

**FEDERAL CRIMINAL  
LAW AND PROCEDURE  
FALL 2011**



Co-Sponsored by  
THE FEDERAL PUBLIC DEFENDER'S OFFICE  
AND  
THE IOWA ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS

**DRAKE LAW SCHOOL LEGAL CLINIC  
DES MOINES, IOWA  
November 16, 2011**

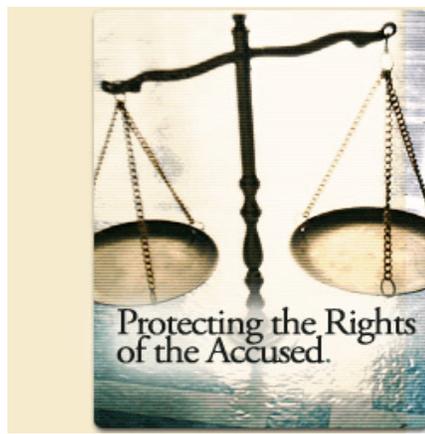
# WELCOME



**In Memory of Nick Drees  
(1962 - 2011)**

**THE  
FALL 2011  
FEDERAL LAW AND PROCEDURE SEMINAR  
IS CO-SPONSORED BY  
THE FEDERAL DEFENDER'S OFFICE AND  
THE IOWA ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS**

# Program



## **PROGRAM**

- 8:00 a.m. to 8:30 a.m.      **Registration**
- 8:30 a.m. to 9:15 a.m.      **Odds and Ends**  
*James Whalen, Acting Federal Public Defender*  
*Valarie Gall, Nancy Lanoue,*  
Panel Administration
- 9:15 a.m. to 9:45 a.m.      **Benefitting from the Retroactive Changes in the Crack Cocaine Guidelines Following the Fair Sentencing Act of 2010**  
*B. John Burns, Asst. Federal Public Defender*
- 9:45 a.m. to 10:00 a.m.      **BREAK**
- 10:00 a.m. to 11:15 a.m.      **Post Conviction Risk Assessment**  
*Laura Mate,*  
Sentencing Resource Counsel Project
- 11:15 a.m. to 11:45 a.m.      **Forfeitures**  
*Maureen McGuire,*  
Assistant U.S. Attorney
- 11:45 a.m. to 1:00 p.m.      **LUNCH (On Your Own)**
- 1:00 p.m. to 2:00 p.m.      **Supreme Court & Eighth Circuit Update**  
*John Messina, Research & Writing Attorney*  
Federal Public Defender's Office
- 2:00 p.m. to 3:00 p.m.      **Working With Interpreters**  
*Timothy Ross-Boon, Asst. Federal Public Defender*  
*Patricia Hillock, Federal Certified Interpreter*
- 3:00 p.m. to 3:15 p.m.      **BREAK**
- 3:15 p.m. to 4:15 p.m.      **Ethics**  
*Leon Spies*  
CJA Panel Attorney

# **CLE ACCREDITATION**

# FEDERAL CRIMINAL LAW AND PROCEDURE

*Drake Legal Clinic  
Des Moines, Iowa  
November 16, 2011*

This seminar has been submitted for approval for accreditation under the regulations of the Iowa Supreme Court Commission on Continuing Legal Education. It is planned that this program will provide up to a maximum of 6 hours of credit, with one hour of ethics credit, towards the mandatory continuing legal education requirements under the Iowa Rules.



This seminar has been submitted for approval for accreditation for 6 hours of federal continuing legal education credit with one hour of ethics.



The seminar is also accredited under the Amended Criminal Justice Act Plan for the Southern and Northern Districts of Iowa and will provide 6 hours of credit toward the mandatory continuing legal education requirement under the CJA Plan.

**SPEAKER  
BIOGRAPHICAL  
INFORMATION**

## **B. JOHN BURNS**

EDUCATION: J.D., University of Iowa (1984); B.A., University of Iowa (1982)

PROFESSIONAL: Assistant Federal Public Defender, Southern District of Iowa (1999-Present); Assistant Des Moines Adult Public Defender (1994-1999); Assistant State Appellate Defender (1985-1994)

## **VALARIE GALL**

EDUCATION: 2 yrs. Indian Hills Community College

PROFESSIONAL: Panel Administrator, Federal Defender's Office (2009-Present); Sr. Legal Secretary, Federal Defender's Office (2006-2009); Hearn Law Office (2003-2006); Rosenberg, Stowers & Morse (1999-2003).

## **PATRICIA HILLOCK**

PROFESSIONAL: Patricia is the only federally certified court reporter in Iowa. She was raised in many countries and has worked in the interpretation and translation profession for over 35 years in Europe, South America and the United States. She is a Charter Member and President of the Iowa Interpreters and Translators Association, the Lead Instructor of the Iowa Court Interpreters Orientation Workshop and serves on the Iowa Judicial Branch Court Interpreter Advisory Committee.

## **NANCY LANOUE**

EDUCATION: A.A., Kirkwood Community College, Cedar Rapids, Iowa (1991).

PROFESSIONAL: Secretary to Federal Defender and Asst. Panel Administrator, Federal Defender's Office (2006-Present); Legal Assistant, Alfred E. Willett (1995-2005); Legal Assistant, Shuttleworth & Ingersoll (1992-1994); Legal Assistant, Amana Refrigeration (1991-1992).

## **LAURA MATE**

EDUCATION: J.D., University of Michigan (1998); B.A., Kenyon College (1992)

PROFESSIONAL: Federal Defender National Sentencing Resource Counsel Project (October 2010-Present); Federal Public Defender's Office, Seattle, WA (2001 - 2010); Perkins Coie in Seattle, WA (1998 - 2001).

## **MAUREEN MCGUIRE**

EDUCATION: J.D., University of Iowa (1983); B.A., University of Iowa

PROFESSIONAL: U.S. Attorney's Office - Southern District of Iowa (1996-present); Iowa Attorney General's Office (1983-1996)

## **JOHN MESSINA**

EDUCATION: J.D., Drake University Law School (1979); B.A., Drake University (1975).

PROFESSIONAL: Research and Writing Attorney, Federal Public Defender's Office, Southern District of Iowa (2001-Present); Assistant State Appellate Defender, Iowa State Appellate's Office (1996-2001 and 1984-1988); Assistant Attorney General in the Criminal Appeals and Research Division (1980-1984).

## **TIM ROSS-BOON**

EDUCATION: J.D., University of Iowa (1987); B.A., University of Iowa School of Letters (1979)

PROFESSIONAL: Assistant Federal Public Defender, Southern District of Iowa (2003 - Present); Assistant Public Defender, Linn County Public Defender's Office (1995 - 2003); Attorney with Linn County Advocate (1990 - 1995); Prosecutor with Johnson County Attorney's Office (1987 - 1990).

## **LEON SPIES**

EDUCATION: J.D., University of Iowa College of Law (1975); B.A. University of Iowa (1972).

PROFESSIONAL: A partner in the Iowa City, Iowa firm of Mellon & Spies. He practices primarily in the areas of criminal defense and trial law. He is a fellow in the Iowa Academy of Trial Lawyers and the American College of Trial Lawyers, and is a member of the American College's committee on federal criminal procedure. Since 1997, he has also served as a clinical instructor in trial advocacy at the University of Iowa College of Law. He is admitted to practice before the Iowa Supreme Court, the United States District Courts for the Northern and Southern Districts of Iowa and Central District of Illinois, the United States Court of Appeals for the Eighth Circuit, and the United States Supreme Court.

**JIM WHALEN**

EDUCATION: J.D., University of Iowa (1978); B.A., University of Iowa (1974)

PROFESSIONAL: Assistant Federal Public Defender, Southern District of Iowa (1994-Present); Polk County Public Defender's Office (1989-1994); State Appellate Defender's Office (1987-1989); Private Practice, Waterloo, Iowa (1978-1986).

# **ODDS AND ENDS**

**PRESENTED BY**

**JIM WHALEN**  
**ACTING FEDERAL PUBLIC DEFENDER**

# GUIDELINE AMENDMENTS

*November*



2011

# FAIR SENTENCING ACT

❖ App. N. 28: “maintaining a premises” includes storage of controlled substance for distribution

❖ Guideline changes implementing FSA retroactive. Only Parts A & C of the FSA are retroactive

# ILLEGAL REENTRY - 2L1.2(B)(1)A) AND (B)

- ❖ Enhancements based upon stale convictions or non-counting CH pts. under Chapter 4 subject to 12 or 8 level enhancement
- ❖ 12 or 8 level upward departure if this enhancement doesn't adequately reflect seriousness of underlying conduct

# MITIGATING ROLE

❖ App. N. 3B1.2: struck:

App. N. 3(C) statement the court “is not required to find, based solely on the defendant’s bare assertion, that such a role adjustment is warranted.”

App. N. 4 statement “it is intended that the downward adjustment for minimal participant will be used infrequently.”

# MITIGATING ROLE (FRAUD)

❖ Added to App. N. 3(A): “a defendant who is accountable under 1B1.3 (relevant conduct) for a loss amount under 2B1.1 (theft, property destruction, and fraud) that exceeds defendant’s personal gain from a fraud and who had limited knowledge of scheme is not precluded from an adjustment under the guideline.

# SUPERVISED RELEASE - 5D1.1

- ❖ (c) “The court ordinarily should not impose a term of S.R. in a case in which S.R. is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.”
- ❖ Commentary: “The court should . . . consider imposing term of S.R. . . . if . . . it would provide an added measure of deterrence and protection. . . .”

# SUPERVISED RELEASE

- ❖ 2D1.2 S.R. lowered minimum term from 3 (Class A & B felonies) and 2 years (Class C & D felonies) to 2 and 1 year.
- ❖ 5D1.1 and 5D1.2 commentary: inserted mention of criminal history & substance abuse as factors for court to consider
- ❖ 5D1.2 commentary added language encouraging courts to consider early termination of S.R. “in appropriate cases.”

# FIREARMS 2K2.1

- ❖ Increased penalties for straw purchasers
- ❖ Added 4-levels where defendant “possessed any firearm or ammunition while leaving or attempting to leave U.S., or with knowledge, intent, or reason to believe it would be transported out of the U.S.
- ❖ Straw purchasers downward departure where none of subsection (b) enhancements apply, the defendant was motivated by intimate or familial relationship or by threats or fear to commit offense and was otherwise unlikely to commit the offense, and no monetary compensation from the offense

# FIREARMS - 2M5.2

- ❖ Small arms crossing border – penalties raised from BOL 14 to 26 where more than 2 non-fully automatic small arms involved.
- ❖ Subject to lower level 14 if involved 500 rounds or less of ammo for non-fully automatic small arms.
- ❖ Level 14 where offense involved both small arms and ammunition in quantities listed here.

# FRAUD - 2B1.1

- ❖ Health care fraud involving Government health care program.
- ❖ Tiered enhancements based upon loss amounts > \$1 mil
- ❖ Added rebuttable special prima facie evidence rule for loss amount
- ❖ Defines “Federal health care offense” and “Government health care program”



# CHILD SUPPORT

- ❖ 18 U.S.C. 228 – willful failure to pay not subject to 2-level enhancement under 2B1.1(b)(8)(C)



# DRUG DISPOSAL ACT - 2D1.1

- ❖ App. No. 8 expands list of people subject to enhancement for abuse of position of trust or use of special skill

**Benefitting From the  
Retroactive Changes in the  
Crack Cocaine Guidelines  
Following the  
Fair Sentencing Act of 2010**

**PRESENTED BY**

**B. JOHN BURNS  
ASSISTANT FPD**

## PROPOSED AMENDMENT: FAIR SENTENCING ACT

**Synopsis of Proposed Amendment:** *This multi-part proposed amendment continues the Commission's work on the Fair Sentencing Act of 2010, Pub. L. 111-220 (the "Act").*

*In October 2010, to implement the emergency directive in section 8 of the Act, the Commission promulgated emergency, temporary revisions to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and §2D2.1 (Unlawful Possession; Attempt or Conspiracy). Conforming changes to certain other guidelines were also promulgated on an emergency, temporary basis. See USSG App. C, Amendment 748 (effective November 1, 2010). The proposed amendment re-promulgates the emergency, temporary revisions.*

### Changes to the Drug Quantity Table for Offenses Involving Crack Cocaine

*Part A re-promulgates without change the emergency, temporary revisions to the Drug Quantity Table for offenses involving cocaine base ("crack" cocaine), and the related revisions to Application Note 10 to §2D1.1. This responds to section 2 of the Act, which reduced the statutory penalties for offenses involving manufacturing or trafficking in crack cocaine by increasing the quantity thresholds required to trigger a mandatory minimum term of imprisonment. The quantity threshold required to trigger the 5-year mandatory minimum term of imprisonment was increased from 5 grams to 28 grams, and the quantity threshold required to trigger the 10-year mandatory minimum term of imprisonment was increased from 50 grams to 280 grams. See 21 U.S.C. §§ 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3).*

*To account for these statutory changes, the proposed amendment conforms the guideline penalty structure for crack cocaine offenses to the approach followed for other drugs, i.e., the base offense levels for crack cocaine are set in the Drug Quantity Table so that the statutory minimum penalties correspond to levels 26 and 32. See generally §2D1.1, comment. (backg'd.). Accordingly, using the new drug quantities established by the Act, offenses involving 28 grams or more of crack cocaine are assigned a base offense level of 26, offenses involving 280 grams or more of crack cocaine are assigned a base offense level of 32, and other offense levels are established by extrapolating upward and downward. Conforming to this approach ensures that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionally reflected throughout the Drug Quantity Table.*

*To provide a means of obtaining a single offense level in cases involving crack cocaine and one or more other controlled substances, the proposed amendment also establishes a marijuana equivalency for crack cocaine under which 1 gram of crack cocaine is equivalent to 3,571 grams of marijuana. (The marijuana equivalency for any controlled substance is a constant that can be calculated using any threshold in the Drug Quantity Table by dividing the amount of marijuana corresponding to that threshold by the amount of the other controlled substance corresponding to that threshold. For example, the threshold quantities at base offense level 26 are 100,000 grams of marijuana and 28 grams of crack cocaine; 100,000 grams divided by 28 is 3,571 grams.) In the commentary to §2D1.1, the proposed amendment makes a conforming change to the rules for cases involving both crack cocaine and one or more other controlled substances. The proposed amendment deletes the special rules in Note 10(D) for cases involving crack cocaine and one or more other controlled substances, and revises Note 10(C) so that it provides an example of such a case.*

### Aggravating and Mitigating Factors in Drug Trafficking Cases

Part B re-promulgates the emergency, temporary revisions to §2D1.1 and accompanying commentary that account for certain aggravating and mitigating factors in drug trafficking cases. These changes implement directives to the Commission in sections 5, 6, and 7 of the Act. The emergency revisions are re-promulgated without change, except for the new Application Note 28 (relating to the new enhancement for maintaining a premises), as explained below.

First, Part B amends §2D1.1 to add a sentence at the end of subsection (a)(5) (often referred to as the "mitigating role cap"). The new provision provides that if the offense level otherwise resulting from subsection (a)(5) is greater than level 32, and the defendant receives the 4-level ("minimal participant") reduction in subsection (a) of §3B1.2 (Mitigating Role), the base offense level shall be decreased to level 32. This provision responds to section 7(1) of the Act, which directed the Commission to ensure that "if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32".

Second, Part B amends §2D1.1 to create a new specific offense characteristic at subsection (b)(2) providing an enhancement of 2 levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence. The new specific offense characteristic responds to section 5 of the Act, which directed the Commission to "ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense."

The proposed amendment also revises the commentary to §2D1.1 to clarify how this new specific offense characteristic interacts with subsection (b)(1). Specifically, Application Note 3 is amended to provide that the enhancements in subsections (b)(1) (regarding possession of a dangerous weapon) and (b)(2) may be applied cumulatively. However, in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply.

In addition, the proposed amendment makes a conforming change to the commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to address cases in which the defendant is sentenced under both §2D1.1 (for a drug trafficking offense) and §2K2.4 (for an offense under 18 U.S.C. § 924(c)). In such a case, the sentence under §2K2.4 accounts for any weapon enhancement; therefore, in determining the sentence under §2D1.1, the weapon enhancement in §2D1.1(b)(1) does not apply. See §2K2.4, comment. (n. 4). The proposed amendment amends this commentary to similarly provide that, in a case in which the defendant is sentenced under both §§2D1.1 and 2K2.4, the new enhancement at §2D1.1(b)(2) also is accounted for by §2K2.4 and, therefore, does not apply.

Third, Part B amends §2D1.1 to create a new specific offense characteristic at subsection (b)(11) providing an enhancement of 2 levels if the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense. The new specific offense characteristic responds to section 6(1) of the Act, which directed the Commission "to ensure an additional increase of at least 2 offense levels if . . . the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense".

The proposed amendment also revises the commentary to §2D1.1 to clarify how this new specific offense characteristic interacts with the adjustment at §3C1.1 (Obstructing or Impeding the Administration of Justice). Specifically, new Application Note 27 provides that subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant because such conduct is covered by §3C1.1.

Fourth, Part B amends §2D1.1 to create a new specific offense characteristic at subsection (b)(12) providing an enhancement of 2 levels if the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance. The new specific offense characteristic responds to section 6(2) of the Act, which directed the Commission to "ensure an additional increase of at least 2 offense levels if . . . the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856)".

The proposed amendment also adds commentary in §2D1.1 at Application Note 28 providing that the enhancement applies to a defendant who knowingly maintains a premises (*i.e.*, a building, room, or enclosure) for the purpose of maintaining or distributing a controlled substance, including storage of a controlled substance for the purpose of distribution.

Application Note 28 also provides that among the factors the court should consider in determining whether the defendant "maintained" the premises are (A) whether the defendant held a possessory interest (*e.g.*, owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises. Application Note 28 also provides that manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses of the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

Fifth, Part B amends §2D1.1 to create a new specific offense characteristic at subsection (b)(14) that provides an enhancement of 2 levels if the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved one or more of five specified factors. The new specific offense characteristic responds to section 6(3) of the Act, which directed the Commission "to ensure an additional increase of at least 2 offense levels if . . . (A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and (B) the offense involved 1 or more of the following super-aggravating factors:

- (i) The defendant--
  - (I) used another person to purchase, sell, transport, or store controlled substances;
  - (II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and
  - (III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction.
  
- (ii) The defendant--
  - (I) knowingly distributed a controlled substance to a person under the age

- (II) of 18 years, a person over the age of 64 years, or a pregnant individual; knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;
  - (III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or
  - (IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.
- (iii) The defendant was involved in the importation into the United States of a controlled substance.
  - (iv) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.
  - (v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood."

The proposed amendment also revises the commentary to §2D1.1 to provide guidance in applying the new specific offense characteristic at §2D1.1(b)(14). Specifically, new Application Note 29 provides that if the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(14)(B), the individual is not a "vulnerable victim" for purposes of subsection (b) of §3A1.1 (Hate Crime Motivation or Vulnerable Victim). Application Note 29 also provides that subsection (b)(14)(C) applies if the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance. Subsection (b)(14)(C), however, does not apply if subsection (b)(3) or (b)(5) (as redesignated by the proposed amendment) applies because the defendant's involvement in importation is adequately accounted for by those subsections. In addition, Application Note 29 defines "pattern of criminal conduct" and "engaged in as a livelihood" for purposes of subsection (b)(14)(E) as those terms are defined in §4B1.3 (Criminal Livelihood).

The proposed amendment also revises the commentary in §3B1.4 (Using a Minor To Commit a Crime) and §3C1.1 (Obstructing or Impeding the Administration of Justice) to specify how those adjustments interact with §2D1.1(b)(14)(B) and (D), respectively. Specifically, Application Note 2 to §3B1.4 is amended to clarify that the increase of two levels under this section would not apply if the defendant receives an enhancement under §2D1.1(b)(14)(B). Similarly, Application Note 7 to §3C1.1 is amended to clarify that the increase of two levels under this section would not apply if the defendant receives an enhancement under §2D1.1(b)(14)(D).

Sixth, Part B amends §2D1.1 to create a new specific offense characteristic providing a 2-level downward adjustment if the defendant receives the 4-level ("minimal participant") reduction in subsection (a) of §3B1.2 (Mitigating Role) and the offense involved each of three additional specified factors: namely, the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense when the defendant was otherwise unlikely to commit such an offense; was to receive no monetary compensation from the illegal purchase, sale, transport, or storage of controlled

substances; and had minimal knowledge of the scope and structure of the enterprise. The specific offense characteristic responds to section 7(2) of the Act, which directed the Commission to ensure that "there is an additional reduction of 2 offense levels if the defendant—

- (A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;
- (B) was to receive no monetary compensation from the illegal transaction; and
- (C) was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense."

Seventh, to reflect the renumbering of specific offense characteristics in §2D1.1(b) by the proposed amendment, technical and conforming changes are made to the commentary to §2D1.1 and to §2D1.14 (Narco-Terrorism).

#### Simple Possession of Crack Cocaine

Part C re-promulgates without change the emergency, temporary revisions to §2D2.1 to account for the changes in the statutory penalties for simple possession of crack cocaine made in section 3 of the Act. Section 3 of the Act amended 21 U.S.C. § 844(a) to eliminate the 5-year mandatory minimum term of imprisonment (and 20-year statutory maximum) for simple possession of more than 5 grams of crack cocaine (or, for certain repeat offenders, more than 1 gram of crack cocaine). Accordingly, the statutory penalty for simple possession of crack cocaine is now the same as for simple possession of most other controlled substances: for a first offender, a maximum term of imprisonment of one year; for repeat offenders, maximum terms of 2 years or 3 years, and minimum terms of 15 days or 90 days, depending on the prior convictions. *See* 21 U.S.C. § 844(a). To account for this statutory change, the proposed amendment deletes the cross reference at §2D2.1(b)(1) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under the drug trafficking guideline, §2D1.1.

#### **Proposed Amendment:**

#### **(A) Changes to Drug Quantity Table for Offenses Involving Cocaine Base ("Crack" Cocaine)**

[for formatting reasons, the changes to the Drug Quantity Table begin at the top of the following page]

### (c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
(1) ● 30 KG or more of Heroin; ● 150 KG or more of Cocaine; ● 4-58.4 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; ● 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 Ketamine; ● 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; ● At least 50 KG but less than 150 KG of Cocaine; ● At least <del>15</del> KG but less than 4-58.4 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; ● 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 Ketamine; ● 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; ● At least 15 KG but less than 50 KG of Cocaine; ● At least <del>500840</del> G but less than <del>1-52.8</del> KG 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	Level 34

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;
- At least 1.2 KG but less than 4 KG of Fentanyl;
- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Ketamine;
- 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;
  - At least 5 KG but less than 15 KG of Cocaine;
  - At least ~~500~~280 G but less than ~~500~~840 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;
  - At least 400 G but less than 1.2 KG of Fentanyl;
  - At least 100 G but less than 300 G of a Fentanyl Analogue;
  - At least 1,000 KG but less than 3,000 KG of Marihuana;
  - At least 200 KG but less than 600 KG of Hashish;
  - At least 20 KG but less than 60 KG of Hashish Oil;
  - At least 1,000,000 but less than 3,000,000 units of Ketamine;
  - 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.

**Level 32**

- (5)
- At least 700 G but less than 1 KG of Heroin;
  - At least 3.5 KG but less than 5 KG of Cocaine;
  - At least ~~50~~196 G but less than ~~50~~280 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;
  - 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 Marihuana;

**Level 30**

- 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 Ketamine;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- 700,000 or more units of Schedule III Hydrocodone;
- At least 43,750 but less than 62,500 units of Flunitrazepam.

- (6)
- At least 400 G but less than 700 G of Heroin;
  - At least 2 KG but less than 3.5 KG of Cocaine;
  - At least ~~35112~~ 50196 G but less than 50196 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;
  - 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 Marihuana;
  - 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 Ketamine;
  - At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
  - At least 400,000 but less than 700,000 units of Schedule III Hydrocodone;
  - At least 25,000 but less than 43,750 units of Flunitrazepam.

## Level 28

- (7)
- At least 100 G but less than 400 G of Heroin;
  - At least 500 G but less than 2 KG of Cocaine;
  - At least ~~2028~~ 35112 G but less than 35112 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;
  - 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 Ketamine;
  - At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
  - At least 100,000 but less than 400,000 units of Schedule III Hydrocodone;
  - At least 6,250 but less than 25,000 units of Flunitrazepam.

## Level 26

- (8) ● At least 80 G but less than 100 G of Heroin;  
 ● At least 400 G but less than 500 G of Cocaine;  
 ● At least 522.4 G but less than ~~2028~~ 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;  
 ● 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 Ketamine;  
 ● At least 80,000 but less than 100,000 units of Schedule I or II Depressants;  
 ● At least 80,000 but less than 100,000 units of Schedule III Hydrocodone;  
 ● At least 5,000 but less than 6,250 units of Flunitrazepam.

Level 24

- (9) ● At least 60 G but less than 80 G of Heroin;  
 ● At least 300 G but less than 400 G of Cocaine;  
 ● At least ~~416.8~~ G but less than 522.4 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;  
 ● 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 Ketamine;  
 ● At least 60,000 but less than 80,000 units of Schedule I or II Depressants;  
 ● At least 60,000 but less than 80,000 units of Schedule III Hydrocodone;  
 ● At least 3,750 but less than 5,000 units of Flunitrazepam.

