

# COMMENTS ON PROPOSED SENTENCING GUIDELINE AMENDMENTS OF JANUARY 9, 1995

## Amendment 35(A) §3B1.1

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

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

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

## Amendment 35(B) --§3B1.2

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

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

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

### **Amendment 39 -- §2D1.1**

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

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

### **Amendment 40 -- §2D1.1**

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

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

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

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

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

### **Amendment 46**

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

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

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