

FEDERAL PUBLIC DEFENDER

District of Arizona
222 North Central Avenue, Suite 810
PHOENIX, ARIZONA 85004

FREDRIC F. KAY
Federal Public Defender

(602) 382-2743
1-800-758-7053
(FAX) 602-382-2800

February 6, 2001

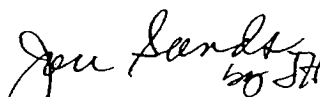
Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle N.E.
Washington, D.C. 20002-8002

Dear Judge Murphy:

On behalf of the Federal Public and Community Defenders, I submit the enclosed statement on proposed amendments one through four, which were published January 26, 2001 in the Federal Register. We will be happy to respond to any questions that you may have.

With best wishes,

Sincerely,

A handwritten signature in cursive script that reads "Jon Sands" followed by a stylized monogram "JS".

Jon Sands
Assistant Federal Public Defender

Proposed Amendment One Ecstasy

Congress has determined that

due to the popularity and marketability of Ecstasy, there are numerous Internet web sites with information on the effects of Ecstasy, the production of Ecstasy, and the locations of Ecstasy use (often referred to as "raves"). The availability of this information targets the primary users of Ecstasy, who are most often college students, young professionals, and other young people from middle- to high-income families.¹

Congress therefore directed the Commission to amend the guidelines to increase penalties for the manufacture, importation, exportation, or trafficking of ecstasy. The Commission, in carrying out this directive, is to provide for increased penalties "such that those penalties reflect the seriousness of these offenses and the need to deter them."² Congress directed the Commission to ensure that the guidelines reflect several factors – "the recent increase in the illegal importation of the controlled substances, "the young age at which children are beginning to use the controlled substances," that the substances are "frequently marketed to youth," and the "large number of doses per gram of the controlled substances"³ Congress authorized the Commission to promulgate a temporary, emergency amendment.⁴

Amendment one responds to the congressional directive by modifying the drug equivalency table of § 2D1.1 to treat ecstasy like heroin. This is accomplished by assigning to MDMA, MDA, MDEA, and PMA, and any other controlled substance marketed as ecstasy that has a similar chemical structure or an effect on the central nervous system substantially similar to, or greater than, MDMA the same marijuana equivalency assigned to heroin – one gram is equal to one kilogram of marijuana.⁵

We oppose abandoning the Commission's current distinctions among MDMA, MDA, and MDEA in the drug equivalency table. The ratios in § 2D1.1 for those substances are –

¹Children's Health Act of 2000, Pub.L. No.106-310, § 3662.

²*Id.* at § 3663(b)(1).

³*Id.* at § 3662(c)(2). It is the sense of Congress that the offense levels for ecstasy are too low, particularly for high level traffickers, and should be comparable to those for other drugs of abuse. *Id.* at § 3663(d)(1).

⁴*Id.* at § 3664.

⁵MDMA is 3,4-methylenedioxy methamphetamine; MDA is 3,4-methylenedioxy amphetamine; MDEA is 3,4-methylenedioxy-N-ethylamphetamine; and PMA is paramethoxymethamphetamine.

1 gm. of MDA = 50 gm. of marihuana
1 gm. of MDMA = 35 gm. of marihuana
1 gm. of MDEA = 30 gm. of marihuana

The Commission set those ratios after hearing from various authorities, including the Drug Enforcement Administration.⁶ Nothing in the legislation or the Commission's published materials addressing amendment one suggests that the distinctions are no longer valid. For instance, a similarity in chemical structure between MDA and MDMA, although of some significance, does not establish that the substances have identical, or even similar, abuse potential. These substances differ from one another in their potency, neurotoxicity, onset, duration, and capacity to modify mood with or without producing hallucinations. This was first recognized when the substance MDMA was being considered for scheduling in the Controlled Substances Act.⁷ It has also been recently recognized that concentrations of MDMA can vary 70-fold between tablets.⁸ In short, these illicitly manufactured tablets can contain a range of ingredients, of widely differing concentrations, and even tablets with the same brand name can have variable concentrations of active ingredients. These factors support differing conversion ratios. We therefore oppose amendment one insofar as it treats all of these substances identically.

⁶See § 2D1.1, comment. (backg'd).

⁷There are observed differences in humans between the effects of MDA and MDMA.

Studies . . . have shown MDA to have duration of action in humans of 12 to 15 hours, as compared to four to six hours for MDMA. MDA has been found to produce a mild cognitive impairment in humans at the 75 mg. Dosage level, while MDMA did not impair cognition even at 200 mg. As MDA dosages increase from 75 mg. to 200 mg., the effects in humans become increasingly similar to the effect of LSD, including the presence of visions. As dosages of MDMA increase from 75 to 200 mg., the intensity of the sense of well being and inner flow of associations which characterize the experience increase only moderately while the ego functions remain intact, cognition is unimpaired and visions are notably absent. Large doses of MDA (200 mg.) produce significantly greater disorientation and an up-welling of visual images that are not characteristic of MDMA in similar dose range.