Level 22

- (10) ● At least 40 G but less than 60 G of Heroin;  
 ● At least 200 G but less than 300 G of Cocaine;  
 ● At least ~~311.2~~ G but less than ~~416.8~~ 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

Level 20

"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;
- 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 Ketamine;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- At least 40,000 but less than 60,000 units of Schedule III Hydrocodone;
- 40,000 or more units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 2,500 but less than 3,750 units of Flunitrazepam.

- (11) ● At least 20 G but less than 40 G of Heroin;
- At least 100 G but less than 200 G of Cocaine;
  - At least ~~25.6~~ 25.6 G but less than ~~311.2~~ 311.2 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;
  - 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 Ketamine;
  - At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
  - At least 20,000 but less than 40,000 units of Schedule III Hydrocodone;
  - At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine or Hydrocodone);
  - 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;
- At least 50 G but less than 100 G of Cocaine;
  - At least ~~12.8~~ 12.8 G but less than ~~25.6~~ 25.6 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);

**Level 16**

- At least 100 MG but less than 200 MG of LSD;
- At least 4 G but less than 8 G of Fentanyl;
- At least 1 G but less than 2 G of a Fentanyl Analogue;
- At least 10 KG but less than 20 KG of Marihuana;
- At least 2 KG but less than 5 KG of Hashish;
- At least 200 G but less than 500 G of Hashish Oil;
- At least 10,000 but less than 20,000 units of Ketamine;
- At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
- At least 10,000 but less than 20,000 units of Schedule III Hydrocodone;
- At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 625 but less than 1,250 units of Flunitrazepam.

- (13) ● At least 5 G but less than 10 G of Heroin;
- At least 25 G but less than 50 G of Cocaine;
  - At least ~~500 MG~~ 1.4 G but less than ~~12.8 G~~ 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;
  - At least 2 G but less than 4 G of Fentanyl;
  - At least 500 MG but less than 1 G of a Fentanyl Analogue;
  - At least 5 KG but less than 10 KG of Marihuana;
  - At least 1 KG but less than 2 KG of Hashish;
  - At least 100 G but less than 200 G of Hashish Oil;
  - At least 5,000 but less than 10,000 units of Ketamine;
  - At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
  - At least 5,000 but less than 10,000 units of Schedule III Hydrocodone;
  - At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine or Hydrocodone);
  - At least 312 but less than 625 units of Flunitrazepam.

#### Level 14

- (14) ● Less than 5 G of Heroin;
- Less than 25 G of Cocaine;
  - Less than ~~500 MG~~ 1.4 G 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;
  - 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;

#### Level 12

- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Ketamine;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III Hydrocodone;
- At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- 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 Ketamine;
  - At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
  - At least 1,000 but less than 2,500 units of Schedule III Hydrocodone;
  - At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine or Hydrocodone);
  - 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 Ketamine;
  - At least 250 but less than 1,000 units of Schedule I or II Depressants;
  - At least 250 but less than 1,000 units of Schedule III Hydrocodone;
  - At least 250 but less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone);
  - 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 Ketamine;
  - Less than 250 units of Schedule I or II Depressants;
  - Less than 250 units of Schedule III Hydrocodone;
  - Less than 250 units of Schedule III substances (except Ketamine or Hydrocodone);
  - 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:

- (A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled

substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

- (B) The terms "PCP (actual)", "Amphetamine (actual)", and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

- (C) "Ice," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.
- (D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.
- (E) In the case of an offense involving marijuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marijuana. *Provided*, however, that if the actual weight of the marijuana is greater, use the actual weight of the marijuana.
- (F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 ml. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (e.g., patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 mg of an anabolic steroid is one "unit".
- (G) In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.
- (H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(30)), (ii) at least two of the following: cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).
- (I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(30)), (ii) at least two of the following: cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

10. Use of Drug Equivalency Tables.—

(A) Controlled Substances Not Referenced in Drug Quantity Table.—The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:

- (i) Use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana.
- (ii) Find the equivalent quantity of marihuana in the Drug Quantity Table.
- (iii) Use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.

(See also Application Note 5.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gm of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kg of marihuana. In a case involving 100 gm of oxymorphone, the equivalent quantity of marihuana would be 500 kg, which corresponds to a base offense level of 28 in the Drug Quantity Table.

(B) Combining Differing Controlled Substances (Except Cocaine Base).—The Drug Equivalency Tables also provide a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its marihuana equivalent, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level. To determine a single offense level in a case involving cocaine base and other controlled substances, see subdivision (D) of this note.

For certain types of controlled substances, the marihuana equivalencies in the Drug Equivalency Tables are "capped" at specified amounts (e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 999 grams of marihuana). Where there are controlled substances from more than one schedule (e.g., a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marihuana equivalency for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalencies to determine the combined marihuana equivalency (subject to the cap, if any, applicable to the combined amounts).

*Note: Because of the statutory equivalences, the ratios in the Drug Equivalency Tables do not necessarily reflect dosages based on pharmacological equivalents.*

(C) Examples for Combining Differing Controlled Substances (Except Cocaine Base).—

- (i) The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of 24.
- (ii) The defendant is convicted of selling 500 grams of marihuana (Level 8) and five kilograms of diazepam (Level 8). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 10 in the Drug Quantity Table.
- (iii) The defendant is convicted of selling 80 grams of cocaine (Level 16) and five kilograms of marihuana<sup>2</sup> grams of cocaine base (Level 14). The cocaine is equivalent to 16 kilograms of marihuana, and the cocaine base is equivalent to 7.142 kilograms of marihuana. The total is therefore equivalent to 23.142 kilograms of marihuana, which has an offense level of 18 in the Drug Quantity Table.
- (iv) The defendant is convicted of selling 56,000 units of a Schedule III substance, 100,000 units of a Schedule IV substance, and 200,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 56 kilograms of marihuana (below the cap of 59.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 4.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 6.25 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 999 grams of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been 1.25 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 59.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 61.99 (56 + 4.99 + .999) kilograms.

(D) Determining Base Offense Level in Offenses Involving Cocaine Base and Other Controlled Substances.—

~~(i) In General.~~—~~Except as provided in subdivision (ii), if the offense involves cocaine base ("crack") and one or more other controlled substance, determine the combined offense level as provided by subdivision (B) of this note, and reduce the combined offense level by 2 levels.~~

~~(ii) Exceptions to 2-level Reduction.~~—~~The 2-level reduction provided in subdivision~~

*(i) shall not apply in a case in which:-*

~~(i) the offense involved 4.5 kg or more, or less than 250 mg, of cocaine base, or~~

~~(ii) the 2-level reduction results in a combined offense level that is less than the combined offense level that would apply under subdivision (B) of this note if the offense involved only the other controlled substance(s) (i.e., the controlled substance(s) other than cocaine base).~~

~~(iii) Examples.~~

~~(i) The case involves 20 gm of cocaine base, 1.5 kg of cocaine, and 10 kg of marihuana. Under the Drug Equivalency Tables in subdivision (E) of this note, 20 gm of cocaine base converts to 400 kg of marihuana ( $20 \text{ gm} \times 20 \text{ kg} = 400 \text{ kg}$ ), and 1.5 kg of cocaine converts to 300 kg of marihuana ( $1.5 \text{ kg} \times 200 \text{ gm} = 300 \text{ kg}$ ), which, when added to the 10 kg of marihuana results in a combined equivalent quantity of 710 kg of marihuana. Under the Drug Quantity Table, 710 kg of marihuana corresponds to a combined offense level of 30, which is reduced by two levels to level 28. For the cocaine and marihuana, their combined equivalent quantity of 310 kg of marihuana corresponds to a combined offense level of 26 under the Drug Quantity Table. Because the combined offense level for all three drug types after the 2-level reduction is not less than the combined base offense level for the cocaine and marihuana, the combined offense level for all three drug types remains level 28.~~

~~(ii) The case involves 5 gm of cocaine base and 6 kg of heroin. Under the Drug Equivalency Tables in subdivision (E) of this note, 5 gm of cocaine base converts to 100 kg of marihuana ( $5 \text{ gm} \times 20 \text{ kg} = 100 \text{ kg}$ ), and 6 kg of heroin converts to 6,000 kg of marihuana ( $6,000 \text{ gm} \times 1 \text{ kg} = 6,000 \text{ kg}$ ), which, when added together results in a combined equivalent quantity of 6,100 kg of marihuana. Under the Drug Quantity Table, 6,100 kg of marihuana corresponds to a combined offense level of 34, which is reduced by two levels to 32. For the heroin, the 6,000 kg of marihuana corresponds to an offense level 34 under the Drug Quantity Table. Because the combined offense level for the two drug types after the 2-level reduction is less than the offense level for the heroin, the reduction does not apply and the combined offense level for the two drugs remains level 34.~~

~~(ED) Drug Equivalency Tables.~~

Schedule I or II Opiates\*

1 gm of Heroin =

1 kg of marihuana

1 gm of Alpha-Methylfentanyl =

10 kg of marihuana

1 gm of Dextromoramide =

670 gm of marihuana

1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4 propionoxypiperidine/MPPP =	700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/ PEPAP =	700 gm of marihuana
1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] Propanamide) =	2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone (actual) =	6700 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone/Dihydrocodeinone =	500 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg of marihuana

*\*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)\*

1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylamine =	40 gm of marihuana
1 gm of Amphetamine =	2 kg of marihuana
1 gm of Amphetamine (Actual) =	20 kg of marihuana
1 gm of Methamphetamine =	2 kg of marihuana
1 gm of Methamphetamine (Actual) =	20 kg of marihuana
1 gm of "Ice" =	20 kg of marihuana
1 gm of Khat =	.01 gm of marihuana
1 gm of 4-Methylaminorex ("Euphoria") =	100 gm of marihuana
1 gm of Methylphenidate (Ritalin) =	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P <sub>2</sub> P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P <sub>2</sub> P (in any other case) =	75 gm of marihuana

1 gm Cocaine Base ('Crack') =	20-kg3,571 gm of marihuana
1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana
1 gm of N-N-Dimethylamphetamine =	40 gm of marihuana

\*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors):\*

1 gm of Bufotenine =	70 gm of marihuana
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg of marihuana
1 gm of Diethyltryptamine/DET =	80 gm of marihuana
1 gm of Dimethyltryptamine/DMT =	100 gm of marihuana
1 gm of Mescaline =	10 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana
1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana
1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-methamphetamine/MDMA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA =	500 gm of marihuana
1 gm of Paramethoxymethamphetamine/PMA =	500 gm of marihuana
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm of marihuana
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg of marihuana

\*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

Schedule I Marihuana

1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm of marihuana
1 gm of Hashish Oil =	50 gm of marihuana
1 gm of Cannabis Resin or Hashish =	5 gm of marihuana
1 gm of Tetrahydrocannabinol, Organic =	167 gm of marihuana

1 gm of Tetrahydrocannabinol, Synthetic = 167 gm of marihuana

Flunitrazepam \*\*

1 unit of Flunitrazepam = 16 gm of marihuana

*\*\*Provided, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.*

Schedule I or II Depressants (except gamma-hydroxybutyric acid)

1 unit of a Schedule I or II Depressant  
(except gamma-hydroxybutyric acid) = 1 gm of marihuana

Gamma-hydroxybutyric Acid

1 ml of gamma-hydroxybutyric acid = 8.8 gm of marihuana

Schedule III Substances (except ketamine and hydrocodone)\*\*\*

1 unit of a Schedule III Substance = 1 gm of marihuana

*\*\*\*Provided, that the combined equivalent weight of all Schedule III substances (except ketamine and hydrocodone), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana*

Schedule III Hydrocodone\*\*\*\*

1 unit of Schedule III hydrocodone = 1 gm of marihuana

*\*\*\*\*Provided, that the combined equivalent weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 999.99 kilograms of marihuana.*

Ketamine

1 unit of ketamine = 1 gm of marihuana

Schedule IV Substances (except flunitrazepam)\*\*\*\*\*

1 unit of a Schedule IV Substance  
(except Flunitrazepam) = 0.0625 gm of marihuana

*\*\*\*\*\*Provided, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 4.99 kilograms of marihuana.*

Schedule V Substances\*\*\*\*\*

1 unit of a Schedule V Substance = 0.00625 gm of marihuana

\*\*\*\*\*Provided, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.

List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)\*\*\*\*\*

1 gm of Ephedrine = 10 kg of marihuana  
1 gm of Phenylpropanolamine = 10 kg of marihuana  
1 gm of Pseudoephedrine = 10 kg of marihuana

\*\*\*\*\*Provided, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

Date Rape Drugs (except flunitrazepam, GHB, or ketamine)

1 ml of 1,4-butanediol = 8.8 gm marihuana  
1 ml of gamma butyrolactone = 8.8 gm marihuana

To facilitate conversions to drug equivalencies, the following table is provided:

MEASUREMENT CONVERSION TABLE

1 oz = 28.35 gm  
1 lb = 453.6 gm  
1 lb = 0.4536 kg  
1 gal = 3.785 liters  
1 qt = 0.946 liters  
1 gm = 1 ml (liquid)  
1 liter = 1,000 ml  
1 kg = 1,000 gm  
1 gm = 1,000 mg  
1 grain = 64.8 mg.

**(B) Aggravating and Mitigating Factors in Drug Trafficking Cases**

**§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) 30, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), 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
- (4) 26, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels. If the resulting offense level is greater than level 32 and the defendant receives the 4-level ("minimal participant") reduction in §3B1.2(a), decrease to level 32.

(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.
- (2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by 2 levels.
- (23) 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, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) 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.

- (34) 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.
- (45) 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.
- (55) If the defendant is convicted under 21 U.S.C. § 865, increase by 2 levels.
- (67) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by 2 levels.
- (78) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.
- (89) If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels.
- (910) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by 2 levels.
- (11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by 2 levels.
- (12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels.
- (+13) (Apply the greatest):
  - (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 defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.
- (C) If—
- (i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or
  - (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,
- increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.
- (D) 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.
- (14) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:
- (A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;
  - (B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;
  - (C) the defendant was directly involved in the importation of a controlled substance;

(D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,

increase by 2 levels.

(15) If the defendant receives the 4-level ("minimal participant") reduction in §3B1.2(a) and the offense involved all of the following factors:

(A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

(B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

(C) the defendant had minimal knowledge of the scope and structure of the enterprise;

decrease by 2 levels.

(H16) 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) was set forth in Part A, above.]

(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) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(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.

(e) Special Instruction

- (1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)-(3), (7), (g), 860a, 865, 960(a), (b); 49 U.S.C. § 46317(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. "Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marijuana having a moisture content that renders the marijuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marijuana or freshly harvested marijuana that had not been dried), an approximation of the weight of the marijuana without such excess moisture content is to be used.

2. The statute and guideline also apply to "counterfeit" substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.

3. Application of Subsections (b)(1) and (b)(2).—

(A) Application of Subsection (b)(1).—Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession in subsection (b)(1) reflects the increased danger of violence when drug traffickers possess weapons. The adjustment enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his the defendant's residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1; see §§2D1.2(a)(1)

and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(c)(1), and 2D2.1(b)(1).

(B) *Interaction of Subsections (b)(1) and (b)(2).*—The enhancements in subsections (b)(1) and (b)(2) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. See §1B1.1 (Application Instructions), Application Note 4(A). However, in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply.

4. *Distribution of "a small amount of marihuana for no remuneration", 21 U.S.C. § 841(b)(4), is treated as simple possession, to which §2D2.1 applies.*
5. *Analogues and Controlled Substances Not Referenced in this Guideline.*—Any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. For purposes of this guideline "analogue" has the meaning given the term "controlled substance analogue" in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue.

*In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the marihuana equivalency of the most closely related controlled substance referenced in this guideline. In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:*

- (A) *Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.*
  - (B) *Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.*
  - (C) *Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.*
6. *Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.*
  7. *Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a downward departure), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or*

prosecution of another person who has committed an offense." See §5K1.1 (Substantial Assistance to Authorities). In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

8. Interaction with §3B1.3.—A defendant who used special skills in the commission of the offense may be subject to an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. Additionally, an enhancement under §3B1.3 ordinarily would apply in a case in which the defendant used his or her position as a coach to influence an athlete to use an anabolic steroid.

Note, however, that if an adjustment from subsection (b)(23)(C) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

9. Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, methamphetamine, or oxycodone for which the guideline itself provides for the consideration of purity (see the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.
10. [Application Note 10 was set forth in Part A, above.]
11. If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (e.g., 100 doses of Mescaline at 500 mg per dose = 50 gms of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE

Hallucinogens

MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg

Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg
2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg

Marihuana

1 marihuana cigarette	0.5 gm
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Stimulants

Amphetamine*	10 mg
Methamphetamine*	5 mg
Phenmetrazine (Preludin)*	75 mg

*\*For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.*

12. *Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.*

*If the offense involved both a substantive drug offense and an attempt or conspiracy (e.g., sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.*

*In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance - actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court*

shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.

13. *Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13-15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13-15 is the appropriate classification.*
14. *If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.*
15. *LSD on a blotter paper carrier medium typically is marked so that the number of doses ("hits") per sheet readily can be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.*

*In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.*
16. *In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38, an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.*
17. *For purposes of the guidelines, a "plant" is an organism having leaves and a readily observable root formation (e.g., a marijuana cutting having roots, a rootball, or root hairs is a marijuana plant).*
18. *If the offense involved importation of amphetamine or methamphetamine, and an adjustment from subsection (b)(23) applies, do not apply subsection (b)(45).*
19. *Hazardous or Toxic Substances.—Subsection (b)(1013)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response,*

Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(13)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. See 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).

20. Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.—

(A) Factors to Consider.—In determining, for purposes of subsection (b)(13)(C)(ii) or (D), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:

- (i) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, and the manner in which the chemicals or substances were stored.
- (ii) The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.
- (iii) The duration of the offense, and the extent of the manufacturing operation.
- (iv) The location of the laboratory (e.g., whether the laboratory is located in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm.

(B) Definitions.—For purposes of subsection (b)(13)(D):

"Incompetent" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.

"Minor" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

21. Applicability of Subsection (b)(16).—The applicability of subsection (b)(16) 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)(1)(6) applies.

22. Imposition of Consecutive Sentence for 21 U.S.C. § 860a or § 865.—Sections 860a and 865 of title 21, United States Code, require the imposition of a mandatory consecutive term of imprisonment of not more than 20 years and 15 years, respectively. In order to comply with the relevant statute, the court should determine the appropriate "total punishment" and divide the sentence on the judgment form between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 860a or § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 860a or § 865. For example, if the applicable adjusted guideline range is 151-188 months and the court determines a "total punishment" of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 860a or § 865 would achieve the "total punishment" in a manner that satisfies the statutory requirement of a consecutive sentence.
23. Application of Subsection (b)(67).—For purposes of subsection (b)(67), "mass-marketing by means of an interactive computer service" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(67) would apply to a defendant who operated a web site to promote the sale of Gamma-hydroxybutyric Acid (GHB) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. "Interactive computer service", for purposes of subsection (b)(67) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).
24. Application of Subsection (e)(1).—
  - (A) Definition.—For purposes of this guideline, "sexual offense" means a "sexual act" or "sexual contact" as those terms are defined in 18 U.S.C. § 2246(2) and (3), respectively.
  - (B) Upward Departure Provision.—If the defendant committed a sexual offense against more than one individual, an upward departure would be warranted.
25. Application of Subsection (b)(78).—For purposes of subsection (b)(78), "masking agent" means a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual's body.
26. Application of Subsection (b)(89).—For purposes of subsection (b)(89), "athlete" means an individual who participates in an athletic activity conducted by (i) an intercollegiate athletic association or interscholastic athletic association; (ii) a professional athletic association; or (iii) an amateur athletic organization.
27. Application of Subsection (b)(11).—Subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant. Such conduct is covered by §3C1.1 (Obstructing or Impeding the Administration

of Justice) and, if applicable, §2D1.1(b)(14)(D).

28. Application of Subsection (b)(12)—Subsection (b)(12) applies to a defendant who knowingly maintains a premises (i.e., a building, room, or enclosure) for the purpose of manufacturing or distributing a controlled substance, including storage of a controlled substance for the purpose of distribution.

Among the factors the court should consider in determining whether the defendant "maintained" the premises are (A) whether the defendant held a possessory interest in (e.g., owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.

Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

29. Application of Subsection (b)(14)—

(A) Distributing to a Specified Individual or Involving Such an Individual in the Offense (Subsection (b)(14)(B)).—If the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(14)(B), the individual is not a "vulnerable victim" for purposes of §3A1.1(b).

(B) Directly Involved in the Importation of a Controlled Substance (Subsection (b)(14)(C)).—Subsection (b)(14)(C) applies if the defendant is accountable for the importation of a controlled substance under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), i.e., the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance.

If subsection (b)(3) or (b)(5) applies, do not apply subsection (b)(14)(C).

(C) Pattern of Criminal Conduct Engaged in as a Livelihood (Subsection (b)(14)(E)).—For purposes of subsection (b)(14)(E), "pattern of criminal conduct" and "engaged in as a livelihood" have the meaning given such terms in §4B1.3 (Criminal Livelihood).

Background: Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense.

The base offense levels in §2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 32 and 26 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse

Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.

The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; e.g., level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.

For marihuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana. In controlled substance offenses, an attempt is assigned the same offense level as the object of the attempt. Consequently, the Commission adopted the policy that each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana, except where the actual weight of the usable marihuana is greater.

The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111-220.

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111-220.

~~Specific Offense Characteristic~~ Subsection (b)(23) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S.Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C.

§ 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence (see Chapman; §5G1.1(b)).

Subsection (b)(11) implements the directive to the Commission in section 6(1) of Public Law 111-220.

Subsection (b)(12) implements the directive to the Commission in section 6(2) of Public Law 111-220.

Subsection (b)(13)(A) implements the instruction to the Commission in section 303 of Public Law 103-237.

Subsections (b)(13)(C)(ii) and (D) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106-310.

Subsection (b)(14) implements the directive to the Commission in section 6(3) of Public Law 111-220.

Subsection (b)(15) implements the directive to the Commission in section 7(2) of Public Law 111-220.

\* \* \*

§2D1.14. Narco-Terrorism

- (a) Base Offense Level:
  - (1) The offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applicable to the underlying offense, except that §2D1.1(a)(5)(A), (a)(5)(B), and (b)(16) shall not apply.
- (b) Specific Offense Characteristic
  - (1) If §3A1.4 (Terrorism) does not apply, increase by 6 levels.

Commentary

Statutory Provision: 21 U.S.C. § 960a.

\* \* \*

**§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes**

- (a) If the defendant, whether or not convicted of another crime, was convicted of violating section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.
- (b) Except as provided in subsection (c), if the defendant, whether or not convicted of another crime, was convicted of violating section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.
- (c) If the defendant (1) was convicted of violating section 924(c) or section 929(a) of title 18, United States Code; and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). Except for §§3E1.1 (Acceptance of Responsibility), 4B1.1, and 4B1.2 (Definitions of Terms Used in Section 4B1.1), Chapters Three and Four shall not apply to that count of conviction.
- (d) Special Instructions for Fines
  - (1) Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section.

Commentary

Statutory Provisions: 18 U.S.C. §§ 844(h), 924(c), 929(a).

Application Notes:

- I. Application of Subsection (a).—Section 844(h) of title 18, United State Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C.

§ 844(h) is the term required by that statute. Section 844(h) of title 18, United State Code, also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

2. Application of Subsection (b).—

(A) In General.—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. § 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.

(B) Upward Departure Provision.—In a case in which the guideline sentence is determined under subsection (b), a sentence above the minimum term required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense but is not determined to be a career offender under §4B1.1.

3. Application of Subsection (c).—In a case in which the defendant (A) was convicted of violating 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a); and (B) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts of Conviction).

4. Weapon Enhancement.— If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction.

A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under §2D1.1(b)(2) (pertaining to use of violence, credible threat to use

violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under §2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or §2K2.1(b)(6) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. § 922(g), the enhancement under §2K2.1(b)(6) would not apply.

In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (i.e., the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).

5. Chapters Three and Four.—Except for those cases covered by subsection (c), do not apply Chapter Three (Adjustments) and Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2. In determining the guideline sentence for those cases covered by subsection (c): (A) the adjustment in §3E1.1 (Acceptance of Responsibility) may apply, as provided in §4B1.1(c); and (B) no other adjustments in Chapter Three and no provisions of Chapter Four, other than §§4B1.1 and 4B1.2, shall apply.
6. Terms of Supervised Release.—Imposition of a term of supervised release is governed by the provisions of §5D1.1 (Imposition of a Term of Supervised Release).
7. Fines.— Subsection (d) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a). This is required because the offense level for the underlying offense may be reduced when there is also a conviction under

18 U.S.C. § 844(h), § 924(c), or § 929(a) in that any specific offense characteristic for possession, brandishing, use, or discharge of a firearm is not applied (see Application Note 4). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense, although a fine is authorized under 18 U.S.C. § 3571.

