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107TH CONGRESS, 2d Session } HOUSE OF REPRESENTATIVES { REPORT 107–769

FAIRNESS IN SENTENCING ACT OF 2002

OCTOBER 31, 2002.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4689]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4689) to disapprove certain sentencing guideline amendments, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 4689, the "Fairness in Sentencing Act of 2002," would disapprove an amendment to the Sentencing Guidelines submitted by the United States Sentencing Commission to Congress on May 1, 2002. The Sentencing Commission's proposed amendment creates a drug quantity "cap" for those persons convicted of trafficking in large quantities of drugs if those persons also qualify for a mitigating role adjustment under the existing guidelines. For example, the sentence of a person convicted of trafficking 150 kilograms or more of cocaine who also qualifies for a mitigating role adjustment would be reduced to the same level as another person convicted of trafficking only a ½ kilogram of cocaine who also qualifies for a mitigating role adjustment. The ½ kilogram trafficker would receive no benefit under the "cap." This would result in the **less** culpable defendant (one who moved less drugs) unfairly receiving a disproportionately longer sentence than the **more** culpable defendant (one who moved more drugs). This amendment to the Sentencing Guidelines will take effect on November 1, 2002, if it is not disapproved by Act of Congress.

BACKGROUND AND NEED FOR THE LEGISLATION

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provided for the development of guidelines to further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The guidelines created a system of determinate sentencing: by eliminating parole and greatly restricting good time, it ensured that defendants would serve nearly all the sentence that the court imposed. The responsibility for shaping these determinate sentences was delegated to the United States Sentencing Commission. The Commission is an independent body within the judicial branch, with authority to promulgate sentencing guidelines and policy statements, consistent with the governing statutes. The Commission's enabling legislation, codified at 28 U.S.C. §§ 991–998, includes a number of congressional directives as to the content of the guidelines. It includes the parallel goals of providing **"certainty and fairness"** in sentencing, while avoiding **"unwarranted sentencing disparities."** [1]

Under the Guidelines the court determines a sentencing range based upon numerous factors, including the nature and seriousness of the offense, the defendant's role in the offense (whether major or minor), whether the defendant accepted responsibility, ob-

[1] 28 U.S.C. § 991(b)(1)(B) (2002); *see also* 28 U.S.C. § 994(f) (2002).

structed justice, used a weapon in connection with the offense, and the extent of the defendant's past criminal record. Once the guideline range is calculated by the court using these factors, the court must generally impose a sentence which is within that range, although the court may in appropriate circumstances depart either below or above the calculated range when necessary.

SENTENCING CALCULATION FOR DRUG TRAFFICKING

"BASE OFFENSE LEVEL"

Calculating the sentencing range for drug trafficking crimes begins by looking to the objective factor of the amount of drugs involved to arrive at a starting "base offense level." The guidelines provide for an orderly gradation of levels, from level 6 (the lowest level) to level 38 (the highest level). These levels are set forth in a table contained within the Guideline Manual. The greater the amount of drugs involved, the greater the defendant's "base offense level" will be. When two or more persons are involved together in a drug trafficking crime, the amount of drugs attributable to each defendant is often different, depending upon whether or not the individual defendant was aware of the total drug amount or whether that amount was foreseeable to that defendant. Amounts of drugs stemming from the criminal conduct of one defendant which are neither known nor foreseeable to the co-defendant are not included in calculating the co-defendants "base offense level," or his ultimate sentence.

"ADJUSTED OFFENSE LEVEL"

The "base offense level" is, however, only the beginning of the calculation. The "base offense level" for each defendant is increased or decreased depending upon other individual factors. In a drug conspiracy some members of the conspiracy may be more culpable than others. For example, those who planned the drug enterprise and directed others in it are considered more culpable than those who played only a minor role in the conspiracy. The offense level of the more culpable members is increased to reflect that fact, while the offense level of less culpable members is decreased. Similarly, the offense level of those who accept responsibility for their crimes is decreased further. The offense level of those who provide substantial assistance in the prosecution of others is decreased further still, while the offense level for those who have obstructed justice during the court proceeding or used a weapon during the crime is increased. The court uses these adjustment factors to determine a defendant's "adjusted offense level."

"CRIMINAL HISTORY CATEGORY"

The Guidelines also take into account whether a defendant has a prior criminal record. Defendants with criminal records are placed in a higher "criminal history category," ranging from the lowest category 1 through the highest category 6. A defendant with a more extensive and egregious history of past crimes is assigned a higher criminal history category.

"SENTENCING RANGE"

The court matches the "adjusted offense level" with the "criminal history category" (using a Table in the Guideline Manual) to determine the "sentencing range." The court is ordinarily required to impose a sentence which falls within that "sentencing range." However, the court has unlimited and unreviewable authority to decide exactly where within that range to sentence an individual defendant. The top of the range is about 25 percent higher than the bottom of the range, giving the sentencing judge significant discretion in meting out sentences appropriate to individual defendants beyond that already achieved by the application of the Guideline adjustments noted above. Further, the court may, in appropriate cases, depart either above or below the sentencing range to arrive at an appropriate sentence for an individual.

AMENDMENT 4

On May 1, 2002, pursuant to 28 U.S.C. § 944(p), the Sentencing Commission submitted to Congress ten amendments to the sentencing guidelines. These amendments will take effect on November 1, 2002, if they are not disapproved by an Act of Congress.

Amendment 4 is an amendment to section 2D1.1(a)(3) of the guidelines which sets the "base offense level" for offenses involving the unlawful manufacturing, importing, exporting, or trafficking of drugs. This amendment would create a drug quantity "cap" at base offense level 30 for those persons convicted of trafficking in large quantities of drugs if those persons also qualify for a mitigating role adjustment under the existing guidelines. The current maximum base offense level a defendant could receive under section 2D1.1(a)(3) is level 38. Persons trafficking in small quantities of drugs receive no benefit from the level 30 "cap," even when they, too, played only a minor or minimal role in the offense.

Amendment 4 also adds an application note to the Commentary to section 3B1.2 of the guidelines, which provides for a further decrease to the "base offense level" for a large-quantity trafficker who is a minimal or minor participant in the criminal activity. This new application note would require the court to decrease the base offense level another two (2) to four (4) levels whenever the court has applied section 2D1.1(a)(3) and "capped" the base offense level at level 30. This means that the "base offense level" for large quantity traffickers would always be reduced to at least level 28 and could be reduced as low as level 26 whenever section 2D1.1(a)(3) is applied. As an example, this amendment would treat traffickers who are responsible for trafficking in 150 kilograms or more of cocaine the same as traffickers who are responsible for trafficking only ½ kilogram of cocaine. This represents a significant departure from the current orderly gradation structure which assures that those trafficking in higher drug amounts receive higher "base offense levels."

Amendment 4 would accordingly result in disproportionate punishment contrary to past congressional directives, and would simply be unfair. Small-time drug defendants—those who perform minor roles and traffic in small amounts of drugs receive no benefit under Amendment 4. The small-timer will thus receive a disproportionately higher sentence than those trafficking in more drugs.

The Sentencing Commission, in its "Reason for Amendment," states that the current guidelines overstate the culpability of certain drug offenders "who perform relatively low level trafficking functions, have little authority in the drug trafficking organization, and have a lower degree of individual culpability." However, such persons already receive an individual downward adjustment to reflect these facts. Had the Commission believed that the current "mitigating role" adjustment was insufficient to reflect relative culpability, **those provisions** could have appropriately been amended to address the issue for all defendants with a mitigating role in an equitable manner without creating a unfair disparity in sentencing.

Amendment 4 will be nothing short of a windfall for large drug traffickers. It gives drug dealers the incentive to move **more** drugs, rather than **less**, and is contrary to the consistent and long-standing congressional intent that **drug quantity** forms the centerpiece of the guidelines in drug sentencing. The greater the drug quantity involved in the trafficking operation, the greater the harm to our Nation. The intent of Congress has been clear that there be an orderly gradation of sentences in drug trafficking cases based primarily upon the **objective** criterion of **drug quantity**. The proposed amendment to "cap" drug quantity is inconsistent with that congressional intent and also with basic notions of fairness. The "mitigating role" participant in a given case whose lower base offense level does not trigger the "cap" (because he moved less drugs) will receive a disproportionately higher sentence than the "mitigating role" participant in another case whose level does trigger the "cap" (because he moved more drugs).

HEARINGS

On May 14, 2002, the Subcommittee on Crime, Terrorism, and Homeland Security held a legislative hearing on H.R. 4689. Testimony was received from four witnesses. The witnesses were: John Roth, Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Department of Justice; William G. Otis, Adjunct Professor of Law, George Mason University Law School; Charles Tetzlaff, General Counsel, United States Sentencing Commission; and the Honorable James M. Rosenbaum, Chief Judge, United States District Court for the District of Minnesota.

TESTIMONY OF JOHN ROTH, UNITED STATES DEPARTMENT OF JUSTICE

The Administration's strong support of H.R. 4689 is aptly reflected in the testimony of John Roth, Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Department of Justice. Mr. Roth testified that the Commission's Amendment 4 would result in "a sentencing scheme that fails to reflect the seriousness of the conduct, will produce wildly disparate sentences between cases or even in the same case, and will ignore the modern reality of drug trafficking crimes in the United States today."[2] Mr. Roth succinctly noted that "[t]he net effect of the Sentencing Commission guideline change is to allow individuals with a minor but

[2] *The Fairness in Sentencing Act of 2002: Hearing on H.R. 4689 Before the Subcomm. on Crime, Terrorism, and Homeland Sec., House Comm. on the Judiciary*, 107th Cong. 15 (2002) [hereinafter *"H.R. 4689 Hearing"*] (prepared statement of John Roth, Section Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Department of Justice [hereinafter "Prepared Statement of John Roth"]).

necessary role in **large drug organizations** to escape the consequences of their actions."[3]

Additionally, he testified that "[t]he guideline change is going to make it more difficult for prosecutors to attack large organizations," and "to convince less culpable members of a conspiracy to aid the government or provide evidence in assistance to the government."[4] Mr. Roth pointed to his own previous prosecutorial experience in gaining the cooperation of low-level participants in catching and prosecuting higher-ups, including one such driver of a 200 kilogram cocaine shipment. According to Mr. Roth:

> "[t]he only reason that he'd cooperate with us is because he realized that notwithstanding his perhaps minor role in the entire organization, he still faced a significant sentence. If we loose that ability to convince these minor players to testify and to cooperate and to provide evidence we loose the ability to go after the kingpins. And to me that's the single most significant problem with the commission's actions."[5]

Significantly, the Department of Justice outlined examples that show this amendment is only the latest in an ongoing effort by the Commission to reduce the severity of Federal drug sentences:

> In 1992, the Commission changed the definition of "relevant conduct" for jointly undertaken activity, which had the effect of lowering drug conspiracy sentences. In 1994, the Commission reduced the highest offense level for trafficking offenses from level 42, for drug crimes involving, for example, a quantity in excess of 1,500 kilograms of cocaine, to a level 38, thereby punishing offenses involving 150 kilograms of cocaine in the same manner as those involving 1,500 kilograms of cocaine. In 1995, the Commission instituted the "safety valve" reduction which, in addition to allowing a defendant to be sentenced without regard to a statutory mandatory minimum, allowed in certain serious drug cases a further two level reduction in the offense level. This carefully crafted safety valve amendment resulted in a proportionate decrease in sentence for a significant group of defendants whose reduced culpability justified lower penalties. Just last year, the Commission once again reduced the drug sentencing guidelines by extending that two level reduction to less serious drug crimes (i.e., less than 500 grams of cocaine).[6]

TESTIMONY OF WILLIAM G. OTIS, ESQ.
GEORGE MASON UNIVERSITY LAW SCHOOL

William G. Otis, former Federal prosecutor and Adjunct Professor of Law at George Mason University Law School, testified in support of H.R. 4689. Mr. Otis testified that the amendment was not needed in as much as the existing guidelines provide ample authority for sentencing judges to arrive at reduced sentences for low-level offenders. He further noted that under the existing guidelines, defendants already: are sentenced only for amount of drugs that

[3] *Id.* at 15 (emphasis added).
[4] *Id.* at 13 (testimony of John Roth, Section Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Department of Justice [hereinafter "Testimony of John Roth"]).
[5] *Id.*
[6] *Id.* at 16 (Prepared Statement of John Roth).

they actually know about or are reasonably foreseeable to them; are sentenced to the bottom of their guideline range; receive reductions for accepting responsibility; receive reductions for their minor or minimal role in the offense; and may qualify for downward departures below the range, significantly including departures for assisting in the prosecution of others involved.[7] Mr. Otis concluded that "[b]ecause the amendment is excessive, ill-conceived and inconsistent with the Guidelines' central purpose of ensuring fairness while protecting the public, it should be rejected."[8]

TESTIMONY OF CHARLES TETZLAFF,
UNITED STATES SENTENCING COMMISSION

Charles Tetzlaff, General Counsel to the Sentencing Commission, testified in opposition to H.R. 4689 and in support of the Commission's amendment. Among the reasons for its adoption, he explained, was a statistical study by the Commission concerning powder cocaine sentences during a single year. According to Mr. Tetzlaff:

> powder cocaine offenders classified as "renters, loaders, lookouts, enablers, users and others" **on average** were held accountable for greater drug quantities (7,320 grams) than powder cocaine offenders classified as managers and supervisors (5,000 grams) or wholesalers (2,500 grams). And couriers and mules were held accountable for almost as much powder cocaine (4,900 grams) as managers and supervisors, and more than wholesalers.[9]

TESTIMONY OF THE HONORABLE JAMES M. ROSENBAUM

Invited at the request of the Minority, the Honorable James M. Rosenbaum, Chief Judge of the United States District Court for the District of Minnesota, appeared before the Subcommittee at the May 14, 2002, hearing and testified in opposition to H.R. 4689. Judge Rosenbaum submitted a prepared statement as part of his testimony.[10] As reflected in his statement, Judge Rosenbaum testified that the U.S. Sentencing Commission's drug level cap amendment was needed because it would help alleviate inequities resulting from the application of the current guideline sentencing structure. In advancing his position, Judge Rosenbaum testified that defendants convicted of drug offenses "frequently have no idea what

[7] *Id.* at 26 (prepared statement of William G. Otis, Adjunct Professor of Law, George Mason Univ. [hereinafter "Prepared Statement of William G. Otis"]).

[8] *Id.* at 25.

[9] *Id.* at 11 (prepared statement of Charles Tetzlaff, General Counsel to the Sentencing Commission [hereinafter "Prepared Statement of Charles Tetzlaff"]) (emphasis added). It is important to note that this "study" shows little more than the ability to manipulate statistics and, more importantly, it tells us nothing about actual cases. In the study, "renters, loaders, lookouts, etc," were thrown together into a statistical pool (regardless of the size of the drug operation in which they were involved) where the drug amounts were **averaged** and then compared against the similarly **averaged** drug amounts for all "supervisors and managers" (regardless of the size of the operation in which they were involved). A comparison of such broadly assessed averages is irrelevant when comparing relative attributable drug amounts within individual conspiracies. Even if it was relevant, it does not explain why the Commission chose to apply the drug cap to all drugs, rather than limit its application to powder cocaine where the supposed "anomaly" was found to exist.

[10] *H.R. 4689 Hearing* at 19–22 (prepared statement of Hon. James M. Rosenbaum, Chief Judge, U.S. Dist. Court for the Dist. of Minn. [hereinafter "Prepared Statement of Judge Rosenbaum"]).

they are carrying or receiving;"[11] that "under the present guidelines, it is the quantity of drugs in the whole scheme that drives the sentence;"[12] and that the "present sentencing system sentences minor and minimal participants who do a day's work, in an admittedly evil enterprise, the same way it sentences the planner and enterprise-operator who set the evil plan in motion and who figures to take its profits."[13]

To further his argument, Judge Rosenbaum offered "examples of the effects of this change, if adopted . . ." and provided "examples . . . pulled from recent cases in the District of Minnesota."[14] He proceeded to discuss several cases, each of which he identified only by defendant initials, setting out guideline ranges under the existing guidelines, sentence terms, and other information with respect to each.[15] He also set out his calculation as to what the sentencing range for each would be if the Sentencing Commission's Amendment 4 were to become law, to suggest that the lower sentence resulting from the Amendment would be a more just sentence in each case.[16]

Following the hearing, the Subcommittee submitted additional written questions to Judge Rosenbaum on May 22, 2002, in order to ascertain, among other things, the actual cases to which Judge Rosenbaum referred during his testimony.[17] After receiving the May 22, 2002 letter, Judge Rosenbaum contacted Subcommittee Chairman Lamar Smith by telephone and asked that the Chairman agree to permit the Judge to limit his response to "publicly available information." The Chairman agreed that the Judge's initial response could be so limited. Thereafter, Judge Rosenbaum responded to the Subcommittee's May 22, 2002 letter on June 6, 2002.[18] Along with his response, Judge Rosenbaum conveyed copies of nine Judgment and Commitment Orders,[19] which reveal some, but by no means all, of the information sought by the Subcommittee.

Both in his June 6, 2002 response, and thereafter, Judge Rosenbaum declined, however, to answer certain questions posed to him by the Subcommittee relevant to his testimony, even for the cases over which he personally presided,[20] despite his acknowledgment

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[11] *Id.* at 19–20.
[12] *Id.* at 20.
[13] *Id.* at 22.
[14] *Id.* at 20.
[15] *Id.* at 20–22 (Prepared Statement of Judge Rosenbaum).
[16] *Id.*
[17] Letter from Hon. Lamar Smith, Chairman, Subcomm. on Crime, Terrorism, and Homeland Sec., to Hon. James M. Rosenbaum, Chief Judge, U.S. Dist. Court for the Dist. of Minn. (May 22, 2002).
[18] Letter from Hon. James M. Rosenbaum, Chief Judge, U.S. District Court for the Dist. of Minn., to Hon. Lamar Smith, Chairman, Subcomm. on Crime, Terrorism, and Homeland Sec. (June 6, 2002).
[19] *U.S.* v.*Vimalam Hamilton Delany,* No. 99–CR–51 (010) (JMR) (D. Minn. Aug. 24, 2000) (Judgment and Commitment Order); *U.S.* v. *Joel Arellano Plateado,* No. 00–CR–327(10)(JMR) (D. Minn. Apr. 4, 2001) (Judgment and Commitment Order); *U.S.* v. *Eliseo Rodrigo Romo,* No. CR 3–95–52 (D. Minn. Nov. 20, 1995) (Judgment and Commitment Order); *U.S.* v. *Reut Bustos-Hernandez,* No. 01–210(2)(DSD/JMM) (D. Minn. Jan. 28, 2002) (Judgment and Commitment Order); *U.S.* v. *Fernando Dwayne Davis,* No. 4:95CR00103–001 (D. Minn. Jan. 14, 1997) (Judgment and Commitment Order); *U.S.* v. *Maria Guadalupe Avalos,* No. 98–137(12)(DSD/AJB) (D. Minn. May 24, 1999) (Judgment and Commitment Order); *U.S.* v. *Stephen Tiarks,* No. 98–137(11)(DSD/AJB) (D. Minn. June 2, 1999) (Judgment and Commitment Order); *U.S.* v. *Alecia Colmenares,* No. 99–351(10)(ADM/AJB) (D. Minn. Sept. 5, 2000) (Judgment and Commitment Order); *U.S.* v. *Heather Ann Genz,* No. 99–351(9)(ADM/AJB) (D. Minn. Sept. 7, 2000) (Judgment and Commitment Order).
[20] *See* letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum (May 22, 2002); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (June 6, 2002); letter from Hon. Lamar

that "trials, guilty pleas, and sentencing proceedings are generally public."[21] As a significant example, the Judgment and Commitment Order in *United States* v. *Joel Arellano Plateado* reflects only that Judge Rosenbaum granted a downward departure in that case "for the reasons set forth at the hearing."[22] When the Subcommittee requested Judge Rosenbaum inform it of his reasons, he declined to do so.[23]

Further, in response to subsequent requests from the Subcommittee,[24] Judge Rosenbaum provided additional Judgment and Commitment Orders which also reflect that he granted downward departures in two other cases "for the reasons set forth at the hearing[s]."[25] Rather than provide the Subcommittee with his reasons in any of these cases, Judge Rosenbaum suggested that the Subcommittee seek to order transcripts of the sentencing proceedings and provided the name and telephone number of his court reporter.[26] He also wrote, "I am—and remain—happy to provide the Subcommittee such assistance as I am able to provide."[27] The Subcommittee thereafter sought to obtain the transcripts of certain relevant proceedings.[28]

I. JUDGE ROSENBAUM'S PREPARED STATEMENT SUGGESTED THAT DEFENDANTS ARE CONVICTED ON LEGALLY INSUFFICIENT EVIDENCE

At the May 14, 2002 hearing, Judge Rosenbaum testified against the bill and advocated strongly that the Sentencing Commission's amendment to cap the base offense level for those trafficking in large quantities of drugs was very much needed to bring equity to the Federal sentencing system. In describing those persons who would be affected by Amendment 4, he testified:

> they are the women whose boyfriends tell them, "A package will be coming by mail or from a package delivery service in the next 2 weeks. Keep it for me, and I'll give you $200, or maybe I'll buy you food for the kids." Or they are drug couriers who either swallow, wear, or drive drugs from one place to another. **And they frequently have no idea what they are**

Smith, Chairman, Subcomm. on Crime, Terrorism, and Homeland Sec., to Hon. James M. Rosenbaum, Chief Judge, U.S. Dist. Court for the Dist. of Minn. (July 19, 2002); letter from Hon. James M. Rosenbaum, Chief Judge, U.S. Dist. Court for the Dist. of Minn., to Hon. Lamar Smith, Chairman, Subcomm. on Crime, Terrorism, and Homeland Sec. (Aug. 9, 2002); letter from Hon. Lamar Smith, Chairman, Subcomm. on Crime, Terrorism, and Homeland Sec., to Hon. James M. Rosenbaum, Chief Judge, U.S. Dist. Court for the Dist. of Minn. (Aug. 9, 2002); letter from Hon. James M. Rosenbaum, Chief Judge, U.S. Dist. Court for the Dist. of Minn., to Hon. Lamar Smith, Chairman, Subcomm. on Crime, Terrorism, and Homeland Sec. (Aug. 30, 2002).

[21] Letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith at 2 (Aug. 9, 2002).

[22] *U.S.* v. *Joel Arellano Plateado,* No. 00–CR–327(10)(JMR) (D. Minn. Apr. 4, 2001) (Judgment and Commitment Order at 4).

[23] *See* letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum at 3 (July 19, 2002); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith at 2 (Aug. 9, 2002).

