 168 months, under the guidelines. But, of course, certain types of—

Mr. SCOTT. That's about what we're talking about. The same kind of range we're talking about, that a mule gets about the same as somebody who will shoot somebody in a bar.

Mr. TETZLAFF. Yes.

Mr. SCOTT. Anything involved in Enron, with all the fraud involved in that, is anybody likely to serve as much as 10 years, after all the shooting is over? With the multimillion dollars, billions of dollars worth of fraud that went on in there, anybody likely to serve the 10 years that a mule might have to serve?

Mr. TETZLAFF. Probably not.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Scott. Are there any other Members who have questions for our witnesses?

And if not, thank you all for being present. Thank you for your testimony. And thank you for your suggestions as well. We appreciate them all.

We're going to move to a markup of this bill. You're welcome to remain in the audience, if you'd like to, or leave. We'll give you a couple of minutes to decide.

Thank you all again.

And the Subcommittee is adjourned.

[Whereupon, at 5:04 p.m., the Subcommittee was adjourned.]

# APPENDIX

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## MATERIAL SUBMITTED FOR THE HEARING RECORD

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### UNITED STATES SENTENCING COMMISSION **GUIDELINES MANUAL**

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Commissioner, Ex-officio

This document contains the text of the *Guidelines Manual* incorporating amendments effective January 15, 1988; June 15, 1988; October 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 27, 1991; November 1, 1992; November 1, 1993; September 23, 1994; November 1, 1994; November 1, 1995; November 1, 1996; May 1, 1997; November 1, 1997; November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; and November 1, 2001.

**§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**

- (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
- (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the

defendant; and

- (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

- (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
- (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
- (4) any other information specified in the applicable guideline.
- (b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

1. *The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.*

2. *A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.*

*In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:*

- (i) *in furtherance of the jointly undertaken criminal activity; and*
- (ii) *reasonably foreseeable in connection with that criminal activity.*

*Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the "jointly undertaken criminal activity") is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.*

*In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.*

*Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).*

*With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.*

*The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).*

*A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.*

Illustrations of Conduct for Which the Defendant is Accountable(a) Acts and omissions aided or abetted by the defendant

- (1) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

*In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity (the scope of which was the importation of the shipment of marihuana). A finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.*

(b) Acts and omissions aided or abetted by the defendant: requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable

- (1) Defendant C is the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was in furtherance of the

*jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).*

*As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).*

(c) Requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable, scope of the criminal activity

- (1) *Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was not in furtherance of the criminal activity he jointly undertook with Defendant D (i.e., the forgery of the \$800 check).*
- (2) *Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount (\$55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity.*
- (3) *Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions in furtherance of the importation of that shipment that were reasonably foreseeable (see the discussion in example (a)(1) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not in furtherance of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).*
- (4) *Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly,*

*Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because the scope of his jointly undertaken criminal activity is limited to that amount. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.*

- (5) *Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (i.e., the one delivery).*
- (6) *Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.*
- (7) *Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R.*
- (8) *Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marijuana across the border from Mexico into the United States. Defendants*

*T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity. In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.*

3. *"Offenses of a character for which §3D1.2(d) would require grouping of multiple counts," as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under §3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in §3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply.*

*As noted above, subsection (a)(2) applies to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. § 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by different statutory provisions, are of a character for which §3D1.2(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.*

4. *"Harm" includes bodily injury, monetary loss, property damage and any resulting harm.*

5. *If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. See e.g., §2K1.4 (Arson; Property Damage by Use of Explosives); §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (e.g., §2A2.2 (Aggravated Assault); §2B3.1 (Robbery)) or to actual, attempted or intended harm (e.g., §2B1.1 (Theft, Property Destruction, and Fraud); §2X1.1 (Attempt, Solicitation, or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred. When not adequately taken into account by the applicable offense guideline, creation of a risk may provide a ground for imposing a sentence above the applicable guideline range. See generally §1B1.4 (Information to be Used in Imposing Sentence); §5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the determination of the offense level should be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) and the applicable offense guideline.*
6. *A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. For example, in §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), subsection (b)(2)(B) applies if the defendant "is convicted under 18 U.S.C. § 1956". Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) ("if the offense was committed by the means set forth in 18 U.S.C. § 2242").*
- Unless otherwise specified, an express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. For example, §2S1.1(b)(2)(B) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) in a case in which the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956 but would not be applied in a case in which the defendant is convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957. See Application Note 3(C) of §2S1.1.*
7. *In the case of a partially completed offense (e.g., an offense involving an attempted theft of \$800,000 and a completed theft of \$30,000), the offense level is to be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to §2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under §2X1.1(c)(1).*
8. *For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of*

conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.

**Examples:** (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and modus operandi. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as a prior sentence; see §4A1.2(a)(1).

Note, however, in certain cases, offense conduct associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2).

9. "Common scheme or plan" and "same course of conduct" are two closely related concepts.

(A) Common scheme or plan. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; i.e., the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of modus operandi (the same or similar computer manipulations were used to execute the scheme).

(B) Same course of conduct. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. The nature of the offenses may also be a relevant consideration (e.g., a defendant's failure to file tax returns in three consecutive years

appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).

10. In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

**Background:** This section prescribes rules for determining the applicable guideline sentencing range, whereas §1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by §1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those Chapters are explicit as to the specific factors to be considered.

Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of §3D1.2(d), which provides for grouping together (i.e., treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would not be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)

Subsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (i.e., to which §3D1.2(d) applies) often involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. For example, a pattern of embezzlement may consist of several acts of taking that cannot separately be identified, even though the overall conduct is clear. In addition, the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing. Thus, in a mail fraud case, the scheme is an element of the offense and each mailing may be the basis for a separate count; in an embezzlement case, each taking may provide a basis for a separate count. Another consideration

is that in a pattern of small thefts, for example, it is important to take into account the full range of related conduct. Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses. Conversely, when §3D1.2(d) does not apply, so that convictions on multiple counts are considered separately in determining the guideline sentencing range, the guidelines prohibit aggregation of quantities from other counts in order to prevent "double counting" of the conduct and harm from each count of conviction. Continuing offenses present similar practical problems. The reference to §3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.

Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, §2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind; §2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 3); November 1, 1989 (see Appendix C, amendments 76-78 and 303); November 1, 1990 (see Appendix C, amendment 309); November 1, 1991 (see Appendix C, amendment 389); November 1, 1992 (see Appendix C, amendment 439); November 1, 1994 (see Appendix C, amendment 503); November 1, 2001 (see Appendix C, amendments 617 and 634).

**§1B1.4. Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)**

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

Commentary

**Background:** This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing sentence within that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for sentencing above the guideline range. Some policy statements do, however, express a Commission policy that certain factors should not

*be considered for any purpose, or should be considered only for limited purposes. See, e.g., Chapter Five, Part H (Specific Offender Characteristics).*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 4); November 1, 1989 (see Appendix C, amendment 303); November 1, 2000 (see Appendix C, amendment 604).

## 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); Attempt or Conspiracy**

## (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.

## (b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.
- (2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export 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.
- (3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.
- (4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by 2 levels.

- (5) (Apply the greater):
- (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.
  - (B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.
  - (C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.
- (6) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).
- (2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

## (c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
(1) ● 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); ● 150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); ● 1.5 KG or more of Cocaine Base; ● 30 KG or more of PCP, or 3 KG or more of PCP (actual); ● 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice"; ● 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual); ● 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); ● 12 KG or more of Fentanyl; ● 3 KG or more of a Fentanyl Analogue; ● 30,000 KG or more of Marihuana; ● 6,000 KG or more of Hashish; ● 600 KG or more of Hashish Oil; ● 30,000,000 units or more of Schedule I or II Depressants; ● 1,875,000 units or more of Flunitrazepam.	Level 38
(2) ● At least 10 KG but less than 30 KG 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 500 G but less than 1.5 KG of Cocaine Base; ● 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 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice"; ● At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual); ● At least 100 G but less than 300 G 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; ● 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; ● At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants; ● At least 625,000 but less than 1,875,000 units of Flunitrazepam.	Level 36
(3) ● At least 3 KG but less than 10 KG of Heroin (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);	Level 34

- At least 150 G but less than 500 G of Cocaine Base;
  - 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 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice";
  - At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);
  - 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 Marijuana;
  - At least 600 KG but less than 2,000 KG of Hashish;
  - At least 60 KG but less than 200 KG of Hashish Oil;
  - At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
  - At least 187,500 but less than 625,000 units of Flunitrazepam.
- (4) ● At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 32**
- At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
  - At least 50 G but less than 150 G of Cocaine Base;
  - 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 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
  - At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
  - 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 Marijuana;
  - At least 200 KG but less than 600 KG of Hashish;
  - At least 20 KG but less than 60 KG of Hashish Oil;
  - At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
  - At least 62,500 but less than 187,500 units of Flunitrazepam.
- (5) ● At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 30**
- At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
  - At least 35 G but less than 50 G of Cocaine Base;
  - At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
  - At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";

- At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
  - At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
  - At least 280 G but less than 400 G of Fentanyl;
  - At least 70 G but less than 100 G of a Fentanyl Analogue;
  - At least 700 KG but less than 1,000 KG of Marijuana;
  - At least 140 KG but less than 200 KG of Hashish;
  - At least 14 KG but less than 20 KG of Hashish Oil;
  - At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
  - At least 43,750 but less than 62,500 units of Flunitrazepam.
- (6) ● At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- Level 28**
- At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
  - At least 20 G but less than 35 G of Cocaine Base;
  - At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
  - At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";
  - At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
  - At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
  - At least 160 G but less than 280 G of Fentanyl;
  - At least 40 G but less than 70 G of a Fentanyl Analogue;
  - At least 400 KG but less than 700 KG of Marijuana;
  - At least 80 KG but less than 140 KG of Hashish;
  - At least 8 KG but less than 14 KG of Hashish Oil;
  - At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
  - At least 25,000 but less than 43,750 units of Flunitrazepam.
- (7) ● At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- Level 26**
- At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
  - At least 5 G but less than 20 G of Cocaine Base;
  - At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
  - At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
  - At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
  - At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
  - At least 40 G but less than 160 G of Fentanyl;
  - At least 10 G but less than 40 G of a Fentanyl Analogue;

- At least 100 KG but less than 400 KG of Marihuana;
  - At least 20 KG but less than 80 KG of Hashish;
  - At least 2 KG but less than 8 KG of Hashish Oil;
  - At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
  - At least 6,250 but less than 25,000 units of Flunitrazepam.
- (8) ● At least 80 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- Level 24**
- At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
  - At least 4 G but less than 5 G of Cocaine Base;
  - At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
  - At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
  - At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
  - At least 800 MG but less than 1 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
  - At least 32 G but less than 40 G of Fentanyl;
  - At least 8 G but less than 10 G of a Fentanyl Analogue;
  - At least 80 KG but less than 100 KG of Marihuana;
  - At least 16 KG but less than 20 KG of Hashish;
  - At least 1.6 KG but less than 2 KG of Hashish Oil;
  - At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
  - At least 5,000 but less than 6,250 units of Flunitrazepam.
- (9) ● At least 60 G but less than 80 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- Level 22**
- At least 300 G but less than 400 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
  - At least 3 G but less than 4 G of Cocaine Base;
  - At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
  - At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";
  - At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
  - At least 600 MG but less than 800 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
  - At least 24 G but less than 32 G of Fentanyl;
  - At least 6 G but less than 8 G of a Fentanyl Analogue;
  - At least 60 KG but less than 80 KG of Marihuana;
  - At least 12 KG but less than 16 KG of Hashish;
  - At least 1.2 KG but less than 1.6 KG of Hashish Oil;
  - At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
  - At least 3,750 but less than 5,000 units of Flunitrazepam.