Background: Section 844(h) of title 18, United States Code, provides a mandatory term of imprisonment. Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment. A sentence imposed pursuant to any of these statutes must be imposed to run consecutively to any other term of imprisonment. To avoid double counting, when a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for explosive or firearm discharge, use, brandishing, or possession is not applied in respect to such underlying offense.

\* \* \*

**§3B1.4. Using a Minor To Commit a Crime**

If the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by 2 levels.

Commentary

Application Notes:

1. "Used or attempted to use" includes directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting.
2. Do not apply this adjustment if the Chapter Two offense guideline incorporates this factor. For example, if the defendant receives an enhancement under §2D1.1(b)(14)(B) for involving an individual less than 18 years of age in the offense, do not apply this adjustment.
3. If the defendant used or attempted to use more than one person less than eighteen years of age, an upward departure may be warranted.

\* \* \*

**§3C1.1. Obstructing or Impeding the Administration of Justice**

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

## Commentary

### Application Notes:

1. In General.—This adjustment applies if the defendant's obstructive conduct (A) occurred with respect to the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant.

Obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by this guideline if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction.

2. Limitations on Applicability of Adjustment.—This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

3. Covered Conduct Generally.—Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 4 sets forth examples of the types of conduct to which this adjustment is intended to apply. Application Note 5 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this adjustment applies is not subject to precise definition, comparison of the examples set forth in Application Notes 4 and 5 should assist the court in determining whether application of this adjustment is warranted in a particular case.

4. Examples of Covered Conduct.—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:

- (A) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;
- (B) committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction;
- (C) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;
- (D) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding

*(e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;*

- (E) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;*
- (F) providing materially false information to a judge or magistrate judge;*
- (G) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;*
- (H) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;*
- (I) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511);*
- (J) failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p);*
- (K) threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.*

*This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.*

5. Examples of Conduct Ordinarily Not Covered.—*Some types of conduct ordinarily do not warrant application of this adjustment but may warrant a greater sentence within the otherwise applicable guideline range or affect the determination of whether other guideline adjustments apply (e.g., §3E1.1 (Acceptance of Responsibility)). However, if the defendant is convicted of a separate count for such conduct, this adjustment will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 8, below.*

*The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:*

- (A) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;*

- (B) *making false statements, not under oath, to law enforcement officers, unless Application Note 4(G) above applies;*
  - (C) *providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;*
  - (D) *avoiding or fleeing from arrest (see, however, §3C1.2 (Reckless Endangerment During Flight));*
  - (E) *lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under §3E1.1 (Acceptance of Responsibility).*
6. "Material" Evidence Defined.—*"Material" evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination.*
7. Inapplicability of Adjustment in Certain Circumstances.—*If the defendant is convicted of an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), §2J1.5 (Failure to Appear by Material Witness), §2J1.6 (Failure to Appear by Defendant), §2J1.9 (Payment to Witness), §2X3.1 (Accessory After the Fact), or §2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., if the defendant threatened a witness during the course of the prosecution for the obstruction offense).*
- Similarly, if the defendant receives an enhancement under §2D1.1(b)(14)(D), do not apply this adjustment.*
8. Grouping Under §3D1.2(c).—*If the defendant is convicted both of an obstruction offense (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1621 (Perjury generally)) and an underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.*
9. Accountability for §1B1.3(a)(1)(A) Conduct.—*Under this section, the defendant is accountable for the defendant's own conduct and for conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.*

\* \* \*

(C) Simple Possession of Crack Cocaine

§2D2.1. Unlawful Possession: Attempt or Conspiracy

(a) Base Offense Level:

- (1) 8, if the substance is heroin or any Schedule I or II opiate, an analogue of these, or cocaine base; or
- (2) 6, if the substance is cocaine, flunitrazepam, LSD, or PCP; or
- (3) 4, if the substance is any other controlled substance or a list I chemical.

(b) Cross References

- (1) — ~~If the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine base, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) as if the defendant had been convicted of possession of that mixture or substance with intent to distribute.~~
- (2) If the offense involved possession of a controlled substance in a prison, correctional facility, or detention facility, apply §2P1.2 (Providing or Possessing Contraband in Prison).

Commentary

Statutory Provision: 21 U.S.C. § 844(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant's own consumption. Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.

Background: Mandatory (statutory) minimum penalties for several categories of cases, ranging from fifteen days' to five years' imprisonment, are set forth in 21 U.S.C. § 844(a). When a mandatory minimum penalty exceeds the guideline range, the mandatory minimum becomes the guideline sentence. See §5G1.1(b). Note, however, that 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

~~Section 2D2.1(b)(1) provides a cross reference to §2D1.1 for possession of more than five grams of a mixture or substance containing cocaine base, an offense subject to an enhanced penalty~~

*under 21 U.S.C. § 844(a). Other cases for which enhanced penalties are provided under 21 U.S.C. § 844(a) (e.g., for a person with one prior conviction, possession of more than three grams of a mixture or substance containing cocaine base, for a person with two or more prior convictions, possession of more than one gram of a mixture or substance containing cocaine base) are to be sentenced in accordance with §5C1.1(b).*

**This compilation is an unofficial "reader-friendly" version of the amendment to policy statement §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement), as promulgated by the Commission on June 30, 2011. Official text of the amendment will be posted on the Commission's website at [www.ussc.gov](http://www.ussc.gov) and can be found in a forthcoming edition of the Federal Register. The official text of the amendment also will be incorporated into a forthcoming supplement to the Guidelines Manual.**

**The amendment does not take effect until November 1, 2011. Until that date, the court should apply §1B1.10 as set forth in the 2010 Guidelines Manual.**

**AMENDMENT: RETROACTIVITY OF AMENDMENT 750 (PARTS A AND C)**

**Synopsis of Amendment:** *This amendment amends §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement) in four ways. First, it expands the listing in §1B1.10(c) to implement the directive in 28 U.S.C. § 994(u) with respect to guideline amendments that may be considered for retroactive application. Second, it amends §1B1.10 to change the limitations that apply in cases in which the term of imprisonment was less than the minimum of the applicable guideline range at the time of sentencing. Third, it amends the commentary to §1B1.10 to address an application issue about what constitutes the "applicable guideline range" for purposes of §1B1.10. Fourth, it adds an application note to §1B1.10 to specify that the court shall use the version of §1B1.10 that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).*

*First, the Commission has determined, under the applicable standards set forth in the background commentary to §1B1.10, that Amendment 750 (Parts A and C only) should be included in §1B1.10(c) as an amendment that may be considered for retroactive application. Part A amended the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) for crack cocaine and made related revisions to Application Note 10 to §2D1.1. Part C deleted the cross reference in §2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1.*

*Under the applicable standards set forth in the background commentary to §1B1.10, the Commission considers, among other factors, (1) the purpose of the amendment, (2) the magnitude of the change in the guideline range made by the amendment, and (3) the difficulty of applying the amendment retroactively. See §1B1.10, comment. (backg'd.). Applying those standards to Parts A and C of Amendment 750, the Commission determined that, among other factors:*

- (1) *The purpose of Parts A and C of Amendment 750 was to account for the changes in the statutory penalties made by the Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372, for offenses involving cocaine base ("crack cocaine"). See USSG App. C, Amend. 750 (Reason for Amendment). The Fair Sentencing Act of 2010 did not contain a provision making the statutory changes retroactive. The Act directed the Commission to promulgate guideline amendments implementing the Act. The guideline amendments implementing the Act have the effect of reducing the term of imprisonment recommended in the guidelines for certain defendants, and the Commission has a statutory duty to consider whether the resulting guideline amendments should be made available for*

retroactive application. *See* 28 U.S.C. § 994(u) ("If the Commission reduces the term of imprisonment recommended in the guidelines . . . it shall specify in what circumstances and by what amount sentences of prisoners . . . may be reduced."). In carrying out its statutory duty to consider whether to give Amendment 750 retroactive effect, the Commission also considered the purpose of the underlying statutory changes made by the Act. Those statutory changes reflect congressional action consistent with the Commission's long-held position that the then-existing statutory penalty structure for crack cocaine "significantly undermines the various congressional objectives set forth in the Sentencing Reform Act and elsewhere" (*see* USSG App. C, Amend. 706 (Reason for Amendment)). The Fair Sentencing Act of 2010 specified in its statutory text that its purpose was to "restore fairness to Federal cocaine sentencing" and provide "cocaine sentencing disparity reduction". *See* 124 Stat. at 2372.

It is important to note that the inclusion of Amendment 750 (Parts A and C) in §1B1.10(c) only allows the guideline changes to be considered for retroactive application; it does not make any of the statutory changes in the Fair Sentencing Act of 2010 retroactive.

- (2) The number of cases potentially involved is substantial, and the magnitude of the change in the guideline range is significant. As indicated in the Commission's analysis of cases potentially eligible for retroactive application of Parts A and C of Amendment 750, approximately 12,000 offenders would be eligible to seek a reduced sentence and the average sentence reduction would be approximately 23 percent.
- (3) The administrative burdens of applying Parts A and C of Amendment 750 retroactively are manageable. This determination was informed by testimony at the Commission's June 1, 2011, public hearing on retroactivity and by other public comment received by the Commission on retroactivity. The Commission also considered the administrative burdens that were involved when its 2007 crack cocaine amendments were applied retroactively. *See* USSG App. C, Amendments 706 and 711 (amending the guidelines applicable to crack cocaine, effective November 1, 2007) and Amendment 713 (expanding the listing in §1B1.10(c) to include Amendments 706 and 711 as amendments that may be considered for retroactive application, effective March 3, 2008). The Commission received comment and testimony indicating that those burdens were manageable and that motions routinely were decided based on the filings, without the need for a hearing or the presence of the defendant, and did not constitute full resentencings. The Commission determined that applying Parts A and C of Amendment 750 would likewise be manageable, given that, among other things, significantly fewer cases would be involved. As indicated in the Commission's Preliminary Crack Cocaine Retroactivity Report (April 2011 Data) regarding retroactive application of the 2007 crack cocaine amendments, approximately 25,500 offenders have requested a sentence reduction pursuant to retroactive application of the 2007 crack cocaine amendments and approximately 16,500 of those requests have been granted.

In addition, public safety will be considered in every case because §1B1.10 requires the court, in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person or the community that

may be posed by such a reduction. See §1B1.10, comment. (n.1(B)(ii)).

Second, in light of public comment and testimony and recent case law, the amendment amends §1B1.10 to change the limitations that apply in cases in which the term of imprisonment was less than the minimum of the applicable guideline range at the time of sentencing. Under the amendment, the general limitation in subsection (b)(2)(A) continues to be that the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum of the amended guideline range. The amendment restricts the exception in subsection (b)(2)(B) to cases involving a government motion to reflect the defendant's substantial assistance to authorities (i.e., under §5K1.1 (Substantial Assistance to Authorities), 18 U.S.C. § 3553(e), or Fed. R. Crim. P. 35(b)). For those cases, a reduction comparably less than the amended guideline range may be appropriate.

The version of §1B1.10 currently in effect draws a different distinction for cases in which the term of imprisonment was less than the minimum of the applicable guideline range, one rule for downward departures (stating that "a reduction comparably less than the amended guideline range . . . may be appropriate") and another rule for variances (stating that "a further reduction generally would not be appropriate"). See §1B1.10(b)(2)(B). The Commission has received public comment and testimony indicating that this distinction has been difficult to apply and has prompted litigation. The Commission has determined that, in the specific context of §1B1.10, a single limitation applicable to both departures and variances furthers the need to avoid unwarranted sentencing disparities and avoids litigation in individual cases. The limitation that prohibits a reduction below the amended guideline range in such cases promotes conformity with the amended guideline range and avoids undue complexity and litigation.

Nonetheless, the Commission has determined that, in a case in which the term of imprisonment was below the guideline range pursuant to a government motion to reflect the defendant's substantial assistance to authorities (e.g., under §5K1.1), a reduction comparably less than the amended guideline range may be appropriate. Section 5K1.1 implements the directive to the Commission in its organic statute to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." See 28 U.S.C. § 994(n). For other provisions authorizing such a government motion, see 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect a defendant's substantial assistance); Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect a defendant's substantial assistance). The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar (but did not provide substantial assistance) are subject to a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing.

Third, the amendment amends the commentary to §1B1.10 to address an application issue. Circuits have conflicting interpretations about when, if at all, the court applies a departure provision before determining the "applicable guideline range" for purposes of §1B1.10. The First, Second, and Fourth Circuits have held that, for §1B1.10 purposes, at least some departures (e.g., departures under §4A1.3 (Departures Based on Inadequacy of Criminal History Category) (Policy Statement)) are considered

before determining the applicable guideline range, while the Sixth, Eighth, and Tenth Circuits have held that "the only applicable guideline range is the one established before any departures". See United States v. Guyton, 636 F.3d 316, 320 (7th Cir. 2011) (collecting and discussing cases; holding that departures under §5K1.1 are considered after determining the applicable guideline range but declining to address whether departures under §4A1.3 are considered before or after). Effective November 1, 2010, the Commission amended §1B1.1 (Application Instructions) to provide a three-step approach in determining the sentence to be imposed. See USSG App. C, Amend. 741 (Reason for Amendment). Under §1B1.1 as so amended, the court first determines the guideline range and then considers departures. *Id.* ("As amended, subsection (a) addresses how to apply the provisions in the Guidelines Manual to properly determine the kinds of sentence and the guideline range. Subsection (b) addresses the need to consider the policy statements and commentary to determine whether a departure is warranted."). Consistent with the three-step approach adopted by Amendment 741 and reflected in §1B1.1, the amendment adopts the approach of the Sixth, Eighth, and Tenth Circuits and amends Application Note 1 to clarify that the applicable guideline range referred to in §1B1.10 is the guideline range determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance.

Fourth, the amendment adds an application note to §1B1.10 to specify that, consistent with subsection (a) of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of §1B1.10 that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Finally, the amendment amends the commentary to §1B1.10 to refer to Dillon v. United States, 130 S. Ct. 2683 (2010). In Dillon, the Supreme Court concluded that proceedings under section 3582(c)(2) are not governed by United States v. Booker, 543 U.S. 220 (2005), and that §1B1.10 remains binding on courts in such proceedings.

**Amendment:**

**§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)**

(a) Authority.—

- (1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.
- (2) Exclusions.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

- (A) none of the amendments listed in subsection (c) is applicable to the defendant; or
  - (B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.
- (3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.
- (b) Determination of Reduction in Term of Imprisonment.—
- (1) In General.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.
  - (2) Limitations and Prohibition on Extent of Reduction.—
    - (A) In-General Limitation.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.
    - (B) Exception for Substantial Assistance.—If the ~~original~~ term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. ~~However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v. Booker, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.~~
    - (C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

- (c) Covered Amendments.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, and 715, and 750 (parts A and C only).

Commentary

Application Notes:

1. Application of Subsection (a).—

(A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (c) is applicable to the defendant; or (ii) an amendment listed in subsection (c) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).

(B) Factors for Consideration.—

(i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. Application of Subsection (b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All

other guideline application decisions remain unaffected.

3. Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the original term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court shall not may reduce the defendant's term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was ~~41 to 51~~ 70 to 87 months; (B) the original term of imprisonment imposed was ~~41~~ 70 months; and (C) the amended guideline range determined under subsection (b)(1) is ~~30 to 37~~ 51 to 63 months, the court shall not may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 30 51 months.

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are §5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction

comparably less than the amended guideline range determined under subsection (b)(1) may be appropriate. For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing); and (C) the amended guideline range determined under subsection (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1)) would amount to a comparable reduction and may be appropriate.

In no case, however, shall the term of imprisonment be reduced below time served. See subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Application to Amendment 750 (Parts A and C Only).—As specified in subsection (c), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in §2D1.1 for crack cocaine and made related revisions to Application Note 10 to §2D1.1. Part C deleted the cross reference in §2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1.

45. Supervised Release.—

(A) Exclusion Relating to Revocation.—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) Modification Relating to Early Termination.—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

6. Use of Policy Statement in Effect on Date of Reduction.—Consistent with subsection (a) of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

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

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by United States v. Booker, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. See Dillon v. United States, 130 S. Ct. 2683 (2010).

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

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

\* So in original. Probably should be "to fall above the amended guidelines".

Crack Retroactivity Meeting
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Date: August 17, 2011
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Time: 1:00 p.m.
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Minutes
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Attendees: Katherine Tahja, Brian Gray, Stacy Dietch, Kristin Herrera, Patricia Christensen, Marge Krahn, Kathy Brandenburg, Andrew Kahl, John Burns, John Messina, Traci Truitt

**1) General discussion of Guideline amendment effective November 1, 2011.**

On June 30, 2011 USSC voted unanimously to give retroactive effect to its proposed permanent amendment to the federal sentencing guidelines that implements the Fair Sentencing Act of 2010. Retroactivity will become effective November 1, 2011, when the amendment takes effect, absent Congress acting to disapprove the amendment.

**2) Lists/tracking cases**

- A. List provided by USSC (105 cases total)
- B. USSC list by Judge (created by Clerk's Office)
- C. List of requests not on the USSC list (created by Clerk's Office)
- D. USPO case assignment list
- E. USPO cases assigned and completed reports from Pacts database

**3) U.S. District Court Clerk's Office processes**

All correspondence will be handled consistently. Specifically, all types of correspondence (ie: letters from inmates to USPO, Court, AFPD, etc.) requesting consideration for a reduction will be filed as a motion to reduce sentence by the Clerk's Office in the original criminal case.

The Clerk's office will determine if there is a way to create a report of 3582 motions only from CM-ECF.

**4) USPO procedures/processes**

- A. Case assignments
- B. Eligibility review/investigation/worksheet
- C. Memo to the Court
- D. Preparation of Order
- E. Disclosure of documents to Court and parties (CM-ECF)
- F. Reduction/Denial to BOP

**5) Court responses/actions**

Marge will determine Court's preferred method of moving cases through the process.

Crack Retroactivity Meeting

Date: August 17, 2011

**6) U.S. Attorney's Office approach/processes**

Andy advised the U.S. Attorney's Office will resist the filing of orders prior to November 1, 2011; however, they support the review of the cases, especially those eligible for release soon, prior to the November 1, 2011, date.

Andy advised that he will likely assign all of the cases to a group of 3 or 4 AUSAs to handle all of the 3582 motions, perhaps based upon the sentencing judge. Andy will disseminate this assignment procedure, once determined and the AUSA will be changed in CM-ECF. The memo prepared by the probation office will be directed to the AUSA assigned to the 3582 motion.

Andy requested a list of the cases in which a 3582 motion has been filed, so that he can be certain to assign the case to an AUSA.

**7) Federal Public Defender's Office approach/processes**

John advised the Federal Public Defender's Office will be sending letters to inmates on the list explaining that their cases will be reviewed for eligibility, at least in cases wherein the FPD has been appointed in the past.

FDP office will also be notifying the panel attorneys of this process.

**\* There was general discussion by all parties of a preferred procedure for the cases to be processed.**

- A. Clerk files the motion in CM-ECF
- B. Probation office prepares memo for the Court and parties of record
- C. Court appoints counsel for inmate if determined necessary and orders responses from the parties
- D. Court rules on the motion
- E. The Court may deny the motion without requiring a response if it is clear that the defendant is not entitled to relief.
- F. The 3582 motions should be prioritized so that the motions for defendants with the earliest projected release date are reviewed first.

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FEDERAL PUBLIC DEFENDER  
NORTHERN AND SOUTHERN DISTRICTS OF IOWA

*JAMES WHALEN*  
*ACTING FEDERAL PUBLIC DEFENDER*

*NICHOLAS DREES*  
*FEDERAL PUBLIC DEFENDER, 1999-2011*

400 Locust Street, Suite 340, Des Moines, IA 50309-2353  
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Timothy S. Ross-Boon  
Cedar Rapids  
Jill Johnston  
Jane Kelly  
JoAnne Lilledahl  
Sioux City  
Michael Smart  
Robert Wichser  
Davenport  
Terence McAtee  
Diane Helpfrey  
*Research & Writing Attorney*  
John Messina

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October 27, 2011

Dear:

The United States Sentencing Commission has recently changed the sentencing guideline that applies to crack cocaine (which is also called "cocaine base" in the guidelines). The change, which takes effect November 1<sup>st</sup>, reduces the guideline offense level for most crack cocaine offenses. The revised guideline applies not only to future cases but also to people who have already been sentenced under the crack guidelines. Unfortunately, however, the change to the crack guideline does not help anyone who was sentenced to a statutory mandatory minimum penalty.

We are reviewing the crack cocaine cases that have been prosecuted in federal court in Iowa to determine which people might benefit from this change to the guideline. You may be eligible for a reduction in your sentence. The court will have to make these decisions, however, on a case-by-case basis.

The District Court, the Probation Office, the U.S. Attorney's Office, and our office are all working together to insure that all of the crack cocaine cases in our district are carefully reviewed and that all eligible defendants are identified and granted relief. It is unclear at this point whether the court will appoint counsel for each individual case, but we are planning to ask that counsel be appointed for anyone who desires it. While you are certainly free to hire a lawyer to represent you on this matter, in case you are unable to do so, I have enclosed a financial affidavit for you to complete and return to our office. After we receive the completed affidavit from you, we will send it to the court and ask that a lawyer be appointed for you. If you were represented before by a lawyer from our office, we will ask the court to appoint our office again. If, instead, you were represented by an appointed lawyer from outside our office, we will ask the court to appoint that lawyer for you again if that lawyer is available.

Please be sure to complete and return the enclosed financial affidavit as soon as possible, and let me know if you have any questions about this.

Sincerely,



James Whalen  
Acting Federal Public Defender

JFW:tl  
enclosure

FEDERAL PUBLIC DEFENDER  
NORTHERN AND SOUTHERN DISTRICTS OF IOWA

*NICHOLAS DREES*  
*FEDERAL PUBLIC DEFENDER*

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**Sioux City**  
Michael Smart  
Robert Wichser  
**Davenport**  
Terence McAtee  
Diane Helpfrey  
**Research & Writing Attorney**  
John Messina

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September 7, 2011

To federal criminal defense attorneys in the Southern District of Iowa:

As I am sure you are aware, the United States Sentencing Commission has amended U.S.S.G. § 2D1.1 to modify sentences in cases involving crack cocaine, as a result of changes made by Congress in the Fair Sentencing Act of 2010. On June 30, 2011, the Commission unanimously voted to make that amendment retroactive. The changes take effect on November 1, 2011, unless Congress acts before that date to disapprove the amendment.

Several defense attorneys and a number of incarcerated defendants have inquired into how the retroactive change is expected to be implemented. Personnel from the Court, the Clerk of Court, the United States Probation Office, the United States Attorney, and the Federal Defender have met to work out a plan for handling the cases to which the retroactive changes are expected to apply.

My office has agreed to communicate to members of the defense bar and to inmates who may be affected by the changes, and to explain the process that is falling into place.

The Sentencing Commission has provided a list of 105 cases from this district it believes will be affected by the amendment. In addition, the Clerk of Court is compiling a list of inmates, not on the Sentencing Commission's list, who have inquired into whether their case is affected by the amendment.

My office plans to send a letter to each inmate on the lists, apprising them of the changes coming into place. They are obviously free to retain counsel if they wish. Otherwise, each inmate will receive a financial affidavit and can request appointment of counsel. The affidavit will indicate that the inmate is requesting counsel for the purpose of exploring the applicability of the crack cocaine amendment to their cases.

October 27, 2011

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Everything that the clerk receives that references this issue (financial affidavits, letters from inmates, motions to reduce) will be treated by the clerk as a motion to reduce sentence. The request then goes to the probation office, which prepares a memorandum for the Court and the parties. The probation office will screen out applicants that appear to be ineligible (e.g., cases in which the sentence is not driven by the quantity of crack cocaine, or sentences at or below the statutory minimum). The Court may appoint counsel for indigent inmates. In cases in which the inmates were originally represented by the federal defender or a panel attorney, the cases will be returned to original trial counsel. If an inmate was originally represented by retained counsel, and now seeks appointed counsel, the case will be assigned to the federal defender.

Once counsel is appointed, the parties will file whatever motions and responses are warranted. The United States Attorney's Office has indicated that it will resist motions to reduce prior to November 1, except in cases involving defendants with imminent release dates.

The Court will review the cases in order of projected date of release, with inmates with the earliest projected release dates being reviewed first. The judges in our district intend to review the cases in which they were the original sentencing judge. The United States Attorney is likely to assign a particular attorney or attorneys to each judge.

This is where we stand at this point. I can attempt to answer questions that you have about this. When I have been contacted by inmates who are or are not on the Sentencing Commission's list, I have been advising them to write to me and I will send them the letter and financial affidavit that we are sending out to inmates on the list.

Sincerely,

B. John Burns  
Assistant Federal Defender

UNITED STATES DISTRICT COURT

for the

Southern District of Iowa

United States of America )
v. )

) Case No: \_\_\_\_\_

) USM No: \_\_\_\_\_

Date of Previous Judgment: \_\_\_\_\_
(Use Date of Last Amended Judgment if Applicable)

) B. John Burns, III

) Defendant's Attorney

Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2)

Upon motion of [X] the defendant [ ] the Director of the Bureau of Prisons [ ] the court under 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on a guideline sentencing range that has subsequently been lowered and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u), and having considered such motion, and taking into account the sentencing factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable,

IT IS ORDERED that the motion is:

[X] DENIED. [ ] GRANTED and the defendant's previously imposed sentence of imprisonment (as reflected in the last judgment issued) of \_\_\_\_\_ months is reduced to \_\_\_\_\_.