[24] *See* letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum at 3 (July 19, 2002).

[25] *U.S.* v. *Miguel Angel Larios-Verduzco,* No. 01–CR–228(JMR) (D. Minn. June 13, 2002) (Judgment and Commitment Order at 4); *U.S.* v. *Eduardo Pelayo-Ruelas,* No. 01–CR–228(01)(JMR/FLN) (D. Minn. Aug. 2, 2002) (Judgment and Commitment Order at 5).

[26] *See* letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith at 2 (Aug. 9, 2002).

[27] Letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith at 2 (Aug. 9, 2002).

[28] The court-reporter was exceedingly professional and helpful concerning this request. It nevertheless resulted in both delay in receiving the information, an obligation of public funds and expenditures of court and Subcommittee staff time to obtain information that Judge Rosenbaum possessed, but would not reveal.

> **carrying or receiving**, and if they have an idea of what, they usually don't know how much.[29]

That a sitting Federal Judge would suggest, as he did in his prepared statement, that persons can be, and are convicted on no more evidence than receiving a package at the request of a boyfriend is remarkable. If true, it raises serious concerns that judges are knowingly permitting such convictions despite the extraordinary power entrusted to them by Congress to prevent convictions based on insufficient evidence.[30] If not true, the falsity of that suggestion, cloaked in the majesty of a Federal judicial officer, can only serve to erode respect for the rule of law in the public's mind and in the mind of those who stand accused of crimes.

Accordingly, Chairman Smith pressed Judge Rosenbaum on this very point:

> Mr. SMITH . . . Judge Rosenbaum . . . In all of the examples that you gave, it's my understanding that the individuals involved were actually convicted of knowing they were trafficking in drugs or were convicted of knowingly being engaged in conspiring to traffic in drugs. . . .
>
> My question is this, going back to one of the examples that you gave—I think it was the example of the girlfriend, you said, [who was] given $200, just deliver this package or receive this package or whatever. If that's all there was to it, I don't think she would have been convicted . . .[31]

The Judge then acknowledged that the suggestion in his prepared statement was not correct and that persons convicted **did know** that they were carrying or receiving illegal drugs:

> Judge ROSENBAUM. . . . They were all convicted of crimes that they committed. They knew what they were doing . . . they understood what they were doing.[32]

II. JUDGE ROSENBAUM'S TESTIMONY INACCURATELY SUGGESTED A REFERENCE TO AN ACTUAL CASE IN SUPPORT OF THE AMENDMENT

In continuing his response to the Chairman's question at the May 14, 2002 hearing, Judge Rosenbaum added:

> The young woman received a box at her home. It was not for her to open that box. **I can assure you, knowing what I**

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[29] *H.R. 4689 Hearing* at 19–20 (Prepared Statement of Judge Rosenbaum) (emphasis added). Judge Rosenbaum also testified concerning an individual whom he identified as "EPR," telling the Subcommittee that "EPR was friends with a drug courier, and was asked to travel with him as a second driver. **According to the courier, the defendant was not aware of the drugs in the car**. His sentence is pending before me." *Id.* at 21 (emphasis added).

[30] Fed. R. Crim. P. 29 (Motion for Judgment of Acquittal). Rule 29 states: "[t]he court on motion of a defendant **or of its own motion shall order** the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed **if the evidence is insufficient to sustain a conviction** of such offense or offenses." *Id.* (emphasis added).

[31] *H.R. 4689 Hearing* at 28 (question from Chairman Smith).

[32] *Id.* at 28 (testimony of Hon. James M. Rosenbaum, Chief Judge, U.S. Dist. Court of the Dist. of Minn. [hereinafter Testimony of Judge Rosenbaum]). Further, Judge Rosenbaum thereafter was unable to identify **any** case in which he declined to grant a motion for judgment of acquittal under Rule 29, Federal Rules of Criminal Procedure, where the facts were as he described in his written statement: that is, where the only evidence adduced at trial was of the woman defendant's boyfriend [who] told her "[a] package will be coming by mail or from a package delivery service in the next 2 weeks. Keep it for me, and I'll give you $200, or maybe I'll buy you food for the kids." *Id.* at 19. *See* letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum at 3 (May 22, 2002) (question 11); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (June 6, 2002).

> **know of her relationship with her boyfriend, she would never have done so**. But she knew the box contained drugs, because she knew that's what her boyfriend did.[33]

This certainly gave every indication that he was speaking of an actual defendant, with an actual boyfriend, and that Judge Rosenbaum had personal knowledge about the nature of their relationship. Yet, in his June 6, 2002 response to the Subcommittee's follow-up questions seeking identification of this case,[34] the Judge revealed that:

> **that statement concerns no particular case**. The statement distills conversations I have had over several years with inmates—particularly women—in Federal Correctional Institutions I have visited. The statement was offered to illustrate the situation in which minor or minimal participants frequently find themselves.[35]

III. JUDGE ROSENBAUM'S INACCURATE REPRESENTATIONS REGARDING THE SENTENCES IN CASES BEFORE HIM AND OTHER FEDERAL DISTRICT COURTS CANNOT BE USED TO JUSTIFY SUPPORT OF THE AMENDMENT

1. Judge Rosenbaum Inaccurately represented the Sentence of "VHD"

The case of "VHD" (Vimalam Hamilton Delaney) cannot support the Amendment because Judge Rosenbaum misrepresented the sentence that "VHD" received under the existing guidelines. Judge Rosenbaum testified:

> Now, let me tell you about VHD . . . Under the present Guidelines she was rated at a level 27, and subject to a sentence of 87–108 months, or 7–9 years. Under the proposed amendment, she would have had a base offense level of 25 and faced 57–71 months, or between 5–6 years.[36]

Judge Rosenbaum did not to disclose that in this case he had actually **departed below the guideline range** (as he is permitted to do in the appropriate case under the existing guidelines) and sentenced "VHD" to **36 months**.[37] This sentence is well below the minimum of the guideline range under either the current guidelines or **the amendment proposed by the Commission.** Yet, Judge Rosenbaum did not disclose to the Subcommittee this essential fact and gave every indication that he was required to sentence this poor woman to an inordinately long term because of the harshness of the current guidelines—guidelines so harsh they need to be amended to provide relief lest injustice occur.

In fact, no amendment is needed at all. The current guidelines provide for departures and sentences below the range when appro-

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[33] *H.R. 4689 Hearing* at 28 (Testimony of Judge Rosenbaum) (emphasis added).

[34] *See* letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum at 3 (May 22, 2002) (question 11).

[35] Letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith at 2 (June 6, 2002) (emphasis added).

[36] *H.R. 4689 Hearing* at 20 (Prepared Statement of Judge Rosenbaum).

[37] *U.S.* v. *Vimalam Hamilton Delany,* No. 99–CR–51 (010) (JMR) (D. Minn. Aug. 24, 2000) (Judgment and Commitment Order at 2, 4).

priate,[38] as William G. Otis made clear in his testimony to the Subcommittee:

> Fifth, if the defendant is exceptional for any reason the Sentencing Commission did not adequately consider, he already qualifies for a downward departure with or without he government's acquiescence. As we speak, downward departures from the guidelines on this basis, combined with Government-sponsored departures, are given in an astonishing 43 percent of all drug trafficking cases.[39]

He further testified:

> With so many avenues of mitigation already built into the system, there is no occasion for an amendment . . .[40]

2. Judge Rosenbaum Inaccurately Represented the Sentence of "JAP"

Judge Rosenbaum also misstated the sentence imposed on "JAP," (Joel Arellano Plateado) which cannot be used to justify the Amendment. Judge Rosenbaum testified that:

> Twenty-one year old JAP . . . was characterized as a level 34 offender, resulting in a range of 57–71 months, or 5–6 years, after reductions for role, acceptance, and safety valve. Under the change [of the Commission's amendment], he would have had a range of 37–46 months, or 3–4 years.[41]

Judge Rosenbaum did not tell the Subcommittee that in this case he had also **departed downward** for "JAP" under the **existing** guidelines to impose a sentence of **36 months**, which represents a sentence below the bottom of the guideline range under either the existing or **amended** guidelines.[42]

3. Judge Rosenbaum Misstated the Circumstances Surrounding the Sentencing of "FDD"

Judge Rosenbaum misstated the circumstances surrounding the sentencing of "FDD" (Fernando Dwayne Davis), which cannot be used to justify the Amendment. Judge Rosenbaum testified that:

> FDD was one of the drivers in the course of a drug distribution chain and had no criminal history. (His defense counsel maintained that his participation in the offense constituted short-term, aberrant behavior in his otherwise law-abiding lifestyle.) Therefore the presentence investigation considered him a minor participant in the drug trafficking conspiracy.[43]

To describe "FDD" merely as, "one of the drivers in the course of the drug distribution chain," understates the seriousness of the defendant's criminal conduct and the extent of his involvement as

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[38] *See* Sentencing Guidelines § 5K2.0. Section 3553(b) of 18 U.S.C. states that "[t]he court shall impose a sentence of the kind, and within the range . . . unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission." *Id.*

[39] *H.R. 4689 Hearing* at 23 (testimony of William G. Otis, Adjunct Professor of Law, George Mason Univ. [hereinafter "Testimony of William G. Otis"]).

[40] *Id.* at 23 (Testimony of William G. Otis).

[41] *Id.* at 21 (Prepared Statement of Judge Rosenbaum).

[42] *U.S.* v. *Joel Arellano Plateado,* No. 00–CR–327(10)(JMR) (D. Minn. Apr. 4, 2001) (Judgment and Commitment Order at 2 , 4).

[43] *H.R. 4689 Hearing* at 21 (Prepared Statement of Judge Rosenbaum).

a full and ongoing participant in the conspiracy as set forth in the sentencing judge's written findings attached to the Judgement and Commitment Order: [44]

> [T]he defendant was present at Patsy Kalfayan's apartment in the early morning on November 1, 1995 when Gerald Jarret made him and the other co-defendants remove their clothing when some cocaine base was misplaced. The defendant was also present when Carlos Cleveland found the missing cocaine base in the hood of his coat in Detroit at the home of a person known only as Tony.[45]
>
> The defendant drove the other members of the conspiracy to Minneapolis, met Steven Howard, who was transporting weapons for the defendants, at the Minneapolis bus station, and registered for a room at the Red Roof Inn.[46]

The Judgment and Commitment Order further reflects the fact that the sentencing judge attributed drug amounts to this defendant based upon his knowledge and involvement in aspects of the conspiracy beyond that of "one of the drivers." [47]

In addition to minimizing "FDD's" involvement, Judge Rosenbaum did not to tell the Subcommittee that the pre-sentence report listed factors which the probation officer who prepared the report believed "may warrant an **upward departure**." [48] While the Subcommittee discovered this only upon review of the Judgment and Commitment Order, Judge Rosenbaum told Chairman Smith, he based his testimony "on case summaries contained in Pre-Sentence Reports (PSRs)." [49]

Despite his prior review of the pre-sentence report containing this information, Judge Rosenbaum similarly did not tell the Subcommittee that "FDD" had also been convicted of aiding and abetting the use of a firearm in connection with his drug trafficking offense,[50] and that "FDD" "participated in the beating of [cooperating witness] Tonya Washington." [51] While failing to disclose these facts, Judge Rosenbaum reassuringly testified "it would seem improbable that a person who uses a weapon or who injures another would even be considered for minor or minimal status in the first place." [52]

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[44] *U.S.* v. *Fernando Dwayne* Davis, No. 4:95CR00103–001 (D. Minn. Jan. 14, 1997) (Judgment and Commitment Order).

[45] *Id.* (Judgment and Commitment Order, Findings of Fact at 3).

[46] *Id.* at 4. In addition, Davis was present, along with all other co-defendants (except one) on November 3, 1995 at the Red Roof Inn and was observed by law enforcement surveillance. Government's Memorandum in Response to Defendants' Position with Respect to Sentencing, page 3, *U.S.* v. *Fernando Dwayne Davis, et al*, 4:95CR000103–001. This was the day that the search warrant was executed at that location where crack cocaine, drug paraphernalia and incriminating documentary evidence was seized. *Id.*

[47] *U.S.* v. *Fernando Dwayne Davis*, No. 4:95CR00103–001 (D. Minn. Jan. 14, 1997) (Judgment and Commitment Order, Findings of Fact at 3).

[48] *Id.* at 1 (emphasis added). "Part E of the PSR, paragraphs 123–27, presents a brief summary of factors the probation officer believes may warrant a departure." *Id.*

[49] Letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith at 1 (June 6, 2002).

[50] *U.S.* v. *Fernando Dwayne Davis*, No. 4:95CR00103–001 (D. Minn. Jan. 14, 1997) (Judgment and Commitment Order, at 1, 2).

[51] *Id.* at 4.

[52] *H.R. 4689 Hearing* at 20 (Prepared Statement of Judge Rosenbaum).

4. The Record Regarding "MGA" Does Not Justify the Amendment Because She Received a Sentence of Only Six Months Under Existing Guidelines

Judge Rosenbaum attempted to support his claim that the Amendment is necessary because of the case of "MGA" (Mari Guadalupe Avalos). Judge Rosenbaum testified:

> MGA accepted $2,000 for accepting a package. This was the extent of her involvement in the conspiracy at issue. This made her a minimal participant entitled to a 4-point reduction. With no prior criminal convictions and a starting offense level of 34 based on drug quantity, her guideline range was 57–71 months, or 5 to 7 years, after reductions for role, acceptance, and safety valve. Under the proposed change, her range would instead be 37–46 months, or 3–4 years.[53]

Yet, Judge Rosenbaum did not tell the Subcommittee that the "proposed change," which he suggested at every step was so badly needed to prevent injustice, would be irrelevant to "MGA's" actual sentence of **only 6 months**. He did not tell the Subcommittee that "MGA" had in fact received a **downward departure** upon motion of the government for her substantial assistance to the United States in the prosecution of others under the existing guidelines and received a sentence of only "**6 months with work-release privileges or accommodations to attend school . . .**"[54] This sentence is well below the guideline range under either the existing **or amended** guidelines.

5. The Proposed Amendment Would be Irrelevant to "AC" Who Received a Downward Departure Under Existing Guidelines.

Similarly, Judge Rosenbaum did not tell the Subcommittee that the proposed amendment to the guidelines would also be irrelevant to "AC," (Alecia Colmenares) who it turns out also received a **downward departure** from her sentencing range under the existing guidelines and was sentenced to only **24 months**.[55] Instead he suggested at the hearing that the amendment was needed because:

> ["AC's"] base offense level was 36 before reductions for role (as a minimal participant), safety valve, and acceptance, resulting in a guideline range of 70–87 months or 6–7 years. Under the new guideline, her range would instead be 37–46 months, or 3–4 years."[56]

6. The Proposed Amendment Would Have No Effect on "ST" Who Received a Downward Departure Under Existing Guidelines

Judge Rosenbaum did not tell the Subcommittee that the proposed amendment would also be irrelevant to "ST" (Stephen Tiarks) who in fact received a **downward departure** from his sentencing range under the **existing** guidelines. The Judgment and Commitment Order reveals that he received a sentence of only

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[53] *Id.* at 21.

[54] *U.S.* v. *Maria Guadalupe Avalos*, No. 98–137(12)(DSD/AJB) (D. Minn. May 24, 1999) (Judgment and Commitment Order at 2, 7).

[55] *U.S.* v. *Alecia Colmenares*, No. 99–351(10)(ADM/AJB) (D. Minn. Sept. 5, 2000) (Judgment and Commitment Order at 2, 5).

[56] *H.R. 4689 Hearing* at 21 (Prepared Statement of Judge Rosenbaum).

42 months.[57] But at the hearing, Judge Rosenbaum used "ST" as an example of why the Commission's amendment was needed, stating:

> his base offense level was 38, which resulted in a guideline range of 108–135 months, or 8–11 years, after reductions for role, acceptance, and safety valve. With the change in the guidelines, his range would instead be 46–57 months, or between 4–5 years."[58]

7. "ERR" Was Denied A Lower Sentence Through the Exercise of the Sentencing Judge's Discretion, Not the Operation of the Guidelines

Judge Rosenbaum sought to justify the amendment through reference to "ERR" (Eliseo Rodrigo Romo) whom he described as having:

> acted as a courier/collections agent in a drug trafficking conspiracy. It did not appear that he had any discretionary power in the decision-making process or leadership in the conspiracy, like DLL he had a criminal history category of I . . . .[59]

Judge Rosenbaum did not inform the Subcommittee that, although the sentencing judge in that case had discretion under the existing guidelines to reduce "ERR's" sentence under the so-called "safety valve" provision[60] (an existing provision permitting further sentence reduction for "low-level" defendants), he specifically declined to do so and stated on the record:

> Long periods of incarceration, are not things that this Court likes to impose on people. . . . Mr. Romo, your conduct in this case, your conduct involved in this drug business, your conduct involving other matters that are outside of this case but are contained within the presentence investigation report is purely reprehensible conduct. It is the kind of conduct that a civil society cannot stand. And it is the kind of conduct that is wrong.[61]

8. "HAG" Received a Downward Departure For Substantial Assistance and Was Sentenced to Only 24 Months.

Judge Rosenbaum's testimony ignored the downward departure received by "HAG" for substantial assistance. Judge Rosenbaum testified that:

> She had a criminal history category II, because of 2 prior convictions for theft and careless driving. Without a change in the guidelines, her base offense level was 36. The presentence investigation concluded she was entitled to a reduction for minor

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[57] *U.S.* v. *Stephen Tiarks*, No. 98–137(11)(DSD/AJB) (D. Minn. June 2, 1999) (Judgment and Commitment Order at 2).

[58] *H.R. 4689 Hearing* at 21 (Prepared Statement of Judge Rosenbaum).

[59] *Id.*

[60] The so-called "Safety Valve" provision allows the court to sentence a qualifying defendant without regard to otherwise applicable mandatory minimum sentences and to further reduce the guideline range. It is available only to persons who, among other things, are found not to be subject to aggravating role enhancements. *See* 18 U.S.C. § 3553(f) (2002); *see also* Sentencing Guidelines § 5C1.2, Limitation on Applicability of Statutory Minimum Sentences in Certain Cases, and § 2D1.1(b)(6)(providing for 2 level reduction under guideline calculation).

[61] *U.S.* v. *Eliseo Rodrigo Romo*, Crim. No. 3–95–52, (D. Minn. Nov. 17, 1995) (Transcript of Sentencing Proceeding at 19–20).

> participant. Her guideline range was 121–151 months, or 10–13 years, after reductions for role and acceptance. With the proposed guideline change, her range would instead be 63–78 months, or between 5–7 years.[62]

Judge Rosenbaum did not tell the Subcommittee that under the existing guidelines, "HAG" (Heather Ann Genz) in fact received a sentence of only **24 months**, the sentencing judge having granted a downward departure for Genz's substantial assistance to the United States in the prosecution of others pursuant to Guideline § 5K1.1.[63]

Because the Judgment and Commitment Order received by the Subcommittee in the case of Heather Ann Genz reflected a criminal history category I and a guideline range of 87–108 months,[64] which was inconsistent with Judge Rosenbaum's testimony, the Subcommittee wrote to Judge Rosenbaum to confirm that his testimony concerning "HAG" in fact referred to Heather Ann Genz.[65] In response, Judge Rosenbaum acknowledged that "[a]s you correctly perceived, 'HAG' pertains to the case of Heather Ann Genz."[66] He then informed the Subcommittee that his statement and testimony before the Subcommittee concerning "HAG" "**did not refer to the actual sentence imposed by Judge Montgomery**."[67] Judge Rosenbaum also told the Subcommittee:

> My written statement submitted to the Subcommittee as part of my testimony (in the portion relating to HAG) stated, "the presentence investigation concluded . . ." These words are in the statement, because the testimony relating to HAG was based on her presentence investigation.[68]

This appears to suggest that his prepared statement attributed all of the information concerning "HAG's" guideline calculation to the presentence investigation. It in fact did not. The only attribution to the presentence investigation contained in his prepared statement was with respect to the reduction for minor participant—"[t]he presentence investigation concluded she was entitled to a reduction for minor participant."[69]

Both before and after this sentence, Judge Rosenbaum stated, without any reference to the source of the information, that: "HAG" "**had** a criminal history category II, because of 2 prior convictions for theft and careless driving;" "her base offense level **was** 36;" and "[h]er guideline range **was** 121—151 months, or 10—13 years, after reductions for role and acceptance."[70] Further, this information was submitted after Judge Rosenbaum informed the Subcommittee at the beginning of his statement: "[l]et me give you a few examples of the **effects of this change** if adopted," and that this was

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[62] *H.R. 4689 Hearing* at 20 (Prepared Statement of Judge Rosenbaum).
[63] *U.S.* v. *Heather Ann Genz*, No. 99–351(9)(ADM/AJB) (D. Minn. Sept. 7, 2000) (Judgment and Commitment Order at 2, 5).
[64] *Id.* at 5.
[65] Letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum (Aug. 9, 2002).
[66] Letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith at 1 (Aug. 30, 2002).
[67] *Id.* (emphasis added). Judge Rosenbaum also stated, "Until your letter, I had not reviewed the sentencing transcript (which had not been prepared, since the sentence was—apparently—not appealed)." *Id.*
[68] *Id.*
[69] *H.R. 4689 Hearing* at 20 (Prepared Statement of Judge Rosenbaum).
[70] *Id.* (emphasis added).

one of the "examples which are all pulled from recent cases in the District of Minnesota."[71]

It is, of course, difficult to understand why Judge Rosenbaum referenced presentence investigative calculations by probation officers contained in confidential records, rather than actual calculations determined by sentencing judges contained in public records, or why he believed that such information (particularly when it conflicted with actual sentences) was relevant.[72] While it may be possible to attribute the inaccurate information to his failure to inquire as to the actual sentence with respect to cases assigned to other judges,[73] the same cannot be said with respect to his own cases. With respect to his own cases, one can assume he was fully aware of the actual guideline determinations as well as the actual sentence imposed.

Regardless of sentencing judge, in the examples cited by Judge Rosenbaum where the "presumptive sentence"[74] conflicted with the actual sentence, the "presumptive sentence" was greater than the undisclosed actual sentence. Many were considerably greater. This could fairly be said to at least have the effect of making it falsely **appear** as though, these low-level defendants really were getting sentenced under the existing guidelines "the same way it sentences the planners and enterprise-operator,"[75] when in fact they were not.

9. Judge Rosenbaum's Testimony Regarding Alleged Sentencing Anomalies Fails to Provide Any Support for the Proposed Amendment

The Committee concludes that the cases cited by Judge Rosenbaum for which the Subcommittee has obtained substantial records, do not provide support for the proposed amendment. Rather, the records establish that sentencing judges are able to impose lower sentences for minor role defendants under the myriad provisions of the existing guidelines.