- (10) ● At least 40 G but less than 60 G of Heroin (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 2 G but less than 3 G of Cocaine Base;  
 ● 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 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";  
 ● At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);  
 ● 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 Marijuana;  
 ● At least 8 KG but less than 12 KG of Hashish;  
 ● At least 800 G but less than 1.2 KG of Hashish Oil;  
 ● At least 40,000 but less than 60,000 units of Schedule I or II Depressants or Schedule III substances;  
 ● At least 2,500 but less than 3,750 units of Flunitrazepam. **Level 20**
- (11) ● At least 20 G but less than 40 G of Heroin (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 1 G but less than 2 G of Cocaine Base;  
 ● 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 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 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);  
 ● 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 Marijuana;  
 ● 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 20,000 but less than 40,000 units of Schedule I or II Depressants or Schedule III substances;  
 ● At least 1,250 but less than 2,500 units of Flunitrazepam. **Level 18**
- (12) ● At least 10 G but less than 20 G of Heroin (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); **Level 16**

- At least 500 MG but less than 1 G of Cocaine Base;
  - 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 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 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
  - 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 Marijuana;
  - 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 10,000 but less than 20,000 units of Schedule I or II Depressants or Schedule III substances;
  - At least 625 but less than 1,250 units of Flunitrazepam.
- (13) ● At least 5 G but less than 10 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 14**
- At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
  - At least 250 MG but less than 500 MG of Cocaine Base;
  - 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 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
  - At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
  - 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 Marijuana;
  - 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 5,000 but less than 10,000 units of Schedule I or II Depressants or Schedule III substances;
  - At least 312 but less than 625 units of Flunitrazepam.
- (14) ● Less than 5 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); **Level 12**
- Less than 25 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
  - Less than 250 MG of Cocaine Base;
  - Less than 5 G of PCP, or less than 500 MG of PCP (actual);
  - Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";

- Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);
  - 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 2,500 but less than 5,000 units of Schedule I or II Depressants or Schedule III substances;
  - At least 156 but less than 312 units of Flunitrazepam;
  - 40,000 or more units of Schedule IV substances (except Flunitrazepam).
- (15) ● 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 1,000 but less than 2,500 units of Schedule I or II Depressants or Schedule III substances;  
 ● At least 62 but less than 156 units of Flunitrazepam;  
 ● At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).
- (16) ● 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 250 but less than 1,000 units of Schedule I or II Depressants or Schedule III substances;  
 ● Less than 62 units of Flunitrazepam;  
 ● At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);  
 ● 40,000 or more units of Schedule V substances.
- (17) ● Less than 250 G of Marihuana; **Level 6**  
 ● Less than 50 G of Hashish;  
 ● Less than 5 G of Hashish Oil;  
 ● Less than 250 units of Schedule I or II Depressants or Schedule III substances;  
 ● Less than 4,000 units of Schedule IV substances (except Flunitrazepam);  
 ● Less than 40,000 units of Schedule V substances.

\*Notes to Drug Quantity Table:

**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.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 345); November 1, 1992 (see Appendix C, amendment 456).

**§3B1.1. Aggravating Role**

Based on the defendant's role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, 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, 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), increase by 2 levels.

CommentaryApplication 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.*
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.*

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.*
4. *In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.*

**Background:** *This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.*

*In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of §3B1.1(c).*

**Historical Note:** Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 414); November 1, 1993 (see Appendix C, amendment 500).

#### §3B1.2. **Mitigating Role**

Based on the defendant's role in the offense, decrease the offense level as follows:

- (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.

CommentaryApplication Notes:

1. Definition.—For purposes of this guideline, "participant" has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).
2. Requirement of Multiple Participants.—This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.
3. Applicability of Adjustment.—
  - (A) Substantially Less Culpable than Average Participant.—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.
 

*A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.*
  - (B) Conviction of Significantly Less Serious Offense.—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 level 14 under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), 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.
  - (C) Fact-Based Determination.—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. As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

4. *Minimal Participant*—Subsection (a) applies to a defendant described in Application Note 3(A) 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. It is intended that the downward adjustment for a minimal participant will be used infrequently.
5. *Minor Participant*—Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants, but whose role could not be described as minimal.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1992 (see Appendix C, amendment 456), November 1, 2001 (see Appendix C, amendment 635).

## CHAPTER FOUR - CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

### PART A - CRIMINAL HISTORY

#### Introductory Commentary

*The Comprehensive Crime Control Act sets forth four purposes of sentencing. (See 18 U.S.C. § 3553(a)(2).) A defendant's record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.*

*The specific factors included in §4A1.1 and §4A1.3 are consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior. While empirical research has shown that other factors are correlated highly with the likelihood of recidivism, e.g., age and drug abuse, for policy reasons they were not included here at this time. The Commission has made no definitive judgment as to the reliability of the existing data. However, the Commission will review additional data insofar as they become available in the future.*

Historical Note: Effective November 1, 1987.

#### **§4A1.1. Criminal History Category**

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

- (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
- (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- (c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.
- (d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
- (e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while

in imprisonment or escape status on such a sentence. If 2 points are added for item (d), add only 1 point for this item.

- (f) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. *Provided*, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.

Commentary

*The total criminal history points from §4A1.1 determine the criminal history category (I-VI) in the Sentencing Table in Chapter Five, Part A. The definitions and instructions in §4A1.2 govern the computation of the criminal history points. Therefore, §§4A1.1 and 4A1.2 must be read together. The following notes highlight the interaction of §§4A1.1 and 4A1.2.*

Application Notes:

1. §4A1.1(a). Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this item. The term "prior sentence" is defined at §4A1.2(a). The term "sentence of imprisonment" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see §4A1.2(k).

*Certain prior sentences are not counted or are counted only under certain conditions:*

*A sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense is not counted unless the defendant's incarceration extended into this fifteen-year period. See §4A1.2(e).*

*A sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted under this item only if it resulted from an adult conviction. See §4A1.2(d).*

*A sentence for a foreign conviction, a conviction that has been expunged, or an invalid conviction is not counted. See §4A1.2(h) and (j) and the Commentary to §4A1.2.*

2. §4A1.1(b). Two points are added for each prior sentence of imprisonment of at least sixty days not counted in §4A1.1(a). There is no limit to the number of points that may be counted under this item. The term "prior sentence" is defined at §4A1.2(a). The term "sentence of imprisonment" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see §4A1.2(k).