I. COURT DETERMINATION OF GUIDELINE RANGE (Prior to Any Departures)

Previous Offense Level: \_\_\_\_\_ Amended Offense Level: \_\_\_\_\_
Criminal History Category: \_\_\_\_\_ Criminal History Category: \_\_\_\_\_
Previous Guideline Range: \_\_\_\_\_ to \_\_\_\_\_ months Amended Guideline Range: \_\_\_\_\_ to \_\_\_\_\_ months

II. SENTENCE RELATIVE TO AMENDED GUIDELINE RANGE

- [ ] The reduced sentence is within the amended guideline range.
[ ] The previous term of imprisonment imposed was less than the guideline range applicable to the defendant at the time of sentencing as a result of a departure or Rule 35 reduction, and the reduced sentence is comparably less than the amended guideline range.
[ ] Other (explain):

III. ADDITIONAL COMMENTS

Defendant's application for appointment of counsel is construed as a motion to reduce sentence. Defendant is not eligible for a sentence reduction because due to the types and amounts of controlled substances for which he was responsible at sentencing, applying the new guideline, U.S.S.G. § 2D1.1(c)(2), results in the same base offense level. A reduction is not available in these circumstances. U.S.S.G. § 1B1.10.

Except as provided above, all provisions of the judgment dated 07/30/1998 shall remain in effect.

IT IS SO ORDERED.

Order Date: 11/01/2011

Handwritten signature of Harold D. Vietor
Judge's signature

Effective Date: \_\_\_\_\_
(if different from order date)

Harold D. Vietor, Senior U.S. District Judge
Printed name and title

# **POST CONVICTION RISK ASSESSMENT**

**PRESENTED BY**

**LAURA MATE  
SENTENCING RESOURCE COUNSEL  
PROJECT**

# Probation's Post-Conviction Risk Assessment

Laura E. Mate  
National Sentencing Resource Counsel Project

FEDERAL RISK AND NEEDS SCREENING INSTRUMENT

OFFENDER NAME: \_\_\_\_\_ DATE OF ASSESSMENT: \_\_\_\_\_

FACTS #: \_\_\_\_\_ OFFICER ID: \_\_\_\_\_

DISTRICT: \_\_\_\_\_ DATE OF INCARCERATION \_\_\_\_\_

12 MONTH TIME PERIOD: \_\_\_\_\_ 24 MONTH TIME PERIOD \_\_\_\_\_

I.0 CRIMINAL HISTORY:

1.1. ARRESTED AT OR UNDER AGE 18

A=NO  
B=YES

Justification:

1.2. NUMBER OF PRIOR MISDEMEANOR AND FELONY ARRESTS

0=NONE  
1=ONE OR TWO  
2=THREE THROUGH SEVEN  
3=EIGHT OR MORE

Justification:

1.3. VIOLENT OFFENSE

0= NO  
1=YES

Justification:

1.4. VARIED OFFENDING PATTERN

0=1 OFFENSE TYPE  
1=2 OR MORE OFFENSE TYPES

Justification:

1.5. REVOCATION OF SUPERVISION OR ARREST FOR NEW CRIMINAL BEHAVIOR WHILE ON SUPERVISION

0=NO  
1=YES

Justification:

**2.0 EDUCATION & EMPLOYMENT:**

2.1. HIGHEST EDUCATION LEVEL ACHIEVED

0= COLLEGE DEGREE, HIGH SCHOOL GRADUATE, SOME COLLEGE, VOCATIONAL OR HIGHER

1= LESS THAN HIGH SCHOOL OR GED

Justification:

2.2. UNEMPLOYED

0=EMPLOYED FULL TIME

0=EMPLOYED PART TIME

0=DISABLED AND RECEIVING BENEFITS

1=STUDENT/HOMEMAKER

1=UNEMPLOYED

1=RETIRED, ABLE TO WORK

Justification:

2.3. NUMBER OF JOBS IN PAST 12 MONTHS

A=1 JOB IN PAST 12 MONTHS

B= NONE OR MORE THAN 1

Justification:

2.4. EMPLOYED LESS THAN 50% OF THE LAST 24 MONTHS

A=EMPLOYED 12 MONTHS OR MORE (NEED NOT BE FULL TIME EMPLOYMENT)

B=EMPLOYED LESS THAN 12 MONTHS

Justification:

2.5. WORK HISTORY OVER THE PAST 12 MONTHS

0=YES

1=NO

Justification:

**TOTAL EDUCATION AND EMPLOYMENT**

**4.0 SOCIAL NETWORKS**

4.1. MARITAL STATUS

0=MARRIED  
1=SINGLE, DIVORCED, SEPARATED

Justification:

4.2. LIVES WITH SPOUSE AND/OR CHILDREN

A=NO  
B=YES

Justification:

4.3. LACK OF FAMILY SUPPORT

A=SUPPORT PRESENT  
B=NO SUPPORT

Justification:

4.4. UNSTABLE FAMILY SITUATION

0=NO  
1=YES

Justification:

4.5. COMPANIONS

A=GOOD SUPPORT AND INFLUENCE  
B= OCCASIONAL ASSOCIATION WITH NEGATIVE PEERS  
C=MORE THAN OCCASIONAL ASSOCIATION WITH NEGATIVE PEERS  
D=NO FRIENDS

Justification:

4.6. LACKS POSITIVE PRO-SOCIAL SUPPORT

0=NO  
1=YES

Justification:

TOTAL SOCIAL NETWORKS

6.0 OTHER FACTORS

6.1 NO OR UNSTABLE HOME

A=1 ADDRESS IN LAST 12 MONTHS

B=MORE THAN ONE ADDRESS LAST 12 MONTHS, NO PERMANENT ADDRESS

Justification:

6.2 RISK INFLUENCE IN HOME

A=NO CRIMINAL RISKS PRESENT IN HOME

B=CRIMINAL RISKS AT HOME

Justification:

6.3 FINANCIAL STRESSORS

A=ADEQUATE INCOME TO MANAGE DEBTS, CONCRETE FINANCIAL PLANS

B=NO PLAN IN PLACE TO MEET FINANCIAL DEBTS, EXPENSES EXCEED INCOME

Justification:

6.4 PRO-SOCIAL RECREATION

A=ENGAGES IN PRO-SOCIAL ACTIVITIES

B=HAS NO INTERESTS, DOES NOT ENGAGE IN THEM, OR RECREATION PRESENTS CRIMINAL RISK

Justification:

**8.0 PROFESSIONAL OVERRIDE**

**POLICY OVERRIDE:**

- 8.1 SEX OFFENDER (HISTORY OR CURRENT)
- 8.2 PERSISTENTLY VIOLENT OFFENDER
- 8.3 SEVERE MENTAL ILLNESS WITH ACTIVE SYMPTOMS (E.G. SCHIZOPHRENIA OR BI-POLAR)
- 8.4A YOUTHFUL OFFENDER (LESS THAN 23 YEARS OLD) WITH AN EXTENSIVE CRIMINAL HISTORY (WHEN USING YOUR JUDGEMENT, DO NOT CONSIDER STATUS OFFENSES) AND/OR SEVERE JUVENILE CRIMINAL HISTORY (PERSISTENT HISTORY OF VIOLENCE, SEX OFFENSES)

**DISCRETIONARY OVERRIDE:**

8.5 DISCRETIONARY OVERRIDES ARE RARE OCCURRENCES AND REQUIRE COMPREHENSIVE JUSTIFICATION.

JUSTIFICATION \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

SUPERVISOR OVERRIDE APPROVAL:  YES  NO

SUPERVISOR SIGNATURE \_\_\_\_\_ DATE \_\_\_\_\_

**9.0 FINAL RISK LEVEL**

PCRA RISK LEVEL: \_\_\_\_\_

ADJUSTED RISK LEVEL (IF OVERRIDE AND SUSPO APPROVAL): \_\_\_\_\_

PCRA OFFENDER SECTION

Name: \_\_\_\_\_

FACTS #: \_\_\_\_\_

Date: \_\_\_\_\_

Directions: The following items, if answered honestly, are designed to help you better understand your thinking and behavior. Please take the time to complete each of the 80 items on this inventory using the four-point scale defined below;

- 4= strongly agree
- 3= agree
- 2= uncertain
- 1= disagree

1. I will allow nothing to get in the way of me getting what I want..... 4 3 2 1
2. I find myself blaming society and external circumstances for the problems I have had in life.....4 3 2 1
3. Change can be scary..... 4 3 2 1
4. Even though I may start out with the best of intentions I have trouble remaining focused and staying "on track"..... 4 3 2 1
5. There is nothing I can't do if I try hard enough..... 4 3 2 1
6. When pressured by life's problems I have said "the hell with it" and followed this up by using drugs or engaging in crime..... 4 3 2 1
7. It's unsettling not knowing what the future holds..... 4 3 2 1
8. I have found myself blaming the victims of some of my crimes by saying things like "they deserved what they got" or "they should have known better"..... 4 3 2 1
9. One of the first things I consider in sizing up another person is whether they look strong or weak.....4 3 2 1
10. I occasionally think of things too horrible to talk about..... 4 3 2 1
11. I am afraid of losing my mind..... 4 3 2 1
12. The way I look at it, I've paid my dues and am therefore justified in taking what I want.....4 3 2 1
13. The more I got away with crime the more I thought there was no way the police or authorities would ever catch up with me..... 4 3 2 1

31. I have used alcohol or drugs to eliminate fear or apprehension before committing a crime..... 4 3 2 1
32. I have made mistakes in life..... 4 3 2 1
33. On the streets I would tell myself I needed to rob or steal in order to continue living the life I had coming..... 4 3 2 1
34. I like to be on center stage in my relationships and conversations with others, controlling things as much as possible..... 4 3 2 1
35. When questioned about my motives for engaging in crime, I have justified my behavior by pointing out how hard my life has been..... 4 3 2 1
36. I have trouble following through on good initial intentions..... 4 3 2 1
37. I find myself expressing tender feelings toward animals or little children in order to make myself feel better after committing a crime or engaging in irresponsible behavior..... 4 3 2 1
38. There have been times in my life when I felt I was above the law..... 4 3 2 1
39. It seems that I have trouble concentrating on the simplest of tasks..... 4 3 2 1
40. I tend to act impulsively under stress..... 4 3 2 1
41. Why should I be made to appear worthless in front of friends and family when it is so easy to take from others..... 4 3 2 1
42. I have often not tried something out of fear that I might fail..... 4 3 2 1
43. I tend to put off until tomorrow what should have been done today..... 4 3 2 1
44. Although I have always realized that I might get caught for a crime, I would tell myself that there was "no way they would catch me this time"..... 4 3 2 1
45. I have justified selling drugs, burglarizing homes, or robbing banks by telling myself that if I didn't do it someone else would..... 4 3 2 1
46. I find it difficult to commit myself to something I am not sure of because of fear..... 4 3 2 1
47. People have difficulty understanding me because I tend to jump around from subject to subject when talking..... 4 3 2 1
48. There is nothing more frightening than change..... 4 3 2 1

14. I believe that breaking the law is no big deal as long as you don't physically hurt someone..... 4 3 2 1
15. I have helped out friends and family with money acquired illegally..... 4 3 2 1
16. I am uncritical of my thoughts and ideas to the point that I ignore the problems and difficulties associated with these plans until it is too late..... 4 3 2 1
17. It is unfair that I have been imprisoned for my crimes when bank presidents, lawyers, and politicians get away with all sorts of illegal and unethical behavior every day..... 4 3 2 1
18. I find myself arguing with others over relatively trivial matters..... 4 3 2 1
19. I can honestly say that the welfare of my victims was something I took into account when I committed my crimes..... 4 3 2 1
20. When frustrated I find myself saying "screw it" and then engaging in some irresponsible or irrational act..... 4 3 2 1
21. New challenges and situations make me nervous..... 4 3 2 1
22. Even when I got caught for a crime I would convince myself that there was no way they would convict me or send me to prison..... 4 3 2 1
23. I find myself taking shortcuts, even if I know these shortcuts will interfere with my ability to achieve certain long-term goals..... 4 3 2 1
24. When not in control of a situation I feel weak and helpless and experience a desire to exert power over others..... 4 3 2 1
25. Despite the criminal life I have led, deep down I am basically a good person..... 4 3 2 1
26. I will frequently start an activity, project, or job but then never finish it..... 4 3 2 1
27. I regularly hear voices and see visions which others do not hear or see..... 4 3 2 1
28. When it's all said and done, society owes me..... 4 3 2 1
29. I have said to myself more than once that if it wasn't for someone "snitching" on me I would have never gotten caught..... 4 3 2 1
30. I tend to let things go which should probably be attended to, based on my belief that they will work themselves out..... 4 3 2 1

49. Nobody tells me what to do and if they try I will respond with intimidation, threats, or I might even get physically aggressive..... 4 3 2 1
50. When I commit a crime or act irresponsibly I will perform a "good deed" or do something nice for someone as a way of making up for the harm I have caused..... 4 3 2 1
51. I have difficulty critically evaluating my thoughts, ideas, and plans..... 4 3 2 1
52. Nobody before or after can do it better than me because I am stronger, smarter, or slicker than most people..... 4 3 2 1
53. I have rationalized my irresponsible actions with such statements as "everybody else is doing it so why shouldn't I"..... 4 3 2 1
54. If challenged I will sometimes go along by saying "yeah, you're right," even when I know the other person is wrong, because it's easier than arguing with them about it..... 4 3 2 1
55. Fear of change has made it difficult for me to be successful in life..... 4 3 2 1
56. The way I look at it I'm not really a criminal because I never intended to hurt anyone..... 4 3 2 1
57. I still find myself saying "the hell with working a regular job, I'll just take it"..... 4 3 2 1
58. I sometimes wish I could take back certain things I have said or done..... 4 3 2 1
59. Looking back over my life I can see now that I lacked direction and consistency of purpose..... 4 3 2 1
60. Strange odors, for which there is no explanation, come to me for no apparent reason..... 4 3 2 1
61. When on the streets I believed I could use drugs and avoid the negative consequences (addiction, compulsive use) that I observed in others..... 4 3 2 1
62. I tend to be rather easily sidetracked so that I rarely finish what I start..... 4 3 2 1
63. If there is a short-cut or easy way around something I will find it..... 4 3 2 1
64. I have trouble controlling my angry feelings..... 4 3 2 1
65. I believe that I am a special person and that my situation deserves special consideration..... 4 3 2 1

66. There is nothing worse than being seen as weak or helpless..... 4 3 2 1
67. I view the positive things I have done for others as making up for the negative things..... 4 3 2 1
68. Even when I set goals I frequently do not obtain them because I am distracted by events going on around me..... 4 3 2 1
69. There have been times when I tried to change but was prevented from doing so because of fear..... 4 3 2 1
70. When frustrated I will throw rational thought to the wind with such statements as "screw it" or "the hell with it"..... 4 3 2 1
71. I have told myself that I would never have had to engage in crime if I had had a good job..... 4 3 2 1
72. I can see that my life would be more satisfying if I could learn to make better decisions..... 4 3 2 1
73. There have been times when I have felt entitled to break the law in order to pay for a vacation, new car, or expensive clothing that I told myself I needed..... 4 3 2 1
74. I rarely considered the consequences of my actions when I was in the community..... 4 3 2 1
75. A significant portion of my life on the streets was spent trying to control people and situations..... 4 3 2 1
76. When I first began breaking the law I was very cautious, but as time went by and I didn't get caught I became overconfident and convinced myself that I could do just about anything and get away with it..... 4 3 2 1
77. As I look back on it now, I was a pretty good guy even though I was involved in crime..... 4 3 2 1
78. There have been times when I have made plans to do something with my family and then cancelled these plans so that I could hang out with my friends, use drugs, or commit crimes..... 4 3 2 1
79. I tend to push problems to the side rather than dealing with them..... 4 3 2 1
80. I have used good behavior (abstaining from crime for a period of time) or various situations (fight with a spouse) to give myself permission to commit a crime or engage in other irresponsible activities such as using drugs..... 4 3 2 1



**Administrative Office of the United States Courts  
Office of Probation and Pretrial Services**

An Overview of the Federal Post Conviction Risk Assessment

September 2011

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## Part A: Introduction

This article is intended to provide federal judges and legal practitioners with information regarding the Federal Post Conviction Risk Assessment (PCRA), a scientifically-based instrument developed by the Administrative Office of the United States Courts (hereafter, “the Administrative Office”). The purpose of the PCRA is to improve the effectiveness and efficiency of post-conviction supervision. The Administrative Office has not fully examined the use of risk assessment tools for other purposes, such as sentencing.

In September 2004, the Judicial Conference of the United States endorsed a “strategic approach” in which the federal probation system would be “organized, staffed, and funded in ways to promote mission-critical outcomes” such as the reduction of recidivism.<sup>1</sup> This endorsement was based in large part on recommendations that IBM Consulting Services and other study partners made in a comprehensive strategic assessment of the probation and pretrial services system (hereafter, “the Strategic Assessment report”).<sup>2</sup> Since then, the Administrative Office has taken numerous steps to further this strategic approach, including the implementation of “evidence-based practices.” This term refers to “the conscientious use of the best evidence currently available to inform decisions about the supervision of individuals, as well as the design and delivery of policies and practices, to achieve the maximum, measurable reduction in recidivism.”<sup>3</sup>

A critical component of evidence-based practices is the use of an actuarial risk and needs assessment tool to identify: 1) which persons to target for correctional interventions, 2) what characteristics or needs to address, and 3) how to deliver supervision and treatment in a way that

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<sup>1</sup> See JCUS-SEP 04, p. 15. The Judicial Conference of the United States, presided over by the Chief Justice of the United States, is the policy-making body of the federal judiciary. The Judicial Conference has 24 committees with responsibility for making recommendations in specified subject-matter areas. The Judicial Conference Committee on Criminal Law has responsibility for issues that affect the probation and pretrial services system.

<sup>2</sup> Throughout the 1980s and 1990s, the probation and pretrial services system grew significantly and absorbed major changes in responsibilities, populations and organization. In 1999, the Director of the Administrative Office of the United States Courts, in consultation with the Chair of the Judicial Conference Committee on Criminal Law, sought an independent contractor to assess the cumulative effects of these changes and to develop recommendations to assist in planning for the effective delivery of services in the future. In September 2000, the AO entered into a contract with PricewaterhouseCoopers (later purchased by IBM) to conduct a strategic assessment of the federal probation and pretrial services system. Over the next several years, the independent assessment team gathered information from a large number of sources, including interviews of Criminal Law Committee members and other key judges, and surveys of 225 judges, 129 chief probation and chief pretrial services officers, 130 other past and present system leaders, and 170 staff in the field. The team also interviewed congressional staffers, policy staff in the Department of Justice, and federal defenders. The assessment team conducted site visits involving 20 districts and examined thousands of documents, including statutes, financial records, policy statements, academic literature, and training manuals. The study team issued a series of recommendations in a 2004 report. See IBM Business Consulting Services et al., *Strategic Assessment: Federal Probation and Pretrial Services System* (2004).

<sup>3</sup> This definition was developed by the Administrative Office’s Working Group on Evidence-Based Practices. This working group was established to assist in the implementation of evidence-based principles in the federal probation and pretrial services system. It comprises 13 representatives from the courts, a staff representative from the Federal Judicial Center, and several staff members from the Administrative Office.

optimizes positive outcomes.<sup>4</sup> While risk assessment devices have been used in the federal system for decades, the PCRA has numerous added advantages and is consistent with the most current scientific research.

This article first describes the evidence-based practices principles that form the foundation for risk and needs assessment instruments. It then summarizes the extensive history of risk assessment in the federal probation system and discusses the purposes, development, and content of the PCRA. Finally, the article discusses implementation issues such as training and certification and describes the Administrative Office's ongoing monitoring and research of the tool.

## **Part B: Overview of Evidence-Based Practices**

Social science research over the past several decades has consistently demonstrated that effective interventions in community corrections adhere to the principles of risk, need, and responsivity.<sup>5</sup>

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<sup>4</sup> The Strategic Assessment report recommended that, as a component of the strategic approach and the focus on mission-critical results, the federal probation system consider purchasing or developing a more modern statistically-based risk assessment instrument. See source cited *supra* note 2; see also discussion *infra* p. 6.

<sup>5</sup> See D.A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 *Criminology*, no. 3, 1990 at 369; P. Gendreau et al., *Does "Punishing Smarter" Work? An Assessment of the New Generation of Alternative Sanctions in Probation*, 5 *Forum on Corrections Research*, no. 3, 1993 at 31; L. Simourd & D.A. Andrews, *Correlates of Delinquency: A Look at Gender Differences*, 6 *Forum on Corrections Research*, no. 1, 1994 at 26; M.W. Lipsey, *What Do We Learn From 400 Research Studies on the Effectiveness of Treatment with Juvenile Delinquents* (1995), in *What works? Reducing Reoffending – Guidelines from Research and Practice* 63-78 (James McGuire ed., 1995); P. Gendreau et al., *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 *Criminology*, no. 4, 1996 at 48; M.W. Lipsey & D.B. Wilson, *Effective Intervention for Serious Juvenile Offenders: A Synthesis of Research* (1998), in *Serious and Violent Juvenile offenders: Risk Factors and Successful Interventions* 313-345 (R. Loeber & D.R. Farrington eds., 1998); C. Dowden & D.A. Andrews, *What Works in Young Offender Treatment: A Meta-Analysis*, 11 *Forum on Corrections Research*, no. 2, 1999 at 21; C. Dowden & D.A. Andrews, *What Works for Female Offenders: A Meta-Analytic Review*, 45 *Crime and Delinquency*, no. 4, 1999 at 438; S. Redondo et al., *The Influence of Treatment Programmes on the Recidivism of Juvenile and Adult Offenders: A European Meta-Analytic Review*, 5 *Psychology, Crime and Law* 251 (1999); Frank S. Pearson & Douglas S. Lipton, *A Meta-Analytic Review of the Effectiveness of Corrections-Based Treatment for Drug Abuse*, 79 *The Prison Journal*, no. 4, 1999 at 384; F.T. Cullen & P. Gendreau, *Assessing Correctional Rehabilitation: Policy Practice and Prospects* (2000), in 3 *Policies, Processes, and Decisions of the Criminal Justice System* 109-175 (J. Horney et al. eds., 2000); P. Gendreau et al., *The Effects of Community Sanctions and Incarceration on Recidivism*, 12 *Forum on Corrections Research*, no. 2, 2000 at 10; M.W. Lipsey et al., *Cognitive Behavioral Programs for Offenders*, 578 *The Annals for the American Academy of Political and Social Science* 144 (2001); F.S. Pearson et al., *The Effects of Behavioral/Cognitive Behavioral Programs on Recidivism*, 48 *Crime and Delinquency*, no. 3, 2002 at 476; P. Gendreau et al., *What Works (What Doesn't Work) Revised 2002: The Principles of Effective Correctional Treatment* (2002) (unpublished manuscript) (on file with the International Community Corrections Association); C. Dowden et al., *The Effectiveness of Relapse Prevention with Offenders: A Meta-Analysis*, 47 *International Journal of Offender Therapy and Comparative Criminology*, no. 5, 2003 at 516; C. Dowden & D.A. Andrews, *The Importance of Staff Practices in Delivering Effective Correctional Treatment: A Meta-Analytic Review of Core Correctional Practices*, 48 *International Journal of Offender Therapy and Comparative Criminology* 203 (2004); D.B. Wilson et al., *Quantitative Review of Structured, Group-Oriented, Cognitive-Behavior Programs for Offenders*, 32 *Criminal Justice and Behavior*, no. 2, 2005 at 172; C.T. Lowenkamp et al., *The Risk Principle in Action: What Have We Learned From 13,676 Offenders and 97 Correctional Programs?*, 51 *Crime and Delinquency*, no. 2, 2006 at 1; D. Wilson et al., *A Systematic Review of Drug Court Effects on Recidivism*, 2 *Journal of experimental Criminology*, no. 4, 2006 at 459; M.W. Lipsey & F.T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 *Annual Review of Law and Social Science* 297 (2007); O. Mitchell et al., *Does Incarceration-Based Drug Treatment Reduce Recidivism? A*

According to the risk principle, the level of correctional intervention should match the client's risk of recidivism. Higher-risk persons require more intensive services in order to reduce reoffending, while lower-risk persons need less intervention. The risk level is determined by the presence or absence of criminogenic factors, which are personal characteristics and circumstances statistically associated with an increased chance of recidivism. Research has shown that actuarial devices in combination with professional judgment are generally more accurate and consistent than professional judgment alone, which is based solely on the experience and individualized assessment of clinicians, probation officers, and other criminal justice professionals.

Under the need principle, correctional interventions should target known and changeable predictors of recidivism (also referred to as "criminogenic needs"). These are factors that, when changed, are associated with changes in the probability of recidivism. Empirical research has shown that the needs most associated with criminal activity include procriminal attitudes, procriminal associates, impulsivity, substance abuse, and deficits in educational, vocational, and employment skills. While an assessment of overall risk suggests the level of correctional services that should be used, the assessment of criminogenic needs suggests the appropriate factors that should be changed in order to reduce recidivism. Though static factors such as criminal history are good predictors of offending, they do not identify what needs should be targeted to reduce reoffending.