Drug Enforcement Administration, U.S. Dept. of Justice, *In the Matter of MDMA Scheduling*, Opinion and Recommended Ruling, Findings of Fact and Conclusions of Law of Administrative Law Judge 56 (Docket No. 84-48) (May 1986) (available online at www.streetdrugs.org/mdma.htm).

⁸K. Sherlock et al., *Analysis of Illicit Ecstasy Tablets: Implications for Clinical Management in the Accident and Emergency Department.*, 16 J. Accident & Emergency Medicine 194 (1999).

We also oppose treating ecstasy the same as heroin. Treating them the same ignores the reality that the substances targeted by Congress have no similarity in chemical structure to heroin. While heroin is an opiate, ecstasy is a hallucinogenic amphetamine – a hybrid of the hallucinogen mescaline and the stimulant amphetamine. Moreover, unlike heroin, ecstasy is neither physically nor psychologically addictive. Heroin is known to be taken intravenously with resultant public safety concerns not associated with ecstasy, which are taken orally.

The issue for comment states that it has been represented to the Commission that ecstasy is similar in its hallucinogenic effect on the user to mescaline (which changes or modifies a person's mood). Ecstasy does have an added stimulant component that can elevate heart rate, blood pressure, and body temperature – effects similar to those produced by caffeine. This suggests that use of the mescaline conversion ratio is appropriate (1gm. of mescaline = 10 grams of marihuana).⁹ Use of the mescaline conversion ratio is inappropriate, however, because the result would be a reduction in the conversion ratios, leading to reduced penalties, the opposite of what Congress is seeking.

Two of the factors that Congress wants taken into consideration in responding to the congressional directive need to be discounted somewhat. First, Congress has told the Commission to ensure that the guidelines for ecstasy reflect “the rapidly growing incidence of abuse of the controlled substances”¹⁰ Despite this congressional assertion, the Department of Health and Human Services reports that hospital emergency department episodes attributable to ecstasy and other “club drugs” (including methamphetamine, LSD, GHB or GBL, rohypnol, and ketamine) are relatively infrequent.¹¹ The data reflects that of the 554,932 drug-related emergency room visits in 1999, ecstasy and GHB *together* comprised only 0.3 percent. The most frequent of the club drugs, methamphetamine and LSD, accounted for 0.5 and 1.0 percent of such episodes. In contrast, heroin accounted for over 84,000 emergency room visits. Deaths associated with ecstasy and other club drugs are quite rare and there were no notable increases in deaths involving club drugs from 1994 to 1998 in DAWN data.¹²

⁹Ecstasy does not produce the violent hallucinations associated with such hallucinogens as LSD or PCP, and thus the dangers associated with ecstasy, and its potential for harm, is not comparable to those drugs.

¹⁰Children's Health Act of 2000, Pub.L. No.106-310, § 3663(c)(2)(A).

¹¹See Office of Applied Studies, Substance Abuse and Mental Health Services Administration, Department of Health and Human Services, The DAWN Report (Dec. 2000). DAWN, the Drug Abuse Warning Network, is an ongoing, national drug abuse surveillance system that monitors visits to hospital emergency departments and deaths reviewed by medical examiners and coroners that are attributable to drug abuse.

¹²*Id.*

Second, Congress has stated that use of ecstasy "can cause long-lasting and perhaps permanent, damage to the serotonin system of the brain."¹³ That conclusion, however, does not accurately reflect current scientific findings. Scientists, at present, do not know with certainty the long-term effects on humans of recreational usage.¹⁴

We believe that amendment three, because of the heroin equivalency, is flawed and results in disproportionately larger increases for offenders responsible for lower quantities. For example, amendment three will increase by 12 levels (from level 14 to level 26) the offense level for 100 grams of MDA, but will increase by only four levels (from level 32 to level 36) the offense level for 20 kilograms of MDA.¹⁵ We think that the fairest way to implement the congressional mandate is to add to § 2D1.1(b) a two-level enhancement that applies if the offense involved ecstasy.

Proposed Amendment Three Trafficking in List I Chemicals

Congress has directed the Commission to amend the guidelines affecting ephedrine, phenylpropanolamine, and pseudoephedrine offenses to increase penalties "such that those

¹³Children's Health Act of 2000, Pub.L. No.106-310, § 3662(2).

¹⁴In a 1998 study conducted by scientists at Johns Hopkins Department of Neurology, nerve cell damage was associated with very heavy use, with some subjects having used it 200 or more times. Press release, Johns Hopkins Medical Institutions, Office of Communications and Public Affairs, October 30, 1998. "Whether or not the [serotonin-producing] nerve cells are permanently damaged, is uncertain." *Id.* Recent studies in human MDMA users probing for evidence of "brain serotonergic neurotoxicity" indicate that some MDMA users may incur neural injury and possibly functional sequelae, however, "additional studies in animals, as well as longitudinal and epidemiological studies in MDMA users, are required to confirm and extend the present data, and to determine whether MDMA users are at increased risk for developing neuropsychiatric illness as they age. McCann, UD, and Ricaurte, GA; 3,4-Methylenedioxymethamphetamine ('Ecstasy')-induced serotonin neurotoxicity: clinical studies, Neuropsychobiology 2000; 42(1):11-6; see also Hatzidimitriou, McCann, and Ricaurte, *Journal of Neuroscience*, June 15, 1999; 19(12):5096-5107 ("Additional studies are needed to better understand these and other factors that influence the response of primate 5-HT neurons to MDMA injury and to determine whether the present findings generalize to humans who use MDMA for recreational purposes.)