*Certain prior sentences are not counted or are counted only under certain conditions:*

*A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. See §4A1.2(e).*

*An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense. See §4A1.2(d).*

*Sentences for certain specified non-felony offenses are never counted. See §4A1.2(c)(2).*

*A sentence for a foreign conviction or a tribal court conviction, an expunged conviction, or an invalid conviction is not counted. See §4A1.2(b), (i), (j), and the Commentary to §4A1.2.*

*A military sentence is counted only if imposed by a general or special court martial. See §4A1.2(g).*

3. *§4A1.1(c). One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this item. The term "prior sentence" is defined at §4A1.2(a).*

*Certain prior sentences are not counted or are counted only under certain conditions:*

*A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. See §4A1.2(e).*

*An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if imposed within five years of the defendant's commencement of the current offense. See §4A1.2(d).*

*Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. See §4A1.2(c)(1).*

*Sentences for certain specified non-felony offenses are never counted. See §4A1.2(c)(2).*

*A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. See §4A1.2(f).*

*A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. See §4A1.2(b), (i), (j), and the Commentary to §4A1.2.*

*A military sentence is counted only if imposed by a general or special court martial. See §4A1.2(g).*

4. §4A1.1(d). Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(h). For the purposes of this item, a "criminal justice sentence" means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this item to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. See §4A1.2(m).
5. §4A1.1(e). Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) less than two years following release from confinement on a sentence counted under §4A1.1(a) or (b). This also applies if the defendant committed the instant offense while in imprisonment or escape status on such a sentence. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). However, if two points are added under §4A1.1(d), only one point is added under §4A1.1(e).
6. §4A1.1(f). Where the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as related cases but did not arise from the same occasion (i.e., offenses committed on different occasions that were part of a single common scheme or plan or were consolidated for trial or sentencing; see Application Note 3 of the Commentary to §4A1.2), one point is added under §4A1.1(f) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(f). "Crime of violence" is defined in §4B1.2(a); see §4A1.2(p).

For example, a defendant's criminal history includes two robbery convictions for offenses committed on different occasions that were consolidated for sentencing and therefore are treated as related. If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(f) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(f) because the sentence for the second robbery already resulted in an additional point under §4A1.1(a). Without the second sentence, the defendant would only have received two points under §4A1.1(b) for the one-year sentence of imprisonment.

**Background:** Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence

*pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. In recognition of the imperfection of this measure however, §4A1.3 permits information about the significance or similarity of past conduct underlying prior convictions to be used as a basis for imposing a sentence outside the applicable guideline range.*

*Subdivisions (a), (b), and (c) of §4A1.1 distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines, and residency in a halfway house.*

*Section 4A1.1(d) implements one measure of recency by adding two points if the defendant was under a criminal justice sentence during any part of the instant offense.*

*Section 4A1.1(e) implements another measure of recency by adding two points if the defendant committed any part of the instant offense less than two years immediately following his release from confinement on a sentence counted under §4A1.1(a) or (b). Because of the potential overlap of (d) and (e), their combined impact is limited to three points. However, a defendant who falls within both (d) and (e) is more likely to commit additional crimes; thus, (d) and (e) are not completely combined.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 259-261); November 1, 1991 (see Appendix C, amendments 381 and 382).

**§4A1.3. Adequacy of Criminal History Category (Policy Statement)**

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

- (a) prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses);
- (b) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;
- (c) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;

- (d) whether the defendant was pending trial or sentencing on another charge at the time of the instant offense;
- (e) prior similar adult criminal conduct not resulting in a criminal conviction.

A departure under this provision is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes. Examples might include the case of a defendant who (1) had several previous foreign sentences for serious offenses, (2) had received a prior consolidated sentence of ten years for a series of serious assaults, (3) had a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding, (4) committed the instant offense while on bail or pretrial release for another serious offense, or (5) for appropriate reasons, such as cooperation in the prosecution of other defendants, had previously received an extremely lenient sentence for a serious offense. The court may, after a review of all the relevant information, conclude that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines. However, a prior arrest record itself shall not be considered under §4A1.3.

There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. An example might include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category (Category II), and therefore consider a downward departure from the guidelines.

In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly under-represents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with Criminal History Category IV, the court should look to the guideline range specified for a defendant with Criminal History Category IV to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History

Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses. On the other hand, a defendant with nine prior 60-day jail sentences for offenses such as petty larceny, prostitution, or possession of gambling slips has a higher number of criminal history points (18 points) than the typical Criminal History Category VI defendant, but not necessarily a more serious criminal history overall. Where the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

However, this provision is not symmetrical. The lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate.

#### *Commentary*

*Background:* This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.

*Historical Note:* Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 381); November 1, 1993 (see Appendix C, amendment 460).

**SENTENCING TABLE**  
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

Commentary to Sentencing TableApplication Notes:

1. *The Offense Level (1-43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I-VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "Life" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24-30 months of imprisonment.*
2. *In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.*
3. *The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A, except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal). The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (~~see~~ Appendix C, amendment 270); November 1, 1991 (~~see~~ Appendix C, amendment 418); November 1, 1992 (~~see~~ Appendix C, amendment 462).

**§5C1.2. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases**

- (a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth verbatim below:
- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
  - (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
  - (3) the offense did not result in death or serious bodily injury to any person;
  - (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
  - (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.
- (b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five

years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17.

*Commentary*

*Application Notes:*

1. *"More than 1 criminal history point, as determined under the sentencing guidelines," as used in subsection (a)(1), means more than one criminal history point as determined under §4A1.1 (Criminal History Category).*
2. *"Dangerous weapon" and "firearm," as used in subsection (a)(2), and "serious bodily injury," as used in subsection (a)(3), are defined in the Commentary to §1B1.1 (Application Instructions).*
3. *"Offense," as used in subsection (a)(2)-(4), and "offense or offenses that were part of the same course of conduct or of a common scheme or plan," as used in subsection (a)(5), mean the offense of conviction and all relevant conduct.*
4. *Consistent with §1B1.3 (Relevant Conduct), the term "defendant," as used in subsection (a)(2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.*
5. *"Organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines," as used in subsection (a)(4), means a defendant who receives an adjustment for an aggravating role under §3B1.1 (Aggravating Role).*
6. *"Engaged in a continuing criminal enterprise," as used in subsection (a)(4), is defined in 21 U.S.C. § 848(c). As a practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who "engaged in a continuing criminal enterprise" but is convicted of an offense to which this section applies will be an "organizer, leader, manager, or supervisor of others in the offense."*
7. *Information disclosed by the defendant with respect to subsection (a)(5) may be considered in determining the applicable guideline range, except where the use of such information is restricted under the provisions of §1B1.8 (Use of Certain Information). That is, subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant.*
8. *Under 18 U.S.C. § 3553(f), prior to its determination, the court shall afford the government an opportunity to make a recommendation. See also Fed. R. Crim. P. 32(c)(1), (3).*
9. *A defendant who meets the criteria under this section is exempt from any otherwise applicable statutory minimum sentence of imprisonment and statutory minimum term of supervised release.*