Finally, according to the responsivity principle, interventions should involve the treatment modality most capable of changing known predictors of recidivism. Research has demonstrated that cognitive behavioral strategies are the most effective way to influence change. This modality is designed to alter dysfunctional thinking patterns through 1) explaining what cognitive behavioral therapy is and how it works to replace dysfunctional thinking; 2) role-playing and other scenario exercises to give clients practical experience in how to apply it, especially in situations that typically trigger dysfunctional responses; 3) pro-social modeling and the proper use of authority by correctional officials and treatment providers. To increase the likelihood of positive effects on clients' behaviors, interventions must also be delivered in a style and mode specifically suited to their learning styles and abilities. Characteristics such as intelligence, levels of anxiety, or mental health disorders may affect their learning styles, leading them to respond more readily to some techniques than to others. For instance, individual therapy may be more effective than group therapy for those with a high level of anxiety and social phobias. Responsivity factors may be relevant, not because they predict criminal conduct, but because they affect how supervision and treatment services are delivered and matched to clients to produce the best outcome.

The most advanced risk and needs assessment instruments incorporate the principles of risk, need, and responsivity by addressing all three components: 1) whom to target for correctional intervention, 2) what needs to address, and 3) how to remove barriers to successful implementation of a supervision and treatment plan.

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*Meta-Analytic Synthesis of the Research*, 3 *Journal of Experimental Criminology*, no. 4, 2007 at 353; D.A. Andrews & James Bonta, *The Psychology of Criminal Conduct* 279 (4th ed. 2007); M. Nrdecka et al., *A Meta-Analysis on the Effectiveness of Juvenile Cognitive Behavioral Programs* (2008), in *Cognitive Behavioral Interventions for At Risk Youth* 14-1 (B. Glick ed., 2008).

## Part C: History of Risk Assessment in the Federal Probation System

Criminal justice agencies in the United States began using actuarial risk assessment instruments for post-conviction supervision as early as 1923.<sup>6</sup> Federal judiciary policy in the 1970s required probation officers to “classify persons under supervision into maximum, medium, and minimum supervision categories dependent upon the nature and seriousness of the original offense, extent of prior criminal history, and social and personal background factors in the individual case.”<sup>7</sup> Survey data collected by the Administrative Office in 1974 and by the Federal Judicial Center (FJC) in 1977 indicated that federal probation officers were using a variety of statistical prediction tools.<sup>8</sup> The purpose of these instruments was to “assist case managers in making decisions about how much time and effort to devote to working with certain groups of persons.”<sup>9</sup> Federal probation supervision programs were “rationalized if attention [was] paid to risk of failure on probation or parole as established by the [prediction] scale. For example, a decision might be made to increase the supervision of those cases identified as high risk offenders.”<sup>10</sup>

In 1982, the FJC identified more than two dozen probation or parole prediction instruments in the federal probation system and evaluated the validity of four of these tools for classifying federal probation caseloads. The models selected for validation and comparative evaluation were: (1) the California BE61A (Modified) developed by the state of California; (2) the Revised Oregon Model developed by the United States Probation Office for the District of Oregon; (3) the United States Parole Commission’s Salient Factor Score (SFS), and (4) the U.S.D.C. 75 Scale developed by the United States Probation Office for the District of Columbia.<sup>11</sup> The term “caseload classification” was defined as “the process of organizing individual clients into supervision categories based on the nature and severity of the offense of conviction, extent of

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<sup>6</sup> See James B. Eaglin & Patricia A. Lombard, *A Validation and Comparative Evaluation of Four Predictive Devices for Classifying Federal Probation Caseloads* 9 n. 6 (1982) (citing E. Burgess, *The Workings of the Indeterminate Sentence Law and the Parole System* (1928); L. Ohlin, *Selection for Parole* (1951); Hart, *Predicting Parole Success*, 14 *Journal of Criminal Law & Criminology* 405-413 (1923); Tibbits, *Success and Failure on Parole Can Be Predicted*, 22 *Journal of Criminal Law & Criminology* 11-50 (1931); Warner, *Factors Determining Parole from the Massachusetts Reformatory*, 14 *Journal of Criminal Law & Criminology* 172-207 (1923)).

<sup>7</sup> See Administrative Office of the U.S. Courts, *Guide to Judiciary Policies and Procedures*, X-A Probation Manual, no. 7, Feb 15, 1979 at § 4004.

<sup>8</sup> See Eaglin & Lombard, *supra* note 6, at 1.

<sup>9</sup> See William E. Hemple et al., *Researching Prediction Scales for Probation*, 40 *Fed. Probation* 33, 33 (1976).

<sup>10</sup> *Id.*

<sup>11</sup> See Eaglin & Lombard, *supra* note 6.

prior criminal history, and other personal characteristics, needs, and problems.”<sup>12</sup> The FJC noted at the time that caseload classification:

is one of the most critical stages of the supervision process. A probation or parole prediction model holds considerable prospect as a tool for assisting the probation officer in deciding how much time and effort should be devoted to various categories of offenders. It is through the process of classifying his or her caseload that the officer should arrive at a determination regarding the extent of supervisory attention each offender should receive.<sup>13</sup>

The instruments studied by the FJC took into account information related to the client’s criminal history, age, employment, education, residential stability, and drug or alcohol involvement. The study’s major recommendation was that the tool used by the District of Columbia (the “U.S.D.C. 75 Scale”) be implemented nationally to assist officers in classifying probation caseloads. This recommendation was based primarily on the statistical tool’s “potential for improved accuracy in prediction” over a “purely subjective” non-statistical classification technique.<sup>14</sup> After field testing and some modification, the Administrative Office adopted this tool for system-wide use and renamed it the Risk Prediction Scale 80 (RPS-80).

In 1991, the Judicial Conference Committee on Criminal Law asked that the FJC develop a new risk assessment tool for the federal probation system out of concern that the instruments in use at that time (the RPS-80 for probation supervision and the SFS for parole supervision) were losing predictive accuracy.<sup>15</sup> The FJC developed the Risk Prediction Index (RPI) based on a multivariate regression analysis of a sample of 2,651 supervision cases.<sup>16</sup> Several steps were

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<sup>12</sup> *Id.* at 13.

<sup>13</sup> *Id.*

<sup>14</sup> The recommendation was also based on the statistical model’s “consistency in classifying offenders and its potential for enhancing the prospects of future research on supervision.” Specifically, it was anticipated that the use of a statistical prediction device would “allow a measure of policy control over specific items and the weight each is to be given in the classification decision,” and would “allow for data gathering that can ultimately be used to improve the classification process, a benefit that would not necessarily result if purely subjective classification techniques were to continue to be used.” *Id.* at 59.

<sup>15</sup> See Pat Lombard & Laural Hooper, Federal Judicial Center, *RPI FAQs Bulletin*, Aug. 1998 at 5.

<sup>16</sup> The FJC identified a national sample of 3,009 offenders who, in 1989, were accepted for active supervision after release from imprisonment, or upon the imposition of probation. These offenders constituted an eight percent systematic random sample of all offenders received for supervision in 1989. The Center also added to the sample all Native American offenders (502) and all sex offenders (238) who were received for supervision in 1989 but were not included in the systematic sample. This resulted in a total research sample of 3,749 offenders. Extensive data were collected on more than 3,300 of these offenders directly from case files. However, only offenders from the systematic sample, which similarly included eight percent of the Native American and sex offender populations, were used to do the model-building analyses; full data were collected on 2,651 of those offenders. See James B. Eaglin et al., Federal Judicial Center, *RPI Profiles: Descriptive Information About Offenders Grouped by Their RPI Scores*, May 1997 at 21.

involved in the construction of the model, including evaluating the strength of the relationship of individual items to recidivism, which was defined as any rearrest or revocation of supervision.<sup>17</sup>

The FJC compared the predictive ability of the RPI model to that of the RPS-80 and the SFS for supervisees in the construction sample and found that the RPI correlation coefficients were consistently higher and less variable (average of .38 and spread of .06) than the RPS-80 (average of .30 and spread of .14) or SFS (average .30 and spread .08) correlations.<sup>18</sup> The model was also field-tested in 11 districts and scores were calculated for a verification sample of 278 persons who had terminated supervision in 1995. The FJC found that “[t]he distribution of scores for the verification sample was consistent with the distribution seen in the construction sample; the recidivism patterns by RPI score were consistent with the expected patterns; and the correlation coefficient for the verification sample (.54) was higher than those achieved in the construction sample.”<sup>19</sup>

Scores in the RPI range from 0 to 9, with low scores associated with low recidivism rates and high scores associated with high recidivism rates.<sup>20</sup> While the RPI score for a particular person is “not a definitive prediction that the offender will or will not recidivate,”<sup>21</sup> knowing the recidivism for other similarly situated persons “should help an officer identify the appropriate level of risk control to use with the offender.”<sup>22</sup> The RPI includes information about the age at the start of supervision, number of prior arrests, whether a weapon was used in the instant offense, employment status, history of drug and alcohol abuse, whether the person ever absconded from supervision, whether the person has a college degree, and whether the person was living with a spouse and/or children at the start of supervision. In 1997, the Judicial Conference approved the use of the RPI and the Administrative Office required that it be calculated for all persons at the beginning of supervision.<sup>23</sup>

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<sup>17</sup> See Lombard & Hooper, *supra* note 15, at 5.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> A graph illustrating the correlation between RPI score and revocation rate from Fiscal Years 2006 through 2010 is included at Appendix A.

<sup>21</sup> As the FJC explained: “The RPI score represents a broad estimate of the proportion of offenders with that score who will recidivate. For example, in theory, without referring to any specific sample of offenders, we would estimate that about 40% (actually in the range of 35% to 44%) of all offenders who receive a score of 4 will recidivate. Similarly, we would estimate that about 80% (i.e., between 75% and 84%) of the offenders who receive a score of 8 will recidivate... Thus, the theoretical score-by-score estimates are helpful in getting a general idea of the recidivism rates that are likely to be associated with each score, but variations from a clear increasing pattern should be expected. In addition, remember that the RPI cannot predict with certainty whether an individual offender will recidivate or not. That is, it cannot pinpoint whether someone who receives a score of 4 will be among the 60% of offenders who succeed or the 40% who recidivate.” See Eaglin et al., *supra* note 16, at 2.

<sup>22</sup> *Id.* at 1.

<sup>23</sup> See JCUS-MAR 97, p. 21; Memorandum from Eunice R. Holt Jones to all Chief Probation Officers (Sept. 19, 1997) (on file with the Administrative Offices of the U.S. Courts)(regarding implementation of the Risk Prediction Index).

## Part D: Development of the Federal Post-Conviction Risk Assessment

One of the recommendations of the Strategic Assessment report was that the federal probation system investigate how to make “[b]etter use of data-driven tools.”<sup>24</sup> An important shortcoming of the RPI, according to the study, is that its factors are static and “do not enable an officer to regularly assess changes in the risk posed by the offender.”<sup>25</sup> Second, the RPI is “not tied to case management, and so [it] does not suggest actions to be taken by officers in managing risk.”<sup>26</sup> While the purpose of the RPI is to aid officers in developing a case supervision plan, it is unclear how this can be accomplished.<sup>27</sup> The newer generation of risk and needs assessment instruments offers several advantages over older tools such as the RPI, including the ability to detect change in risk over time, identification of future criminal drivers, and a direct connection between the actuarial assessment tool and a supervision case plan.<sup>28</sup> Given these advances in risk assessment technology, the Strategic Assessment report recommended that the Administrative Office research tools used in other jurisdictions and “adopt proven case management practices.”<sup>29</sup>

The Administrative Office met with developers of some of the most advanced risk and needs assessment tools, including the Level of Service/Case Management Inventory (LS/CMI), the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), and the Risk Management Systems (RMS), and it initiated pilot programs for five federal districts to experiment with the commercially-available instruments. It also assembled a panel of experts

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<sup>24</sup> See IBM Business Consulting Services et al., *supra* note 2, at A21.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See Scott VanBenschoten, Office of Probation and Pretrial Services, Administrative Offices of the U.S. Courts, *Risk/Needs Assessment: Is This the Best We Can Do?*, Federal Probation, Sept. 2008 at 38, 39.

<sup>28</sup> *Id.* The most modern form of risk and needs assessment instruments are often referred to as “fourth generation” tools. See Andrews & Bonta, *supra* note 5, at 285. In first generation assessment, a criminal justice professional makes a decision about risk level based on professional experience and intuition. Under second generation assessment, prediction of offender behavior is based on an empirically-based instrument that summates risk factors and places offenders in different subgroups based on their probability of recidivism. An example of a second generation instrument is the Salient Factor Score. While second generation assessment is demonstrated by research to be more accurate than first generation methods, a major limitation is focus on static rather than dynamic factors, which do not provide relevant information about what needs to be changed to reduce an offender’s level of risk. *Id.* at 286. Third generation assessments systematically and objectively measure changeable criminogenic needs, which increases the utility for criminal justice agencies. An example is the Level of Service Inventory-Revised (LSI-R), a risk/need offender assessment that samples 54 risk and needs items (e.g., antisocial associates, antisocial attitudes, etc.) demonstrated by research to be associated with criminal conduct across 10 domains (criminal history, education, employment, etc.). Third generation tools are intended to assist in allocating supervision resources (risk principle) and targeting intervention (need principle). *Id.* at 291. Fourth generation assessment goes several steps further by emphasizing the link between assessment and case management, acknowledging the role of responsivity factors to maximize the benefits from treatment intervention, and monitoring of the case from the beginning to the end of supervision. An example of a fourth generation instrument is the Level of Service/Case Management Inventory (LS/CMI). *Id.* at 292.

<sup>29</sup> See *supra* notes 24-26.

from government agencies and academic institutions to examine whether to purchase an existing instrument or build a new one. The Administrative Office determined that creating an instrument with data specific to the federal probation system was preferable. This decision was based on numerous factors, including the high cost of commercially available tools, the fact that other tools were developed based on data from outside the federal probation system, the fact that an AO-built instrument would be more easily modified to improve its accuracy based on ongoing assessment and research, and the fact that no existing tool included some of the most important predictors of criminal behavior, such as antisocial values and attitudes.

In 2009, the Administrative Office employed Christopher T. Lowenkamp, Ph.D., a nationally recognized expert in risk assessment and community corrections research, to develop an instrument for the federal probation system.<sup>30</sup> The goal was to create a tool that provides information about whom to target for intensive supervision and programming (the risk principle), what factors to target for change (the needs principle), and how to remove barriers that hinder the effective delivery of services (the responsivity principle). Unlike past generations of assessment instruments that include static factors and focus only on measuring risk and classifying persons convicted of crimes, this tool, like many modern instruments used in other jurisdictions, includes the dynamic factors most associated with recidivism (e.g., antisocial attitudes and associates) and allows regular reassessment so that officers can determine if supervision strategies are in fact reducing risk of recidivism. It can also directly inform the supervision and treatment plan by identifying the necessary level of supervision, the most pressing criminogenic needs, and the possible obstacles to correctional intervention. Finally, it can assist the Administrative Office in understanding the nature of the population of persons under supervision and in strategically directing resources to target the appropriate offenders and needs with the correct services.

Dr. Lowenkamp and other Administrative Office researchers constructed and validated the PCRA using data collected through the Probation/Pretrial Services Automated Case Tracking System (PACTS), existing risk assessments from the five federal districts with pilot risk assessment programs,<sup>31</sup> criminal history records, and presentence reports. The Administrative Office researchers constructed and validated the PCRA from three samples: a construction sample and two validation samples. The construction sample and the first validation sample were taken from data obtained from the initial case plan for persons under supervision.<sup>32</sup> The second validation sample was taken from subsequent case plans. Both the construction (N=51,428) and

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<sup>30</sup> Dr. Lowenkamp holds a doctorate in criminal justice from the University of Cincinnati School of Criminal Justice. He has written over 50 articles for publication in criminal justice journals and over 150 technical reports on criminal justice issues for government and private agencies. Of these, 20 published articles and 18 technical reports relate to risk assessment in community corrections. He has given over 300 professional presentations and trainings on risk assessment and other criminal justice issues. Finally, Dr. Lowenkamp has provided criminal justice consulting services to 37 government agencies and private criminal justice services agencies and conducted evaluations for 28 criminal justice programs.

<sup>31</sup> The development of the instrument was based on 400 RMS assessments and 100 COMPAS assessments from the five federal districts.

<sup>32</sup> According to national judiciary policy, case plans, which describe the supervision strategies and objectives for a specific offender, are to be developed within 30 to 60 days of the start of the offender's supervision term. They are then formally evaluated after six months of supervision and every subsequent year.

first validation (N=51,643) groups comprised persons who started a term of supervised release or probation on or after October 1, 2005. The second validation sample included 193,586 persons.

Bivariate and multivariate analyses were used to determine the most predictive elements for inclusion in the instrument, including criminal history, education, employment, substance abuse, social networks, and cognitions. Law enforcement records were used to identify any new arrests after the start of supervision. Four risk categories were identified based on the statistical analysis: low, low/moderate, moderate, and high. In all three samples, low and low/moderate risk persons accounted for at least 85 percent of the cases. Much smaller percentages were identified in each sample as moderate and high risk (approximately 12 percent and 1 percent, respectively).

A statistical technique known as the “area under the curve” (AUC) was used to measure the accuracy of the PCRA in predicting recidivism based on risk category. The AUC measures the probability that a score drawn at random from one sample or population (e.g., a recidivist’s score) is higher than that drawn at random from a second sample or population (e.g., a nonrecidivist’s score).<sup>33</sup> The AUC can range from .0 to 1.0, with .5 representing the value associated with chance prediction. Values equal to or greater than .75 are considered large.<sup>34</sup> The AUC for the PCRA ranges from .709 to .783, which places it among the most accurate instruments in the field of criminal risk and needs assessment.<sup>35</sup> The PCRA’s predictive validity was confirmed for both short-term (6-12 months) and longer (up to 48 months) follow-up periods.

## **Part E: Content of the Federal Post-Conviction Risk Assessment**

The PCRA consists of two sections. One section is completed by the probation officer (Officer Assessment), and the other section is completed by the person under supervision (Offender Self-Assessment). It includes both “scored items” and “unscored items.” Scored items have been demonstrated by the Administrative Office’s empirical research to be statistically significant predictors of recidivism, and they contribute to the PCRA’s final conclusion regarding risk level and criminogenic needs. Unscored items have been shown by other empirical research to be predictors of recidivism but have not been studied by the Administrative Office in federal cases due to the lack of necessary data. They are included for data collection purposes and to inform the PCRA’s final conclusion regarding criminogenic needs and responsivity factors (barriers to supervision and treatment), but not risk level. If the unscored items prove to be predictive of

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<sup>33</sup> See M.E. Rice & G.T. Harris, *Comparing Effect Sizes in Follow-Up Studies: ROC Area, Cohen's d, and r*, 29 *Law and Human Behavior*, no. 5, 2005 at 615.

<sup>34</sup> See M. Dolan & M. Doyle, *Violence prediction: Clinical and Actuarial Measures and the Role of the Psychopathy Checklist*, 177 *British Journal of Psychiatry* 303 (2000).

<sup>35</sup> For a frame of reference, it is helpful to consider the risk factors for a heart attack (e.g., high levels of bad cholesterol, smoking, and hypertension). These risk factors were identified in a study, which followed approximately 5,000 people over a 12-year period. When the risk factors are combined, the AUC falls between .74 and .77. See Andrews & Bonta, *supra* note 5, at 276 (citing W.F. Wilson et al., *Prediction of Coronary Heart Disease Using Risk Factor Categories*, 97 *Circulation Journal of the American Heart Association* 1837 (1998)). While perfect prediction is an impossibility in both the medical and criminal justice fields, the knowledge of risk has practical value. *Id.*

recidivism by the Administrative Office’s research, they may contribute to risk level determination in future modifications of the instrument.

There are currently 15 scored items and 41 unscored items. Information for all scored items and the majority of unscored items is obtained as part of the Officer Assessment based on the interviews and a review of file documents. The Offender Self-Assessment is currently used only for 12 unscored items under the “cognitions” domain. The PCRA includes information from the following seven domains:

1. Criminal History	6 scored items, 1 unscored item
2. Education/Employment	3 scored items, 2 unscored items
3. Substance Abuse	2 scored items, 4 unscored items
4. Social Networks	3 scored items, 3 unscored items
5. Cognitions	1 scored item, 13 unscored items
6. Other (Housing, Finances, Recreation)	0 scored items, 4 unscored items
7. Responsivity Factors	0 scored items, 14 unscored items

The criminal history domain is measured by whether the person was arrested at or under age 18, the number of prior misdemeanor and felony arrests, whether there are prior violent offenses, whether there is a varied (more than one offense type) offending pattern, whether there has been a revocation for new criminal behavior on supervision, whether there has been problematic institutional adjustment while imprisoned, and the person’s age at the time of supervision.<sup>36</sup> The education and employment domain includes measures for the highest education level achieved, degree of employment, and number of jobs in past 12 months.

Drug and alcohol use is measured by whether there are disruptions at work, school, and home due to drug or alcohol use, whether the offender uses drugs or alcohol when it is physically hazardous, whether legal problems have occurred due to drug or alcohol use, whether the person continues to use drugs or alcohol despite social and interpersonal problems, and whether a current drug or alcohol problem exists. Under the social networks category, the officer assesses marital status, whether the person lives with a spouse or children, whether there is a lack of

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<sup>36</sup> Arrests were selected as the measure of criminal history rather than prior convictions or imprisonments for two reasons. First, arrest data are more accessible and complete. See Michael D. Maltz, Dept. of Criminal Justice & Dept. of Information of Decision Sciences, University of Illinois at Chicago, *Recidivism* (1984) available at <http://www.uic.edu/depts/lib/forr/pdf/crimjust/recidivism.pdf>. Second, “criminologists have generally assumed that arrest is the most valid measure of frequency of offending that can be gained from official data sources” because arrests are “much closer in occurrence to the actual behavior [criminologists] seek to study and are not filtered by the negotiations found at later stages of the legal process.” See David Weisburd & Chester Britt, *Statistics in Criminal Justice* 24 (3d ed. 2007).

family support, whether there is an unstable family situation, the nature of the person's relationship with peers, and whether the person lacks positive pro-social support.

Turning to the cognitions domain, the officer is directed to assess whether the person has antisocial attitudes and values and whether he is motivated toward supervision and change. The client also takes part in an 80-question self-assessment, which is discussed further below. The housing, finances, and recreation domain assesses the level of home stability, whether there are criminal risks at home, the financial situation, and the level of engagement in pro-social activities. Finally, for the responsivity factors domain, the officer is directed to check for the following areas of concern: low intelligence, physical handicap, reading and writing limitations, mental health issues, no desire to change/participate in programs, homelessness, transportation, child care, language, ethnic or cultural barriers, history of abuse/neglect, and interpersonal anxiety.

The Offender Self-Assessment section of the PCRA is based on the Psychological Inventory of Criminal Thinking Styles (PICTS), which was developed by Glenn Walters, Ph.D. using data collected on Federal Bureau of Prisons inmates.<sup>37</sup> The PICTS is a quantifiable instrument that provides a reliable and valid method to assess criminal thinking styles. It is an 80-item self-report measure of criminal thinking styles created to provide clinicians and criminal justice professionals with information about how an offender thinks, which can be valuable for treatment and supervision purposes. It is designed to assess the following eight thinking styles hypothesized to support and maintain criminal activity:

1. Mollification: A tendency to project blame for past and present criminal conduct onto external factors (e.g., family upbringing, poverty, the government). The focus of intervention for those with this thinking trait is to encourage them to stop externalizing blame and start taking responsibility for their actions and decisions, including accepting responsibility for the negative consequences of their actions and decisions.
2. Cutoff: A measure of impulsivity and the tendency to use phrases like “screw it” to eliminate common deterrents to crime. Drugs and alcohol are also sometimes employed as cutoffs. The solution to cutoff thinking is to help the respondent develop such skills as patience, tolerance, and emotional control.
3. Entitlement: A sense of ownership, privilege, and uniqueness that is used by the individual to grant him or herself permission to violate the laws of society and the rights of others. Misidentification of wants as needs is another aspect of entitlement. Entitlement can perhaps best be challenged by suggesting the creation of a personal

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<sup>37</sup> Glenn D. Walters, Ph.D., holds a doctorate in Counseling Psychology from Texas Tech University. Since 1992, Doctor Walters has been employed as a clinical psychologist by the Federal Bureau of Prisons (Federal Correctional Institution—Schuylkill). He has also been an adjunct professor of psychology at Penn State University—Schuylkill (1992 to present), Lehigh University (2008 to present), and Chestnut Hill College (1995-2004). He has written 17 books and monographs, 19 book chapters, and 191 journal articles relating to psychology, crime, and psychopathology. The original PICTS instrument was written in 1989. The current version of the PICTS was introduced in 2001.

inventory of values and expectancies and helping clients distinguish between wants and needs.