IV. JUDGE ROSENBAUM'S TESTIMONY REGARDING THE ATTRIBUTABLE DRUG AMOUNTS WAS INACCURATE AND DOES NOT JUSTIFY THE PROPOSED AMENDMENT

Judge Rosenbaum's testimony regarding the quantity of drugs attributable to each defendant in a multiple defendant offense suggests that the same quantity of drugs is attributable to every participant in the scheme. This is simply inaccurate—a defendant's

[71] *Id.* (emphasis added). After the Subcommittee first requested information concerning the actual cases (*see* letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum (May 22, 2002)), Judge Rosenbaum informed the Subcommittee that "these examples were based on case summaries contained in Pre-sentence Reports (PSR's)" and asked "[b]ecause the factual information in my testimony was taken from the confidential PSRs, however, I ask that you do not publicly cross reference my testimony with the Judgment and Commitment Orders . . ." Letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith at 1 (June 6, 2002).

[72] Indeed, as Judge Rosenbaum acknowledged, it is the sentencing Judge who makes the determinations concerning all of these sentencing issues. *See* letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith, at 2 (Aug. 30, 2002) ("the confusion, of course, lies in the fact that the sentencing judge made her own calculations and the adjustments she felt were appropriate at the actual sentencing. (These are reflected in the Judgment and Commitment Orders, which I have supplied pursuant to your previous request.)").

[73] Although even a cursory review of the Judgment and Commitment Order would reveal this information.

[74] This is Judge Rosenbaum's term. *See* letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith, at 1 (Aug. 30, 2002).

[75] *See H.R. 4689 Hearing* at 22 (Prepared Statement of Judge Rosenbaum).

sentence depends on the defendant's personal involvement with an amount of drugs and the foreseeability of any additional amounts involved in the offense. Not only is this true as a general matter, it is true in specific examples that Judge Rosenbaum cited. Judge Rosenbaum testified:

> And remember, under the present guideline, it is the quantity of drugs **in the whole scheme** *that drives the sentence. The judge only looks at the defendant, after* **all the scheme's drugs** have been accounted for. This means **drugs which were gotten or distributed by other people are included** before the defendant's role is considered.[76]

Judge Rosenbaum further responded to questions from Mr. Scott as follows:

> Mr. SCOTT. The way I understand they add this up, if you were transporting the half [kilogram], and your buddy is transporting 150 [kilograms], the conspiracy has got 150.
>
> Judge ROSENBAUM. You've got 150 and a half.
>
> Mr. SCOTT. And does that mean that the one who knew he was carrying a half gets sentenced in the 150-and-a-half conspiracy?
>
> Judge ROSENBAUM. Worse than that, the person who is financing it is the one who make the profits, regardless of which one is transporting it.
>
> Mr. SCOTT. So **everybody gets sentenced the same**?
>
> Judge ROSENBAUM. **Yes, sir**.[77]

However, the current guidelines provide that a defendant is only charged with the amount of drugs **with which he was directly involved**[78] and any additional amount of drugs distributed by others **that was reasonably foreseeable and within the scope of the criminal activity which he jointly undertook with such others**.[79] The example given by Mr. Scott and embraced by Judge Rosenbaum would only result in attribution of the larger drug amounts to the half-kilo defendant if the court determined from the evidence that the larger amount was **both reasonably foreseeable** by that defendant **and was within the scope of joint criminal activity** with the person trafficking the 150 kilograms. Judge Rosenbaum, who elsewhere informed the Subcommittee that he deals with criminal drug cases "every day,"[80] had an obligation

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[76] *Id.* at 20 (Prepared Statement of Judge Rosenbaum) (emphasis added). *See also id.* at 19 ("the Sentencing Commission's proposal reorients the sentencing inquiry, for bit players, away from the **quantity of drugs in the entire crime** and instead toward the perpetrator.") (emphasis added); *id.* at 19–20 ("under the present Guidelines, the sentencing decision is driven by the quantity of drugs **in the overall deal**. And it does not at all reflect the minor or minimal participant's reality.") (emphasis added).

[77] *Id.* at 30 (emphasis added). *But see* Judge Rosenbaum's answer to another question by Mr. Scott, concerning the application of mandatory minimum sentences on kingpins and mules. *H.R. 4689 Hearing* at 30 ("Let me be fair, Mr. Otis was also correct. It is addressed to the sound discretion of the court."). It is not at all clear what Judge Rosenbaum is attempting to say here in as much as mandatory minimums are not subject to the court's discretion, whereas sentencing guideline factors often are.

[78] Sentencing Guideline § 1B1.3 (a)(1)(A) ("all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant.").

[79] Sentencing Guideline § 1B1.3, Application Note 2(ii).

[80] *H.R. 4689 Hearing* at 22 (Prepared Statement of Judge Rosenbaum).

to provide this information in response to Mr. Scott's question and elsewhere, but chose not to.[81]

Significantly, the current Guidelines additionally provide that:

> A defendant's relevant conduct does **not** include conduct of members of a conspiracy prior to the defendant joining the conspiracy, **even if the defendant knows of that conduct**. (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level).[82]

With respect to this issue, it is significant that Judge Rosenbaum has repeatedly declined to provide the Subcommittee with information concerning the amount and type of drugs for which he determined each defendant was directly involved under Guideline § 1B1.3(a)(1)(A), and the amount and type of any additional drugs for which he determined the defendant was responsible as a result of the application of Guideline § 1B1.3 for jointly undertaken criminal activity.[83] Instead, he suggested that we seek to obtain the transcripts of the sentencing proceedings in order to find out.[84]

Similarly, Judge Rosenbaum has repeatedly declined to identify other individuals who were charged as codefendants in jointly undertaken criminal activity with each defendant referenced by Judge Rosenbaum in his testimony.[85] Such information would have revealed whether more culpable co-defendants or co-conspirators were appropriately sentenced based on attribution of greater drug quantities than that attributed to minor or minimal participant defendants referenced in Judge Rosenbaum's testimony. However, the Subcommittee's efforts to identify co-defendants by other investigative means lead to the receipt of additional documents containing

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[81] Judge Rosenbaum made only a passing reference to "forseeability," and thereafter agreed that "everybody gets sentenced the same." *See H.R. 4689 Hearing* at 30 (Testimony of Judge Rosenbaum).

[82] Sentencing Guidelines § 1B1.3, Application Note 2 (ii) (emphasis added). This is an extraordinary benefit to defendants convicted of drug trafficking conspiracies, for it is a radical departure from traditional conspiracy law. As a general rule, one who joins an existing conspiracy is guilty of conspiracy and adopts the prior acts of the other conspirators. *U.S.* v. *Green*, 600 F.2d 154 (8th Cir. 1979); *U.S.* v. *Lemm*, 680 F.2d 1193, 1204 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983). "[A] person who knowingly, voluntarily and intentionally joins an existing conspiracy is responsible for all of the conduct of the conspirators from the beginning of the conspiracy." Modern Fed. Jury Instructions—Criminal § 5 (MB), Manual of Model Criminal Jury Instructions for the Dist. Courts of the Eighth Circuit at § 5.06I (2002) (Conspiracy: co-conspirator Acts and Statements). "[U]nder the law each member is an agent or partner of every other member and each member is bound by or responsible for the acts of every other member done to further their scheme." *Id.* at § 506D (Conspiracy: Overt Act—explained).

[83] *See* letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum at 1 (May 22, 2002) (question 4, 5); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (June 6, 2002); letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum, (July 19, 2002); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (Aug. 9, 2002); letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum (Aug. 9, 2002); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (Aug. 30, 2002).

[84] Letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith at 2 (Aug. 9, 2002). Of course, even transcripts of sentencing hearings often do not reveal this information where the judge will often simply state on the record that the court adopts paragraphs of the presentence report. This is particularly so when the matter is not contested by the parties. For example, in *U.S.* v. *Eliseo Rodrigo Romo*, the court merely acknowledges on the record receipt of the presentence report, adopts it and recites his finding of a Total Offense Level. *U.S.* v. *Eliseo Rodrigo Romo*, No. 3–95–52 (D. Minn. Nov. 17, 1995) (Transcript of Criminal Sentencing Proceedings at 2).

[85] *See* letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum at 1 (May 22, 2002) (question 3); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (June 6, 2002); letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum at 3 (July 19, 2002); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (Aug. 9, 2002).

this information. These documents clearly establish that Judge Rosenbaum's testimony (that coconspirators are all held accountable for the same drug quantity) was unquestionably false.

Two individuals about whom Judge Rosenbaum testified, "ST" (Stephan Tiarks) and "MGA" (Maria Guadalupe Avalos),[86] were in fact co-defendants charged in the same conspiracy.[87] Judge Rosenbaum failed to inform the Subcommittee of this fact.[88] Had he done so, it would have been apparent to the Subcommittee, even at the hearing on May 14, 2002 that his suggestion that defendants are sentenced based on all of the drugs in an offense was patently false. This is so because he testified that "ST" received a base offense level of 38 for drug quantity, while "MGA" had received a base offense level of 34.[89] Base offense level 38 is assigned to a defendant when 15 kilograms of Methamphetamine or more are attributable to that defendant.[90] Base Offense level 34 is assigned to a defendant when a quantity of methamphetamine between 1.5 kilograms and 5 kilograms is attributable to that defendant.[91]

Subsequent investigation concerning this case reveals even further the extent of Judge Rosenbaum's attempts to mislead the Subcommittee. The Subcommittee obtained the Judgment and Commitment Orders for additional co-defendants whom Judge Rosenbaum declined to identify.[92] From these records, it is clear that **neither** "ST" nor "MGA" were sentenced for "the quantity of drugs **in the whole scheme**,"[93] or "the **entire crime**."[94] More culpable co-defendants in that methamphetamine conspiracy were determined by the sentencing judge to be liable for drug amounts of 34.4 kilograms (Alfredo Prieto)[95] and 55 kilograms (Juan Villanueva Monroy).[96]

Analysis of the case involving "HAG" (Heather Ann Genz) and "AC" (Alecia Colmenares) similarly reveals that, contrary to Judge Rosenbaum's assertion, co-defendants are not sentenced based on all drugs in the offense. Through its followup investigation, the Subcommittee confirmed that these two individuals were in fact co-defendants along with others,[97] charged in a methamphetamine

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[86] *See H.R. 4689 Hearing* at 21 (Prepared Statement of Judge Rosenbaum).

[87] *U.S.* v. *Herman Espino*, et al, Cr. No. 98–137 (DSD/AJB) (D. Minn. Aug. 5, 1998) (Second Superseding Indictment).

[88] In response to the Subcommittee's May 22, 2002 inquiry, Judge Rosenbaum provided the Subcommittee with copies of the Judgment and Commitment Orders for each of these defendants on June 6, 2002. The Orders reflect the same case number.

[89] *See H.R. 4689 Hearing* at 21 (Prepared Statement of Judge Rosenbaum).

[90] Sentencing Guidelines § 2D1.1 (a)(3) and (c) Drug Quantity Table (1); *see also U.S.* v. *Stephen Tiarks*, No. 98–137(11)(DSD/AJB) (D. Minn. June 2, 1999) (Judgment and Commitment Order, Application of Guidelines to Facts at 1) ("Defendant is responsible for the 16 kilograms of methamphetamine he attempted to bring into Minnesota.").

[91] Sentencing Guidelines § 2D1.1 (a)(3) and (c) Drug Quantity Table (3).

[92] *See* letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum at 1 (May 22, 2002) (question 3); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (June 6, 2002); letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum at 3 (July 19, 2002); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (Aug. 9, 2002).

[93] *See H.R. 4689 Hearing* at 20 (Prepared Statement of Judge Rosenbaum).

[94] *See id.* at 19.

[95] *U.S.* v. *Alfred Prieto*, No. 98–137(4) (DSD/AJB) (D. Minn. July 2, 1998) (Judgment and Commitment Order, Findings of Fact at 6).

[96] *U.S.* v. *Juan Villanueva Monroy*, No. 98–137(3)(DSD/AJB) (D. Minn. June 15, 1999) (Judgment and Commitment Order, Findings of Fact at 2).

[97] Whom Judge Rosenbaum declined to identify. *See* letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum at 1 (May 22, 2002) (question 3); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (June 6, 2002); letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum at 3 (July 19, 2002); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (Aug. 9, 2002).

distribution conspiracy.[98] While not indicating that they were co-defendants, Judge Rosenbaum nevertheless testified that "HAG" and "AC" had each received a base offense level of 36 based on drug quantity[99] (at least 5 kilograms but less than 15 kilograms of methamphetamine).[100] The Judgment and Commitment Order of their co-defendant Jesus Ibarra-Torres[101] reveals that Ibarra-Torres was held accountable for far greater drug quantities than either "HAG" or "AC"—(that is 55 pounds or 25 kilograms of methamphetamine) which would mandate a base offense level of 38.[102]

It is not just **other** judges who make individual determinations with respect to each defendant concerning attributable drug amounts in conformity with the current guideline directives rather than blindly sentencing all conspirators based on total quantity involved in the offense. Judge Rosenbaum does that as well. In *United States* v. *McCarthy, et al*,[103] the evidence at trial established that the overall conspiracy imported and attempted to distribute in excess of 5,000 pounds of marijuana. However, in sentencing co-conspirator Michael Ness, Judge Rosenbaum "did not hold Ness accountable for the entire amount chargeable to the conspiracy. Rather, he attributed to Ness 220 pounds of marijuana, which is the actual amount that [Judge Rosenbaum] determined Ness obtained from [a co-conspirator] and distributed."[104]

Judge Rosenbaum made similar individual determinations concerning attributable drug amounts for co-defendants in *United States* v. *Brown, et al.*[105] In that case "Hewitt was held accountable for all drugs proved to have been distributed during the conspiracy,"[106] while his co-defendant, Brown was held accountable for a lesser quantity of drugs.[107] In upholding Judge Rosenbaum's individual drug attribution calculations on appeal, the Court of Appeals for the Eighth Circuit properly noted:

> Before a quantity of drugs may be attributed to a particular defendant, the sentencing court is required to find by a preponderance of the evidence that the transaction of activity involving those drugs was in furtherance of the conspiracy and either known to the defendant or reasonably foreseeable to him.[108]

The record clearly illustrates Judge Rosenbaum's past practice of sentencing co-defendants according to different attributable drug amounts. Despite this practice, and the Eighth Circuit's affirmation of the same, Judge Rosenbaum suggested otherwise to the Subcommittee.

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[98] *U.S.* v. *Jaime Rosas Mancilla*, et al., Cr. No. 99–351 (ADM/AJB) (D. Minn. Feb. 8, 2000) (Superseding Indictment).

[99] *H.R. 4689 Hearing* at 20, 21 (Prepared Statement of Judge Rosenbaum ("HAG") and ("AC")).

[100] Sentencing Guidelines § 2D1.1 (a)(3) and (c) Drug Quantity Table (2).

[101] *U.S.* v. *Jesus Ibarra-Torres*, Cr. No. 99–351(2) (D. Minn. Oct. 2, 2000) (Judgment and Commitment Order).

[102] Sentencing Guidelines § 2D.1.1 (a)(3) and (c) Drug Quantity Table (1).

[103] *U.S.* v. *McCarthy, et al.*, 97 F. 3d 1562 (8th Cir. 1996).

[104] *Id.* at 1574 (Judge Rosenbaum held Ness "accountable at sentencing only for the relevant conduct of distributing 220 pounds of marijuana in Minnesota, **even though the jury had found him guilty of the larger conspiracy** charged in Count I of the Indictment.") (emphasis added).

[105] *U.S.* v. *Brown, et al.*, 148 F. 3d 1003 (8th Cir. 1998).

[106] *Id.* at 1006.

[107] *Id.* at 1009.

[108] *Id.* at 1008 (citation omitted).

V. JUDGE ROSENBAUM'S INACCURATE TESTIMONY THAT MAJOR AND MINOR PARTICIPANTS RECEIVE THE SAME SENTENCE DOES NOT JUSTIFY THE PROPOSED AMENDMENT

Judge Rosenbaum's testimony that major and minor participants receive the same sentence does not provide any support for the proposed amendment. Judge Rosenbaum testified at the May 14, 2002 hearing that:

> The present sentencing system **sentences minor and minimal participants** who do a day's work, in an admittedly evil enterprise, **the same way it sentences planner and enterprise-operator** [sic] who set the evil plan in motion and who figures to [sic] to take its profits.[109]

Of course, it does no such thing. After determining the base offense level (based on amount of drugs), the current guidelines structure provides that "planners and enterprise operators" receive an additional **upward** adjustment,[110] while minor and minimal participants receive a **downward** adjustment[111] from their base offense level.[112] This assures that minor and minimal participants are **not** sentenced "in the same way" as enterprise operators.

Once again, the facts from the very cases cited by Judge Rosenbaum prove this point and do not support his testimony. Concerning this issue, it is also important to remember that Judge Rosenbaum did not to inform the Subcommittee of the material facts and thereafter declined to identify co-defendants which would have led to the discovery of these facts. Judge Rosenbaum provided testimony concerning "ST" (Stephan Tiarks) and "MGA" (Maria Guadalupe Avalos),[113] and outlined some of the many **downward adjustments** each received (mitigating role, and "safety valve"), yet failed to inform the Subcommittee that more culpable co-defendants received corresponding **upward adjustments** to reflect their greater culpability.

"ST's" and "MGA's" co-defendants Alfredo Prieto, Arturo Bahena, and Juan Villanueva Monroy, (in addition to starting out with higher base offense levels for drug amounts), each received an additional four point increase to reflect their respective degree of culpability—that of organizer and leader under Guideline § 3B1.1(a).[114] This, along with a two-point increase for firearms in the case of

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[109] *H.R. 4689 Hearing* at 22 (Prepared Statement of Judge Rosenbaum (emphasis added)); *see also id.* at 18 (Testimony of Judge Rosenbaum) ("[minor or minimal role players] are being sentenced as though they are running the entire enterprise.").

[110] *See* Sentencing Guideline § 3B1.1 Aggravating Role.

[111] *See* Sentencing Guideline § 3B1.2. Mitigating Role. As William G. Otis testified, "[a]s a lawyer who dealt with dozens if not hundreds of these sentencings, I can tell you that these mitigating role adjustments are granted giving the defendant the benefit of every doubt—even if the doubt has to be cobbled together with a certain degree of creativity." *H.R. 4689 Hearing* at 23 (Testimony of William G. Otis).

[112] As discussed in "Judge Rosenbaum's Testimony Regarding the Attributable Drug Amounts . . .," *supra*, a "planner and enterprise operator" will usually have a higher base offense level than the minor participant even before any upward and downward adjustments are made for role in the offense. This is so because a "planner and operator," unlike a minor participant, is generally directly involved with a greater quantity of drugs and greater quantities still are more reasonably foreseeable by him. This further assures, they are not sentenced "in the same way."

[113] *H.R. 4689 Hearing* at 21 (Prepared Statement of Judge Rosenbaum).

[114] *U.S.* v. *Alfred Prieto*, No. 98–137(4)(DSD/AJB) (D. Minn. July 2, 1998) (Judgment and Commitment Order, Findings of Fact at 6); *U.S.* v. *Juan Villanueva Monroy*, No. 98–137(3)(DSD/AJB) (D. Minn. June 15, 1999) (Judgment and Commitment Order, Findings of Fact at 2); *U.S.* v. *Arturo Bahena*, No. 98–137(6)(DSD/AJB) (D. Minn. May 26, 1999) (Judgment and Commitment Order, Findings of Fact at 3).

Prieto and Monroy, resulted in their receiving significantly higher guideline ranges and significantly higher sentences. Co-defendant Arturo Bahena received a guideline range of 262–327 months, and a sentence of 320 months.[115] Co-defendants Prieto and Monroy each received guideline calculations and sentences of life compared to 42 months for "ST" and 6 months for "MGA.".[116] These facts reveal Judge Rosenbaum's testimony (that the current guidelines structure mandates that low-level defendants be sentenced "the same way" as high-level defendants) to be utterly false.

The facts in yet another case involving two defendants cited by Judge Rosenbaum similarly proves the falsity of his testimony. He testified concerning the methamphetamine conspiracy case involving "HAG" (Heather Ann Genz) and "AC" (Alecia Colmenares). Judge Rosenbaum revealed that each received lower guideline ranges due to mitigating role reductions,[117] but failed to inform the Subcommittee that a more culpable co-defendant in that case, Jesus Ibarra-Torres, not only received a higher starting base offense level for drug quantity starting out, but also received an **additional increase** in his guideline range to reflect his greater role in the offense—that of supervisor and manager—under Guideline § 3B1.1(b).[118] This co-defendant received a sentence of 188 months[119] compared to the 24 months received by "HAG" and "AC."[120] Yet Judge Rosenbaum suggested that such co-defendants are sentenced "in the same way."[121]

In his response to the Subcommittee's follow-up questions, Judge Rosenbaum was unable to identify **any** multiple defendant case in which he sentenced a "planner and enterprise-operator who set the [drug trafficking] plan in motion and who figures to take its profits" "the same way," as the minor or minimal participant who "did a days work."[122] He was similarly unable to identify **any** case in which he failed to impose an aggravating role upward adjustment for co-defendants who were organizers, leaders, managers, or supervisors of the criminal activity under Guideline § 3B1.1.[123]

In addition, under the current guideline structure, (and contrary to Judge Rosenbaum's testimony) even **after** making adjustments

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[115] *U.S.* v. *Arturo Bahena*, No. 98–137(6)(DSD/AJB) (D. Minn. May 26, 1999) (Judgment and Commitment Order at 2, 7).

[116] *U.S.* v. *Alfred Prieto*, No. 98–137(4)(DSD/AJB) (D. Minn. July 2, 1998) (Judgment and Commitment Order at 2, 7). *U.S.* v. *Juan Villanueva Monroy*, No. 98–137(3)(DSD/AJB) (D. Minn. June 15, 1999) (Judgment and Commitment Order at 2, 7).

[117] *H.R. 4689 Hearing* at 20–21 (Prepared Statement of Judge Rosenbaum).

[118] *U.S.* v. *Jesus Ibarra-Torres*, Cr. No. 99–351(2) (D. Minn. Oct. 2, 2000) (Judgment and Commitment Order).

[119] *U.S.* v. *Jesus Ibarra-Torres*, Cr. No. 99–351(2) (D. Minn. Oct. 2, 2000) (Judgment and Commitment Order at 2) (even after a downward departure from the calculated guideline range of 235–293 months).