*Background:* This section sets forth the relevant provisions of 18 U.S.C. § 3553(f), as added by section 80001(a) of the Violent Crime Control and Law Enforcement Act of 1994, which limit the applicability of statutory minimum sentences in certain cases. Under the authority of section 80001(b) of that Act, the Commission has promulgated application notes to provide guidance in the application of 18 U.S.C. § 3553(f). See also H. Rep. No. 460, 103d Cong., 2d Sess. 3 (1994) (expressing intent to foster greater coordination between mandatory minimum sentencing and the sentencing guideline system).

*Historical Note:* Effective September 23, 1994 (see Appendix C, amendment 509). Amended effective November 1, 1995 (see Appendix C, amendment 515); November 1, 1996 (see Appendix C, amendment 540); November 1, 1997 (see Appendix C, amendment 570); November 1, 2001 (see Appendix C, amendment 624).

## PART K - DEPARTURES

## 1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES

§5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

- (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
  - (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
  - (3) the nature and extent of the defendant's assistance;
  - (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
  - (5) the timeliness of the defendant's assistance.

Commentary

Application Notes:

1. *Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.*
2. *The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.*
3. *Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.*

***Background:** A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant *in camera* and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.*

**Historical Note:** Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 290).

**§5K1.2. Refusal to Assist (Policy Statement)**

A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor.

**Historical Note:** Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 291).

\* \* \* \* \*

**2. OTHER GROUNDS FOR DEPARTURE**

**Historical Note:** Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 358).

**§5K2.0. Grounds for Departure (Policy Statement)**

Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guideline range pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in determining the guideline range (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guidelines is inadequate or excessive.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under other guidelines. Therefore, if a weapon is a relevant factor to sentencing under one of these other guidelines, the court may depart for this reason.

Finally, an offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines.

#### *Commentary*

*The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court. Koon v. United States, 518 U.S. 81 (1996). Furthermore, "[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District Courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do." Id. at 98.*

*The last paragraph of this policy statement sets forth the conditions under which an offender characteristic or other circumstance that is not ordinarily relevant to a departure from the applicable guideline range may be relevant to this determination. The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such*

*characteristics or circumstances, differs significantly from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.*

*In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. See 18 U.S.C. § 3553(b). For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range.*

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 57); November 1, 1990 (see Appendix C, amendment 358); November 1, 1994 (see Appendix C, amendment 508); November 1, 1997 (see Appendix C, amendment 561); November 1, 1998 (see Appendix C, amendment 585).

**United States Sentencing Commission  
Amendments to the Sentencing Guidelines  
Policy Statements and Commentary  
Amendment 4  
May 1, 2002**

4. Amendment: Section 2D1.1(a)(3) is amended by striking "below." and inserting ", except that if the defendant receives an adjustment under §3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level 30."

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 11 in the "TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE" by striking the line referenced to MDA and inserting the following:

"MDA 250 mg  
MDMA 250 mg".

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

"21. Applicability of Subsection (b)(6).—The applicability of subsection (b)(6) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(6) applies."

Section 2D1.8(a)(2) is amended by striking "16" and inserting "26".

The Commentary to §3B1.2 captioned "Application Notes" is amended by adding at the end the following:

"6. Application of Role Adjustment in Certain Drug Cases.—In a case in which the court applied §2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(a)(3), the court also shall apply the appropriate adjustment under this guideline."

Reason for Amendment: This amendment responds to concerns that the guidelines pertaining to drug offenses do not satisfactorily reflect the culpability of certain offenders. The amendment also clarifies the operation of certain provisions in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

First, the amendment increases the maximum base offense level under subsection (a)(2) of §2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy) from level 16 to level 26. This part of the amendment responds to concerns that §2D1.8 did not adequately punish defendants convicted under 21 U.S.C. § 856, pertaining to the establishment of manufacturing operations. That statute originally was enacted to target defendants who maintain, manage, or control so-called "crack houses" and more recently has been applied to defendants who facilitate drug use at commercial dance clubs, frequently called "raves".

Prior to this amendment, §2D1.8(a)(2) provided a maximum base offense level of level 16 for defendants convicted under 21 U.S.C. § 856 who had no participation in the underlying controlled substance offense other than allowing use of their premises. The Commission determined that the maximum base offense level of level 16 did not adequately reflect the culpability of offenders who permit distribution of drugs in quantities that under §2D1.1 result in offense levels higher than level 16. Such offenders

knowingly and intentionally facilitate and profit, at least indirectly, from the trafficking of illegal drugs, even though they may not participate directly in the underlying controlled substance offense.

Second, the amendment modifies §2D1.1(a)(3) to provide a maximum base offense level of level 30 if the defendant receives an adjustment under §3B1.2 (Mitigating Role). The maximum base offense level somewhat limits the sentencing impact of drug quantity for offenders who perform relatively low level trafficking functions, have little authority in the drug trafficking organization, and have a lower degree of individual culpability (e.g., "mules" or "couriers" whose most serious trafficking function is transporting drugs and who qualify for a mitigating role adjustment).