4. Power orientation: An attempt to exert maximum control over the external environment at the expense of personal or internal control. When not in control of the external environment, some will engage in a power thrust whereby they put another person down in order to feel better about themselves. Focusing on the development of personal control and self-discipline is one way to overcome the external emphasis of the power orientation.
5. Sentimentality: The belief that performing good deeds erases the harm a person has inflicted on others. Such individuals fail to recognize the harm they do to themselves, their families, and their victims (both known and unknown) because sentimentality limits their awareness. Sentimentality can best be challenged by showing the individual how others have been hurt by his or her actions whether or not such harm was intended.
6. Superoptimism: The belief that one will be able to indefinitely postpone or avoid the negative consequences of criminal activity (incarceration, injury, death). The best way to expose superoptimism is to point out the different ways the individual has been unable to escape the negative consequences of his or her criminal actions (e.g., jail, prison, probation, loss of family or job).
7. Cognitive indolence: The tendency to take short-cuts and look for the easy way around problems. Such individuals are often enmeshed in controversy because their short-cuts invariably get them into trouble with those to whom they are accountable (supervisor, parent, spouse). Those with this thinking style are frequently described as lazy, unmotivated, and irresponsible.
8. Discontinuity: the propensity to lose sight of one's goals and to be easily sidetracked by environmental events. Respondents who elevate on this scale often come across as fragmented, flighty, and unpredictable. Discontinuity is the most difficult of the eight thinking styles to confront because the individual is often oblivious to the inconsistency evident in his or her own thinking. Training in goal-setting can be helpful in combating this thinking style.

The PICTS also includes the “General Criminal Thinking” score, which is the sum of the raw scores for the items in the self-assessment that make up the eight PICTS thinking style scales. Finally, the PICTS includes the “Proactive Criminal Thinking” composite scale and the “Reactive Criminal Thinking” composite scale, which identify the mode of criminal thinking to which an individual subscribes and may potentially lead to valuable information for treatment and supervision. Proactive thinking is goal-directed. Persons who are proactive tend to expect positive things to come from their criminal behavior such as money, status, and power. Others may describe them as devious, callous, calculating, and cold-blooded. Reactive thinking involves reactions to a situation rather than planned behavior. Persons who are reactive view the world suspiciously and misinterpret others as hostile. Others may describe them as impulsive, emotional, and hot-blooded.

The PICTS instrument does not ask respondents about specifically identifiable events and does not require a “yes” or “no” answer. Once the PICTS instructions have been read and the evaluator has answered all of the respondent’s questions, the respondent is instructed to read and rate (using the four-point scale described on the test form: 4 = strongly agree, 3 = agree, 2 = uncertain, 1 = disagree) each of the 80 PICTS items, trying not to leave any items blank. If more than five items are left blank, the computer-based testing system will inform the officer that a valid test cannot be completed and a result cannot be reached. There is no time limit for completion of the inventory, though respondents should be able to finish in 15 to 30 minutes under normal circumstances. Instructions for completion are printed at the top of the test form and the officer is advised to instruct the respondent to read the instructions out loud so that a general reading level can be gauged. A respondent should be able to read at the sixth-grade level or higher to register a valid PICTS protocol. The answers to the questions are not intended to be interpreted individually. Rather, the PICTS uses a complex set of algorithms based on the collective answers to the questions to produce an output about the respondent’s thinking style.

After the Officer Section and the Offender Self Assessment are completed, an output page is produced that lists the person’s risk category, criminogenic needs, and responsivity factors. The total risk score is determined by adding the points for each of the scored items in the seven domains. The score is then used to classify the person into one of four risk categories: Low, Low/Moderate, Moderate, and High. The Administrative Office’s research indicates that, with each increase in risk category, the probability of failure (rearrest and revocation) increases. The majority of the persons under federal supervision fall into the Low or Low/Moderate categories.

In rare cases, officers can deviate from the PCRA risk category through a “policy override” for the following categories if officers believe that the PCRA risk score is not appropriate: sex offenders, persistently violent offenders, offenders with severe mental illness, and youthful offenders with extensive criminal histories. Officers are also permitted to deviate from the PCRA risk level for other reasons through a “professional override,” though these require a comprehensive justification. Any type of override requires the approval of a supervising officer.

In addition to the risk category, the output page lists the criminogenic needs that should be targeted for change for each person. Finally, the PCRA informs officers about responsivity factors that should be addressed. Responsivity factors are not predictors of future criminal behavior, but they can present barriers to the supervision and service delivery process. The officer shares the PCRA output results with the client and discusses which risk factors to address and the appropriate treatment and supervision plan.

## **Part F: Training and Certification for the Federal Post Conviction Risk Assessment**

The Administrative Office and the EBP Working Group have determined that, in order to ensure the correct application of the PCRA scoring rules, only those probation officers who attend in-person training and subsequently pass online certification tests can access the PCRA.

The use of the PCRA without successfully completing the formal training and maintaining current PCRA certification is strictly prohibited.<sup>38</sup>

The Administrative Office is in the process of training all officers in the federal probation system who supervise persons convicted of a crime. The 16-hour training covers the principles of offender risk, needs, and responsivity, provides a detailed overview of the PCRA scoring rules, gives officers time to practice the PCRA on test cases, and examines the relationship between the PCRA and the case plan. The sessions are taught by Administrative Office staff members with the assistance of probation officers from local districts that are certified in administering the PCRA. The Administrative Office's PCRA training manual provides the purpose behind each of the scoring items, the scoring rules themselves, sample questions, interviewing strategies, case planning considerations, and citations to social science research discussing the relationship between each scored or unscored item and offender recidivism. Items are scored by officers based on official records, offender self-reports, and the officers' professional judgment.

After the initial training, officers will be required to complete an online certification process before administering the PCRA. Once certified, officers are required to re-certify annually to ensure that they are correctly interpreting and implementing the tool. Certification consists of a computer-based examination where the officer is directed to complete PCRA scoring sheets based on videos of hypothetical interviews with clients and supporting documentation such as presentence reports, chronological entries, and Bureau of Prisons records on institutional adjustment. Officers who fail the examination are required to take an online course until they pass. The Administrative Office will collect data on the certification examination process, which will provide information about areas of difficulty for officers and may lead to changes in the training curriculum or content of the instrument.

## **Part G: Conclusion**

Federal probation officers are statutorily required to “use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition.”<sup>39</sup> Social science research suggests that several practices contribute to achieving behavioral change: 1) intensive correctional interventions should be directed to higher-risk rather than lower-risk clients (risk principle), 2) dynamic risk factors should be targeted (need principle), and 3) strategies such as cognitive behavioral treatment should be delivered in a way that is specifically responsive to the characteristics of individual clients (responsivity principle). Research has also demonstrated that empirically-based instruments provide a more accurate, consistent, and value-neutral method for making decisions than relying solely on a probation officer's experience and intuition.

While risk assessment has been used in the federal probation system for several decades, the PCRA is based on a dataset of unprecedented size that is representative of the population of persons under supervision. It is also consistent with contemporary scientific research, since it adheres to the principles of risk, need, and responsivity. Assessment information is used not only

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<sup>38</sup> See Office of Probation and Pretrial Services, Administrative Office of the U.S. Courts, *Federal Post Conviction Risk Assessment Scoring Guide* (Jan. 10, 2011).

<sup>39</sup> See 18 U.S.C. §3603(3).

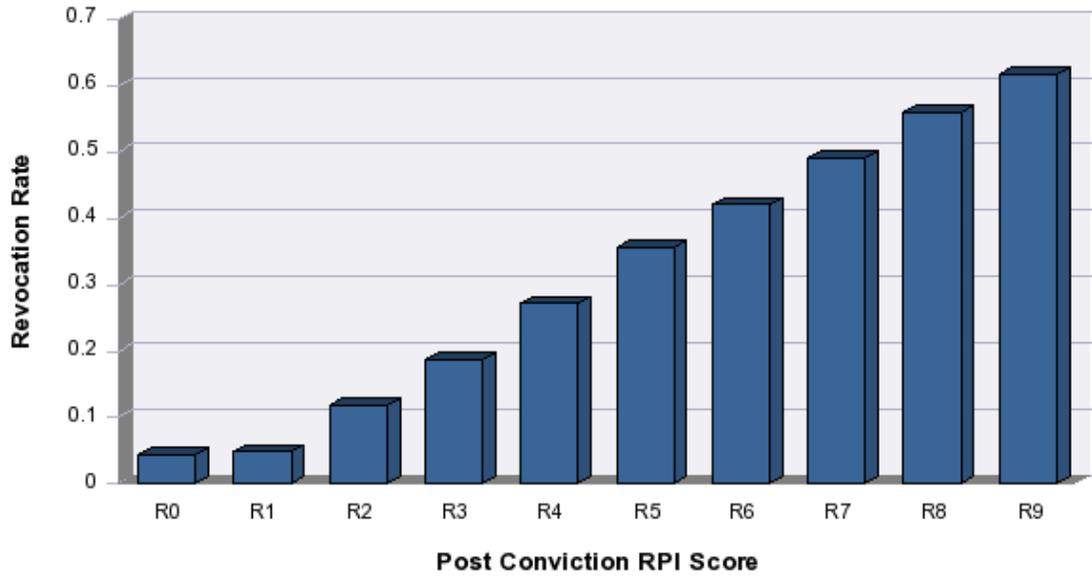
to measure risk to determine the appropriate supervision level but to change risk as well. Because it includes dynamic risk factors, the PCRA allows officers to identify needs that should be targeted for change. Additionally, it provides officers with the ability to detect whether positive change successfully occurs over time through regular reassessment and to determine whether intervention strategies are effective. Finally, the PCRA provides important information that should be integrated into a client's supervision and treatment plan.

The Administrative Office will conduct ongoing research to monitor and improve the PCRA's predictive accuracy as more data are obtained. It will analyze the relationship between both scored and unscored items and recidivism to determine whether any factors should be added or removed from the instrument. Data will also be examined to determine if changes in levels of risk and recidivism rates occur to ensure that supervision and treatment strategies are having their intended effects. Because many of the items on the PCRA are dynamic, risk scores are likely to change as clients are periodically reassessed. The changes could result from an event or change in circumstances (e.g., the client finds and maintains a job) or from treatment (e.g., the client stops abusing drugs or demonstrates a change in antisocial cognitions).

Future research will also be conducted to determine whether a risk assessment instrument can predict not just whether a person recidivates generally but whether a person commits specific offense types (violent offending, sex offending, etc.). Finally, the Administrative Office, in consultation with the Working Group on Evidence-Based Practices, is developing a new case planning tool informed by the risk, need, and responsivity factors identified by the PCRA. The goal is to provide officers and clients with a roadmap to supervision by identifying specific supervision and treatment services based on the risk and needs that each person presents.

Appendix A

**REVOCATION RATE BY RPI SCORE - FY 2006 TO 2010**



Source: Administrative Office of the U.S. Courts, Decision Support System

# **FORFEITURES**

**PRESENTED BY**

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November 16, 2011

## **FORFEITURE**

### **I. Administrative Forfeiture ( 18 U.S.C. §983)**

### **II. Civil Forfeiture (18 U.S.C. §983; Federal Rules of Civil Procedure, Supplemental Rule G)**

- A. Civil action *in rem* against the property
- B. Property derived from or used to commit/facilitate commission of crime
- C. Civil discovery, motions, trial

### **III. Criminal Forfeiture (18 U.S.C. §982; 21 U.S.C. §853; 28 U.S.C. §2461(c); Fed. Rules of Crim. P. 32.2)**

- A. *In personam* against the Defendant
- B. Forfeiture notice included in charging document
- C. Jury or Court to decide forfeiture
- D. Ancillary hearing to address 3<sup>rd</sup> party interests

### **IV. Restraint of assets**

- A. Pre-indictment TRO or seizure (21 U.S.C. §§853(e)(2) and (f))
- B. Post - indictment (21 U.S.C. §853(e)(1)(A))
- C. Pre-complaint (18 U.S.C. §983(j))

## **RESTITUTION**

### **I. Mandatory Victim Restitution** (18 U.S.C. §§ 3663A, 3613, 3664)

- A. Restitution must be imposed
- B. Liability 20 years
- C. Not dischargeable in bankruptcy, cannot be remitted and cannot be “settled” with victim (*US v. Boal*, 534 F.3d 965 (8<sup>th</sup> Cir. 2008))
- D. Enforced as fine pursuant to 18 U.S.C. §3664(m)

### **II. Enforcement**

- A. U.S. responsible for collection of unpaid fines and restitution (18 U.S.C. §3612(c))
- B. Upon entry of judgment, lien on all property of Defendant similar to a tax lien (18 U.S.C. §3613(c))
- C. Exempt property
- D. Federal Debt Collections Act (28 U.S.C. §3001, *et al.*)
- E. Preservation of assets - All Writs Act (28 U.S.C. §1651; *See US v. Yielding*, 2011 WL 4578444, ( 8<sup>th</sup> Cir., October 5, 2011))

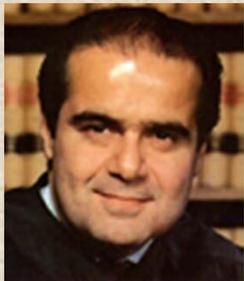
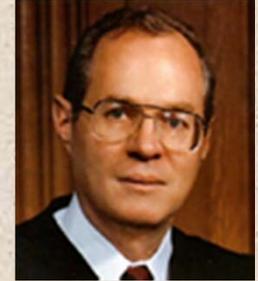
**SUPREME COURT  
&  
EIGHTH CIRCUIT  
UPDATE**

**PRESENTED BY**

**JOHN MESSINA  
RESEARCH & WRITING ATTORNEY**



# U.S. Supreme Court Justices



# Search and Seizure - - Exclusionary Rule - - Reliance on Binding Appellate Precedent

***Davis v. United States***,  
131 S.Ct. 2419 (2011)

**Officers reasonably relied on *Belton*  
precedent in conducting vehicle  
search subsequently invalidated  
under *Gant***



“It is one thing for the criminal ‘to go free because the constable has blundered.’ *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.). It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs. We therefore hold that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply.”

# Search and Seizure - - Material Witness Warrants - - Pretext

*Ashcroft v. al-Kidd*,  
131 S.Ct. 2074 (2011)

**Otherwise valid material witness warrant does not violate the Fourth Amendment merely because law enforcement may have had an ulterior motive**



“[W]e have almost uniformly rejected invitations to probe subjective intent.”

•

“Because al-Kidd concedes that individualized suspicion supported the issuance of the material witness warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant; we find no Fourth Amendment violation.”

# Miranda - - Custody - - Age as a Custody Factor

*J.D.B. v. North Carolina,*  
131 S.Ct. 2394 (2011)

**A juvenile suspect's age must be taken into account in making a Miranda custody determination**



“[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.”

# Confrontation - - Forensic Lab Reports - - Use of Surrogate Lab Analyst

*Bullcoming v. New Mexico*,  
131 S.Ct. 2705 (2011)

**Confrontation Clause guaranteed right to cross examine analyst who prepared forensic lab report on defendant's blood testing**



“The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification – made for the purpose of proving a particular fact – through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused’s right is to be confronted with the analyst who made the certification. . . .”

# Due Process - - Right to Counsel - - Civil Contempt Proceedings to Collect Child Support

*Turner v. Rogers*,  
131 S.Ct. 2507 (2011)

**Assuming adequate alternative safeguards are in place, the Due Process Clause does not guarantee counsel for an indigent facing a civil contempt proceeding to collect child support, at least where the intended recipient of the support is not represented by counsel**



“[T]he Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subjected to a child support order, even if that individual faces incarceration (for up to a year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings).”

•

“We do not address civil contempt proceedings where the underlying child support payment is owed to the State. . . . The government is likely to have counsel. . . .”

# Federalism - - Tenth Amendment Challenge to Federal Chemical Weapons Statute (18 U.S.C. § 229) - - Standing

*Bond v. United States*,  
131 S.Ct. 2355 (2011)

**Angry spouse charged with  
chemical weapons offense has  
standing to assert 10<sup>th</sup> Amendment  
challenge to statute**



“States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable.”

# Crimes - - Witness Tampering - - 18 U.S.C. § 1512(a)(1)(C) - - Killing with Intent to Prevent Communication to a Federal Law Enforcement Officer regarding a Federal Offense

*Fowler v. United States*,  
131 S.Ct. 2045 (2011)

**Tampering by murder offense  
requires reasonable likelihood that  
victim would have communicated  
with a federal officer**



**18 U.S.C. § 1512(a)(1)(C)** (proscribing killing or attempting to kill another with “intent to . . . prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense. . . .”)

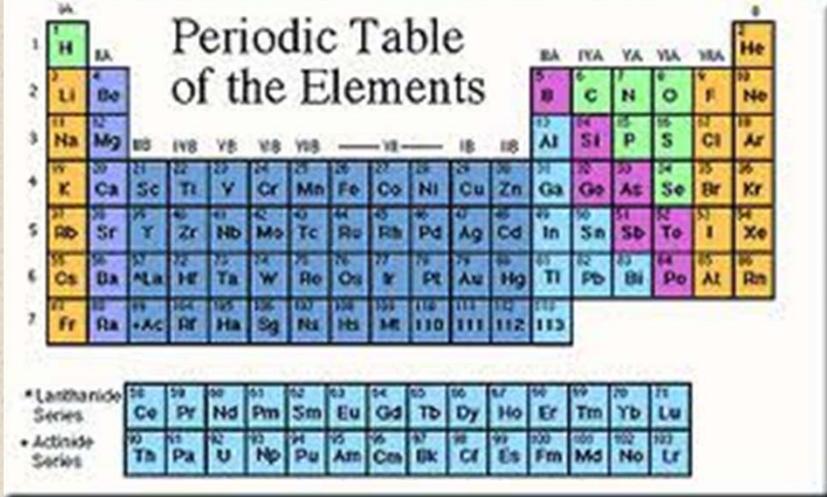
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“[W]here the defendant kills a person with an intent to prevent communication with law enforcement officers generally, that intent includes an intent to prevent communications with *federal* law enforcement officers only if it is reasonably likely under the circumstances that (in the absence of the killing) at least one of the relevant communications would have been made to a federal officer.”

# Crimes - - Drug Trafficking - - 21 U.S.C. § 841(b)(1)(A) - - “Cocaine Base”

*DePierre v. United States*,  
131 S.Ct. 2225 (2011)

“Cocaine base” as used in Ch. 841  
refers to all forms of cocaine base  
(coca paste, crack, freebase) and  
not just crack cocaine



Periodic Table of the Elements

The image shows a standard periodic table of elements. The main table is color-coded by groups: Group 1 (IA) is pink, Group 2 (IIA) is blue, Groups 3-10 (IIB-VIIB) are yellow, Group 11 (IB) is green, Group 12 (IIB) is blue, Groups 13-18 (IIIA-VIIIA) are various colors (purple, green, yellow, orange, red, pink), and Group 19 (VIIA) is blue. The Lanthanide Series (elements 57-71) and Actinide Series (elements 89-103) are shown in separate boxes below the main table.

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
1 H																	2 He
2 Li	Be											B	C	N	O	F	Ne
3 Na	Mg											Al	Si	P	S	Cl	Ar
4 K	Ca	Sc	Ti	V	Cr	Mn	Fe	Co	Ni	Cu	Zn	Ga	Ge	As	Se	Br	Kr
5 Rb	Sr	Y	Zr	Nb	Mo	Tc	Ru	Rh	Pd	Ag	Cd	In	Sn	Sb	Te	I	Xe
6 Cs	Ba	La	Hf	Ta	W	Re	Os	Ir	Pt	Au	Hg	Tl	Pb	Bi	Po	At	Rn
7 Fr	Ra	Ac	Rf	Ha	Hs	Rg	Uu										

\* Lanthanide Series  
Ce Pr Nd Pm Sm Eu Gd Tb Dy Ho Er Tm Yb Lu

\* Actinide Series  
Th Pa U Np Pu Am Cm Bk Cf Es Fm Md No Lr

“As a matter of chemistry, cocaine is an alkaloid with the molecular formula  $C_{17}H_{21}NO_4$ . An alkaloid is a base—that is, a compound capable of reacting with an acid to form a salt.”  
(citation omitted)

•

“We agree with the Government that the most natural reading of the term ‘cocaine base’ is ‘cocaine in its base form’—i.e.,  $C_{17}H_{21}NO_4$  the molecule found in crack cocaine, freebase, and coca paste. On its plain terms, then, ‘cocaine base’ reaches more broadly than just crack cocaine.”

# How to Cook Cocaine at Home: A Supreme Court Primer

Coca Paste: Leaves of the Coca plant + water + kerosene  
+ sodium carbonate (baking powder) + sulphuric acid.

Cocaine Salt (Powder): Coca paste + water + hydrochloric acid.

Crack: Cocaine powder + water + sodium carbonate (baking  
soda) or other base.

Freebase: Cocaine powder + water and ammonia + ether.

“Chemically . . . there is no difference between the cocaine in coca paste, crack cocaine, and freebase—all are cocaine in its base form. On the other hand, cocaine in its base form and in its salt form (*i.e.*, cocaine hydrochloride) are chemically different, though they have the same active ingredient and produce the same physiological and psychotropic effects. The key difference between them is the method by which they generally enter the body; smoking cocaine in its base form—whether as coca paste, freebase, or crack cocaine—allows the body to absorb the active ingredient quickly, thereby producing a shorter, more intense high than obtained from insufflating cocaine hydrochloride.”

# Armed Career Criminal Act - - 18 U.S.C. § 924(e) - - Time Frame for Determining Whether a Prior “Serious Drug Offense” has a Maximum Term of Imprisonment of 10 Years or More

*McNeil v. United States*,  
131 S.Ct. 2218 (2011)

For ACCA purposes, the relevant  
penalty for prior drug offense is the  
penalty in place at the time the drug  
offense was committed



“The plain text of ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant’s previous drug offense at the time of his conviction for that offense. The statute requires the court to determine whether a “previous conviction” was for a serious drug offense. The only way to answer this backward-looking question is to consult the law that applied at the time of that conviction.”

# Crimes of Violence / Violent Felonies - - Felony Vehicle Flight

***Sykes v. United States,***  
131 S.Ct. 2267 (2011)

**Felony intentional vehicle flight from law enforcement is a violent felony for ACCA purposes; *Begay* demoted, *Scalia* emoted**



“Risk of violence is inherent to vehicle flight.”

- 

“In general, levels of risk divide crimes that qualify from those that do not.”

- 

“The [*Begay*] phrase ‘purposeful, violent, and aggressive’ has no precise textual link to the residual clause. . . . In many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk. . . . As between the two inquiries, risk levels provide a categorical and manageable standard that suffices to resolve the case before us.”

# Sykes - - Scalia Dissenting:

“We try to include an ACCA residual-clause case in about every second or third volume of the United States Reports.”

•

“We should admit that ACCA’s residual provision is a drafting failure and declare it void for vagueness.”

•

“ . . . today’s tutti-frutti opinion.”

•

“The residual clause series will be endless, and we will be doing ad hoc application of ACCA to the vast variety of state criminal offenses until the cows come home.”

•

“The reality is the phrase ‘otherwise involves conduct that presents a serious potential risk of physical injury to another’ does not clearly define the crimes that will subject defendants to the greatly increased ACCA penalties.”

•

“[W]hat confirms its incurable vagueness – is our repeated inability to craft a principled test out of the statutory text.”

# Scalia Dissenting from the Denial of Certiorari in Additional Residual Clause Cases:

*Derby v. United States*

(burglary of “booths, vehicles, boats, and aircraft.”)

*Johnson v. United States*

(rioting at a correctional institution, including hunger strikes and refusal to work at a prison job)

*Schmidt v. United States*

(theft of a firearm from a licensed dealer)

*Turner v. United States*

(larceny from the person) (Scalia: “. . . in other words, pick-pocketing. . . . Oliver Twist was a violent felon. . . .”)

“How we would resolve these cases if we granted certiorari would be a fine subject for a law-office betting pool. No one knows for sure. Certainly our most recent decision [*Sykes*] would be of no help.”

•

“If it is uncertain how this Court will apply *Sykes* and the rest of our ACCA cases going forward, it is even more uncertain how our lower-court colleagues will deal with them. Conceivably, they will simply throw the opinions into the air in frustration, and give free rein to their own feelings as to what offenses should be considered crimes of violence—which, to tell the truth, seems to be what we have done. (Before throwing the opinions into the air, however, they should check whether littering—or littering in a purposeful, violent, and aggressive fashion—is a felony in their jurisdiction. If so, it may be a violent felony under ACCA; or perhaps not.)”

*Derby v. United States*, 131 S.Ct. 2858 (2011) (Scalia, J., dissenting from denial of cert.).

# Speedy Trial Act - - 18 U.S.C. § 3161(h)(1)(D) - - Excludable Periods of Delay - - Pretrial Motions

*United States v. Tinklenberg*,  
131 S.Ct. 2007 (2011)

**Filing of pretrial motion  
automatically stops speedy trial  
clock regardless whether the  
motion actually causes a delay in  
the trial**



“[E]very Court of Appeals has considered the question before us now, and every Court of Appeals, implicitly or explicitly, has rejected the interpretation that the Sixth Circuit adopted in this case.”