[120] *U.S.* v. *Heather Ann Genz*, No. 99–351(9)(ADM/AJB) (D. Minn. Sept. 7, 2000) (Judgment and Commitment Order at 2); *U.S.* v. *Alecia Colmenares*, No. 99–351(10)(ADM/AJB) (D. Minn. Sept. 5, 2000) (Judgment and Commitment Order at 2).

[121] *H.R. 4689 Hearing* at 22 (Prepared Statement of Judge Rosenbaum).

[122] *See* letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum at 2 (May 22, 2002) (question 9); *see also* letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (June 6, 2002); letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum, (July 19, 2002); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (Aug. 9, 2002); letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum (Aug. 9, 2002); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (Aug. 30, 2002).

[123] *See* letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum at 2 (May 22, 2002) (question 9); *see also* letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (June 6, 2002); letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum, (July 19, 2002); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (Aug. 9, 2002); letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum (Aug. 9, 2002); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (Aug. 30, 2002).

for role in the offense, the sentencing judge has full and unreviewable authority[124] to sentence minor and minimal participants to the **low-end** of their guideline range, while sentencing enterprise operators to the **high-end** of their guideline range.[125] This further assures that they are **not** sentenced "in the same way."

Here too, the undisclosed facts of the cases cited by Judge Rosenbaum prove this point. In the case involving "ST" and "MGA,"[126] the more culpable co-defendant, Arturo Bahena, was sentenced to 320 months which was at the high-end of his guideline range of 262–327 months, while "ST" and "MGA" each received downward departures below their guideline range.[127]

In his response to the Subcommittee's follow-up questions, Judge Rosenbaum was unable to identify **any** multiple defendant case in which he failed to sentence the "planner and enterprise-operator who set the [drug trafficking] plan in motion and who figures to take its profits" at the high-end of that defendant's guideline range and/or in which he failed to sentence the "minor or minimal participants who did a day's work" at the low-end of that defendant's range, in order to assure that they were not sentenced "in the same way."[128]

Indeed, the Judgment and Commitment Orders for **every** sentenced defendant about whom Judge Rosenbaum testified reflect that the court sentenced the minor or minimal participant to the very bottom of the guideline range,[129] or departed to achieve an even **lower** sentence.[130]

Further, the current guideline structure authorizes the sentencing court to depart downward (in the case of minor or minimal participants) and upward (in the case enterprise operators) when a defendant falls outside of the "heartland" of typical offenders for a reason which the Sentencing Commission did not adequately consider.[131] As William G. Otis testified:

> If the defendant falls outside of the "heartland" of typical offenders for a reason the Sentencing Commission did not ade-

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[124] *See* Sentencing Guideline § 1B1.4 ("In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U.S.C. § 3661."); *see also*, *e.g.*, *U.S.* v. *Woodrum*, 959 F.2d 100 (8th Cir. 1992) (unless the sentence is in violation of law, a sentence within a properly calculated range is not reviewable).

[125] The Guideline range varies by roughly 25% from top to bottom. *H.R. 4689 Hearing* at 26 (Prepared Statement of William G. Otis).

[126] *H.R. Hearing* at 21 (Prepared Statement of Judge Rosenbaum).

[127] *U.S.* v. *Arturo Bahena*, No. 98–137(6)(DSD/AJB) (D. Minn. May 26, 1999) (Judgment and Commitment Order at 2, 7).

[128] *See* letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum at 2 (May 22, 2002) (question 10); *see also* letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (June 6, 2002); letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum, (July 19, 2002); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (Aug. 9, 2002); letter from Hon. Lamar Smith, to Hon. James M. Rosenbaum (Aug. 9, 2002); letter from Hon. James M. Rosenbaum, to Hon. Lamar Smith (Aug. 30, 2002).

[129] "[T]he judge is permitted to sentence anywhere within a range that varies by roughly 25% from top to bottom. In almost three-quarters of drug trafficking cases, defendants ALREADY receive sentences at the very bottom of their range." *H.R. 4689 Hearing* at 26 (Prepared Statement of William G. Otis) (emphasis in original).

[130] In one instance, *U.S.* v. *Eliseo Rodrigo Romo*, No. Cr. 3–95–52, the sentencing court imposed 120 months because of the application of the statutory mandatory minimum. Even there, however, the court imposed no more than the minimum required by statute, even though the range permitted a higher sentence up to 135 months. *See U.S.* v. *Eliseo Rodrigo Romo*, Cr. 3–95–52 (D. Minn. Nov. 20, 1995) (Judgment and Commitment Order at 2, 4).

[131] Sentencing Guidelines § 5K2.0 ("The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court.").

> quately consider, he already qualifies for a downward departure with or without the government's acquiescence. As we speak, downward departures on this basis, combined with government-sponsored departures, are given in an astonishing 43% of all drug trafficking cases.[132]

As noted above, the Judgment and Commitment Orders provided to the Subcommittee in response to its inquiries reveal the extensive use of downward departures (by Judge Rosenbaum and others) to assure that minor participants are **not** sentenced "in the same way" as those more culpable.

In sum, Judge Rosenbaum's testimony regarding the similarity in sentencing of major and minor participants does not support implementation of the proposed amendment. The full record in cases on which that testimony relies reflects individual determinations in sentencing between major and minor participants. Accordingly, these cases demonstrate that the proposed amendment is not needed to accomplish the alleged purpose of the proposed amendment—to ensure that minor participants do not receive the same sentences as major participants.

VI. ASSURANCES OF CATEGORICAL ENHANCEMENTS FOR CRIMINAL HISTORY WERE NOT REFLECTED IN JUDGE ROSENBAUM'S OWN SENTENCING OF "EPR"

Judge Rosenbaum sought to assure the Subcommittee that more blameworthy defendants would not necessarily receive reduced sentences as a result of the application of Amendment 4. At the May 14, 2002 hearing, Judge Rosenbaum testified:

> And, of course, the Guidelines' **categorical**[133] enhancement for criminal history is unaffected. This means that if the person has a record, his penalty is enhanced, **under any circumstances**. And the worse the record, the greater the enhancement.[134]

Yet this is not true.

After this representation to the Subcommittee and after testifying concerning "EPR" (Eduardo Pelayo-Ruelas)—"his sentence is pending before me,"[135] Judge Rosenbaum returned to Minnesota and disregarded the criminal history of "EPR." On August 2, 2002, Judge Rosenbaum proceeded to "find it appropriate to adjust [the] criminal history" for "EPR,", **departing downward** from criminal history category III to I in order to arrive at a new **(lower)** guideline range.[136] He did this despite the record reflecting that "EPR" had, among other things, committed the instant offense while on

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[132] *H.R. 4689 Hearing* at 26–27 (Prepared Statement of William G. Otis).

[133] Webster's II New Riverside University Dictionary defines categorical as: "utterly without exception of qualification: ABSOLUTE." Webster's II New Riverside University Dictionary 238 (1984).

[134] *H.R. 4689 Hearing* at 20 (Prepared Statement of Judge Rosenbaum) (footnote added) (emphasis added).

[135] *Id.* at 21. Judge Rosenbaum testified that "EPRs" "guideline range is 151–293 months." It was however 151–188. *See U.S.* v. *Eduardo, Pelayo-Ruelas*, No. 01–CF–228(10) (D. Minn. Aug. 2, 2002) (Judgment and Commitment Order at 5); *see also* Sentencing Table (Offense Level 32, Criminal History Category III); *see also U.S.* v. *Eduardo Pelayo-Ruelas*, Crim. No. 01–228(JMR/FLN) (D. Minn. Aug. 2, 2002) (Transcript of Sentencing Hearing). The Committee believes this discrepancy to be merely a typographical error.

[136] *U.S.* v. *Eduardo Pelayo-Ruelas*, Crim. No. 01–228(JMR/FLN) (D. Minn. Aug. 2, 2002) (Transcript of Sentencing Hearing at 6).

probation from another crime,[137] for which the guidelines expressly direct points be included in the criminal history calculation.[138]

While the guidelines permit the sentencing court to depart downward when it concludes that "a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history,"[139] it is not at all clear that Judge Rosenbaum's wholesale recalculation from category III to I (rather than II) was appropriate under the circumstances.[140] Regardless, he exercised discretion to depart downward on this ground shortly after suggesting to the Subcommittee that such discretion did not exist under the guidelines. Judge Rosenbaum's knowledge of his ability to exercise that discretion in appropriate cases, notwithstanding his testimony, vividly demonstrates that "the Guidelines already provide ample authority for more nuanced and targeted mitigation in a case where it is truly warranted."[141]

VII. JUDGE ROSENBAUM'S RECORD OF HOSTILITY TO THE GUIDELINES UNDERMINES THE PERSUASIVE VALUE OF HIS TESTIMONY

Judge Rosenbaum's testimony before the Subcommittee on the application of the guidelines is illuminated by his record on the bench concerning the application of the guidelines. In the aforementioned case of *United States* v. *Eduardo Pelayo-Ruelas*,[142] after Judge Rosenbaum reduced the defendant's criminal history category to arrive at lower sentencing range, he then *sua sponte*[143] granted **an additional departure below the already reduced guideline range of 121–151 months**. In sentencing the defendant to **120** months, Judge Rosenbaum stated:

> I just sentenced you to 1 month less than the Guidelines. The Guidelines were calculated by a computer which apparently was not satisfied with the fact that 10 years is 120 months. And so we have a ridiculous extra month which I have taken off. **Now that represents an illegal departure**, and if the United States wants to appeal, I presume that they will have a right to take that appeal. My guess is that they will decline, but if they do, and you need a lawyer to defend you, one will be appointed at no cost.[144]

Significantly, this case is one in which Judge Rosenbaum declined to inform the Subcommittee as to the reason for his departure, suggesting instead that the Subcommittee order the tran-

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[137] *Id.* at 6.

[138] Sentencing Guidelines § 4A1.1(d) ("Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.").

[139] Sentencing Guidelines § 4A1.3. Adequacy of Criminal History Category (Policy Statement).

[140] For example, in the case of upward departures when a court finds the criminal history category significantly under-represents the seriousness of a defendant's criminal history, the Guidelines suggest "the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level . . ." Sentencing Guidelines § 4A1.3. Adequacy of Criminal History Category (Policy Statement).

[141] *H.R. 4689 Hearing* at 27 (Prepared Statement William G. Otis).

[142] *U.S.* v. *Eduardo Pelayo-Ruelas*, No. 01–228 (JMR/FLN) (D. Minn. Aug. 2, 2002).

[143] Even the defense counsel had asked Judge Rosenbaum to impose a sentence only at the very bottom of the guideline range—121 months. *See U.S.* v. *Eduardo Pelayo-Ruelas*, No. 01–228 (JMR/FLN) (D. Minn. Aug. 2, 2002) (Transcript of Sentencing Hearing at 6).

[144] *U.S.* v. *Eduardo Pelayo-Rueles*, Cr. No. 01–228(JMR/FLN) (D. Minn. Aug. 2, 2002) (Transcript of Sentencing Hearing at 10) (emphasis added). There can be no better example of the need for statutory mandatory minimum sentences, for while Judge Rosenbaum was quite willing to violate the guidelines, he apparently felt constrained to violate the statutory command that the sentence be not less than 120 months. *See* 21 U.S.C. § 841(b)(1)(A)(vii) (2002).

script of the proceeding and necessarily obligate public funds, and expend time and effort to obtain the information, which Judge Rosenbaum readily possessed, but would not disclose.

This is not an isolated instance. In *United States* v. *Heilman*,[145] the United States Court of Appeals for the Eighth Circuit reversed another of Judge Rosenbaum's unlawful departures. In that case, Judge Rosenbaum summarily excluded a prior conviction from the defendant's criminal history category, lowered the guideline range to 57–71 months, and thereafter **granted an additional departure below the already reduced guideline range** to impose a sentence of only 48 months. In doing so Judge Rosenbaum stated:

> It represents a downward departure because 57 months is the bottom range of the guidelines, it's kind of calculated because they had a computer that worked out all of these things and it seems to me that 4 years is a reasonable number, and 60 months is too long, **and I can parse this out as I want**. But it seems to me we're about at a 4-year level and might as well leave it at that level.[146]

At the May 14, 2002 hearing, Judge Rosenbaum concluded his testimony by appealing to the Subcommittee as follows:

> Please consider giving the judiciary the chance to do the **job for which it was chosen and designated by the Constitution to perform**. We work with this system, and those who operate in it every day of our lives. Please give us the tools to make it more fair and just.[147]

The "job for which [Judge Rosenbaum] was chosen and designated by the Constitution to perform" requires him to follow the law as written, and prohibits him from imposing his own views of what the law ought to be.

VIII. JUDGE ROSENBAUM'S TESTIMONY SHOULD BE DISREGARDED AS SUPPORT FOR THE PROPOSED AMENDMENT

For the purpose of consideration of the legislation, it is sufficient to conclude, as we must, that Judge Rosenbaum's testimony was inaccurate. His characterization of the existing guidelines and their application are not supported by the facts and cannot be relied upon by Congress in consideration of this, or any other legislation.

The **true facts**, gathered by the Subcommittee and set forth herein, both with respect to the existing guidelines and their application, and with respect to each of the specific cases he referenced, support, not Judge Rosenbaum's position, but that of William G. Otis who testified that the amendment is "unnecessary, because the Guidelines already provide ample authority for more nuanced and targeted mitigation in a case where it is truly warranted."[148]

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[145] *U.S.* v. *Heilman*, 235 F. 3d 1146 (8th Cir. 2001).
[146] *Id.* at 1147 (emphasis added).
[147] *H.R. 4689 Hearing* at 22 (Prepared Statement of Judge Rosenbaum).
[148] *H.R. 4689 Hearing* at 26 (Prepared Statement of William G. Otis); *see also H.R. 4689 Hearing* at 22 (Testimony of William G. Otis).

IX. JUDGE ROSENBAUM MAY HAVE UNLAWFULLY CLOSED A SENTENCING PROCEEDING THAT WOULD PROVIDE FURTHER EVIDENCE OF THE OPERATION OF THE GUIDELINES

As previously noted, Judge Rosenbaum has declined to provide the Subcommittee with the reasons for his departures, suggesting instead that we order the transcripts of the proceedings. Because he declined, and because the judgment and commitment order in the case of *United States* v. *Miguel Angel Larios-Verduzco*[149] reflects a downward departure "for the reasons stated at the hearing,"[150] the Subcommittee ordered the transcript of the sentencing hearing in that case. Only after ordering the transcript was the Subcommittee informed by the court-reporter that the sentencing hearing in that case had been sealed. The Subcommittee then contacted Judge Rosenbaum's chambers and requested a copy of the sealing order. The Judge's law clerk informed the Subcommittee that there was no sealing order in that case and that Judge Rosenbaum had sealed the proceeding from the bench. Judge Rosenbaum, however, authorized his law clerk to provide the Subcommittee with redacted portions of three pages of the sentencing hearing transcript.[151]

The portions of the hearing contained in the pages provided, however, reflect a proceeding that can best be described as peculiar. It appears to reflect *sua sponte* action by Judge Rosenbaum, clearing the courtroom, ordering the proceeding sealed[152], closing the record, and then leaving the bench. The portions provided to the Subcommittee significantly do not reflect the reason for Judge Rosenbaum having granted a downward departure in that case, or any other information reflecting the defendant's sentence.

Judge Rosenbaum's action in conducting the proceeding in secret appears to be in conflict with 18 U.S.C. § 3553(b) that requires that:

> The court, at the time of sentencing, **shall state in open court the reasons for its imposition of the particular sentence**, and, if the sentence
>
> * * *
>
> (2) . . . is outside the range described in section (a)(4), **the specific reason for the imposition of a sentence different from that described**.[153]

There are certainly mechanisms available to a court in appropriate circumstances, consistent with Federal law and judicial practice, to conduct certain proceedings or portions of proceedings *in camera* or have matters placed under seal. Protecting the safety of a cooperating defendant by not publicly disclosing the details of his

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[149] *U.S.* v. *Miguel Angel Larios-Verduzco*, 01–Cr–228 (02) (JMR/FLN) (D. Minn. June 13, 2002).

[150] *Id.* (Judgment and Commitment Order at 4).

[151] *See* facsimile from the Chambers of Judge Rosenbaum, Chief Judge, U.S. Dist. Court for the Dist. of Minn, to the Subcommittee on Crime, Terrorism, and Homeland Sec. (containing redacted portions of the transcript of the sentencing hearing in *United States* v. *Miguel Angel Larios-Verduzco*, 01–Cr–228 (JMR) (D. Minn. June 13, 2002) (portions of pages 6 and 7)).

[152] *Id.* at 6 ("this transcript is a secret transcript, it is sealed. Okay?").

[153] 18 U.S.C. § 3553(b) (2002) (emphasis added).

cooperation is a prime and common example,[154] which can be achieved consistent with 18 U.S.C. § 3553(b).

Judge Rosenbaum has offered no justification for his action. In addition to Congress' right to this information in the exercise of its oversight responsibilities, plea and sentencing hearings are subject to First Amendment right of public access.[155] In appropriate cases, "Proceedings may be closed and, by analogy, documents may be sealed if 'specific, on the record findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to [a compelling government] interest."'"[156] If the district court decides to close a proceeding or seal certain documents, **it must explain why closure or sealing was necessary** and why less restrictive alternatives were not appropriate.[157] Judge Rosenbaum has failed to do so.

Moreover, the Eighth Circuit mandates that "the fact that a closure or sealing order has been entered must itself **be noted on the court's docket**, absent extraordinary circumstances."[158] "The case dockets maintained by the clerk of the district court are **public records**."[159] The Subcommittee obtained a copy of the docketing sheet for this case from the district court clerk.[160] The docket contains no notation or any indication of any matter being sealed with respect to this defendant's sentencing. Instead the docket sheet reflects only the following entry for June 13, 2002:

> 6/13/02 77 MINUTES: before Chief Judge James M. Rosenbaum SENTENCING Miguel Angel Larios (2) to counts 1 & 2. Custody of BOP 120 months on counts 1 & 2 to be served concurrently; 5 years supervised release; $200.00 spec assmt. Deft remanded to custody of USM. Court Reporter: Dawn Hansen. 1 pg (lg) [Entry date 07/30/02][161]

The Subcommittee in turn, obtained a copy of the one page "minutes" referenced in the docket sheet entry for June 13, 2002. Nothing therein contains any indication of any matter having been placed under seal.[162]

The circumstantial record suggests that this case may be one in which Judge Rosenbaum granted yet another unlawful departure

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[154] That can be accomplished, and usually is, by providing the sentencing judge with an *in camera* submission detailing the cooperation and assistance. It does not require closing the entire proceeding, nor does it justify failure to adhere to the command of 18 U.S.C. § 3553(b). *See* Rule 32(c)(4) Fed. R. Crim. P. ("The court's summary of information under (c)(3)(A) ['information that if disclosed might result in harm, physical or otherwise, to the defendant or other persons'] may be in camera"). Rule 32(c)(4) further permits "[u]pon joint motion by the defendant and by the attorney for the Government, the court may hear in camera the statements [of counsel, the defendant and the victim]." Significantly, Rule 32 does not authorize the court to exclude from the public record the reasons for the imposition of a particular sentence.

[155] *See In re Search Warrant*, 855 F.2d 569, 573 (8th Cir. 1988) (citing, *In re Washington Post Co.*, 807 F.2d at 389, 389 (4th Cir. 1989) for the proposition that many circuits include additional court proceedings in the right of public access).

[156] *In re Search Warrant*, 855 F.2d at 574 (quoting *In re New York Times Co.*, 828 F. 2d 110, 116 (2nd Cir. 1987), *cert. denied*, 485 U.S. 977 (1988) (quoting *Press-Enterprise II* v. *Superior Court*, 478 U.S. 1, 13–14 (1986))).

[157] *Id.* at 573 (citing *Press-Enterprise II* v. *Superior Court*, 478 U.S. 1, 13–14 (1986)).

[158] *Id.* at 757 (emphasis added).

[159] *Id.* at 575 (citing *U.S.* v. *Criden*, 675 F. 2d 550, 559 (3d Cir. 1986)) (emphasis added).

[160] *See* Criminal Docket for Case #01–CR–228–ALL (D. Minn. Aug. 14, 2001).

[161] *Id.* at 13.

[162] Proceedings before United States Judge James M. Rosenbaum, SENTENCING, *United States* v. *Miguel Angel Larios*, Crim. No. 01–228, (D. Minn. June 13, 2002) (Minutes).

below the guideline range,[163] which he sought to conceal from the public and from the Subcommittee by unlawfully sealing the transcript. The Subcommittee's inquiry into this matter is ongoing.

COMMITTEE CONSIDERATION

On May 14, 2002, the Subcommittee on Crime, Terrorism, and Homeland Security met in open session and ordered favorably reported the bill H.R. 4689, by a voice vote, a quorum being present. On September 10, 2001, the Committee met in open session and ordered favorably reported the bill H.R. 4689 by a voice vote, a quorum being present.

VOTE OF THE COMMITTEE

There were no recorded votes on H.R. 4689.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of Rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of Rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

PERFORMANCE GOALS AND OBJECTIVES

H.R. 4689 does not authorize funding. Therefore, clause 3(c) of Rule XIII of the Rules of the House of Representatives is inapplicable.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 4689, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 26, 2002.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4689, the Fairness in Sentencing Act of 2002.

[163] As in "EPR," the Judgment and Commitment Order in *Angel-Larios-Verduzco* reflects a sentence of 120 months which is below the guideline range of 121–151 months. *U.S.* v. *Miguel Angel Larios-Verduzco*, 01–Cr–228 (02) (JMR/FLN) (D. Minn. June 13, 2002) (Judgment and Commitment Order at 2).

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Lanette J. Walker, who can be reached at 226–2860.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 4689—Fairness in Sentencing Act of 2002.

SUMMARY

The U.S. Sentencing Commission has proposed a number of amendments to Federal sentencing guidelines. Those amendments will take effect on November 1, 2002, if the Congress does not act on them prior to that date. H.R. 4689 would disapprove one part of an amendment, which would limit the length of prison sentences that certain defendants will receive if they are found to be a minor participant in a drug trafficking case.

By disapproving this amendment, H.R. 4689 would result in longer prison sentences for certain defendants. Assuming appropriation of the necessary amounts, CBO estimates that enacting this legislation would result in costs of about $20 million over the 2003–2007 period to incarcerate such individuals in the Federal prison system for longer periods than they would likely serve under the amended guidelines. Enacting H.R. 4689 would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply to the bill.

H.R. 4689 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on State, local, or tribal governments.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 4689 is shown in the following table. The cost of this legislation falls within budget function 750 (administration of justice).