¹⁵Using the midpoint of the applicable range for a criminal history category I defendant, the increase from level 14 to level 26 is from 18 months to 70.5 months, slightly more than 390 percent. The increase from level 32 to level 36 is from 136 months to 211.5 months, an increase of 75.5 months, about 55 percent.

penalties correspond[] to the quantity of controlled substance that could reasonably have been manufactured using the quantity of ephedrine, phenylpropanolamine, or pseudoephedrine possessed or distributed.”¹⁶ Congress also directed the promulgation of a table setting forth “the quantity of controlled substance that could reasonably have been manufactured” from a given amount of ephedrine, phenylpropanolamine, or pseudoephedrine. Finally, Congress called for increased penalties for list I chemicals other than ephedrine, phenylpropanolamine, and pseudoephedrine “such that those penalties reflect the dangerous nature of such offense, the need for aggressive law enforcement action to fight such offenses, and the extreme dangers associated with unlawful activity involving methamphetamine and amphetamine”¹⁷ Congress gave the Commission the authority to promulgate a temporary, emergency amendment.¹⁸

Amendment three would add a new chemical table to § 2D1.11 that ties the base offense levels for offenses involving ephedrine, phenylpropanolamine, and pseudoephedrine to the base offense level for methamphetamine (actual), assuming a 50 percent yield from the chemicals. In response to the directive about a conversion-ratio table, amendment three would amend the drug equivalency tables of § 2D1.1 to set forth a drug conversion ratio for ephedrine, phenylpropanolamine, and pseudoephedrine. Finally, amendment three, in response to the directive about other list I chemicals, would increase the base offense level (from 30 to 32) for benzaldehyde, hydriodic acid, methylamine, nitroethane, and norpseudoephedrine.

We believe that amendment three complies with the congressional directive. We believe that the Commission should maintain the distinction between offenses involving possession of precursor chemicals with intent to manufacture a controlled substance and offenses involving an actual attempt to manufacture a controlled substance.

Proposed Amendment Four Human Trafficking

Congress has directed the Commission to amend the guidelines concerning offenses involving “the trafficking of persons” (such as peonage cases) “to ensure that these sentencing guidelines and policy statements . . . are sufficiently stringent to deter and adequately reflect the heinous nature of such offenses.”¹⁹ In particular, Congress directed the Commission to consider

¹⁶*Id.* at § 3651 (b)(1).

¹⁷*Id.* at § 3651(c).

¹⁸*Id.* at § 3651(d).

¹⁹Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 112(b). The Act gave the Commission the authority to promulgate a temporary, emergency amendment. *Id.* at § 112(b)(3).

providing enhancements for offenses that (1) involve a large number of victims, (2) involve a pattern of continued and flagrant violations, (3) involve the use or threatened use of a dangerous weapon, or (4) result in death or bodily injury.²⁰

Amendment four would revise §§ 2G1.1, 2G2.1, and 2H4.1 and add a new guideline to Chapter 4, part H, subpart 4 of the *Guidelines Manual* (peonage, involuntary servitude, and slave trade). Amendment four would revise § 2G1.1(b)(2) by adding an enhancement for victimizing children under the age of 12 years (six or nine levels, amount to be decided), for victimizing children 12 years old but not 14 years old (four or six levels, amount to be decided), and for victimizing children 14 years old but not 16 years old (two or three levels, amount to be decided). Amendment four would amend § 2G2.1 similarly.

Amendment four would revise § 2H4.1 to add an alternative base offense level to reflect a newly-enacted offense, expand the weapon enhancement of § 2H4.1(b)(2), and add an enhancement based upon the number of victim. Finally, amendment four would add a new guideline to Chapter 4 of the *Guidelines Manual*. The new guideline would have a base offense level of four or six (amount to be decided) and two specific offense characteristics, for injury to a victim and for committing any part of the offense after a civil or administrative adjudication for similar misconduct.

With regard to the new enhancements to §§ 2G1.1 and 2G2.1 for the age of the victims, we favor a six-level enhancement for the youngest category, a four-level enhancement for the middle category, and a two-level enhancement for the oldest category. We believe that these increases will produce appropriately severe punishment. With regard to the new departure commentary for those guidelines, we favor designating as 10 the number of victims above which a departure would be warranted. With regard to the new base offense level for § 2H4.1, we believe that level 15 best reflects the nature of the offense. With regard to how the number of victims should be handled in that guideline, we favor the departure commentary and, consistent with our view above, would favor designating as 10 the number of victims above which a departure would be warranted.

With regard to the new guideline, we believe that a base offense level of four is appropriate, in view of the enhancements for injury (four levels for serious bodily injury, and two levels for bodily injury) and for prior similar misconduct (two levels).

²⁰*Id.* at § 112(b)(2)(C).