# Speedy Trial Act - - 18 U.S.C. § 3161(h)(1)(F) - - Excludable Periods of Delay - - Transportation for Examination or Hospitalization

*United States v. Tinklenberg*,  
131 S.Ct. 2007 (2011)

**10-day excludable period for  
transportation for examination or  
hospitalization includes weekend  
days and holidays**

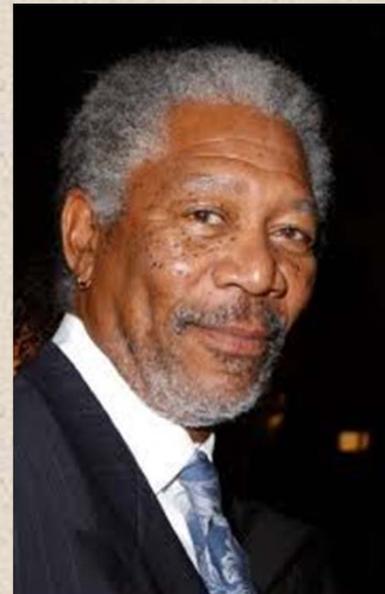


“[W]e believe the better reading of subparagraph (F) would include weekend days and holidays in its 10-day time period.”

# **Guidelines - - Retroactive Amendments - - Relief Under 18 U.S.C. § 3582(c)(2) - - Rule 11(c)(1)(C) Agreements**

***Freeman v. United States,***  
131 S.Ct. 2685 (2011)

**Crack defendant was entitled to  
§ 3582(c)(2) relief even though  
sentenced pursuant to a Rule  
11(c)(1)(C) agreement**



“[W]hen a (C) agreement expressly uses a Guidelines sentencing range to establish the term of imprisonment, and that range is subsequently lowered by the Commission, the defendant is eligible for sentence reduction under § 3582(c)(2).”

**Federal Sentencing - - 18 U.S.C. § 3582(a) - -  
“[R]ecognizing that Imprisonment is Not an  
Appropriate Means of Promoting Correction  
and Rehabilitation.”**

***Tapia v. United States***

131 S.Ct. 2382 (2011)

**Sentencing court could not increase  
sentence to insure defendant’s  
participation in 500 hour drug program**



“[W]hat Congress said was that when sentencing an offender to prison, the court shall consider all the purposes of punishment except rehabilitation — because imprisonment is not an appropriate means of pursuing that goal.”

# WATER FIGHT - - Montana Takes on Wyoming

***Montana v. Wyoming,***  
131 S.Ct. 1765 (2011)

**Montana left high and dry, as decrease in runoff and seepage due to improved irrigation methods in Wyoming did not wrongly deprive Montana of flow from the Yellowstone River**



“No appropriator can compel any other appropriator to continue the waste of water which benefits the former. If the senior appropriator, through scientific and technical advances, can utilize his water so that none is wasted, no other appropriator can complain.”

•

“Wyomans\*”

“\*The dictionary-approved term is ‘Wyomingite,’ which is also the name of a type of lava. I believe the people of Wyoming deserve better.” (citation omitted).

- Scalia, J., siding with Montana, but endearing himself to the people of Wyoming.

# Stuff to Come

## Search and Seizure - - Jail Strip Searches

### ***Florence v. Board of Chosen Freeholders***

S.Ct. No. 10-945 (cert. granted 4/04/11). Decision below reported at 621 F.3d 296 (3<sup>rd</sup> Cir. 2010).

Cert. granted to consider whether the Fourth Amendment permits a suspicionless strip search of every arrestee, even those arrested for minor offenses.

## Search and Seizure - - Tracking Devices

### ***U.S. v. Jones***

S.Ct. No. 10-1259 (cert. granted 6/27/11). Decision below reported at 615 F.3d 544 (D.C. Cir. 2010).

Cert. granted to consider whether the warrantless installation and extended use of a GPS tracking device on defendant's vehicle violated the Fourth Amendment.

# Stuff to come cont'd

## Confrontation - - Expert Testimony on DNA Testing Results

### ***Williams v. Illinois***

S.Ct. No. 10-8505 (cert. granted 6/28/11). Decision below reported at 238 Ill.2d 125 (Ill. 2010).

Is the Confrontation Clause violated by a state rule of evidence that allows an expert witness to testify about the results of DNA testing performed by non-testifying analysts?

## Miranda - - Prison Interrogation

### ***Howes v. Fields***

S.Ct. No. 10-680 (cert. granted 1/24/11). Decision below reported at 617 F.3d 813 (6<sup>th</sup> Cir. 2010).

Section 2254 case. Does “clearly established precedent” hold that a prisoner is always “in custody” for *Miranda* purposes when isolated from the general prison population and questioned by the authorities?

# Stuff to come cont'd

## **Crimes - - SORNA - - Standing to Challenge Attorney General's Interim Rule**

### ***Reynolds v. U.S.***

S.Ct. No. 10-6549 (cert. granted 1/24/11). Decision below reported at 380 Fed.Appx. 125 (3d Cir. 2010).

Cert. granted to consider whether Mr. Reynolds has standing to challenge Attorney General's Interim Rule implementing SORNA.

## **Federal Sentencing - - Running the Federal Sentence Consecutive to a Yet-To-Be-Imposed State Sentence**

### ***Stetser v. U.S.***

S.Ct. No. 10-7387 (cert. granted 6/13/11). Decision below reported at 607 F.3d 128 (5<sup>th</sup> Cir. 2010).

Cert. granted to decide whether a federal sentence can be ordered to run consecutive to a state sentence that has not yet been imposed.

# Stuff to come cont'd

## Ineffective Assistance - - Misadvice or Omission that Causes Defendant to Reject a Favorable Plea Bargain

### ***Lafler v. Cooper***

S.Ct. No. 10-209 (cert. granted 1/07/11). Decision below reported at 376 Fed.Appx. 563 (6<sup>th</sup> Cir. 2010).

### ***Missouri v. Frye***

S.Ct. No. 10-444 (cert. granted 1/7/11). Decision below reported at 311 S.W.3d 350 (Mo.App. 2010).

Cert. granted in two cases to decide if a defendant is entitled to relief when he rejects or loses a plea bargain through counsel error or omission, despite the fact that the defendant has been validly convicted following jury trial. What's the remedy?

# Stuff to come cont'd

## Collateral Review - - 28 U.S.C. § 2244(d)(1)(A) - - Determining When Direct review Has Concluded in State Court

### ***Gonzalez v. Thaler***

S.Ct. No. 10-895 (cert. granted 6/13/11). Decision below reported at 623 F.3d 222 (5<sup>th</sup> Cir. 2010).

Supreme Court will decide how a state's discretionary (further) review process affects the one-year deadline for seeking federal habeas corpus relief.

**Collateral Review - - State Postconviction Proceedings - - Effective Assistance of Postconviction Counsel**

***Martinez v. Ryan***

S.Ct. No. 10-1001 (cert. granted 6/6/11). Decision below reported at 623 F.3d 731 (9<sup>th</sup> Cir. 2010).

S.Ct. will decide whether there is a right to effective assistance of postconviction counsel when postconviction is the first and only opportunity afforded a defendant to raise a claim of ineffective assistance of trial counsel.

# Eighth Circuit Case Update



# Eighth Circuit Judges

## Active Judges

Hon. William Jay Riley, Chief  
Hon. Roger L. Wollman  
Hon. James B. Loken  
Hon. Diana Murphy  
Hon. Kermit E. Bye  
Hon. Michael J. Melloy  
Hon. Lavenski R. Smith  
Hon. Steven M. Colloton  
Hon. Raymond W. Gruender  
Hon. Duane Benton  
Hon. Bobby Shepherd

## Senior Judges

Hon. Myron H. Bright  
Hon. Pasco M. Bowman  
Hon. C. Arlen Beam  
Hon. David R. Hansen  
Hon. Morris Arnold

# Search and Seizure - - Curtilage - - Unpaved Driveway Extending Past Carport and Into the Backyard

*United States v. Wells*,  
648 F.3d 671 (8<sup>th</sup> Cir. 2011)

**Circuit finds that driveway extending past rear of defendant's home and into the backyard was part of the home's curtilage, and that defendant had an expectation of privacy that others would not walk back there**



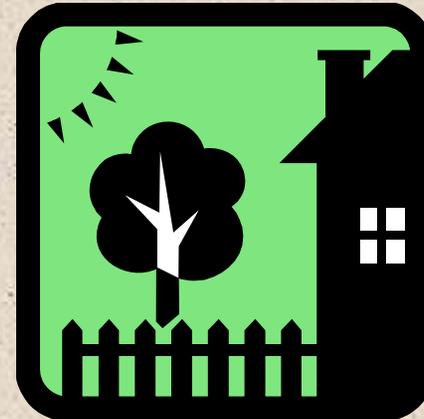
“The area of the driveway on which the officers were standing . . . is just behind the home and only a few feet from it. In order arrive at that point, passers-by would be required to walk, from the street, 27 feet down the unpaved driveway to the front (northeast) corner of the home, and then another 24 feet to the rear (southeast) corner. . . . Along the way they would pass both the paved walkway leading to Wells’s front door and the door in the carport. And, at all times they would be flanked on three sides by Wells’s fence. . . .”

•  
“Wells certainly exposed his unpaved driveway to public view, and therefore could not reasonably expect that members of the public would not observe whatever he might do there. But he could reasonably expect that members of the public would not traipse down the drive to the back corner of his home, from where they could freely observe his entire backyard.”

# Search and Seizure - - Knock and talk - - Entering at Rear of Curtilage

*United States v. Wells,*  
648 F.3d 671 (8<sup>th</sup> Cir. 2011)

**Knock and talk purpose did not  
justify entry to backyard, as police  
made no effort to first try the front  
door**



“To the extent that the ‘knock-and-talk’ rule is grounded in the homeowner’s implied consent to be contacted at home, we have never found such consent where officers made no attempt to reach the homeowner at the front door.”

•

“Furthermore . . . it was 4:00 a.m. Other than perhaps their suspicion of drug manufacturing, there was no reason to think that Wells would be found in the backyard at that time. . . .”

# Search and Seizure - - Abandonment - - Flight from Police

***United States v. Smith,***  
648 F.3d 654 (8<sup>th</sup> Cir. 2011)

**Defendant lost expectation of privacy  
in his car when he exited the vehicle,  
left it running, and took off on foot  
during flight from the police**



“[T]he district court determined Smith abandoned the Cadillac ‘when he left the car open, with the keys in the ignition, the motor running, in a public area’ and then ran from the police. Based on the totality of the circumstances, the district court did not err in concluding Smith relinquished any legitimate expectation of privacy he might have had in the Cadillac and its contents.”

# Search and Seizure - - Violation of State Law

***United States v. Kelley,***  
652 F.3d 915 (8<sup>th</sup> Cir. 2011)

**Violation of Arkansas law on  
nighttime searches afforded no basis  
for suppression in federal  
prosecution**



“When evidence obtained by state law enforcement officers is offered in a federal prosecution, the legality of the search and seizure is not determined by reference to a state statute, but rather is resolved by [F]ourth [A]mendment analysis.”

# Search and Seizure - - Utility Records - - Expectation of Privacy

***United States v. McIntyre,***  
646 F.3d 1107 (8<sup>th</sup> Cir. 2011)

**Defendant lacked expectation of  
privacy in electricity usage records  
obtained via county attorney  
subpoena from the local power  
company**

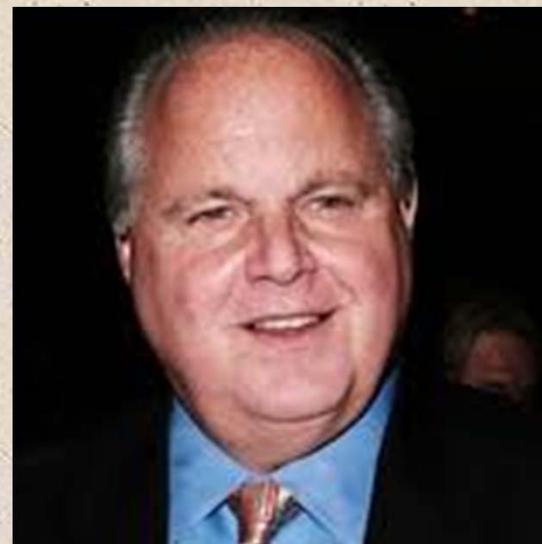


“ . . . *Smith v. Maryland* . . . is on point. There the court held that “[w]hen [defendant] used his phone, [he] voluntarily conveyed numerical information to the telephone company and ‘exposed’ that information to its equipment in the ordinary course of business” and therefore did not have an objectively reasonable expectation of privacy in that information. *Smith*, 442 U.S. at 744, 99 S.Ct. 2577. Similarly, when [McIntyre] used power in his home, he voluntarily conveyed that information to [Cedar-Knox Public Power District]. As a result, he had no reasonable expectation of privacy in his power records.”

# Search and Seizure - - Parking Lot Encounter

***United States v. Rush,***  
651 F.3d 871 (8<sup>th</sup> Cir. 2011)

**Although officer followed defendant's vehicle for nearly two miles, encounter when defendant stopped in parking lot was not a seizure**



“Although Rush may have subjectively felt the circumstances compelled him to speak to Deputy Price, the law is clear that absent a restraint of liberty, police questioning occurs with the citizen’s consent, and does not constitute an investigative stop requiring reasonable suspicion . . . . Deputy Price followed the Caprice for some distance, did not use his lights or siren to stop the Caprice, did not obstruct the vehicle’s exit from the parking lot when it stopped, and approached and asked Rush about his plans and purpose for being in the parking lot. Deputy Price did not use any physical force or issue any orders, and deputy made no show of authority beyond that which an officer necessarily exudes whenever he or she engages in consensual questioning.”

# Confrontation - - Failure to Preserve Evidence as a Denial of Effective Cross-Examination

*United States v. Watson*,  
650 F.3d 1084 (8<sup>th</sup> Cir. 2011)

**Officer's failure to preserve gun holster and cell phone picture as evidence did not deprive defendant of right to confront the officers regarding their observations of the same**

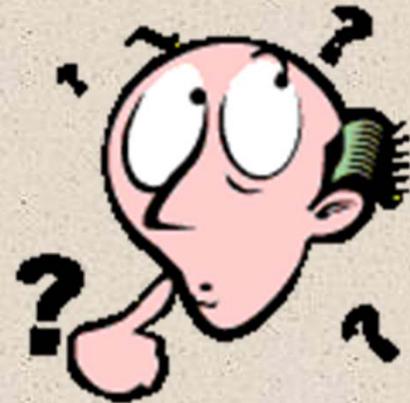


“It does not follow that the right to cross-examine is denied when a witness testifying about his observations fails to produce as exhibits the objects about which he is testifying.”

# Crimes - - Possession of a Firearm by a Person Subject to Certain Restraining Orders - - 18 U.S.C. § 922(g)(8)

*United States v. Miller*,  
646 F.3d 1128 (8<sup>th</sup> Cir. 2011)

**Due process does not require proof of knowledge that possession of the firearm was illegal**



“The penalty provisions . . . require the government to prove that the defendant knew of the facts that constituted the offense under § 922(g), not that the defendant knew that his possession of a firearm was illegal.”

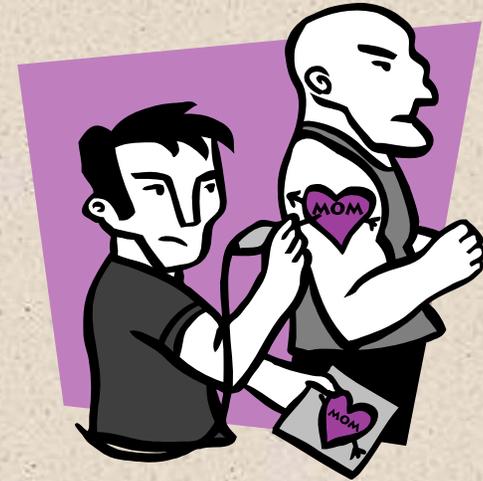
•

“Our sister circuits have uniformly rejected due process challenges to § 922(g)(8) based on the defendant’s lack of awareness that his possession of a firearm was a federal offense.”

# Crimes - - Illegal Reentry - - 8 U.S.C. § 1326(a) - - Defense of Necessity

*United States v. Bonilla-Siciliano*,  
643 F.3d 589 (8<sup>th</sup> Cir. 2011)

**District court did not err in precluding necessity defense to illegal reentry charge (defendant claimed his tattoos marked him as a gang member, making it unsafe for him to remain in El Salvador)**



“[G]eneralized fears are insufficient to establish an imminent threat of harm; rather, a ‘defendant must show that a real and specific threat existed.’”

•

“[Defendant] cannot show that he lacked a reasonable, legal alternative to illegally reentering the United States, because he did not exclude the option of going to a country other than the United States. . . .”

**Crimes - - “Use” of a Firearm During and in  
Relation to a Drug Trafficking Crime - -  
18 U.S.C. § 924(c)(1)(A) - - Sale of Gun as “Use”**

***United States v. Claude X,***  
648 F.3d 599 (8<sup>th</sup> Cir. 2011)

**Defendant’s sale of gun and drugs in  
single container constituted “use” of  
a firearm for § 924(c) purposes**



“[T]he meaning of ‘use’ adopted by the Supreme Court in *Watson*, *Bailey*, and *Smith* clearly encompasses selling a firearm and drugs in the same container, in a single transaction.”

# Crimes - - Tax Evasion - - 18 U.S.C. § 7201 - - Diverted Funds Held in Trust

*United States v. Renner*,  
648 F.3d 680 (8<sup>th</sup> Cir. 2011)

**Wrongful taking of customer funds  
held in trust was income and not a  
mere debt for income tax purposes**



“[S]tolen funds are included in gross income for federal income tax purposes in the year(s) in which they are misappropriated, where the embezzler receives an economic benefit, under the normal principles of income taxation.”

# Armed Career Criminal Act - - 18 U.S.C. § 924(e)(1) - - Predicates Stemming from Simultaneous Drug Transactions

***United States v. Willoughby,***  
653 F.3d 738 (8<sup>th</sup> Cir. 2011)

**Simultaneous drug sales to  
informant and undercover officer  
were not separate and distinct  
criminal episodes for ACCA  
purposes**

“The C/I knocked on the door and received permission for us to enter the house. . . . The C/I asked Willoughby if he still did business. Willoughby said yes. The C/I said he wanted to purchase an ‘eighth’ and I wanted to purchase a ‘quarter.’ . . . When Willoughby returned to the living room he had two sandwich bags containing a green leafy substance in his hand. . . . Willoughby gave one to the C/I then gave one to me. The C/I gave Willoughby the \$25 I gave him. I gave Willoughby \$50.

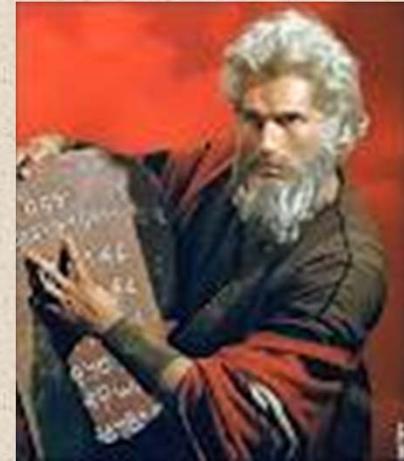
- Undercover officer describing transaction that yielded two drug trafficking convictions

“[W]e have never held two convictions to be sufficiently separate and distinct to serve as predicate ACCA convictions where, as here, those convictions were for drug offenses that the defendant committed, in essence, simultaneously.”

# Trial - - Competency - - Hyper-religious Pro Se Defendant

***United States v. Turner,***  
644 F.3d 713 (8<sup>th</sup> Cir. 2011)

**Pro Se defendant's irrational behavior did not  
require sua sponte inquiry into his  
competency**



Mr. Turner's voir dire questions: "Can you testify that your sins are forgiven? . . . Is Matthew a Saint? . . . If you believe God will return, raise your hand. . . . If you believe a soul can overcome death, raise your hand. . . . Do you believe the blood of Jesus washes away sins, raise your hands. . . ."

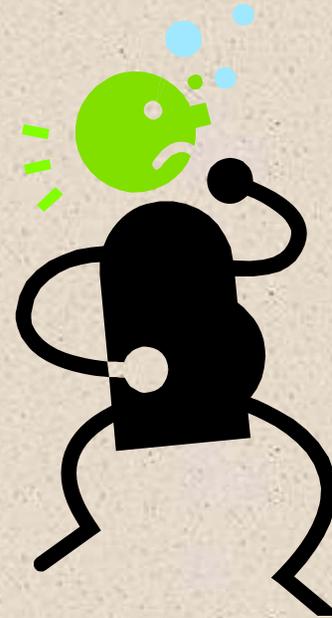
Mr. Turner's opening argument: "Ladies and gentlemen of the jury, I stand before you evident, accused and convicted but through - - but before my Father in Heaven, through my Lord and Savior Jesus Christ's blood, I am innocent, without guilt and shame. All right. Thank you."

Mr. Turner's closing argument: "Ladies and gentlemen of the jury, which of you are without sin. He that have no sinful transgression let him judge first. I stand before this Court evident accused and convicted but before my Father which is in Heaven, through my Lord and Savior, Jesus Christ blood I am found innocent, without guilt and shame. Which of you is without mercy? He shall have judgment without mercy and mercy rejoices against judgment. Thank you Your Honor."

# Speedy Trial Act - - 18 U.S.C. § 3161(h)(1)(D) - - Excludable Time - - Pretrial Motions

*United States v. Bloate*,  
655 F.3d 750 (8<sup>th</sup> Cir. 2011)

**Defendant's "waiver of pretrial motions" was not a motion for purposes of excluding time under § 3161(h)(1)(D)**



“Bloate’s waiver did not request leave to do anything, or in any way seek a ruling, determination, or other response from the court — either expressly or impliedly.”

# Crimes of Violence - - Violent Felonies - - Mailing Threatening Communications

*United States v. Tessmer*,  
2011 WL 5008544 (8<sup>th</sup> Cir. 10/21/11)

**Circuit reaffirms prior holding that  
a threatening communications  
offense under 18 U.S.C. §876(c) is a  
crime of violence**



“Tessmer contends that *Left Hand Bull* is no longer good law after *Begay v. United States*, 553 U.S. 137 (2008). However, *Begay* analyzed solely the analogous residual clause of 18 U.S.C. § 924(e)(2)(B). . . . In contrast, *Left Hand Bull* determined that § 876(c) constituted a crime of violence under the separate “has as an element the . . . threatened use of physical force” clause of U.S.S.G. § 4B1.2(a)(1), and not the residual clause of § 4B1.2(a)(2). Therefore, *Begay* does not affect the holding of *Left Hand Bull*.”

# Crimes of Violence / Violent Felonies - - Possession of a Firearm During a Drug Trafficking Offense

*United States v. Watson*,  
650 F.3d 1084 (8<sup>th</sup> Cir. 2011)

**Applying Sykes, the circuit holds that possession of firearm during a drug trafficking offense is a crime of violence under the residual clause, as the conduct presents a serious potential risk of physical injury to another**



“[W]e think that the crime creates a risk of violent confrontation that is at least as substantial as the risk created by the enumerated crime of burglary.”

# Crimes of Violence / Violent Felonies - - Child Molestation

***United States v. Scudder,***  
648 F.3d 630 (8<sup>th</sup> Cir. 2011)  
(Opinion by Jarvey, J., sitting by designation)

**Indiana crime for touching or fondling a child between ages 12-16, with intent to arouse or satisfy sexual desires, is a violent felony under the residual clause for conduct creating a serious potential risk of physical injury to another**



“Scudder’s child molestation convictions are for intentional crimes, and they are ‘similar in risk’ to the crimes listed in the ACCA’s residual clause.” (citations omitted).

# Guidelines - - USSG § 2K2.1(a)(4)(B) - - Enhanced Offense Level for Possession of a Semiautomatic Firearm Capable of Accepting a Large Capacity Magazine

*United States v. Price*,  
649 F.3d 857 (8<sup>th</sup> Cir. 2011)

**Circuit finds higher offense level  
for possession of assault weapon  
justified by weapon's lethal  
capacity**



“Price presents empirical evidence that homicides are most often committed with handguns and that the semiautomatic weapons . . . are used in a relatively small percentage of all gun crimes. Price contends that this means that semiautomatic rifles capable of accepting large capacity magazines are actually ‘less dangerous’ than handguns.” (citation omitted).



“Price’s argument ignores the relative availability and ease of use of handguns as compared to the type of semiautomatic rifle that was found in his home. . . .The guideline enhancements for certain types of weapons are not based on the number of deaths that they cause each year but on their lethal capacity.”



“[Assault weapons] can ‘unleash extraordinary firepower’ and are built to shoot people quickly, efficiently, and accurately. Given these characteristics it was certainly within the Sentencing Commission’s discretion to recommend more severe punishment. . . .” (citation omitted).

# Guidelines - - USSG § 2K2.1(b)(4)(B) - - Altered or Obliterated Serial Number

*United States v. Jones,*  
643 F.3d 257 (8<sup>th</sup> Cir. 2011)

**“Scratched over” serial number that could be recovered by application of a weak acidic solution was still an “altered” serial number for § 2K2.1(b)(4)(B) purposes**



“[A] firearm’s serial number is “altered or obliterated” when it is materially changed in a way that makes accurate information less accessible. . . . [U]nder that standard, a serial number which is not discernible to the unaided eye, but which remains detectible via microscopy, is altered or obliterated.”