By Fiscal Year, in Millions of Dollars

	2002	2003	2004	2005	2006	2007
SPENDING SUBJECT TO APPROPRIATION						
Federal Prison System Spending Under Current Law						
Estimated Authorization Level [1]	3,809	3,965	4,100	4,238	4,378	4,526
Estimated Outlays	3,768	3,946	4,084	4,221	4,361	4,508
Proposed Changes						
Estimated Authorization Level	0	*	1	3	7	8
Estimated Outlays	0	*	1	3	7	8
Federal Prison System Spending Under H.R. 4689						
Estimated Authorization Level	3,809	3,965	4,101	4,241	4,385	4,534
Estimated Outlays	3,768	3,946	4,085	4,224	4,368	4,516

NOTE: * = Less than $500,000.

1. The 2002 level is the amount appropriated for that year for salaries and expenses of the Federal Prison System. The 2003–2007 levels represent CBO's baseline estimate for this account (that is, the 2002 level adjusted for anticipated inflation).

BASIS OF ESTIMATE

The U.S. Sentencing Commission has assigned each Federal crime a base level, numbered from 1 to 43, which corresponds to a certain recommended length of imprisonment, with higher numbers reflecting longer prison terms. If the amendments to the sentencing guidelines proposed by the commission go into effect on November 1, 2002, level 30 will be the highest level that could be assigned to certain defendants' sentences that are based on the quantity of drugs involved in drug trafficking cases. These defendants would qualify for a lower recommended sentence if found to be a minor participant in the crime. (Additional adjustments could be made from this base level to increase or decrease an individual's sentence.)

According to the commission, roughly 1,300 prisoners a year would receive shorter prison sentences under the amended guidelines. Sentences for such prisoners generally range from less than 1 year to more than 10 years. CBO expects that the average sentence would be reduced by about 1.6 years from 5.8 years to 4.2 years under the amended guidelines. Based on information from the Bureau of Prisons (BOP), CBO estimates that the cost to incarcerate a prisoner for an additional year is about $7,000 (at 2003 prices). Assuming that the number of convictions and length of sentences would remain at 2001 levels, CBO estimates that enacting the legislation—and thus disapproving the amended guideline—would increase costs to BOP by about $20 million over the next 5 years to incarcerate prisoners for lengthier sentences than they would receive under the amended guidelines. The full budgetary effects of this bill would not be realized until 10 to 15 years after enactment. At that time, the cost to the prison system would reach over $20 million annually for an additional 2,100 prisoners. These added costs would be subject to the availability of appropriated funds.

PAY-AS-YOU-GO CONSIDERATIONS:

None.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

H.R. 4689 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no cost on State, local, or tribal governments.

ESTIMATE PREPARED BY:

Federal Costs: Lanette J. Walker (226–2860)
Impact on State, Local, and Tribal Governments: Angela Seitz (225–3220)
Impact on the Private Sector: Paige Piper/Bach (226–2940)

ESTIMATE APPROVED BY:

Robert A. Sunshine
Assistant Director for Budget Analysis

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of Rule XII-I of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short Title

This Act may be cited as the "Fairness in Sentencing Act of 2002"

Section 2. Disapproval of amendments relating to providing a maximum base offense level under § 2D1.1(a)(3) if the defendant receives a mitigating role adjustment under § 3B1.2.

This section disapproves Amendment number 4 of the "Amendment to the Sentencing Guidelines, Policy Statements, and Official Commentary," submitted by the United States Sentencing Commission to Congress on May 1, 2002, to the extent it amends § 2D1.1(a)(3) of the sentencing guidelines and to the extent it amends the Commentary to § 3B1.2 captioned "Application Notes."

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

Also, the language of Amendment 4 that amends the Commentary to § 3B1.2 captioned "Application Notes" is disapproved to the extent it adds the following:

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

MARKUP TRANSCRIPT

BUSINESS MEETING

THURSDAY, SEPTEMBER 5, 2002

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:03 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order. The Chair notes the presence of a working quorum.

* * * * * * *

Pursuant to notice, the Chair calls up H.R. 4689, the "Fairness in Sentencing Act of 2002." The Chair recognizes the gentleman from Texas, Mr. Smith, for a motion.

Mr. SMITH. Mr. Chairman, the Subcommittee on Crime, Terrorism, and Homeland Security reports favorably the bill H.R. 4689 and moves its favorable recommendation to the full House.

Chairman SENSENBRENNER. Without objection, H.R. 4689 will be considered as read and open for amendment at any point.

[The bill, H.R. 4689, follows:]

I

107TH CONGRESS
2D SESSION

H. R. 4689

To disapprove certain sentencing guideline amendments.

IN THE HOUSE OF REPRESENTATIVES

MAY 9, 2002

Mr. SMITH of Texas (for himself, Mr. SENSENBRENNER, Mr. HYDE, Mr. GEKAS, Mr. COBLE, Mr. GALLEGLY, Mr. GOODLATTE, Mr. BRYANT, Mr. CHABOT, Mr. BARR of Georgia, Mr. JENKINS, Mr. CANNON, Mr. GRAHAM, Mr. BACHUS, Mr. HOSTETTLER, Mr. GREEN of Wisconsin, Mr. KELLER, Mr. ISSA, Ms. HART, Mr. FLAKE, and Mr. PENCE) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To disapprove certain sentencing guideline amendments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fairness in Sentencing Act of 2002".

SEC. 2. DISAPPROVAL OF AMENDMENTS RELATING TO PROVIDING A MAXIMUM BASE OFFENSE LEVEL UNDER SECTION 2D1.1(a)(3) IF THE DEFENDANT RECEIVES A MITIGATING ROLE ADJUSTMENT UNDER SECTION 3B1.2.

Amendment number 4 of the "Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary", submitted by the United States Sentencing Commission to Congress on May 1, 2002, is disapproved and shall not take effect to the extent it—

(1) amends section 2D1.1(a)(3) of the sentencing guidelines; and

(2) amends the Commentary to section 3B1.2 captioned "Application Notes".

○

Chairman SENSENBRENNER. The Chair recognizes the gentleman from Texas to strike the last word.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Chairman, H.R. 4689, the "Fairness in Sentencing Act of 2002," disapproves of an amendment to the sentencing guidelines submitted by the United States Sentencing Commission to Congress on May 1st, 2002. The amendment will take effect on November 1st if it is not disapproved by Congress.

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

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

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

The proposed amendment by the Sentencing Commission is a windfall for large drug traffickers. It gives drug dealers the incentive to move more drugs rather than less, because no matter how many drugs they traffic, they will only be subject to the penalties for the trafficking of small quantities of drugs.

It also is contrary to the consistent and long-standing congressional intent that drug sentences be in proportion to drug quantity.

Mr. Chairman, it is common sense that the greater the drug quantity involved, the greater the harm to individuals. The Commission's reason for accompanying amendment 4 states that this amendment will only apply to 6 percent of all drug trafficking offenders. The problem is that these are the largest traffickers bringing drugs into our country.

The amendment would result in the less culpable defendant, the one who moved a lesser amount of drugs, receiving a disproportionally harsher sentence compared to the more culpable defendant, one who moved more drugs.

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

Mr. Chairman, this amendment will result in sentencing that fails to reflect the seriousness of the conduct and will produce wildly disparate sentences between cases or even within the same case. And for these reasons, Mr. Chairman, I hope my colleagues will support this legislation.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I appreciate the opportunity to speak on the Fairness in Sentencing Act of 2002. I think

this bill clearly reflects the principle that fairness is in the eye of the beholder.

The Sentencing Commission amendment the bill would overturn is designed to accord a measure of fairness to minimal role offenders who receive as much and sometimes more time than those who plan, control, and profit from the criminal enterprise.

So if the Commission's amendment provides fairness to minimal role offenders, the question is, to whom is the bill seeking to provide fairness?

The bill would overturn the U.S. Sentencing Commission's studied and reasoned findings that fairness required that they limit the extent to which drug quantity could affect the sentence of an offender who qualifies for a minimal role sentencing adjustment. The Commission conducted extensive public hearings through which it received a broad spectrum of input. Virtually all of the input it received supported its proposed minimal role adjustment amendment, including the criminal law section of the United States Judicial Conference. I have a copy of a letter sent by the section to the Commission, stating its support, and I'd like unanimous consent that that letter be made part of the record.

[The material referred to follows:]

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
300 East Washington Street, Suite 222
Greenville, South Carolina 29601

Honorable Doneita W. Ambrose
Honorable William M. Catoe, Jr.
Honorable William F. Downes
Honorable Richard A. Enslen
Honorable David F. Hamilton
Honorable Sim Lake
Honorable James B. Loken
Honorable John S. Martin
Honorable A. David Mazzone
Honorable William T. Moore, Jr.
Honorable Wm. Frenzenig Nielsen
Honorable Emmet G. Sullivan

Honorable William W. Wilkins, Chair

TELEPHONE
(864) 233-7681

FACSIMILE
(864) 242-0489

May 22, 2002

The Honorable Diana E. Murphy
Chair, U. S. SENTENCING COMMISSION
1 Columbus Circle, N.E., Suite 2-500S
Washington, DC 20002-8002

Dear Judge Murphy:

The Committee on Criminal Law appreciated the opportunity to meet with you and other members of the Sentencing Commission at our recent meeting in St. Louis and to receive your written and oral reports updating the work of the Sentencing Commission.

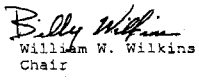
The members of the Criminal Law Committee reviewed in detail the Commission's amendments to the sentencing guidelines that were submitted to Congress on May 1. The amendments include several proposals that our Committee had suggested, or on which we had commented favorably. As you recall, we had suggested that consideration be given to a recently discharged term of imprisonment when a defendant's guideline range has been enhanced for conduct underlying that term of imprisonment. Further, we supported a base offense level limit for drug defendants of lesser culpability, as indicated by the guidelines' mitigating role adjustment. The Committee unanimously endorsed these amendments, and we hope the Congress will permit them to take effect on November 1, after the requisite period of review.

The latter proposal is of great interest to the federal judiciary and will help to achieve more reasonable sentences for minor and minimal role drug defendants. Drug type and quantity certainly are important indicators of offense seriousness and offender culpability. However, sentencing experience has shown

that some relatively low-level drug offenders (*e.g.*, mules, couriers, off-loaders, and lookouts) may be held accountable under the guidelines' relevant conduct rules for very large drug quantities, quantities which these particular defendants did not control and of which they often are not even aware. For this reason, our Committee has endorsed a modest adjustment in the drug sentencing guidelines that would limit the base offense level for these mitigating role defendants to a level that approximates ten years' imprisonment. Of course, other factors such as weapon involvement, criminal history, sales in protected locations or to protected individuals, obstructionist conduct, and acceptance of responsibility may and should further adjust the ultimate guideline penalty.

Our Committee appreciates the opportunity to work closely with the Sentencing Commission to refine the sentencing guidelines so that they are as just and effective as possible.

Sincerely,



William W. Wilkins
Chair

/dd

h:\docs\murphy

The Commission's amendment would apply only to those who qualify for mitigation based on the fact that they played a minimal role in the offense, which is very hard to show. Typically, we are talking about mules or other such limited role offenders. Clearly, a drug kingpin or other major player in a drug transaction would not qualify for a minimal role adjustment.

Most of those qualifying for such consideration get little benefit from the transaction and generally have no knowledge of the quantity or the value of the drugs in the transaction. Such an offender is only involved in a small way in the transaction, but they receive responsibility for the whole transaction.

If there is an unlimited amount of enhancements based on the quantity of drugs involved, the quantity enhancement can virtually make insignificant any consideration for a minimal role.

For example, the Commission has documented cases in which offenders who perform less culpable functions—such as the courier mule, the renter, the loader, et cetera—receive sentences in excess of those who are managers or leaders of the transaction. In addition, Judge Rosenbaum, the chief judge of the U.S. District Court of Minnesota, testified at a hearing on the bill before the Subcommittee. And he detailed several cases coming before his court where he had no choice under the existing guidelines except to sentence minimal role offenders to as much time as more culpable offenders, based solely on the impact of the drug quantity enhancements. He believed these sentences to be inappropriately severe for such offenders, and he supported the Commission's guideline adjustment.

Indeed, Mr. Chairman, I'm also aware of cases where those who qualify for mitigating role reduction in drug transactions end up being sentenced to not just a little but a lot more than those who plan, execute, and profit from the transaction. I submitted two such cases to the record of the Subcommittee, and I was directly involved in assisting one such offender, Kemba Smith, a constituent of mine, in obtaining commutation of a 24-and-a-half year sentence in a drug case in which her role was minimal if not negligible.

The Commission's amendment was designed to reduce such unfairness and disparity in sentencing of co-defendants with unequal culpability in a crime. Just as treating like offenders differently brings about disparities in sentencing, treating unlike offenders the same also brings about disparities.

The Commission's amendment would limit the impact of drug quantity enhancements to a maximum of 10 years. But we're not talking about opening the prison gates as a result of the amendment. While the maximum enhancements for quantity for a minimal role offender would be 10 years, the minimum would be 8 years. In addition, all other applicable sentencing would apply, such as any mandatory minimum sentences and any enhancements such as an obstruction of justice enhancement that is routinely applied if the defendant testifies and is convicted.

So as we consider what the Commission's amendment is designed to do, let's be clear on what the amendment would not do. The Commission's amendment would not set a 10-year sentencing cap for cases in which a convicted drug trafficker played a minimal or minor role in a drug conspiracy. Whether the amendment would allow no more than 10 years of the imposed sentence to be based

on the quantity of drugs involved in the offense, for those offenders whom the courts have to have the least culpability—the actual sentence imposed could be higher than 10 years because of other important factors, such as obstruction of justice——

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. SCOTT. Mr. Chairman, could I have an additional minute and a half?

Chairman SENSENBRENNER. Without objection.

Mr. SCOTT. Thank you.

Such as obstruction of justice, weapons involvement, criminal history, drug sales in a protected location or to protected individuals.

And contrary to the suggestion of proponents of this legislation, the Commission's amendment would not provide a windfall to large-scale drug traffickers or disincentives to law enforcement officials to stamp out drug operations. Rather, the amendment better implements the apparent intent of Congress in its establishment of mandatory minimum penalties for serious traffickers—that is, the managers of retail traffic—the 10-year mandatory penalties, and 10-year mandatory minimums for major traffickers—that is, the manufacturers and heads of organizations.

The amendment allows the sentencing guidelines to reflect and expand on this congressional intent by establishing various penalties for specified quantities of drugs. And the amendment assures that in a limited number of cases in which there is a tension between a relatively large drug quantity and relatively low individual culpability of the offender, the drug quantity will not disproportionately increase an offender's sentence in comparison to a more serious——

Chairman SENSENBRENNER. The gentleman's time has once again expired.

Mr. SCOTT. Mr. Chairman, could I have an additional 30 seconds?

Chairman SENSENBRENNER. Without objection.

Mr. SCOTT. Thank you.

Mr. Chairman, I really feel this bill has a lot to do about very little in the total scheme of drug sentencing in the country. If this bill had anything to do with fairness of drug offenders, it would be directing the Sentencing Commission to address the multitude of unfairness that unfolds before the Federal courts today as a result of politically based mandatory minimum and other drug sentencing limitations.

I would ask that my colleagues defeat the bill and allow the Sentencing Commission to do the work it was established to do in setting appropriate, proportionate sentences for offenders across the entire spectrum of criminal offenses and penalties.

Mr. Chairman, I thank you, and I thank you for your indulgence.

Chairman SENSENBRENNER. Without objection, all Members may insert opening statements in the record at this point.

Chairman SENSENBRENNER. Are there amendments?

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Mr. Chairman, I rise only for a minute to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CONYERS. I'd like to ask our distinguished colleague from Texas, Mr. Smith, whether or not he feels that couriers in drug incidents, mules, gofers, and lookouts should be punished in the same way—in drug trafficking—the same as manufacturers, organizers of the crime, supervisors, and high-level offenders.

Mr. SMITH. Would the gentleman yield?

Mr. CONYERS. I think I will.

Mr. SMITH. The answer to the gentleman's question is that of course those are factors that should be considered. But as I pointed out in my remarks, those are factors that can be considered at the discretion of the judge, and we should continue to leave that discretion in the judge's hands, not allow a rule to be approved that would allow 150 kilos to be treated the same way as a half a kilo.

If there are extenuating circumstances, let's leave it up to the discretion of the judge. I'll yield back.

Mr. CONYERS. I'm so happy to hear the gentleman say that, because then it means that he doesn't understand that what he is doing is taking away that discretion of the judges, which is precisely what the Sentencing Commission was providing.

So if the gentleman and his staffer would consult—himself, his staffer, another prominent criminal trial attorney—we may be in agreement, because if you do agree with my premise, then this is the wrong bill. There's been a tremendous mistake in your shop, because what you're doing takes away the judicial discretion.

So if during the course of this matter, if my colleague from Texas will consider the direction of his remarks, and may want to consider—his support of the bill would be very helpful.

The other point I wanted to make, Mr. Chairman, was merely that the Sentencing Commission was created to remove politics from sentencing. Unfortunately, what has happened is that all the things that I don't agree with about the Sentencing Commission get approved and the few good things that they do always get disapproved. So we're back in the same fix.

So my enthusiasm about the Sentencing Commission has diminished over the years.

Now, the second question I have to my colleague from Texas is, have you ever heard of the Kemba Smith case?

Mr. SMITH. If the gentleman will yield, I don't know that I am familiar with it. I've heard the name, but I'll be happy to have you describe it.

Mr. CONYERS. Well, thank you. This was the case in which a mother of two children was sentenced to 20 years in prison because she inadvertently acted as a courier in one instance in which her husband was trafficking drugs.

What you are doing—now do you remember the case? Okay. Well, anyway, it received a presidential pardon and considerable attention.

She served 7 years and would have been there for the whole 20, had not the executive branch intervened. Would you have, just taking this case on the bare, simple description, would you have wanted a person with no criminal record and otherwise outstanding sentence—not a user, no violence—do you think that this could have been a case in which the Sentencing Commission granting discre-

tion to the judge could have allowed the judge to exert his discretion? I yield to the gentleman.

Mr. SMITH. I thank the gentleman for raising the case, because I think it proves the exact point that I want to make. The reason that the individual received the sentence she did is because she refused to cooperate with law enforcement officials. Had she done so, the judge told her that the sentence would be reduced. She refused to do so, and that's why she received the sentence that she did.

Chairman SENSENBRENNER. The gentleman's time has expired.

Are there amendments?

For what purpose does the gentleman from New York——

Mr. NADLER. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman. One comment and then I want to ask Mr. Smith a question.

He commented that this woman we were talking about a moment ago received a very long sentence because she refused to cooperate with prosecutors. Commonly, we know that lower level people receive long sentences because they have no information with which to strike a deal with prosecutors, and lower level people get heavier sentences than higher level people who have information. And that's what the Sentencing Commission was trying to get at.

It is unfair to sentence someone who would have been cooperative but had nothing to bargain with to a longer sentence than someone who is much more culpable, was a higher level person in the organization, but gets a lower sentence because they have information to trade. They have something to bargain with.

Now, we all know that goes on, and we all know that the guy who really gets stuck is the lower level person who has no information to trade. And that is patently unfair, and it's what the Sentencing Commission was trying to get at. And I don't understand why we're trying to remove this discretion.

Now, I'd like to ask if Mr. Smith will yield for a question, and the question I want to ask Mr. Smith is, he stated that the problem with this sentencing guideline proposal is that although it affects only 6 percent of the people, they're the higher level people. But is Mr. Smith aware of the fact that you're not eligible under the terms of this proposal for this treatment, for this more lenient treatment, unless you qualify as mitigable, in other words, you're not a higher level person?

Mr. SMITH. If the gentleman from New York will yield, let me say at the outset, I think we can debate for a long time about what the gentleman might mean by low-level offender. In any case, the point to make again is that judges already have the discretion to reduce the sentence for a number of reasons. Among them are mitigating role reductions for defendants who take responsibility for their actions, for defendants who cooperate with law enforcement officials, and for those who don't have a criminal record. All those are already factors that can be considered by a judge today.

So there are plenty of ways in which or reasons for which the sentence can be reduced.

Mr. NADLER. If the gentleman will yield again, but that's not true. They have discretion to consider those factors, but that discretion is overcome by the quantity in absolute terms, so they don't

have that discretion. What this proposal would do would be to enable some of that discretion to apply despite the quantity. Is that not the case?

Mr. SMITH. I'm not sure I understood the gentleman's question. But I disagree. We have a fundamental disagreement. You say that those various mitigations are not allowed today. I'll be happy to——

Mr. NADLER. They're not—excuse me——

Mr. SMITH.—provide the statute to you that says that they can be considered——

Mr. NADLER. Reclaiming my time——

Mr. SMITH.—by a Federal judge.

Mr. NADLER.—they're not allowed—or, they are overcome by the quantity measurement in many cases. And this would simply allow those mitigation matters to apply, as——

Mr. SMITH. Let me respond. They're not overcome, but you do have to look at the quantity. The whole point of passing this legislation is to send the, I think, legitimate signal that you shouldn't deal with 150 kilos of cocaine, for example, the same way you deal with someone who has been trading in a half a kilo.

Like I say, it's very clear. If you think they should be in some instances equated, then you should vote against this. If you think that there is, as there always has been in American jurisprudence——

Mr. NADLER. Reclaiming my time, we're not dealing with a big guy with a ton. We're dealing with a mule who carries a gram in a one-ton transaction. And under the current law, the judge has no discretion, except to consider the entire amount, the ton, not the gram he was carrying. With the sentencing guideline proposal, it would be more intelligent and you could actually consider what he was carrying as opposed to the entire size of the transaction, of which he may have no knowledge or control.

I yield back.

* * * * * * *

The Committee met, pursuant to notice, at 10:00 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order, and a working quorum is present.

Are we going to have any minority Members today?

The first bill on the agenda is H.R. 4689. When we last met, the Chairman of the Subcommittee on Crime, Terrorism, and Homeland Security moved favorable recommendation of this bill to the full House. Pursuant to the order of the Committee, the bill has been considered as read and open for amendment at any point.

Chairman SENSENBRENNER. Are there amendments? Are there amendments? If not, the previous question is ordered on the motion to report the bill favorably.

The Chair will now entertain a motion to reconsider ordering the previous question. The question is, shall ordering the previous question be reconsidered?

The gentleman from Texas?

Mr. SMITH. I'll move to lay the motion on the table, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Texas moves to lay the motion to reconsider on the table.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it, and the motion to reconsider ordering the previous question is laid on the table.

Mr. SMITH. Mr. Chairman, I have a unanimous consent request, real quickly.

Chairman SENSENBRENNER. The gentleman from Texas.