This part of the amendment responds to concerns that base offense levels derived from the Drug Quantity Table in §2D1.1 overstate the culpability of certain drug offenders who meet the criteria for a mitigating role adjustment under §3B1.2. The Commission determined that, ordinarily, a maximum base offense level of level 30 adequately reflects the culpability of a defendant who qualifies for a mitigating role adjustment. Other aggravating adjustments in the trafficking guideline (e.g., the weapon enhancement at §2D1.1(b)(1)), or other general, aggravating adjustments in Chapter Three (Adjustments), may increase the offense level above level 30. The maximum base offense level is expected to apply narrowly, affecting approximately six percent of all drug trafficking offenders.

The amendment also adds an application note in §3B1.2 that instructs the court to apply the appropriate adjustment under that guideline in a case in which the maximum base offense level in §2D1.1(a)(3) operates to reduce the defendant's base offense level under §2D1.1.

Third, the amendment modifies the Typical Weight Per Unit (Dose, Pill, or Capsule) Table in the commentary to §2D1.1 to reflect more accurately the type and weight of ecstasy pills typically trafficked and consumed. Specifically, the amendment adds a reference for MDMA (3,4-methylenedioxymethamphetamine) in the Typical Weight Per Unit Table and lists the typical weight as 250 milligrams per pill. The amendment also revises the typical weight for MDA to 250 milligrams of the mixture or substance containing the controlled substance. Prior to this amendment, the Table listed the typical weight of MDA as 100 milligrams of the actual controlled substance.

Information provided by the Drug Enforcement Administration indicates that ecstasy usually is trafficked and used as MDMA in pills weighing approximately 250 to 350 milligrams.

The absence of MDMA from the Typical Weight Per Unit (Dose, Pill, or Capsule) Table and the listing for MDA of an estimate of the actual weight of the controlled substance created the potential for misapplying the MDA estimate in a case in which MDMA is

involved, which could result in underpunishment in some ecstasy cases. This part of the amendment thus promotes uniform application of §2D1.1 for offenses involving ecstasy by adding a reference for MDMA and revising the estimated weight for MDA.

Fourth, the amendment addresses two application concerns regarding the two level reduction under §2D1.1(b)(6) for defendants who meet the criteria set forth in §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases). The amendment provides an application note that clarifies that the two level reduction under §2D1.1(b)(6) does not depend on whether the defendant is convicted under a statute that carries a mandatory minimum term of imprisonment. The application note also clarifies that §5C1.2(b), which provides a minimum offense level of level 17 for certain offenders, is not applicable to §2D1.1(b)(6).



**National Association of Assistant United States Attorneys**  
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May 17, 2002

Honorable Lamar Smith  
 Chairman  
 Subcommittee on Crime, Terrorism and Homeland Security  
 House Judiciary Committee  
 U.S. House of Representatives  
 Washington, D.C. 20515

Attn: Jay Apperson, Chief Counsel

Dear Chairman Smith:

The National Association of Assistant United States Attorneys (NAAUSA) has examined the "Fairness in Sentencing Act of 2002," and supports its enactment into law. This Bill would disapprove Amendment No. 4 of the Sentencing Commission's recent submission to Congress. Unless Congress specifically disapproves the Commission's submissions, the proposed amendments to the Sentencing Guidelines automatically go into effect in November. NAAUSA believes that Amendment No. 4 of the May 1, 2002 Sentencing Commission's submission to Congress would sanction unfairness in sentencing by permitting unwarranted sentencing disparities.

Amendment No. 4 provides that if a drug offender qualifies for a mitigating role pursuant to U.S.S.G. § 3B1.2 (which permits a four, three or two-level reduction for a minimal or minor participant), then the base offense level under U.S.S.G. § 2D1.1(c) would be capped at Level 30 before application of any adjustments. This, in effect, creates a "double bite" at the reduction apple in the most serious cases.

Amendment No. 4 replaces the objective test established by Congress to determine severity of sentence, i.e., drug amount and purity, with a subjective test, i.e., judicial assessment of role in the offense. Amendment No. 4 would likely increase sentencing disparity, as the following examples demonstrate.

In Case Number 1, an offender is stopped at the border between Mexico and the United States and found to be transporting 5 kilograms of cocaine. After a plea of guilty, the sentencing

<b>President:</b> Richard L. Delonis ED of Michigan	<b>Vice President:</b> Steven H. Cook ED of Tennessee	<b>Treasurer:</b> Barbara M. Carlin WD of Pennsylvania	<b>Secretary:</b> William I. Shockey ND of California
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court finds the defendant qualifies for relief under the “safety valve” provision ( U.S.S.G. § 5C1.2, thus removing the mandatory-minimum 10-year sentence and reducing the offense level by 2), resulting in an offense level of 30 before other adjustments, and finds the defendant is eligible for a three level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. The defendant would be sentenced at offense level 27, which provides for a sentencing range of 70-87 months in criminal history category I. Note that this offender is not eligible for a role adjustment, since no “more than one participant was involved in the offense.” U.S.S.G. § 3B1.2, App. Note 2.

In case number 2, an offender pleads guilty to a conspiracy in which he was the driver of a vehicle which, on ten occasions, was utilized to transport 500 kilograms of cocaine over a period of two years. After a plea of guilty, the sentencing court finds the defendant was a minor participant in the conspiracy, thus capping the offense level at 30, and reducing the offense level by 2, to 28. The Court finds the defendant qualifies for relief under the “safety valve” provision (U.S.S.G. § 5C1.2, thus removing the mandatory-minimum 10-year sentence, and reducing the offense level by 2). The court finds the defendant is eligible for a three level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. The defendant would be sentenced at offense level 23, which provides for a sentencing range of 46-57 months in criminal history category I.

Thus Amendment 4 would permit an offender involved in two years of criminal conduct and 5000 kilogram of cocaine to be sentenced four offense levels lower than a one-time offender involved with five kilograms of cocaine. This appears to us to create an unwarranted sentencing disparity, and forms the basis for our objection to the amendment.

The proposed amendment would serve to merge the previously distinct concepts of the level of criminal activity with the level of personal involvement with that activity. We believe that the Guidelines, as currently constituted, appropriately take these two concepts into account. The proposed amendment would indirectly inure to the detriment of those involved in less serious criminal activity by comparison to the sentences that would be capped for those committing more serious crimes.

For the foregoing reasons, the National Association of Assistant United States Attorneys supports the “Fairness in Sentencing Act of 2002.”

