

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of final action regarding amendments to a policy statement and commentary effective May 1, 2008.

SUMMARY: The Sentencing Commission hereby gives notice of amendments to the commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and to policy statement §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) made pursuant to its authority under 28 U.S.C. § 994(a), (o), and (u).

DATES: The Commission has specified an effective date of May 1, 2008 for the amendments set forth in this notice.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer,
Telephone: (202) 502-4590.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o), and specifies in what circumstances and by what amount sentences of imprisonment may be reduced if the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses pursuant to 28 U.S.C. § 994(u).

Unlike amendments made to sentencing guidelines, the Commission is not required to apply the procedures of section 553 of title 5, United States Code, to amendments to policy statements and commentary. See 28 U.S.C. § 994(x). To the extent practicable, the Commission endeavors to apply such procedures to amendments to policy statements and commentary. Because the Commission has identified a certain sentencing anomaly in which some offenders have not received the reduction intended by Amendment 706 and some offenders have received a greater reduction than intended by Amendment 706, see USSC, Guidelines Manual, Supplement to Appendix C, Amendment 706 (November 1, 2007), the Commission did not apply the provisions of section 553 of title 5, United States Code, to the promulgation of the amendments

set forth in this notice.

Additional information may be accessed through the Commission's website at www.ussc.gov.

AUTHORITY: 28 U.S.C. § 994(a), (o), and (u); USSC Rules of Practice and Procedure 4.1.

Ricardo H. Hinojosa,

Chair

1. Amendment: The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 by striking subdivision (D) in its entirety and inserting the following:

"(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."

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10, in subdivision (E), by inserting under the heading "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*" the following as the fifteenth entry:

"1 gm Cocaine Base ('Crack') = 20 kg of marihuana".

Reason for Amendment: This amendment modifies the commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to revise the manner in which combined offense levels are determined in cases involving cocaine base ("crack cocaine") and one or more other controlled substance. Specifically, Application Note 10(D) has resulted in a certain sentencing anomaly in which some offenders have not received the benefit of the two-level reduction provided by Amendment 706 because of the conversion of cocaine base to its marihuana equivalent, and some offenders have received a reduction greater than intended. (See USSC, Guidelines Manual, Supplement to the 2007 Supplement to Appendix C, Amendment 706).

In order to remedy this anomaly, this amendment modifies the Drug Equivalency Tables to provide that 1 gram of cocaine base equals 20 kilograms of marihuana, as it did prior to Amendment 706, and amends Application Note 10(D) to provide that the combined

offense level for an offense involving cocaine base and one or more other controlled substance is determined initially in the same manner as for other polydrug cases under Application Note 10(B). In order to effectuate the two-level reduction intended by Amendment 706, this amendment further provides that the resulting combined offense level is reduced by two levels. However, the amendment provides three exclusions to application of the two-level reduction. First, the two-level reduction does not apply if the offense involved 4.5 kilograms or more of cocaine base because the offense levels for such offenses were unaffected by Amendment 706. Second, the two-level reduction does not apply if the offense involved less than 250 milligrams of cocaine base in order to ensure that the offense level does not reduce below level 12, the minimum offense level in the Drug Quantity Table for offenses involving cocaine base. Third, the two-level reduction does not apply if it would result in a combined offense level that is less than the combined offense level that would apply if the offense involved only the other controlled substance(s) (i.e., the controlled substance(s) other than cocaine base). This third exclusion ensures that offenses involving controlled substances other than cocaine base do not receive a lower offense level than they otherwise would receive merely because cocaine base also is involved in the offense.

2. Amendment: Section 1B1.10 is amended in subsection (c) by striking "and"; and by inserting ", and 715" before the period.

Reason for Amendment: This amendment expands the listing in §1B1.10(c) (Reduction

in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) to include Amendment 715 as an amendment that may be applied retroactively pursuant to 28 U.S.C. § 994(u). The Commission determined for the same reasons accompanying Amendment 713 that Amendment 715 also should be applied retroactively. (See USSC, Guidelines Manual, Supplement to the 2007 Supplement to Appendix C, Amendment 713).