Mr. SMITH. Mr. Chairman, I ask unanimous consent to place in the record follow-up letters between the Subcommittee and Judge Rosenbaum, letters dated May 22, June 6, July 1, July 19, and August 9, with attachments, and published opinion from the Eastern District of Virginia, *United States* v. *Kemba Smith*, 113 F.Supp.2d 879.

Chairman SENSENBRENNER. Without objection, the material referred to by the gentleman from Texas will be included in the record.

[The information follows:]

[Due to privacy concerns, the Committee has redacted private information including the defendant's Social Security number, USM number, date of birth, and address.]

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ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951

http://www.house.gov/judiciary

May 22, 2002

The Honorable James M. Rosenbaum
Chief Judge
United States District Court
for the District of Minnesota
300 South Fourth Street, Suite 15E
Minneapolis, MN 55415

Dear Judge Rosenbaum:

Thank you for your recent testimony before the Subcommittee on Crime, Terrorism, and Homeland Security on May 14, 2002. Would you please provide the Subcommittee with the following information concerning each case referenced in your testimony:

1. The complete case name (including defendant name) and case number.

2. The name of each Assistant United States Attorney assigned to the case.

3. Whether or not any other person (other than the defendant referenced in your testimony) was charged with jointly undertaken criminal conduct with the defendant, whether in a single charging document or separately, and whether charged with conspiracy, or aiding or abetting.

4. The amount and type of drugs for which you determined the defendant was directly involved under Guideline § 1B1.3 (a)(1)(A) ("all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant".)(See, also Application note 2(ii), "With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband **with which he was directly involved** . . ." (Emphasis added)).

5. The amount and type of any *additional* drugs for which you determined the defendant was responsible at sentencing as a result of the application of Guideline § 1B1.3 Relevant Conduct ("in the case of jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of other in furtherance of the jointly undertaken criminal activity that occurred during the commission of the offense of conviction, in preparation for that offense. See Application Note 2(ii) "[w]ith respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.")

6. Whether the defendant cooperated with the United States, plead guilty, and testified against co-defendants and co-conspirators.

7. Whether the defendant received a government motion for reduction of sentence for substantial assistance under 18 U.S.C § 3553 (e) and Guideline § 5 K1.1.

8. Whether the defendant qualified for a sentence without regard to the mandatory minimum statutory sentence pursuant to Guideline § 5C1.2. (the so called "safety valve").

9. Please identify **any** multiple defendant case over which you presided and in which you sentenced a "planner and enterprise-operator who set the evil [drug trafficking] plan in motion and who figures to take its profits" "the same way," as the minor or minimal participant who "did a day's work." Specifically, please identify any such case in which you declined to impose an aggravating role adjustment for those persons who were organizers, leaders, managers, or supervisors of the criminal activity under Guideline § 3B1.1, in order to assure that they were not sentenced in "the same say."

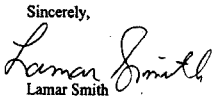
10. Please identify **any** multiple defendant case over which you presided and in which you declined to sentence the "planner and enterprise-operator who set the evil [drug trafficking] plan in motion and who figures to take its profits"at the high end of his guideline range and/or in which you declined to sentence the "minor or minimal participants who did a day's work" at the low end of their guideline range, in order to assure that they were not sentence "in the same way."

The Honorable James M. Rosenbaum
May 22, 2002
Page 3 of 3

11. Please identify **any** case in which you declined to grant a motion for judgment of acquittal under Rule 29, Federal Rules of Criminal Procedure where the facts were as you described on page 3 of your written statement: that is where the only evidence adduced at trial was of the woman defendant's boyfriend told her "a package will be coming by mail or from a package delivery service in the next two weeks. Keep it for me, and I'll give you $200, or maybe I'll buy you food for the kids."

We would appreciate receiving this information by close of business on Friday, June 7, 2002. Thank you for your assistance in this regard. Should you have any questions, please contact Sean P. McLaughlin, Counsel to the Subcommittee, at 202-225-3926.

Sincerely,



Lamar Smith
Chairman
Subcommittee on Crime,
Terrorism, and Homeland Security

c: The Honorable Robert C. Scott

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CHAMBERS
JAMES M. ROSENBAUM
CHIEF JUDGE
UNITED STATES DISTRICT COURT
300 SOUTH FOURTH STREET, SUITE 15E
MINNEAPOLIS, MINNESOTA 55415
JMROSENBAUM@MND.USCOURTS.GOV
(612) 664-5050

June 6, 2002

Honorable Lamar Smith
United States Congress
Chairman, House Subcommittee on Crime,
Terrorism, and Homeland Security
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Chairman Smith:

Thank you for your letter of May 22, 2002. I appreciate your interest in the individual cases I described in my previous testimony and written submission. It was a pleasure to have the opportunity to testify before your distinguished Subcommittee.

My previous submission summarized the roles played by minor and minimal participants in several of the District of Minnesota's recent and pending cases. You, of course, understand that while each of these cases was or will be heard in this District, not all were or are my own cases. My testimony gave the Sentencing Guidelines calculation for each defendant, based on the present system, and then re-calculated the Guidelines ranges based on the Sentencing Commission's proposed change.

As we discussed during our telephone conversation, these examples were based on case summaries contained in Pre-Sentence Reports (PSRs). PSRs are confidential. For the few cases in which PSRs had not yet been prepared, I summarized information from the indictment or information and accompanying materials.

In accord with our discussion, although the PSRs are confidential, I am pleased to provide the Judgment and Commitment Orders for those cases in which defendants have been sentenced. These documents detail the ultimate sentences imposed and the final Guidelines calculations. Because the factual information in my testimony was taken from the confidential PSRs, however, I ask that you do not publicly cross reference my testimony with the Judgment and Commitment Orders that are enclosed.

Finally, with respect to your letter's Inquiry No. 11: that statement concerns no particular case. The statement distills conversations I have had over several years with inmates - particularly women - in Federal Correctional Institutions I have visited. The statement was offered to illustrate the situation in which minor or minimal participants frequently find themselves.

I hope this information is helpful to the Subcommittee. If there is any additional information I can provide, please do not hesitate to contact me. Thank you again for the opportunity to testify before your subcommittee.

Very truly yours,

James M. Rosenbaum

cc: Honorable Bobby Scott

Enclosures: Judgment and Commitment Orders

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

v.

VIMALAM HAMILTON DELANEY

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 99-CR-S1(010)(JMR)
Def.Counsel: James J. Rennicke

The defendant pleaded guilty to Count 1 of the Second Superseding Indictment.

Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

Title & Section	Nature of Offense	Count Number(s)
21 U.S.C. § 846	Conspiracy to Distribute Cocaine and Cocaine Base	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The remaining counts are dismissed on the motion of the United States.

It is ordered that the defendant shall pay a special assessment of $100, for Count 1, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's SSN: [redacted]

Defendant's DOB: [redacted]

Defendant's Mailing Address:
[redacted]

Defendant's Residence Address:
Same

Sentence Imposed: August 18, 2000

JAMES M. ROSENBAUM, U.S. District Judge

Dated: August 24, 2000

FILED AUG 24 2000
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD
DEPUTY CLERK

(627)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 36 months. Defendant shall receive credit for time served.

The Court recommends a jail-type facility in the State of California for service of sentence.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____,

with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release. While on supervised release, the defendant shall comply with all federal, state, and local laws; comply with all rules and regulations of the probation office; abide by the standard conditions of supervised release as recommended by the sentencing commission; not possess any firearms or other dangerous weapons; submit to periodic drug testing and participate in substance abuse treatment and aftercare as directed by the probation office and as required by statute; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions: not associate with any member, prospect or associate member of any gang, including, in particular, the Broadway 5 Deuce Crips gang.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: VIMALAM HAMILTON DELANEY
Case Number: 99-CR-51(010)(JMR)

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	27
Criminal History Category:	III
Imprisonment Range:	87 to 108 months
Supervised Release Range:	5 years to life
Fine Range:	$12,500 to $4,000,000
Restitution:	N/A

No fine is imposed based on defendant's inability to pay.

The sentence departs from the guideline range upon the motion of the government as a result of defendant's substantial assistance.

AO 245B (Rev. 8/96) Sheet 1 - Judgment in Criminal Case

United States District Court

District of Minnesota

UNITED STATES OF AMERICA
v.
JOEL ARELLANO PLATEADO

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 00-CR-327(01)(JMR)

Scott Tilsen
Defendant's Attorney

THE DEFENDANT:

[✓] pleaded guilty to count(s): 1 of the Indictment.
[ ] pleaded nolo contendere to counts(s) ___ which was accepted by the court.
[ ] was found guilty on count(s) ___ after a plea of not guilty.
Accordingly, the defendant is adjudged guilty of such count(s), which involves the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 841(a)(1) and (b)(1)(A)	Possession with Intent to Distribute Methamphetamine		1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on counts(s) ___ and is discharged as to such count(s).
[ ] Count(s) ___ (is)(are) dismissed on the motion of the United States.

Special Assessment Amount $ $100.00 in full and immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: [redacted]
Defendant's Date of Birth: [redacted]
Defendant's USM No.: [redacted]
Defendant's Residence Address:
None

Defendant's Mailing Address:
None

March 28, 2001
Date of Imposition of Judgment

Signature of Judicial Officer

JAMES M. ROSENBAUM, United States District Judge
Name & Title of Judicial Officer

April 3, 2001
Date

Filed _____
Francis E. Dosal, Clerk
Judgment Entd _____
Deputy Clerk _____

A true copy in 4 sheet(s) of the record in my custody.
Certified _____, 2001
by _____
Deputy Clerk

(18)

FILED APR 04 2001
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD _____
DEPUTY CLERK _____
(dist'd)

CASE NUMBER: 00-CR-327(01)(JMR)
DEFENDANT: JOEL ARELLANO PLATEADO

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 36 months. Defendant shall be given credit for time served.

[X] The court makes the following recommendations to the Bureau of Prisons: The Court recommends a facility in the State of Minnesota for service of sentence.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at __ on __.
[✓] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] before _ on __.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13,1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[ ] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions: Defendant shall comply with the rules and regulations of the INS and, if deported from this country, either voluntarily or involuntarily, not reenter the United States illegally. Upon any reentry to the United States during the period of court-ordered supervision, the defendant shall report to the nearest U.S. Probation Office within 72 hours.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit home or her at an time a home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 25

Criminal History Category: I

Imprisonment Range: 57 to 71 months

Supervised Release Range: 3 to 5 years

Fine Range: $ 10,000 to $ 6,000,000

[X] Fine is below the guideline range, because of inability to pay.

Total Amount of Restitution: $__

[ ] Full restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s).

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s):

OR

[X] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[X] for the reasons set forth at the hearing.

AO 245 S (Rev. 4/90) Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
Third Division - District of Minnesota

UNITED STATES OF AMERICA

v. Case Number CR 3-95-52

ELISEO RODRIGO ROMO
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, ELISEO RODRIGO ROMO, was represented by Daniel M. Scott.

On motion of the United States the court has dismissed count(s) 1, 2, 3, 4, 2s, 3s, and 4s.

The defendant pleaded guilty to count(s) 1s. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:841(a)(1) and (b)(1)(A)(viii) and 18:2	Possess with intent to distribute	10/15/94	1s

As imposed on November 17, 1995, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $ 50.00, for count(s) 1s, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Dated: November 17, 1995.

PAUL A. MAGNUSON, Judge
United States District Court

Defendant's Soc. Sec. No: [redacted]
Defendant's Date of Birth: [redacted]
Defendant's address: [redacted]

FILED 11-20-95
ROBERT C. BRAM, CLERK
JUDGMENT ENTERED
DEPUTY CLERK INITIALS 15/01

22

AO 245 B (Rev. 4/90) Sheet 2 - Imprisonment

Defendant: ELISEO RODRIGO ROMO
Case Number: CR 3-95-52

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 MONTHS.

The Court makes the following recommendations to the Bureau of Prisons: The defendant's incarceration to be near his family. The defendant be placed in a facility with a drug treatment program. The Court also recommends that the defendant be considered for transfer to an Intensive Confinement Center in the final 30 days of his sentence, provided the defendant meets other eligibility requirements for the program.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

CERTIFIED ORIGINAL AND TRUE COPY IN 4 PAGES.

DATED: November 17, 1995.

BY: __Barbara M. Bain__
DEPUTY CLERK

UNITED STATES MARSHAL

By _____
Deputy Marshal

Defendant: ELISEO RODRIGO ROMO
Case Number: CR 3-95-52

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm or destructive device.
4. The defendant shall participate in program for treatment of narcotic addiction or drug dependency, which may include counseling and testing to see if he has reverted to drug use.
5. The defendant shall not associate with any member or associate member of the Latin Gangster Disciples gang or any other gang. If he is found to be in the company of individuals while wearing the clothing, colors or insignia of the Latin Gangster Disciples gang or any other gang, the court will presume that this association was for the purpose of participating in gang activities.
6. The defendant shall undergo mandatory drug testing as set forth by 18:3563(a) and 3583(d).

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: ELISEO RODRIGO ROMO
Case Number: CR 3-95-52

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	31
Criminal History Category:	I
Imprisonment Range:	108 months to 135 months
Supervised Release Range:	5 years
Fine Range:	$ 15,000 to $ 4,000,000
Restitution:	$

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

AO 245B (Rev. 8/96) Sheet 1 - Judgment in a Criminal Case

United States District Court

District of Minnesota

UNITED STATES OF AMERICA
v.
REUT BUSTOS-HERNANDEZ

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 01-201(2)(DSD/JMM)

Andrea K. George
Defendant's Attorney

THE DEFENDANT:

[✓] pleaded guilty to count: 1 of the Indictment.

Accordingly, the defendant is adjudged guilty of such count, which involves the following offense:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC §§ 841(a)(1) and (b)(1)(A) and 846	Conspiracy to distribute and possess with intent to distribute in excess of 500 grams of a mixture of methamphetamine	06/18/2001	1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[✓] Count 3 of the Indictment is dismissed on the motion of the United States.

Special Assessment Amount $ 100.00 in full and immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: None
Defendant's Date of Birth: [redacted]
Defendant's USM No.: [redacted]
Defendant's Residence Address:

No legal address

Defendant's Mailing Address:

JAN 28 2002
Filed
Richard D. Sletten, Clerk
Judgment Entd
Deputy Clerk

A true copy in 5 sheet(s) of the record in my custody.
Certified _____, 2002
by _____
Deputy Clerk

January 28, 2002
Date of Imposition of Judgment

Signature of Judicial Officer

DAVID S. DOTY, Senior United States District Judge
Name & Title of Judicial Officer

January 28, 2002
Date

(69)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 70 months.

[✓] The court makes the following recommendations to the Bureau of Prisons:

Incarceration with brother and co-defendant Jose Hernandez-Correa, Cr. No. 01-201(1).

[✓] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at ___ on ___.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] before _ on ___.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[✓] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit home or her at an time a home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapons.

2. The defendant shall undergo mandatory drug testing as set forth by 18 U.S.C. §§ 3563(a) and 3583(d).

3. The defendant shall participate in a program for drug and alcohol abuse at the direction of the probation officer. That program may include testing and inpatient or outpatient treatment, counseling or a support group.

4. The defendant shall abstain from the use of alcohol and other intoxicants.

5. The defendant shall comply with the rules and regulations of the Immigration and Naturalization Service (INS) and, if deported from this country, either voluntarily or involuntarily, not reenter the United States illegally. Upon any reentry to the United States during the period of court-ordered supervision, the defendant shall report to the nearest U.S. Probation Office within 72 hours.

STATEMENT OF REASONS

[✓] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 27

Criminal History Category: I

Imprisonment Range: 70 to 87 months

Supervised Release Range: 3 to 5 years

Fine Range: $ 12,500 to $ 4,000,000

[✓] Fine is waived or is below the guideline range, because of inability to pay. Defendant will not be ordered to pay the costs of incarceration or supervised release.

[✓] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines. In determining the sentence of 70 months, the court has considered the nature and circumstances of defendant's conduct, his history and characteristics, and the criteria set forth in U.S.S.G. § 5C1.2(1)-(5) limiting the applicability of statutory minimum sentences in certain cases. It is the court's belief that the sentence imposed reflects the seriousness of defendant's offense, promotes respect for the law, provides just punishment, affords adequate deterrence to criminal conduct, and protects the public from further crimes of the defendant.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s):

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

AO 245B (Rev. 3/95) Sheet 1 - Judgment in a Criminal ...

United States District Court

UNITED STATES OF AMERICA
v.

Fernando Dwayne Davis

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 4:95CR00103-001
Andrea K. George
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1, 3 and 4/superseding indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	Consp. to dist. and possess w/intent to dist. a mix. or substance containing cocaine base	11/28/1995	1
21 U.S.C. § 841 (a)(1)	Aiding & abetting poss. w/intent to dist. a mix. or subs. containing cocaine base	11/03/1995	3
18 U.S.C. § 924 (c)	Aiding & abetting use/carrying of firearm during drug trafficking crime	11/03/1995	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: [redacted]
Defendant's Date of Birth: [redacted]
Defendant's USM No.: [redacted]
Defendant's Residence Address:
[redacted]

Defendant's Mailing Address:
[redacted]

01/14/1997
Date of Imposition of Judgment

Signature of Judicial Officer

David S. Doty
U.S. District Judge
Name & Title of Judicial Officer

01/14/1997
Date

JAN 1 8 1997
FILED
JAMES E. DOSAL, CLERK
JUDGMENT ENTD
DEPUTY CLERK

(585)

DEFENDANT: Fernando Dwayne Davis

CASE NUMBER: 4:95CR00183-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 181 month(s).

as follows: 121 months under Counts 1 and 3 to run and be served concurrently. 60 months under Count 4 to run and be served consecutively to Counts 1 and 3.

☒ The court makes the following recommendations to the Bureau of Prisons:

FCI, Milan, Michigan or another facility near Detroit, Michigan.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: Fernando Dwayne Davis

CASE NUMBER: 4:95CR00103-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision - Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Fernando Dwayne Davis
CASE NUMBER: 4:95CR00103-001

SPECIAL CONDITIONS OF SUPERVISION

Defendant shall, at the direction of the U.S. Probation Office, participate in and complete a program approved by that office for the treatment of narcotics addiction or drug dependency. That program may include testing to determine if defendant has reverted to the use of drugs, and counseling.

DEFENDANT: Fernando Dwayne Davis

CASE NUMBER: 4:95CR00103-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 150.00	$	$

☐ If applicable, restitution amount ordered pursuant to plea agreement ..... $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

Totals: $ _____ $ _____

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

DEFENDANT: Fernando Dwayne Davis

CASE NUMBER: 4:95CR00103-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately; or

B ☐ $ _____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____; or

D ☐ in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ *(e.g. equal, weekly, monthly, quarterly)* installments of $ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

☐ Joint and Several

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in the district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

DEFENDANT: Fernando Dwayne Davis

CASE NUMBER: 4:95CR00103-001

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See attachment.

Guideline Range Determined by the Court:

Total Offense Level: 32

Criminal History Category: I

Imprisonment Range: 121 to 151 months

Supervised Release Range: 5 to 5 years

Fine Range: $ 17,500.00 to $ 8,000,000.00

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

Low end reflects nature, circum. & serious. of crime and past crim. history. Sent. designed to protect public from further crimes.

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

FINDINGS OF FACT

The court adopts the factual statements contained in the PSR as to which there is no objection, and as to controverted factual statements, resolves the disputes as follows.

The defendant challenges the factual statements contained in paragraphs 50, 51, 55 and 60 of the Presentence Investigation Report ("PSR") and attacks the credibility of Tonya Washington and Patsy Kalfayan, two cooperating co-defendants who testified against him. He argues that based on (1) discrepancies in their testimony, (2) a strong motive to fabricate, (3) the fact that they received favorable treatment from the government in return for testifying against their co-defendants and (4) Washington's history of drug abuse, Washington and Kalfayan's testimony lacks a sufficient indicia of reliability to form the basis of any sentencing decision. The court recognizes that the testimony of the government witnesses may have been inconsistent at times. It was the jury's duty, however, to weigh the credibility of the defendant's co-conspirators regarding the operation of the conspiracy. The jury was fully informed of all the factors bearing on the credibility of the government's witnesses, including Washington and Kalfayan. After having heard all of the testimony and arguments, the jury credited the testimony of the government's witnesses, as it was entitled to do. Therefore, the court will, as it must, resolve issues of credibility in favor of the verdict.

The Offense Conduct portion of the PSR is not a verbatim recitation of the trial transcript; it is a summary of the evidence presented at trial. Based upon an independent review of the case file and record, the court's trial notes and the trial transcripts, the court finds that the factual statements contained in paragraphs 50, 51, 55 and 60 are accurate as written, reliable, and clearly established by the evidence. Moreover, the court finds that the probation officer's summarization of the trial testimony is objectively reasonable.

To the extent that any of defendant's factual objections could affect his guideline calculations, the court will address those objections and make specific findings when it applies the guidelines to the facts.

Part E of the PSR, paragraphs 123-27, presents a brief summary of factors the probation officer believes may warrant a departure. The information contained in those paragraphs do not, however, constitute a recommendation by the probation officer for a departure. The defendant does not object to any of the factual statements contained in these paragraphs. Rather, he disagrees with the probation officer's assessment that there are factors in this case which may warrant an upward departure.

To the extent that the defendant contends that the factors identified by the probation officer do not constitute grounds for departure, such an objection is misplaced. Whether factors identified in the PSR, or by the parties, and the evidence in this case warrant a departure is a decision committed to the sound discretion of the court.

APPLICATION OF GUIDELINES TO FACTS

The court adopts the guideline calculations contained in the PSR as to which there is no objection. A question of guideline application has arisen with respect to the conclusions contained in paragraphs 62, 63, 65, 80, 83, 86 and 110. The court resolves the disputes as follows:

1. Quantity of Drugs

Defendant objects to paragraph 62, 63, 80, 86 and 110 of the PSR which hold him accountable for 160 grams of cocaine base ("crack") triggering a base offense level of 34. Defendant contends that he should be held accountable for no more than 84.9 grams of cocaine base, which was the amount seized by the police from Room 211 at the Red Roof Inn in Plymouth, Minnesota. Defendant also contends that the probation officer's drug quantity calculation is not supported by the trial testimony and further argues that it was not reasonably foreseeable to him that his co-conspirators would distribute cocaine base rather than powder cocaine.