Respectfully,



Richard L. Delonis  
President, NAAUSA



## ACLU Urges Congress to Defer to Sentencing Commission Expertise on Drug Offenses

**FOR IMMEDIATE RELEASE**

**Tuesday, May 14, 2002**

WASHINGTON - The American Civil Liberties Union today joined with a coalition of advocacy groups in urging a congressional subcommittee to defer to the expertise of the United States Sentencing Commission and defeat a bill that would supercede a Commission guideline that the groups say would inject a greater measure of fairness into drug sentencing.

"It is unfortunate that certain members of Congress are trying to turn a reasonable sentencing reform into a political issue. The Sentencing Commission was formed to maintain fairness and rationality in the penalties handed down by our criminal justice system - the representatives pushing this bill need to let the Commission do its job," said Rachel King, an ACLU Legislative Counsel.

At issue is a piece of legislation (HR 4698) that would void a U.S. Sentencing Commission guideline designed to allow the courts greater discretion to consider mitigating circumstances when handing down penalties for drug offenses. The ACLU and other groups consider the guideline necessary in light of recent cases where low-level drug offenders -- who find themselves caught up in an offense involving a large quantity of drugs but in which they play a very minor role -- have received sentences light-years beyond what common sense would suggest they deserve.

The legislation is set for consideration at a hearing this afternoon in the Crime Subcommittee of the House Judiciary Committee, chaired by the bill's main sponsor, Rep. Lamar Smith (R-TX).

In the coalition's letter to the subcommittee on the legislation, the groups were quick to point out that conservative Republican Sens. Orrin Hatch of Utah and Jeff Sessions of Alabama have introduced legislation similar to the Sentencing Commission's guidelines in the Senate. Hatch and Sessions have publicly supported a reduction in the relevance of drug quantity for sentencing.

The coalition letter on the bill can be found at:  
<http://www.aclu.org/congress/1051402a.html>



May 14, 2002

The Honorable Lamar S. Smith  
Chairman, Subcommittee on Crime  
House Judiciary Committee  
207 Cannon House Office Building  
Washington, D.C. 20515

Dear Chairman Smith:

The undersigned organizations write to express opposition to H.R. 4689, a bill to disapprove Amendment 4 of the federal sentencing guideline amendments recently transmitted to Congress by the United States Sentencing Commission. Amendment 4 would set a maximum base offense level of 30 for drug defendants who qualify for a mitigating role adjustment under the guidelines.

First, we oppose H.R. 4689 because it undermines the authority Congress vested in the Sentencing Commission to promulgate rational, cohesive sentencing guidelines. In enacting the Sentencing Reform Act of 1984, Congress established the Commission as an independent expert agency in the judicial branch to insulate from undue political pressure the complex and technical task of drafting sentencing rules. The Commission did the job Congress entrusted to it: it carefully evaluated empirical evidence and drew conclusions that led it to promulgate Amendment 4. H.R. 4689 makes short shrift of that careful and considered judgment. The Congress should defer to the Commission's expertise, particularly as the amendment was approved unanimously by the bipartisan Commission.

Second, we support the Commission's efforts, reflected in Amendment 4, to limit undue reliance on drug quantity as the predominant factor determining drug sentences. Drug quantity can be an inaccurate measure of a defendant's culpability. Low-level, non-violent defendants may be held legally accountable for a vast quantity of drugs, even if the defendant did not know about or profit from the larger enterprise. Although those defendants can qualify for mitigating role adjustments they are still often subject to unduly long sentences based on quantity. Drug quantity may be a relevant sentencing factor, but a defendant's role in the offense is also a very important factor in determining a just sentence. Amendment 4 strikes a reasonable balance between these factors.

We note that the goal of limiting reliance on drug quantity and increasing consideration of role as a sentencing factor, has been endorsed by Republican Senators Jeff Sessions and Orrin Hatch. Their pending bill (S. 1874) includes a provision similar to Amendment 4. In introducing the bill, former United States Attorney Sessions stated that this change is "very significant because couriers, who are often low-level participants in a drug organization, can have disproportionate sentences of 20 or 30 years simply because they are caught with a large amount of drugs in their possession." (Congressional Record, December 20, 2001, S13964).

Third, Amendment 4 will begin to redress racial disparities in drug law enforcement. Over 73 percent of all individuals convicted for federal drug crimes (including over 93 percent of all those convicted for crack cocaine offenses) are African-American or Latino. Unnecessarily lengthy sentences for low-level, non-violent drug offenders exacerbate disproportionate minority incarceration rates. Efforts to tie sentences more closely to a defendant's culpability will enhance fairness and improve the credibility of federal drug efforts in minority communities.

Contrary to the statements of the sponsors of H.R.4689, Amendment 4 will not result in wholesale changes to drug sentences. The only defendants covered by Amendment 4 are those found by a court to have been minor or minimal participants in drug crimes. The Sentencing Commission estimates that only six percent of all drug defendants will qualify (approximately 240 people each year). While the amendment would cap their base offense level at level 30, it does not prohibit a judge from increasing the sentence based on obstruction of justice, presence of a firearm, or any other factor determined by the court to be appropriate.

Thank you for considering our views. Please regard Julie Stewart as a point of contact for the undersigned individuals. She may be reached at (202) 822-6700.

Sincerely,

Julie Stewart  
Families Against Mandatory Minimums

Jamie Fellner  
Human Rights Watch

Wade Henderson  
Leadership Conference on Civil Rights

Charles Kamasaki  
National Council of La Raza

Laura Murphy  
American Civil Liberties Union

Nancy Price  
National Association of Federal Defenders

Irwin Schwartz  
National Association of Criminal Defense Lawyers



Contact: Monica Pratt  
(202) 822-6700

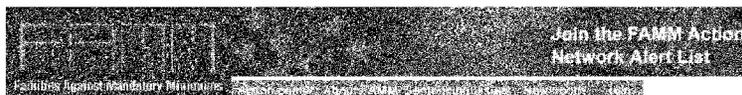
### H.R. 4689 Prevents the Punishment from Fitting the Crime

May 14, 2002, Washington, D.C.— H.R. 4689, introduced May 9, 2002, by Rep. Lamar Smith (R-TX) would disapprove Amendment 4 of the federal sentencing guideline amendments recently submitted to Congress by the U.S. Sentencing Commission. H.R. 4689 would thwart a judge's ability to make the punishment more accurately fit the offender's role in a drug crime.