# **Guidelines - - USSG § 4A1.2(a)(1) - - “Prior Sentence” - - Discrete Drug Possession Offense During Course of Drug Distribution Conspiracy**

*United States v. Edward Boroughf,  
aka “Special Ed”*

649 F.3d 887 (8<sup>th</sup> Cir. 2011)

**District court properly assessed  
criminal history points for drug  
possession conviction that  
occurred during the course of  
defendant’s large scale marijuana  
distribution conspiracy**



“[T]he instant offense involved a fifteen-year conspiracy that resulted in the distribution of between 3,000 and 10,000 kilograms of marijuana in and around the St. Louis area. Even at the beginning of the conspiracy, each shipment Boroughf received contained between 10 to 350 pounds of marijuana. . . . In contrast, Boroughf’s 1997 conviction involved the possession of a small bag containing approximately 35 grams of marijuana. Additionally, whereas the instant offense involves only the conspiracy to distribute marijuana, Boroughf’s 1997 conviction involved two offenses: the possession of heroin and the possession of marijuana. . . .”

# Guidelines - - USSG § 4A1.2(d)(2) - - Criminal History Points for Juvenile Sentence - - “Sentence to Confinement”

*United States v. Stewart*,  
643 F.3d 259 (8<sup>th</sup> Cir. 2011)

**Placement in Minnesota juvenile facility constituted “sentence to confinement” because defendant was physically confined there and not free to leave**



“In order to determine whether a sufficiently recent juvenile sentence is counted under part (A), and is therefore assigned two points, or instead is counted under part (B), and is assigned only one point, a district court must determine whether the prior sentence was a ‘sentence to confinement of at least sixty days.’ U.S.S.G. § 4A1.2(d)(2)(A). ‘[S]entence to confinement’ is not, however, defined in the guidelines.”

•  
“The district court . . . reasoned that a juvenile sentence qualified as a ‘sentence to confinement’ if the juvenile was ‘physically confined and not free to leave.’ We agree with this analysis.” (citation omitted).

# Guidelines - - USSG § 2D1.1(b)(1) - - Possession of a Firearm - - Proximity to Drugs

***United States v. Smith,***

656 F.3d 821 (8<sup>th</sup> Cir. 2011)  
(unpublished)

**Gun enhancement was proper even though defendant claimed he possessed rifle only for target practice; rifle was “approximately fifteen feet from a large amount of drugs.”**



“[T]he use or intended use of firearms for one purpose, even if lawful, does not preclude a finding that the defendant used the firearm for the prohibited purpose of facilitating a drug trade.”

# **Guidelines - - Date an Illegal Reentry Offense Commences - - Failure to Prove Defendant Continuously Remained in U.S.**

***United States v. Delgado-Hernandez,*  
646 F.3d 562 (8<sup>th</sup> Cir. 2011)**

**Reentry offense commences on date  
defendant illegal entered;  
government need not prove that  
defendant thereafter continuously  
remained in the country in order to  
establish date of offense**



“The rule advocated by Delgado-Hernandez is without authority and we reject it. No case . . . has held that the government must prove that the defendant has *never* left the United States and illegally returned in the interim.”

# Guidelines - - USSG § 3A1.2(c)(1) - - Enhancement for Assaulting a Law Enforcement Officer During Offense or Flight Therefrom

*United States v. Olson*,  
646 F.3d 569 (8<sup>th</sup> Cir. 2011)

**Act intended to cause, and reasonably causing, fear of immediate bodily harm was an assault for § 3A1.2(c)(1) purposes. (Defendant started to raise his gun after ignoring repeated orders to drop it)**



“We join those circuits that have concluded that the term ‘assault’ in the Official Victim enhancement is a reference to common-law criminal assault.”

•  
“ . . . Olson intended to frighten the officers, satisfying the intent element of the common-law definition of ‘menacing’ assault. Furthermore, the officers testified that Olson’s movements put them in fear of losing their lives. Such fear was reasonable when faced with a fleeing suspect, holding a gun, who had refused to relinquish it and began to raise it as they closed in around him.” (citation omitted).

# Sentencing - - Variances - - Absence of “Fast Track” Disposition Program

*United States v. Jimenez-Perez*,  
2011 WL 4916585 (8<sup>th</sup> Cir. 10/18/11)

OVERRULED!

**Circuit overrules precedent that  
barred absence of fast track  
program as a variance factor**

“[W]e hold that *Kimbrough* undermines the rationale of our prior decisions that disallowed variances based on the unavailability of Fast Track in a particular judicial district.”

•  
“However, we provide a word of caution that a [variance] premised solely on a [F]ast-[T]rack disparity may still be unreasonable. To withstand scrutiny, a [variance] should result from a holistic and meaningful review of all relevant § 3553(a) factors.”

# Sentencing - - Crack Cocaine Offenses - - Retroactive Application of the Fair Sentencing Act

*United States v. Sidney*,  
648 F.3d 904 (8<sup>th</sup> Cir. 2011)

**Post-FSA sentencing doesn't  
change circuit's view on  
retroactive application of FSA**



“[T]his court holds that the FSA is not retroactive, even as to defendants who were sentenced after the enactment of the FSA where their criminal conduct occurred before the enactment.”

# Sentencing - - Departures - - USSG § 4A1.3(a)(1) - - Underrepresented Criminal History - - Near Career Offender Status

*United States v. Johnson*,  
648 F.3d 940 (8<sup>th</sup> Cir. 2011)

**Circuit affirms 125-month jumbo  
departure for bank robber who fell  
just short of career offender status  
(Range was 51-63; sentenced to  
188 months; § 924(c) penalty  
pushed total sentence to 272  
months)**



“In imposing the 125-month upward departure, the court permissibly noted that Johnson’s criminal history was comparable to a career offender’s, who would have had a guideline range of 210-262 months.” (Johnson had prior robbery convictions from 1980 and 1985. Only one received criminal history points.)

# Sentencing - - Departures - - Substantial Assistance - - Authority to Limit the Extent of Departure Based Upon Non-Assistance Related Factors

***United States v. Rublee,***

2011 WL 4089532 (09/15/11)  
(8<sup>th</sup> Cir. 2011)

**District court can consider non-assistance related factors in limiting the extent of its substantial assistance departure**



“If the court decides to grant the Rule 35(b) motion, its decision to *limit* the § 3553(e) reduction, as opposed to extending it further downward, need not be based only on factors related to the assistance provided.”

# Sentencing - - Drug Trafficking in Benzylpiperazine (BZP) - - Most Closely Related Controlled Substance

*United States v. Bennett,*  
2011 WL 4950051 (8<sup>th</sup> Cir. 10/19/11)

District court did not err in using MDMA/Ecstasy as “most closely related controlled substance” in determining BZP defendant’s guideline range



“The PSR determined that BZP was most closely related to MDMA/Ecstasy.”

# Sentencing - - Variance Between Oral Pronouncement and Written Judgment

*United States v. Brave*,  
642 F.3d 625 (8<sup>th</sup> Cir. 2011)

**Oral special condition that defendant not reside with her children controlled over broader written condition that defendant not have contact in any manner with her children**



“Because the oral pronouncement by the sentencing court is the judgment of the court, the government acknowledges that the portion of the written [special condition] that is broader than the oral version is void. . . .” (citation omitted)

Accord *U.S. v. Mayo*, 642 F3d. 628, 633 (8<sup>th</sup> Cir. 2011) (“[W]hen an oral sentence and the written judgment conflict, the oral sentence controls.”)

# Sentencing - - General Remand - - Deference Owed to Original Sentencing

*United States v. Ross*,  
640 F.3d 1269 (8<sup>th</sup> Cir. 2011)

**On remand, district court did not  
abuse its discretion in imposing  
higher sentence than the one  
imposed by the original sentencing  
judge**



“[T]he effect of a general remand for resentencing ‘effectively wipe[s] the slate clean.’”

# Sentencing - - Rule 35(b) Proceedings - - Defendant's Right to be Present

*United States v. Lewis,*

2011 WL 2083330 (8<sup>th</sup> Cir. 5/27/11)

**Southern District defendant had right to be present at his Rule 35(b) hearing where written plea agreement afforded him the right to comment and present evidence at “any . . . proceeding related to this case.”**



“A Rule 35(b) hearing plainly is a ‘proceeding related to this case,’ and the right to comment or present evidence at a proceeding necessarily encompasses the right to participate in that proceeding.”

•

“A defendant has no right under the Federal Rules of Criminal Procedure or the Constitution to be present at a hearing that involves the reduction of sentence under Rule 35(b).”

- Colloton, J., dissenting

# Jurisdiction - - Juveniles - - Age at Time of Indictment

*United States v. Running*,  
431 Fed.Appx. 520 (8<sup>th</sup> Cir. 2011)

**Jurisdiction of district court is proper if juvenile offender is 21 or older when indicted**



“Although Running was 14 years old when he committed the offense, he was 23 years old when he was indicted, and thus [precluded] from invoking the [Juvenile Delinquency Act.]”

# Restitution - - Valuation of Lost or Damaged Property - - Use of Replacement Cost

*United States v. Frazier*,  
651 F.3d 899 (8<sup>th</sup> Cir. 2011)

**District court erred in using  
replacement cost in determining  
value of destroyed home**



“[R]eplacement value is intended to capture the amount of a victim’s loss when the lost or damaged property lacks a viable market for determining fair market value or is unique and carried with it intangible value that cannot easily be measured.”

# Restitution - - “Victims” - - Red Cross and BIA Aid to Victims of Defendant’s Crime

*United States v. Frazier*,  
651 F.3d 899 (8<sup>th</sup> Cir. 2011)

**Red Cross and Bureau of Indian Affairs were not victims for MVRA purposes even though they provided financial assistance to persons displaced by defendant’s arson offense**



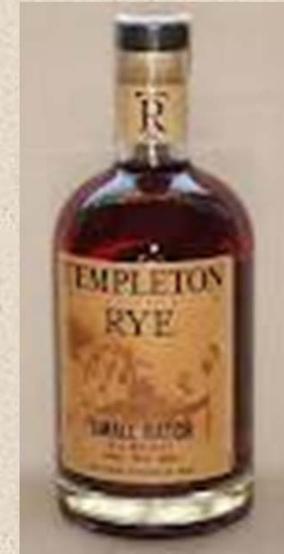
“[T]he Red Cross and the BIA were not victims under the MVRA because neither demonstrated it suffered a direct or proximate harm from Frazier’s burning down the home.”

# Supervised Release - - Special Conditions - - Alcohol Bans

*United States v. Walters,*  
643 F.3d 1077 (8<sup>th</sup> Cir. 2011)

*United States v. Wisecarver,*  
644 F.3d 764 (8<sup>th</sup> Cir. 2011)

**Circuit tosses alcohol bans where record failed to show past alcohol abuse or that alcohol played any role in instant offense**



“While Walters may possess an impulsive personality and while he may have used illicit substances after his last treatment program in 2005, nothing in the PSR suggests that Walters’s use of alcohol spurred his criminal behavior or impeded efforts to rehabilitate him. Moreover, nothing in the record suggests that Walters is ‘drug dependent’ and would replace an addiction to illicit substances with an addiction to alcohol.”

•

“Given the record before us, the Government’s contention that even minimal alcohol use might exacerbate Wisecarver’s volatile temper appears to be purely speculative.”

# Supervised Release - - Special Conditions - - Protected Location Restrictions

*United States v. Smith*,  
655 F.3d 839 (8<sup>th</sup> Cir. 2011)

**District court abused its discretion  
in prohibiting SORNA defendant  
from traveling within 500 feet of  
schools, parks, and other areas  
where children congregate**



“Condition 6, a movement restriction, does not just ban loitering near protected places. Its ‘not . . . come within’ language prohibits Smith even from driving by schools, parks, or other places used primarily by children, on main thoroughfares to legitimate activities.”

# Supervised Release - - Grounds for Revocation - - Evidence Portrayed in Rap Videos

*United States v. Rhone,*  
647 F.3d 777 (8<sup>th</sup> Cir. 2011)

**Yo! I said the guns were fake and all, 'cause the video was just for fun y'all, but the Judge said I was a liar, and now I'm in prison attire**



“The court was able to view the video recordings, to observe in court the toy gun and BB gun that Rhone and Harrison said were depicted in the videos, to consider the statements made by Rhone in the videos, and to evaluate the credibility of Rhone and Harrison.”

# Supervised Release - - “Mere Talk” as a Violation

*United States v. Vanhorn*,  
641 F.3d 296 (8<sup>th</sup> Cir. 2011)

**Defendant’s vocal refusal to go to a halfway house, and email threatening legal action if placed there, justified revocation even though no halfway house placement or report date had yet been obtained**



“Defendant argues . . . that his refusals to go to a halfway house were merely talk. He says his comments do not rise to the level of conduct, and without conduct, there could be no violation of a condition of supervised release.”

# Supervised Release - - Special Conditions - - Remote Sex Offense History

*United States v. Springston*,  
650 F.3d 1153 (8<sup>th</sup> Cir. 2011)

**SORNA defendant's 25-year-old sexual assault conviction didn't justify special conditions prohibiting contact with minors and Internet access, and requiring sex offender testing or treatment**



“Springston’s prior offense did not involve a minor, and there was nothing in the record suggesting that Springston was a risk to reoffend against adults. The court simply did not explain why it believed that Springston’s twenty-five-year-old conviction justified the conditions.”

# **WORKING WITH INTERPRETERS**

**PRESENTED BY**

**TIM ROSS-BOON, ASST. FPD**

**AND**

**PATRICIA HILLOCK**

**FEDERAL CERTIFIED INTERPRETER**

## WORKING WITH AN INTERPRETER IN FEDERAL COURT

### I. FEDERAL CRIMINAL CASES

1. COURT INTERPRETER'S ACT - 28 U.S.C. § 1827
  - A. Director of Administrative Office of the U.S. Courts shall establish a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings.
  - B. Director Certifies Interpreters.
  - C. When no certified interpreter is available an "otherwise" qualified interpreter may be used.
  - D. A defendant is entitled to an interpreter if the court determines that he "speaks only or primarily a language other than the English language ... so as to inhibit [his] comprehension of questions and the presentation of...testimony." *See* 28 U.S.C. 1827(d)(1).
  - E. Where no request for an interpreter is made and the record shows no need for one in that the defendant has no difficulty in communicating in English, failing to appoint an interpreter is not an abuse of discretion. *See Luna v. Black*, 772 F.2d 448, 451 (8<sup>th</sup> Cir. 1985).
  - F. District Court has broad discretion in determining whether a defendant needs an interpreter. *United States v. Nguyen*, 526 F.3d 1129, 1134-35 (8<sup>th</sup> Cir. 2008).
  - G. Once a district court decides an interpreter is needed, it is obligated to use a certified interpreter unless one is not reasonably available. *United States v. Gonzalez*, 339 F.3d 725, 728 (8<sup>th</sup> Cir. 2003).
  - H. The court is not obligated to provide written translations of court documents. *Id.* at 729.
  - I. Make your objection.

## 2. CONSTITUTIONAL RIGHT - FUNDAMENTAL FAIRNESS

- A. An accused's rights to a fair trial and due process of law are arguably violated when a defendant cannot adequately comprehend or communicate in English and no interpreter is provided. *See United States v. Tapia*, 631 F.2d 1207, 1210 (5<sup>th</sup> Cir. 1980); *But see Luna v. Black*, 772 F.2d 448, 451 (8<sup>th</sup> Cir. 1985) (district court did not abuse its discretion when record showed the defendant did not make a request for an interpreter and the government is not put on notice of a language barrier.)

## 3. CASE TYPES

### A. Illegal Reentry

- 1. Heartbreaking personal lives
- 2. Low education client
- 3. Local Dialects
- 4. Cultural differences
- 5. Idioms

### B. Immigration Related Cases

- 1. Document Fraud
- 2. False Identification
- 3. Fraudulent Marriage

### C. Drug Trafficking

- 1. Terms of Art
  - a. Substantial Assistance
  - b. Cooperation
  - c. Safety Valve
  - d. Proffer
  - e. Conspiracy - "Agreement"
  - f. Relevant Conduct
- 2. Issues
  - a. Awkward Spot - In the Middle
  - b. Confidentiality

#### 4. FEDERAL SENTENCING GUIDELINES

- A. Sentencing Table
- B. Base Offense Level
- C. Criminal History Category
- D. Departure
- E. Variance

## II. CHALLENGES TO TRANSLATION

### A. HEARSAY

1. The interpretation of the words of a defendant in a foreign language is not hearsay if the interpreter is sworn in court and is available for cross-examination.
2. If a witness is testifying about an out-of-court statement in another language that the witness did not understand but which is translated by someone else at the time it was spoken, if the interpreter is not available it may be hearsay. *See Martinez-Gaytan*, 213 F.3d 890, 891 (5<sup>th</sup> Cir. 2000) (Non-Spanish-speaking officer's testimony detailing the interrogation and confession of the Spanish-speaking officer who interpreted and translated a synopsis of the interrogation but did not testify at the suppression hearing is inadmissible hearsay).
3. Generally, if the non-English speaker is the declarant, then the statement is not hearsay. If the declarant is the interpreter it is probably hearsay.
4. Most Circuits recognize that properly qualified interpretation of a defendant's statements where translations are apparently correct are not hearsay because the interpreter is merely a language conduit. *See e.g. United States v. Herrera-Zuleta*, 937 F.2d 614 (9<sup>th</sup> Cir. 1991).
5. But some courts have hammered out factors to consider in determining whether to treat a translator as a mere language conduit: A. Which party supplied the interpreter; B. Whether the interpreter had any motive to mislead or distort; C. The interpreter's qualifications and language skill; D. Whether the actions taken subsequent to the conversation were consistent with the statements translated. *See United States v. Nazemian*, 948 F.2d 522 (9<sup>th</sup> Cir. 1991).

## B. ACCURACY

1. A party may challenge the qualifications and expertise of an interpreter. The government has the burden to show that the interpreter meets the qualifications of an expert witness.
2. Fed. R. Evid. § 604: An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.
3. Fed. R. Evid. § 702: Interpreters are experts by virtue of their “knowledge, skill, experience, training, or education”.
4. Federally certified interpreters are per se qualified.
5. Currently, there are only three languages that have federal certification procedures: Spanish, Creole, and Navajo.
6. Fed. R. Crim. P. 16: At the defendant’s request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rule 702, which includes opinions, the bases and reasons for those opinions, and the witness’s qualifications. This applies to interpreters. *See United States v. Hasan*, 747 F. Supp. 2d 642 (E.D. Va. 2010).

## III. KEEP YOUR SPANISH SKILLS TO YOURSELF!

1. Rudimentary skills in a language should be kept in check.
  - A. Respect what you may not know.
  - B. Only in rarest occasions attempt to correct.
  - C. Attempt to speak in foreign language probably a mistake.
  - D. Remember to not speak too fast.
  - E. Be as clear as possible.

## IV. IDIOMS

1. A natural part of language
  - A. Old-fashion attorneys use figures of speech.
  - B. An interpreter will get bogged down trying to translate obscure idioms.
  - C. It’s the lawyer’s responsibility to be clear.
  - D. Beware of terms of art, like “Snitch”.

- E. Other examples: rock and a hard place; sword of damocles; grab the bull by the horns; can't win for losing; sol; up a creek without a paddle.

**V. TRY NOT TO INVOLVE THE INTERPRETER**

- 1. Must not ask an interpreter if client "gets it."
- 2. Don't ask an interpreter to gauge mental health.
- 3. Don't allow interpreters to engage in conversation with the client.

**VI. REMEMBER DIFFERENCE BETWEEN SIMULTANEOUS V. SUMMARY**

- 1. One on one with lawyer - simultaneous
- 2. Allocution - summary
- 3. Summary depends on the translator's ability to take notes

**VII. LEARN FROM THE INTERPRETER AFTER THE INTERVIEW**

- 1. Ask interpreter to rate your performance.
  - A. "Don't use figures of speech"
  - B. "Don't try your Spanish"!

**VIII. AVOID CONVERSATIONS WITH THE INTERPRETER THAT DO NOT INCLUDE THE CLIENT**

- 1. Questions regarding the legal system must wait.

**IX. ETHICS**

- 1. Accuracy: If in doubt about an interpreter's skills, you have an obligation to correct the problem.
- 2. Context
- 3. Allow for reasonable interruptions by interpreter.
- 4. Tolerate and comply with requests to slow down by the interpreter. Better yet, go slow enough so that your words can be translated.
- 5. Confidentiality
  - A. An interpreter cannot be forced to testify regarding the content of the client interview.

# **ETHICS**

**PRESENTED BY**

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***WHO'S IN CHARGE? ALLOCATION OF RESPONSIBILITY  
BETWEEN LAWYER AND CLIENT IN A CRIMINAL CASE***

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[T]he need for assistance of counsel extends well beyond assistance in deciding whether to waive constitutional rights. The Sixth and Fourteenth Amendments embody “a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.” Thus, counsel is authorized to make certain choices for his client, after consultation with the client, during which counsel, who is fully informed of the facts, discusses the options with his client. As this Court has noted, “[w]ith the exception of [the three] specified fundamental decisions [involving waiver of constitutional rights], an attorney’s duty is to take professional responsibility for the conduct of the case, after consulting with his client.” Alvord v. Wainwright, 469 U.S. 956, 961 (1984) (Marshall, dissenting)

**The Standards**

**American Bar Association Criminal Justice Standards, The Defense Function  
Standard 4- 3.6 Prompt Action to Protect the Accused**

Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken, including, for example, motions seeking pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

## **CONTROL AND DIRECTION OF LITIGATION**

### **Standard 4- 5.1 Advising the Accused**

(a) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

(b) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.

(c) Defense counsel should caution the client to avoid communication about the case with witnesses, except with the approval of counsel, to avoid any contact with jurors or prospective jurors, and to avoid either the reality or the appearance of any other improper activity.

### **Standard 4- 5.2 Control and Direction of the Case**

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;
- (iii) whether to waive jury trial;
- (iv) whether to testify in his or her own behalf; and
- (v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

## **American Bar Association Model Rules of Professional Conduct**

### ***Client-Lawyer Relationship***

#### **Rule 1.2 Scope of Representation And Allocation Of Authority Between Client And Lawyer**

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

#### **Comment**

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

### **Independence from Client's Views or Activities**

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

### **Agreements Limiting Scope of Representation**

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which

representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

### **Criminal, Fraudulent and Prohibited Transactions**

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It

may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

### **Decisions Over Which the Client Has Control**

“Personal” or “fundamental” decisions over which a criminal defendant is deemed to have ultimate control:

1. to plead guilty,
2. to waive the right to a jury trial,
3. to be present at trial,
4. to testify on his own behalf<sup>1</sup>
5. to take an appeal.

Other decisions found by federal and state lower courts to belong solely to the defendant:

1. to waiver of the right to attend important pretrial proceedings,
2. to waive the constitutional right to a speedy trial,

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<sup>1</sup> Subject to counsel's obligation not to present false evidence or assist in its production

3. to refuse to enter an insanity plea,
4. to waive the right to be charged by a grand jury indictment,
5. to withhold the client's sole defense at the guilt phase of a capital case and use it solely in the penalty phase,
6. whether to submit lesser-included offense instructions.

### **Decisions Over Which the Lawyer Has Control**

The lawyer generally has control over decisions relating to matters of "strategy" or "tactics," including:

1. to challenge the admissibility of unconstitutionally obtained evidence,
2. to move to dismiss the indictment because the grand jury was unconstitutionally selected,
3. to have the defendant wear civilian clothing at trial,
4. to forego objections to jury instructions,
5. whether to assert a particular issue on appeal,
6. whether to forego cross-examination,
7. to decide which witnesses to call to testify at trial,
8. to control or assert scheduling matters,
9. to allow a federal magistrate judge (instead of a district judge) to conduct voir dire and jury selection,
10. to determine what evidentiary objections to raise, including to whether to stipulate to the admission of certain evidence at trial,
11. whether and how to exercise preemptory challenges,
12. whether to bring jury misconduct to the attention of the trial court,
13. whether to move for or consent to a mistrial,
14. whether to seek a change of venue, continuance, or relief from pretrial publicity,
15. whether to move for a continuance or to waive statutory speedy trial rights,
16. whether to request a competency determination,
17. to decide what evidence should be introduced at trial, what stipulations should be entered into, and what pretrial motions should be filed,
18. whether to submit lesser-included offense instructions. Neal v. Acevedo, 114 F.3d 803, 806 (8<sup>th</sup> Cir. 1997).

## **The Dilemma of the Impaired Client**

If an attorney has a reasonable belief that the client is impaired, Rule 1.14 of the Model Rules of Professional Conduct allows the attorney to take “reasonably necessary protective action,” including seeking mental health evaluations, the appointment of a guardian, and “going forth with a defense in spite of the client’s directive to the contrary.” *See also* the dissenting opinions of Justices Marshall and Brennan in Alvord v. Wainwright, 469 U.S. 956 (1984).

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