At sentencing, the government must prove the type and quantity of drugs attributable to a defendant by a preponderance of the evidence. See United States v. Scott, 91 F.3d 1058, 1062 (8th Cir. 1996); United States v. Tauil-Hernandez, 88 F.3d 576, 579 (8th Cir. 1996). Once challenged, the PSR "is not evidence and is not a legally sufficient basis for making findings on contested issues of material fact." United States v. Wise, 976 F.2d 393, 404 (8th Cir. 1992) (en banc), cert. denied, 507 U.S. 989 (1993). If a defendant objects to the PSR's drug quantity recommendation, the court must make a specific finding "on the basis of evidence, and not the presentence report." United States v. Greene, 41 F.3d 383, 386 (8th Cir. 1994). The court may rely on evidence presented at trial and on stipulations made at trial. United States v. Thompson, 51 F.3d, 122, 125 (8th Cir. 1995); Bender, 33 F.3d at 23. The court will rely on the evidence presented at trial, its impressions of the witnesses' testimony and the jury's verdict to resolve all of the defendant's objections, including drug quantity.

Under the Sentencing Guidelines, a defendant convicted as a co-conspirator may be held accountable for "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken activity." U.S.S.G. § 1B1.3(a)(1)(B). Under this section, a defendant may be held accountable for the criminal activities of other co-conspirators provided the activities fall within the scope of the criminal activity the defendant agreed to undertake. Id. at application n.2. Further, a defendant is accountable for only those activities of co-conspirators which were reasonably foreseeable to him in relation to the criminal activity the defendant agreed to jointly undertake.

The only quantity of cocaine base the government recovered in this case was the 84.9 grams found at the Red Roof Inn, which was brought to Minnesota by Tonya

Washington on November 1, 1995. This is understandable because the government did not rely on undercover operatives to either purchase or sell cocaine base to or from the defendants in any controlled transactions. Any quantity of cocaine base in excess of the 84.9 grams has been sold by the defendant and his co-defendants in furtherance of their conspiracy. Although the cocaine base found at the Red Roof Inn is the only direct evidence pertaining to the drug quantity attributable to the defendant, it does not follow that there is no other credible evidence linking defendant to a quantity of cocaine base in excess of 84.9 grams.

Tonya Washington testified during the government's case-in-chief that she carried the 84.9 grams of cocaine base found at the Red Roof Inn from Michigan for the defendants. (5/22/96 Tr. at 223). She also testified that Karen Bradley transported an equal amount of cocaine base from Michigan for the defendants on November 1, 1995. Although Washington and Bradley brought the drugs to Minnesota on November 1, 1995, they were not recovered until November 3, 1995. Given the fact that the defendants sold drugs throughout November 1-3, it is fair to conclude that the cocaine base the police seized was not the full amount the defendants brought to Minnesota. Thus, the total amount of cocaine base attributable to the defendant based on Washington's testimony is at least 169 grams.

In addition to the specific testimony summarized above, there is other evidence in the record which supports the probation officer's drug quantity calculation and corroborates Washington's testimony. Tonya Washington testified that the officers who searched Room 211 at the Red Roof Inn did not find all of the drugs hidden in that room. Her testimony is consistent with that of Officer Christianson who testified that when he returned to the room after the first search was executed on November 3, 1995, he noticed an electrical outlet and lamp had been disassembled. Captain Fontana testified that these are two places drug dealers often hide their drugs. Gerald Jarrett also admitted that there were additional drugs in Room 211 that the officers did not find.

It was clearly foreseeable to the defendant that the controlled substance he and his co-conspirators agreed to distribute was cocaine base instead of powder cocaine. The defendant was present at Patsy Kalfayan's apartment in the early morning on November 1, 1995, when Gerald Jarrett made him and the other co-defendants remove their clothing when some cocaine base was misplaced. The defendant was also present when Carlos Cleveland found the missing cocaine base in the hood of his coat in Detroit at the home of a person known only as Tony.

The court presided at defendant's six-week trial and had the opportunity to observe all of the witnesses and assess their testimony and credibility. The court has carefully reviewed the entire file and record in this case, the trial transcript, and its notes of the trial testimony and evidence. Based upon the its independent review and assessment, the court accepts the testimony of Tonya Washington summarized previously, as it relates to

drug quantity, and finds that it is accurate, reliable and is supported by the great weight of evidence presented at trial. The court further finds that based upon the testimony of Washington, and all the other evidence presented at trial, there is a sufficient factual basis to establish that the defendant conspired to distribute at least 150 grams but less than 500 grams of cocaine base, and that the type and quantity of the controlled substance was reasonably foreseeable to the defendant.

In sum, the probation officer's drug quantity determination is well-supported by the trial record. Accordingly, the court rejects the defendant's drug quantity objection and finds that the government has shown at trial by a preponderance of the evidence that the appropriate type and quantity of drugs involved in the conspiracy which is attributable to the defendant is at least 150 grams but less than 500 grams of cocaine base. Thus, the court concludes that the appropriate base offense level is 34 as stated in paragraph 80 of the PSR.

2. Role in the Offense

Defendant objects to paragraphs 65 and 83 of the PSR. In paragraph 83 of the PSR, the probation officer concluded that the defendant was a minor participant in the conspiracy and recommends that his base offense level be decreased by two levels pursuant to U.S.S.G. § 3B1.2(b). Defendant argues that his role in the conspiracy was minimal.

Pursuant to U.S.S.G. § 3B1.2, the court may decrease a defendant's base offense level if the court finds that defendant's participation in the criminal activity was either minor or minimal. Whether a defendant deserves a reduction under this section depends heavily on the facts of the particular case. The court takes into account all of the defendant's relevant conduct in determining his role in the offense.

Section 3B1.2(a) provides for a four-level reduction where, "[b]ased on the defendant's role in the offense . . . the defendant was a minimal participant." Before such a reduction can be granted, which should be done infrequently, the court must find that the defendant is "'plainly among those least culpable in a group.'" United States v. Turk, 21 F.3d 309, 314 (8th Cir. 1994) (quoting § 3B1.2, application n.1).

The court agrees with the probation officer that the defendant is properly considered a minor participant in the conspiracy. The defendant drove other members of the conspiracy to Minneapolis, met Steven Howard, who was transporting weapons for the defendants, at the Minneapolis bus station, and registered for a room at the Red Roof Inn. In addition, the defendant participated in the beating of Tonya Washington. Given these facts, defendant's role in the offense cannot be fairly assessed as minimal. Moreover, even of the defendant was arguably less culpable than his co-defendants, this does not

entitle him to a minimal participant reduction given the large amount of cocaine base involved in the conspiracy. United States v. Garvey, 905 F.2d 1144 (8th Cir. 1990). Accordingly, the court rejects the defendant's objection and concludes that the PSR properly described the defendant as a minor participant in the conspiracy.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

v.

MARIA AVALOS
(True Name: MARIA GUADALUPE AVALOS)
Name of Defendant

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 98-137(12)(DSD/AJB)

Terry L. Hegna
Defendant's Attorney

THE DEFENDANT:

[x] pleaded guilty to count 1 of the Second Superseding Indictment.
[] pleaded nolo contendere to count(s) which (was) (were) accepted by the court.
[] was found guilty on count(s) after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846, 841(a)(1) and (b)(1)(A)	Conspiracy to Distribute and Possess With Intent to Distribute Methamphetamine	06/16/98	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on count(s)
[x] Count 3 of the Second Superseding Indictment is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant Information:

Soc. Sec. No.: [redacted]
Date of Birth: [redacted]
USM No.: [redacted]

May 24, 1999
Date of Imposition of Sentence

Judge David S. Doty, United States District Judge

Residence Address:

[redacted]

Mailing Address: (if different from residence address)

May 24, 1999
Date

A true copy in _____ sheet(s)
of the record in my custody.
Certified _____, 19__
Francis E. Dosal, Clerk
by _____
Deputy Clerk

Filed MAY 24 1999
Francis E. Dosal, Clerk
Judgment Entd _____
Deputy Clerk _____
(dist'd.)

543

Defendant: MARIA AVALOS
Case Number: 98-137(12)(DSD/AJB)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

6 months with work-release privileges or accommodations to attend school if schooling is related to career enhancement opportunities.

[x] The Court makes the following recommendations to the Bureau of Prisons:

Incarceration in a facility in the Minneapolis, Minnesota, area.

[] The defendant is remanded to the custody of the United States Marshal.

[] The defendant shall surrender to the United States Marshal for this district:
[] at
[] as notified by the United States Marshal.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[] before 2:00 p.m. on .
[] as notified by the United States Marshal.
[x] as notified by the U.S. Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer 10 days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risk that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapons.

The defendant shall undergo mandatory drug testing as set forth by 18 U.S.C. 3563 (a) and 3583 (d).

The defendant shall participate for a period of 180 days in a home detention program which may include electronic monitoring. The defendant will not be required to pay for the costs of the electronic monitoring.

The defendant shall perform 75 hours of community service, as directed by the probation officer.

Defendant: MARIA AVALOS
Case Number: 98-137(12)(DSD/AJB)

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth on Sheet 5, Part B:

	Assessment	Fine	Restitution
Totals:	$100.00		

[] If applicable, restitution amount ordered pursuant to plea agreement . . . . . $

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612 (f). All of the payment options on the Sheet 5, Part B, may be subject to penalties for default and delinquency pursuant to 18 U.S.C § 3612 (g).

[] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[] The interest requirement is waived.

[] The interest requirement is modified as follows:

RESTITUTION

[] The determination of restitution is deferred. A true copy in _____ sheet(s) until . An Amended Judgment in a Criminal Case will be entered after such determination.

[] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

Totals:

Payments are to be made to the Clerk, U.S. District Court, for disbursement to the victim.

** Findings for the total amount of losses are under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [x] in full immediately; or

B [] $ immediately, balance due (in accordance with C, D, or E); or

C [] not later than ; or

D [] in installments to commence days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [] in installments of $ over a period of year(s) to commence days after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

[] Joint and Several

[] The defendant shall pay the costs of prosecution.

[] The defendant shall pay the following court cost(s):

[] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the Clerk U.S. District Court and sent to the United States District Court, attention Financial Department, 300 South 4th Street, Minneapolis, Minnesota 55415.

STATEMENT OF REASONS

[x] The court adopts the factual findings and guideline application in the presentence report.

OR

[] The court adopts the factual findings and guideline application in the presentence report except (see attachment if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 25.

Criminal History Category: I.

Imprisonment Range: 57 to 71 months

Supervised Release Range: 3 to 5 years

Fine Range: $10,000 to $4,000,000

[x] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $

[] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[] Partial restitution is ordered for the following reason(s):

[] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

[x] The sentence departs from the guideline range

[x] for the following reasons: Upon motion of the government, as a result of defendant's substantial assistance and defendant meets the requirements of 18 U.S.C. 3553(f)(1)-(5), thereby warranting a sentence below the guideline range and statutory minimum.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

v.

STEPHEN TIARKS
Name of Defendant

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 98-137(11)(DSD/AJB)

Kyle White
Defendant's Attorney

THE DEFENDANT:

[x] pleaded guilty to count 1 of the Second Superseding Indictment.
[] pleaded nolo contendere to count(s) which (was) (were) accepted by the court.
[] was found guilty on count(s) after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846, 841(a)(1) and (b)(1)(A)	Conspiracy to Distribute and Possess With Intent to Distribute Methamphetamine	06/16/98	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on count(s)
[x] Count 4 of the Second Superseding Indictment is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant Information:

Soc. Sec. No.: [redacted]
Date of Birth.: [redacted]
USM No.: [redacted]

June 2, 1999
Date of Imposition of Sentence

Judge David S. Doty, United States District Judge

June 2, 1999
Date

Residence Address:

[redacted]

Mailing Address: (If different from residence address)

Filed JUN 0 2 1999
Francis E. Dosal, Clerk
Judgment Entd
Deputy Clerk PS
(dist'd)

565

Defendant: STEPHEN TIARKS
Case Number: 98-137(11)(DSD/AJB)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

42 months. Defendant shall receive credit for time served.

[x] The Court makes the following recommendations to the Bureau of Prisons:

1. 500 hour drug treatment program in Waseca, Minnesota.
2. Intensive Confinement Center program.

[x] The defendant is remanded to the custody of the United States Marshal.

[] The defendant shall surrender to the United States Marshal for this district:
[] at
[] as notified by the United States Marshal.

[] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[] before 2:00 p.m. on .
[] as notified by the United States Marshal.
[] as notified by the U.S. Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy U.S. Marshal

A true copy in _____sheet(s)
of the record in my custody.
Certified_____, 19___
Francis E. Dosal, Clerk
by _____
Deputy Clerk

Defendant: STEPHEN TIARKS
Case Number: 98-137(11)(DSD/AJB)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer 10 days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risk that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program for drug and/or alcohol abuse at the direction of the probation officer. That program may include testing and inpatient or outpatient treatment, counseling or a support group.

The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapons.

The defendant shall undergo mandatory drug testing as set forth by 18 U.S.C. 3563 (a) and 3583 (d).

The defendant shall participate in a psychological/psychiatric counseling or treatment program, as approved and directed by the probation officer.

The defendant shall abstain from the use of alcohol and other intoxicants.

Defendant: STEPHEN TIARKS
Case Number: 98-137(11)(DSD/AJB)

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth on Sheet 5, Part B:

	Assessment	Fine	Restitution
Totals:	$100.00		

[] If applicable, restitution amount ordered pursuant to plea agreement . . . . . $

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612 (f). All of the payment options on the Sheet 5, Part B, may be subject to penalties for default and delinquency pursuant to 18 U.S.C § 3612 (g).

[] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[] The interest requirement is waived.

[] The interest requirement is modified as follows:

RESTITUTION

[] The determination of restitution is deferred, until . An Amended Judgment in a Criminal Case will be entered after such determination.

[] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

Totals:

Payments are to be made to the Clerk, U.S. District Court, for disbursement to the victim.

** Findings for the total amount of losses are under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

Defendant: STEPHEN TIARKS
Case Number: 98-137(11)(DSD/AJB)

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [x] in full immediately; or

B [] $ immediately, balance due (in accordance with C, D, or E); or

C [] not later than ; or

D [] in installments to commence days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [] in installments of $ over a period of year(s) to commence days after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

[] Joint and Several

[] The defendant shall pay the costs of prosecution.

[] The defendant shall pay the following court cost(s):

[] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the Clerk U.S. District Court and sent to the United States District Court, attention Financial Department, 300 South 4th Street, Minneapolis, Minnesota 55415.

STATEMENT OF REASONS

[] The court adopts the factual findings and guideline application in the presentence report.

OR

[x] The court adopts the factual findings and guideline application in the presentence report except (see attachment if necessary):

See attachment

Guideline Range Determined by the Court:

Total Offense Level: 31.

Criminal History Category: I.

Imprisonment Range: 108 to 135 months

Supervised Release Range: 3 to 5 years

Fine Range: $15,000 to $4,000,000

[x] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $

[] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[] Partial restitution is ordered for the following reason(s):

[] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

[x] The sentence departs from the guideline range

[] upon motion of the government, as a result of defendant's substantial assistance.

[x] for the following reasons: Substantial assistance warrants a sentence below the applicable guideline range. Reflects seriousness of offense and affords adequate deterrence to criminal conduct and protects the public against further crimes of the defendant.

DEFENDANT: STEPHEN TIARKS
CRIMINAL NO. 98-137(11)(DSD/AJB)

APPLICATION OF GUIDELINES TO FACTS

The court adopts the Guideline calculations contained in the presentence report to which there is no objection. Defendant has objected to paragraph 79 of the report, which relates that defendant was a minor participant in the instant offense and affords a two level reduction in the total offense level. Defendant contends that he is a minimal participant in the instant offense and should be eligible for a 4-level reduction in the total offense level.

Guideline Section 3B1.2 provides that if a defendant is a minimal participant in any criminal activity, his offense level should be decreased by 4 levels; if a minor participant the offense level should be decreased by 2 levels; and in cases falling in between the offense level should be decreased by 3 levels. Defendant contends he was a minimal participant and should be eligible for a 4-level reduction because he was not involved in the planning of the conspiracy and was not in communication with the majority of his co-defendants. Defendant contends his role essentially was as a courier.

As detailed in the presentence investigation report, however, defendant and co-defendant Barber agreed to accept packages of drugs for co-defendants Villanueva and Monroy. Further, defendant agreed to transport a large load of methamphetamine from California to Minnesota. While it is true that defendant was a minor player in this drug conspiracy, his involvement was more extensive than simply acting as a courier for one shipment of drugs. The court therefore finds that a two-level reduction for being a minor player is appropriate in this case.

In his position paper, defendant also maintains that a 2 level reduction is warranted pursuant to Guideline Section 2D1.1, application note 14. This provision provides that where the amount of the controlled substance for which the defendant is accountable results in a base offense level greater than 36 and the court finds this offense level to over-represent the defendant's culpability in the criminal activity, the court may depart downward to level 36 if the defendant qualifies for a mitigating role adjustment under Guideline Section 3B1.2. Although, as just discussed, defendant was a minor participant in this drug conspiracy, the court finds that the offense level of 38 does not over-represent the defendant's culpability. Defendant is responsible for the 16 kilograms of methamphetamine he attempted to bring into Minnesota. This represents one of the largest, if not the largest, seizure of this type of drug in this state's history. The court finds that a 2 level departure to level 36 is not warranted in this case.

The court notes that the defendant is subject to a 120 month statutory minimum; however, because the court finds that defendant meets the criteria set forth in Guideline Section 5C1.2, Limitation on Applicability of Statutory Minimum Sentences in Certain Cases, the court may impose a sentence in accordance with the applicable guidelines

without regard for any statutory minimum sentence for imprisonment and supervised release.

Further, the government has made a motion for downward departure pursuant to Guideline Section 5K1.1 and 18 U.S.C. § 3553(e) due to the substantial assistance defendant has provided to authorities. The government has indicated that defendant has fully cooperated with law enforcement officers and provided truthful and reliable information. Defendant's cooperation is outlined in a letter filed by the government under seal, which shall remain under seal for the protection of defendant and his family. Based on the information provided by the government, the court agrees that defendant has cooperated with law enforcement officers since the time of his arrest and has provided substantial assistance. The court therefore grants the government's motion for downward departure, and may depart below the mandatory minimum sentence and Guidelines range in this case.

Defendant also moves for a downward departure pursuant to Guideline Section 5K2.0 on the grounds that: 1) due to defendant's strong ties to his family and community, employment history, lack of criminal record, no prior distribution of drugs, and brief and limited involvement with the co-defendants, the commission of this offense amounts to aberrant behavior; and 2) defendant has engaged in substantial efforts toward rehabilitation and treatment. Defendant contends these factors are mitigating circumstances of a kind not taken into consideration by the Sentencing Commission in formulating the Guidelines that take this case out of the "heartland" of cases covered by the Guidelines and should result in a sentence different from that prescribed.

The court has reviewed the lengthy § 5K2.0 motion submitted by defendant's counsel and the many letters of support submitted by family, friends, and acquaintances of defendant. The court need not rely on defendant's § 5K2.0 motion, however, because it has granted the government's motion for downward departure based on substantial assistance pursuant to § 5K1.1 and 18 U.S.C. § 3553(e). Accordingly, the court neither grants nor denies defendant's motion for downward departure pursuant to § 5K2.0.

United States District Court

District of Minnesota

UNITED STATES OF AMERICA
v.
ALECIA COLMENARES

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 99-351(10)(ADM/AJB)

Terry Hegna
Defendant's Attorney

THE DEFENDANT:

[✓] pleaded guilty to count: 1 of the indictment.
[ ] pleaded nolo contendere to counts(s) ___ which was accepted by the court.
[ ] was found guilty on count(s) ___ after a plea of not guilty.
Accordingly, the defendant is adjudged guilty of such count(s), which involves the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846 & 841(a)(1) and (b)(1)(A)	Narcotics	Unknown-10/28/99	1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on counts(s) ___ and is discharged as to such count(s).
[✓] Counts 2 and 8 of the Indictment are dismissed on the motion of the United States.

Special Assessment Amount $ 100 in full and immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: [redacted]
Defendant's Date of Birth: [redacted]
Defendant's USM No.: [redacted]
Defendant's Residence Address:
[redacted]

Defendant's Mailing Address:

September 5, 2000
Date of Imposition of Judgment

Signature of Judicial Officer

ANN D. MONTGOMERY, United States District Judge
Name & Title of Judicial Officer

September 11, 2000
Date

Filed SEP 11 2000
Francis E. Dosal, Clerk
Judgment Entd
Deputy Clerk
(dist d)

A true copy in 5 sheet(s) of the record in my custody.
Certified _____, 2000
by _____
Deputy Clerk

383

CASE NUMBER: 99-351(10)(ADM/AJB)
DEFENDANT: ALECIA COLMENARES

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 24 months.

[✓] The court makes the following recommendations to the Bureau of Prisons:
It is recommended that defendant be incarcerated in a facility in California or as close to her family as possible.

[✓] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at ___ on ___.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] before _ on ___.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[✓] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit home or her at an time a home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program for drug and alcohol abuse at the direction of the probation officer. That program may include testing and inpatient or outpatient treatment, counseling, or a support group.
2. The defendant shall be requried to undergo mandatory drug testing as set forth by 18 U.S.C. §§3563(a) and 3583(d).
3. The defendant shall participate in a psychological/psychiatric counseling or treatment program, as approved and directed by the probation officer.
4. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.

CASE NUMBER: 99-351(10)(ADM/AJB)
DEFENDANT: ALECIA COLMENARES

STATEMENT OF REASONS

[✓] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 27

Criminal History Category: 1

Imprisonment Range: 70 to 87 months

Supervised Release Range: 3 to 5 years

Fine Range: $ 12,500 to $ 4,000,000

[✓] Fine is waived or is below the guideline range, because of inability to pay.

Total Amount of Restitution: $___

[ ] Full restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s).

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s):

OR

[✓] The sentence departs from the guideline range:

[✓] upon motion of the government, as a result of defendant's substantial assistance pursuant to §5k1.1.

[ ] for the following specific reason(s):

United States District Court

District of Minnesota

UNITED STATES OF AMERICA
v.
HEATHER ANN GENZ

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 99-351(5)(ADM/AJB)

Peter Wold and Bruce Hanley
Defendant's Attorney

THE DEFENDANT:

[✓] pleaded guilty to count: 1 of the indictment.
[ ] pleaded nolo contendere to counts(s) ___ which was accepted by the court.
[ ] was found guilty on count(s) ___ after a plea of not guilty.
Accordingly, the defendant is adjudged guilty of such count(s), which involves the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC §§841(a)(1) and (b)(1)(A) and 846	Narcotics	Unknown-10/28/99	1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on counts(s) ___ and is discharged as to such count(s).

[✓] Counts 4 and 8 of the indictment are dismissed on the motion of the United States.