Families Against Mandatory Minimums (FAMM) strongly opposes this congressional attempt to stop Amendment 4 from becoming law. Amendment 4 targets the least culpable of all drug defendants, capping their base sentences at 10 years. This cap prevents their sentences from being driven up by drug quantity, which currently is the primary determining factor in sentence length. Quantity is not a proxy for culpability and should not be the motivating force behind sentences for the least culpable drug offenders.

Attached are two cases that illustrate the type of defendants who would receive the benefit of Amendment 4. In each case, their sentences would be 10 years instead of 14 years for Michael Baker, and 19 ½ years for Tammi Bloom. Ten years in prison is more than sufficient punishment for nonviolent first time offenders.

For more information, please contact [www.FAMM.org](http://www.FAMM.org).



**MICHAEL D. BAKER  
#02723-025**

Sentence: 14 years, 1 month  
 Offense: cocaine conspiracy (15-50 kg)  
 Date of Sentencing: 2/2/94  
 Date of Birth: 4/9/60  
 Court: 7th Circuit, Southern District of Illinois  
 Priors: None



**Nature of Offense:**

Michael was involved in selling cocaine in the late 1980's. The state of Illinois charged him in 1989, and he agreed to a plea bargain of 6 years in Illinois state prison. Three years into his sentence, Michael was indicted by the Federal government for the same crime. Michael claims he was asked to testify that he and some of his friends were selling cocaine as part of a conspiracy. At Michael's federal trial he would not testify to a conspiracy because as he says, "I had indeed had spot dealings, but I was not aware of any overall conspiracy."

Michael admits to selling cocaine in the amount of approximately 2-3 kgs total. However, he contends that his cocaine activities and the activities of his codefendants were not part of one large conspiracy. Michael was held responsible for 13 kgs of cocaine which his codefendants purchased from a supplier named John Pahl. In exchange for reduced sentences, they testified that Michael "kicked in" money for the purchase, when in fact Michael says this is no true and there was never any evidence to indicate that he did. He says, "The real fact is that I never 'kicked in' any money, I never received one granule of [the] cocaine, nor did I even have any knowledge of these happenings." Without the additional 13 kgs, Michael's sentence would have been approximately 41-50 months.

Michael has tried to have his sentence vacated based on the Petit Policy, which requires local U.S. Attorneys to obtain permission from the Attorney General to prosecute crimes already prosecuted at the state level. No such permission was obtained in Michael's case, but his pleas were rejected by the Department of Justice.

**Guideline Sentence:**

Michael had a baseline offense level of 34 based on an amount of more than 15 but less than 50 kgs of cocaine. He received a two-point reduction for minor participation and a two-point enhancement for obstruction of justice due to his testimony. The government originally tried to count the state conviction (for the same crime) as a prior offense, but eventually removed that enhancement.

**Sentences of Others Involved:**

All of Michael's co-defendants in the conspiracy received plea agreements (for testifying against Michael) and all of their sentences were less than his -- some of them even got as little as one day in prison. John Pahl, the supplier of the 13 kg

got 22 years, and that was the highest sentence next to Michael's.

**Personal Background:**

Michael has a daughter, Jessica, who was 5 months old when he originally went to prison. She is now 10 and lives 1,000 miles away from where Michael is incarcerated.

compiled from inmate information and PSR  
1/11/99 dl

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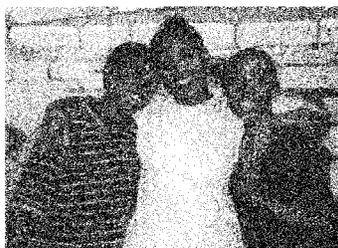
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**TAMMI BLOOM**  
**#28050-018**

Federal Sentence:  
 19 years, 7 months  
 Offense: Cocaine  
 and cocaine base  
 conspiracy  
 Date of Sentencing:  
 01/29/99  
 Date of Birth:  
 03/25/66  
 Priors: None



**Nature of Offense:** Tammi's husband of 15 years, Ronald, distributed cocaine, primarily from the apartment he shared with his mistress in Ocala, Florida. Tammi who lived with Ronald and their two children in Miami, says she did not know about her husband's mistress or his cocaine business. However, a confidential informant (CI) says Tammi was present at one of two cocaine sales Ronald conducted at the Miami house. According to the CI, Tammi's job was to count the money from Ronald's transactions.

On the day Ronald and his mistress were apprehended in Ocala, police searched the Miami house and found cocaine, cocaine base, 3 firearms, and drug ledgers. Tammi says that with the exception of a small bag of cocaine in her husband's nightstand, most of the drugs were well hidden—even from her—in a septic tank in the backyard. The guns, Tammi says, were also located in an area of the house clearly used by her husband. Tammi was held accountable for the drugs found in the search as well as those sold by Ronald in Miami: 2.41 kilograms of cocaine and 510.05 grams of cocaine base.

**Guideline Sentence:** Tammi's base offense level was 36. She received a 2-level enhancement for the firearms found in the search, a 2-level reduction for being a minor participant in the conspiracy, and a 2-level obstruction of justice enhancement for testifying to her innocence at trial. With a total offense level of 38 and a criminal history category I, the guideline range was 235-293 months.

**Sentences of Others Involved:** Tammi received the longest sentence of anyone convicted in the conspiracy. Ronald received 210 months (17.5 years); his mistress received 78 months (6.5 years). A drug associate of Ronald's in Ocala received 168 months (14 years.)

Families Against Mandatory Minimums (FAMM)

wysiwyg://8/http://www.famm.org/Federa%...profiles%20women/tammi\_bloom\_profile.htm

Personal Background: Tammi is a licensed practical nurse. At the time the conspiracy took place, she was working full time and attending nursing classes. She and Ronald have two children who are now 13 and 15 years old.

Compiled from Pre-Sentence Report and inmate information.  
3/31/01 dl

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