Special Assessment Amount $ 100 in full and immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: [redacted]
Defendant's Date of Birth: [redacted]
Defendant's USM No.: [redacted]
Defendant's Residence Address:
[redacted]

Defendant's Mailing Address:
[redacted]

September 7, 2000
Date of Imposition of Judgment

Signature of Judicial Officer

ANN D. MONTGOMERY, United States District Judge
Name & Title of Judicial Officer

September 12, 2000
Date

SEP 12 2000
Filed
Francis E. Dosal, Clerk
Judgment Entd
Deputy Clerk
(dist'd)

A true copy in 5 sheet(s) of the record in my custody.
Certified _____, 2000
by _____
Deputy Clerk

386

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 24 months.

[✓] The court makes the following recommendations to the Bureau of Prisons:
It is recommended that defendant be placed in the Intensive Confinement Center Program and the Comprehensive Drug Abuse Program.

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at ___ on ___.
[as notified by the United States Marshal.

[✓] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] before _ on _.
[ ] as notified by the United States Marshal.
[✓] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

CASE NUMBER: 99-351(9)(ADM/AJB)
DEFENDANT: HEATHER ANN GENZ

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13,1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[✓] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit home or her at an time a home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not possess any firearms or other dangerous weapons.
2. The defendant shall participate in a program for drug abuse at the direction of the probation officer. That program may include testing and/or inpatient or outpatient treatment, counseling, or a support group.
3. The defendant shall undergo mandatory drug testing as set forth by 18 U.S.C. §§3563(a) and 3583(d).

STATEMENT OF REASONS

[✓] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 29

Criminal History Category: I

Imprisonment Range: 87 to 108 months

Supervised Release Range: 5 to __ years

Fine Range: $ 15,000 to $ 4,000,000

[✓] Fine is waived or is below the guideline range, because of inability to pay.

Total Amount of Restitution: $__

[ ] Full restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s).

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s):

OR

[✓] The sentence departs from the guideline range:

[✓] upon motion of the government, as a result of defendant's substantial assistance pursuant to §5k1.1.

[ ] for the following specific reason(s):

F. JAMES SENSENBRENNER, JR., Wisconsin
CHAIRMAN

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LAMAR S. SMITH, Texas
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MELISSA A. HART, Pennsylvania
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MIKE PENCE, Indiana
J. RANDY FORBES, Virginia

ONE HUNDRED SEVENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

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ADAM B. SCHIFF, California

July 19, 2002

The Honorable James M. Rosenbaum
Chief Judge
United States District Court
for the District of Minnesota
300 South Fourth Street, Suite 15E
Minneapolis, MN 55415

Dear Judge Rosenbaum:

Thank you for forwarding by telefax a copy of your June 6, 2002 letter and attachments thereto, responding to my letter of May 22, 2002. Our effort to locate the original FedEx transmission continues, but preliminary information indicates that it may have been directed to my personal office, rather than the Committee on the Judiciary or the Subcommittee on Crime, Terrorism, and Homeland Security. I appreciate the assistance provided by your Chambers in providing the Subcommittee with replacement copies of the original material.

The Subcommittee acknowledges receipt of the following Judgment and Commitment Orders:

Vimalam Hamilton Delaney (99-Cr-51 (010)(JMR)) which we assume corresponds with the "VHD" designation in your written statement to the Subcommittee at page 6.

Heather Ann Genz (99-351(9)ADM/AJB) which we assume corresponds with the "HAG" designation in your written statement to the Subcommittee at page 6-7.

Stephen Tiarks (98-137(1)(DSD/AJB)) which we assume corresponds with the "ST" designation in your written statement to the Subcommittee at page 7.

Maria Gudalupe Avalos (98-137(12)(DSD/AJB)) which we assume corresponds with the "MGA" designation in your written statement to the Subcommittee at page 8.[1]

Alecia Colmenares (99-351-(10)ADM/AJB)) which we assume corresponds with the "AC" designation in your written statement to the Subcommittee at page 8.

Eliseo Rodrigo Romo (CR03-95-52) which we assume corresponds with the "ERR" designation in your written statement to the Subcommittee at page 9.

Joel Arellano Plateado (00-Cr-327(01)(JMR)) which we assume corresponds with the "JAP" designation in your written statement to the Subcommittee at page 9.

Reut Bustos-Hernandez (01-201(2)(DSD/JMM)) which we assume corresponds with the "RBH" designation in your written statement to the Subcommittee at page 10.

Fernando Dwayne Davis (4:95 Cr00103-001) which we assume corresponds with the "FDD" designation in your written statement to the Subcommittee at page 10.

If the Subcommittee's assumptions are incorrect in any of these matters, please inform the Subcommittee promptly.

With respect to the remaining designations from your written statement: "JMC" (page 5); "MLV" (page 6); "DLL" (page 8); "RCK" (page 9); "EPR" (page 10), please provide the Subcommittee with the full case name and case number, as well as the status of each case. On May 14, 2002 you indicated that "MLV" was scheduled to be sentenced by you "in the next few weeks" (page 6), if he has now been sentenced, please provide the Subcommittee with a copy of his Judgement and Commitment Order, and those for any others which are now available.

I understand and respect the confidential nature of Pre-Sentence Reports (as evidenced by my agreement that you need not have initially disclosed non-public information in responding to the Subcommittee), however trials, guilty pleas, and sentencing proceedings are public. The Orders which you provided set forth the total offense conduct, but do not recite either the base

---

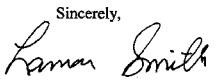
[1] The information contained in this order does not appear to correspond to the description in your prepared statement concerning the offense level, criminal history, or guideline range. We point this out in the event that you may have unintentionally provided the subcommittee with the incorrect order.

offense level (reflecting the amount of drugs), the basis for, or the fact of, adjustments for acceptance of responsibility, role in the offense, etc. Yet, these matters were repeatedly referenced by you in your prepared statement to the Subcommittee, and they are matters which are routinely contested, argued, and decided publicly at the sentencing hearing. Accordingly, I must ask that you provide all of the publicly available information which I requested in my letter of May 22, 2002 and we agreed upon during our telephone conversation following your receipt of that letter.

Further, in the case of *United States v. Joel Arellano Plateado*, (00-CR-327(01)(JMR)), the Order recites that you departed below the guideline range "for the reasons set forth at the hearing." Please provide the Subcommittee with the reasons for the departure. I am making every effort to comply with your request to me that we avoid insisting upon the production of the actual pre-sentence reports (documents to which the Congress is entitled in the fulfillment of it oversight responsibilities).

Your prompt attention this matter is greatly appreciated. Please respond to the Subcommittee on Crime, Terrorism, and Homeland Security at 207 Cannon House Office Building, Washington, D.C. 20525. Should you have any questions, please contact Sean P. McLaughlin, Counsel to the Subcommittee at 202-225-3926.

Sincerely,



Lamar Smith
Chairman
Subcommittee on Crime, Terrorism,
and Homeland Security

c: The Honorable Robert C. Scott

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CHAMBERS
JAMES M. ROSENBAUM
CHIEF JUDGE
UNITED STATES DISTRICT COURT
300 SOUTH FOURTH STREET, SUITE 15E
MINNEAPOLIS, MINNESOTA 55415
JMROSENBAUM@MND.USCOURTS.GOV
(612) 664-5050

August 9, 2002

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

Dear Mr. Chairman:

Thank you for your letter of July 19, 2002, requesting further additional information apparently relating to my testimony given on May 14, 2002. I hope the information below is of help to you.

Your first request is for full case names, file numbers, and the status of each case for those examples I provided which did not have Judgment and Commitment Orders as of the date of my last correspondence. They are as follows:

- JMC: This case is entitled United States of America v. Juan Mata-Chavez, 02-CR-89(RHK/JMM). The defendant has pled guilty and is still awaiting sentence.
- MLV: This case is entitled United States of America v. Miguel Angel Larios-Verduzco, 01-CR-28(02)(JMR/FLN). The defendant was found guilty at trial and was sentenced on June 13, 2002. The Judgment and Commitment Order is enclosed.
- DLL: This case is entitled United States of America v. Demetrio Lopez Longoria, 00-CR-355 (04)(JMR/RLE). The defendant has pled guilty and is still awaiting sentence.
- RCK: This case is entitled United States of America v. Raymond Chege Kimani, 01-CR-291(JMR/FLN). The defendant has pled guilty and is still awaiting sentence.
- EPR: This case is entitled United States of America v. Eduardo Pelayo-Ruelas, 01-CR-228(01)(JMR/FLN). The defendant was found guilty at trial and was sentenced on August 2, 2002. The Judgment and Commitment Order is enclosed.

Your second request is for "all of the publicly available information" that you previously requested. You are correct in noting that trials, guilty pleas, and sentencing proceedings are generally public. But transcripts of these proceedings are not prepared unless specifically requested. Therefore, I respectfully suggest that you specify the transcripts you require, and if they have been prepared, request copies from the court reporters who took the relevant proceedings. (You may request transcripts of any public hearings held before me from my court reporter, [redacted] Her telephone number is [redacted]) This should give you access to whatever information you may wish from the records of these public proceedings.

Again, as you know, I am -- and remain -- happy to provide the Subcommittee such assistance as I am able to provide. On the other hand, I again emphasize that some of those defendants about whom I gave testimony may have provided certain information or cooperated with the United States in other criminal and investigative matters. This kind of work can be extremely dangerous to the cooperating individuals and their families. This information may be available as part to the Pre-Sentence Investigations or Reports. With this in mind, I know you understand my great concern about publicly cross-correlating my testimony with any additional information you compile.

Finally, may I reemphasize my suggestion, extended during our chat, to accompany you, or any Member you may wish to invite to join us, on a visit to any Federal Correctional Institution you select? I know that meeting and discussing sentencing with those who know it most intimately would provide a further insight into the workings of the Sentencing Guidelines system. I believe you would find it especially enlightening respecting those considered to be "minimal" or "minor" participants, as to whom the pending Guideline modification and proposed statute pertains. In my experience, sentencing is one thing when considered in the abstract, and quite another when seen in the context of a whole human being.

I hope this material is responsive to your inquiry and helpful in your important work.

Very truly yours,

James M. Rosenbaum

Enclosures:
Judgment and Commitment Orders
Court Files: 01-CR-228(02) and 01-CR-228(01)

AO 245B (Rev. 8/96) Sheet 1 - Judgment in a Criminal Case

United States District Court
District of Minnesota

UNITED STATES OF AMERICA
v.
MIGUEL ANGEL LARIOS-VERDUZCO

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 01-CR-228(JMR)

Robert Miller
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s): __.
[ ] pleaded nolo contendere to counts(s) __ which was accepted by the court.
[✓] was found guilty on Counts 1and 2 of the indictment after a plea of not guilty.
Accordingly, the defendant is adjudged guilty of such count(s), which involves the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 U.S.C. §§ 846 and 841 (b)(1)(a)	Conspiracy to distribute methamphetamine	1
21 U.S.C. § 841(b)(1)(a) and 18 U.S.C. § 2	Possession of methamphetamine	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on counts(s) __ and is discharged as to such count(s).
[ ] Count(s) __ (is)(are) dismissed on the motion of the United States.

Special Assessment Amount: $ 200 in full and immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: [redacted]
Defendant's Date of Birth: [redacted]
Defendant's USM No.: [redacted]
Defendant's Residence Address:
[redacted]

Defendant's Mailing Address:

June 13, 2002
Date of Imposition of Judgment

Signature of Judicial Officer

JAMES M. ROSENBAUM, Chief United States District Judge
Name & Title of Judicial Officer

July 19, 2002
Date

Filed_____
Richard D. Sletten, Clerk
Judgment Entd_____
Deputy Clerk_____

A true copy in 4 sheet(s)
of the record in my custody.
Certified 7-23-2002
by _____
Deputy Clerk

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 120 months. Defendant shall receive credit for time served.

[✓] The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be afforded the opportunity to participate in the 500 hour Drug Abuse Program.

[✓] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at __ on __.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] before _ on __.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years .

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13,1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[✔] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit home or her at an time a home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[✔] The court adopts the factual findings and guideline application in the presentence report except as stated at the hearing.

Guideline Range Determined by the Court:

Total Offense Level: 32

Criminal History Category: 1

Imprisonment Range: 121 to 151 months

Supervised Release Range: 3 to 5 years

Fine Range: $ 17,500 to $ 4,000,000

[✔] Fine is waived or is below the guideline range, because of inability to pay.

Total Amount of Restitution: $__

[ ] Full restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s).

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s):

OR

[✔] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[✔] for the reasons set forth at the hearing.

AO 245B (Rev. 8/96) Sheet 1 - Judgment in a Criminal Case

United States District Court
District of Minnesota

UNITED STATES OF AMERICA
v.
EDUARDO PELAYO-RUELAS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 01-CF-228(01)(JMR/FLN)

Manvir K. Atwal
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s): __.
[ ] pleaded nolo contendere to counts(s) __ which was accepted by the court.
[✓] was found guilty on Counts 1 and 2 of the Indictment after a plea of not guilty.
Accordingly, the defendant is adjudged guilty of such count(s), which involves the following offenses:

Title & Section	Nature of Offense	Count Numbers
21 U.S.C. §§ 846 and 841(b)(1)(A)	Conspiracy to Distribute Methamphetamine	1
21 U.S.C. § 841(b)(1)(A) and 18 U.S.C. §2	Possessing with Intent to Distribute and Aiding and Abetting	2

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on counts(s) __ and is discharged as to such count(s).
[ ] Count(s) __ (is)(are) dismissed on the motion of the United States.

Special Assessment Amount: $ 200 in full and immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: [redacted]
Defendant's Date of Birth: [redacted]
Defendant's USM No.: [redacted]
Defendant's Residence Address:
[redacted]

Defendant's Mailing Address:
SAME

August 2, 2002
Date of Imposition of Judgment

Signature of Judicial Officer

JAMES M. ROSENBAUM,
Chief United States District Judge
Name & Title of Judicial Officer

August 9th 2002
Date

Filed_____
Richard D. Sletten, Clerk
Judgment Entd_____
Deputy Clerk_____

A true copy in 5 sheet(s)
of the record in my custody.
Certified _____, 2002
by _____
Deputy Clerk

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 120 months . Defendant shall receive credit for time served.

[✓] The court makes the following recommendations to the Bureau of Prisons: the facility in Sheridan, Oregon.

[✓] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at ___ on ___.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] before _ on ___.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on_____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years .

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13,1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[✓] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit home or her at an time a home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit to periodic drug testing and participate in substance abuse treatment and aftercare as directed by the probation office.
2. The defendant shall comply with the rules and regulations of the Immigration and Naturalization Service, and if deported from the country, either voluntarily or involuntarily, not reenter the United States illegally. The defendant shall not reenter the United States without the prior written approval of the Attorney General of the United States. Upon any reentry to the United States during the period of court-ordered supervision, the defendant shall report to the U.S. Probation Office within 72 hours.

STATEMENT OF REASONS

[✓] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 32

Criminal History Category: III

Imprisonment Range: 151 to 188 months

Supervised Release Range: 5 years to life

Fine Range: $ 17,500 to $ 8,000,000

[✓] Fine is waived or is below the guideline range, because of inability to pay.

Total Amount of Restitution: $__

[ ] Full restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s).

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s):

OR

[✓] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[✓] for the following specific reasons: as set forth at the hearing.

F. JAMES SENSENBRENNER, JR., Wisconsin
CHAIRMAN

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ONE HUNDRED SEVENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6216
(202) 225–3951
http://www.house.gov/judiciary

August 9, 2002

The Honorable James M. Rosenbaum
Chief Judge
United States District Court
for the District of Minnesota
300 South Fourth Street, Suite 15E
Minneapolis, MN 55415

Dear Judge Rosenbaum,

This is to acknowledge receipt of your telefaxed letter response dated August 9, 2002 and the two additional Judgement and Commitment Orders (*United States v. Miguel Angel Larios-Verduzco* (01-CR- 228 (JMR) and *United States v. Eduardo Pelayo-Ruelas* (01-CR-228(01)(JMR/FLN)).

I also wish to clarify and correct a matter referenced in my letter to you of July 19, 2002. The Subcommittee correctly noted the existence of an apparent discrepancy between your May 14, 2002 written statement and one of the Judgement and Commitment Orders which you subsequently provided to the Subcommittee. However, the Subcommittee incorrectly identified the discrepancy as being related to Maria Gudalupe Avalos (98-137(12)(DSD/AJB)). (See, footnote 1 of my July 19, 2002 letter). In fact the apparent discrepancy is with respect to Heather Ann Genz (99-351(9) ADM/AJB)). More specifically, your written statement of May 14, 2002 reflects that this defendant had a criminal history category II and that her guideline range was 121 - 151 months after reduction for role and acceptance. (See, your statement page 6-7 regarding "HAG"). However, the Judgement and Commitment Order which you subsequently provided reflects that the defendant had a criminal history category I and a guideline range of 87 - 108 months, apparently after adjustments. Accordingly, I wanted to make certain that you had provided the Subcommittee with the correct Judgement and Commitment Order with respect to this defendant and that the Order for Heather Ann Genz was intended to, and does, correspond to your May 14 statement concerning "HAG."

Thank you for your assistance in this matter. Should you have any questions, please feel free to contact Sean P. McLaughlin, Counsel to the Subcommittee at 202-225-3926. Please respond to the Subcommittee at 207 Cannon House Office Building, Washington, D.C. 20515, and due to delay in mail delivery as a result of security measures now in place at the Capitol, by telefax to 202-225-3737.

Sincerely,

Lamar Smith

Lamar Smith
Chairman
Subcommittee on Crime,
Terrorism, and Homeland Security

c: The Honorable Robert C. Scott

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CHAMBERS
JAMES M. ROSENBAUM
CHIEF JUDGE
UNITED STATES DISTRICT COURT
300 SOUTH FOURTH STREET, SUITE 15E
MINNEAPOLIS, MINNESOTA 55415
JMROSENBAUM@MND.USCOURTS.GOV
(612) 664-5050

August 30, 2002

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

Dear Congressman Smith:

Thank you for your letter of August 9, 2002. Having received it, I have reviewed my testimony regarding the case of "HAG." As you correctly perceived, "HAG" pertains to the case of Heather Ann Genz, 99-CR-351(9) (ADM/AJB). The "ADM" following the case number indicates the case was handled by District Judge Ann D. Montgomery.

The "discrepancy" about which you have inquired is not, in fact, a discrepancy at all. On review, it appears to reflect -- perhaps -- a bit of confusion on both our parts. It is a confusion I am pleased to correct.

My written statement submitted to the Subcommittee as part of my testimony (in the portion relating to HAG) stated, "the presentence investigation concluded . . . ." These words are in the statement, because the testimony relating to HAG was based on her presentence investigation. The statement and my testimony did not refer to the actual sentence imposed by Judge Montgomery. Until your letter, I had not reviewed the sentencing transcript (which had not been prepared, since the sentence was -- apparently -- not appealed).

My statement accurately reflected the presumptive sentence to be imposed on this person under the present guidelines, and contrasted it with the sentence which might be imposed if the proposed guideline changes are put into effect.

The confusion, of course, lies in the fact that the sentencing judge made her own calculations and the adjustments she felt were appropriate at the actual sentencing. (These are reflected in the Judgment and Commitment Order, which I have supplied pursuant to your previous request.) I had simply taken the data for my testimony from the presentence investigation, and spoke about HAG's case as an archetype, whereas your inquiry asks about the specific sentence imposed.

I know you will feel comfortable to contact me in the future, in the event you have any questions. In the meanwhile, I hope this resolves any questions you may have concerning these matters.

Very truly yours,

James M. Rosenbaum

LEXSEE 113 fsupp2d 879

UNITED STATES OF AMERICA, v. KEMBA NIAMBI SMITH, Defendant.

CRIMINAL ACTION NO. 2:93CR162-11, CIVIL ACTION NO. 2:97CV411-2

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

113 F. Supp. 2d 879; 1999 U.S. Dist. LEXIS 22200

August 4, 1999, Decided

DISPOSITION:
[1]** Smith's motion under *28 U.S.C. § 2255* DENIED.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner who had pled guilty to narcotics conspiracy, money laundering conspiracy, and false statements to federal agents as part of a plea agreement, filed a petition for a writ of habeas corpus, pursuant to *28 U.S.C.S. § 2255*, upon the claim that her guilty plea had not been knowing and voluntary. Petitioner also claimed the government had breached the plea agreements terms and that she had received ineffective assistance of counsel.

OVERVIEW: Petitioner pled guilty to narcotics conspiracy, money laundering conspiracy, and false statements to federal agents. As part of the plea agreement, the government promised to dismiss the remaining counts of a superseding indictment. The trial court conducted a thorough Fed. R. Civ. P. 11 colloquy and accepted petitioner's plea as being voluntarily and knowingly made. Petitioner subsequently filed a petition for a writ of habeas corpus pursuant to *28 U.S.C.S. § 2255*. Petitioner requested that the court conduct an evidentiary hearing and she submitted numerous interrogatory and other discovery requests. The court denied petitioner's § 2255 motion because her guilty plea was found to have been knowing and voluntary. The court noted that petitioner had been advised time and again by the trial judge of the consequences of her decision. The court also found that the government had not breached the terms of the plea agreement, that petitioner's sentence was proper under the U.S. Sentencing Guidelines Manual, that the distinction between crack cocaine and cocaine hydrochloride was constitutional, and that petitioner had received effective assistance of counsel.

OUTCOME: Petitioner's motion for a writ of habeas corpus was denied because her plea of guilty, filed pursuant to a plea agreement, was found to have been knowingly and voluntarily made. Additionally, the government was not found to have breached the terms of the plea agreement, the sentencing guidelines' distinction between crack cocaine and cocaine hydrochloride was constitutional, and no ineffective assistance of counsel was found.

CORE CONCEPTS

Criminal Law & Procedure : Habeas Corpus : Evidentiary Hearings
28 U.S.C.S. § 2255 provides for an evidentiary hearing unless the evidence conclusively shows that a petitioner is not entitled to relief. Where the record, transcripts, files and affidavits are sufficiently adequate, a district court may resolve these disputes without the need for a hearing.

Criminal Law & Procedure : Habeas Corpus : Habeas Corpus Procedure
A habeas petitioner is not entitled to discovery in the ordinary course of proceedings. A habeas petitioner must demonstrate good cause in order to obtain discovery. The petitioner must make a preliminary showing that requested documents contain exculpatory or impeaching information in order to compel production.

Criminal Law & Procedure : Guilty Pleas : Knowing & Intelligent Requirement
A plea of guilty is constitutionally valid if it is made on a voluntary and intelligent basis. Thus, a defendant must receive real notice of the true nature of the charge against him. The manner of ensuring that the defendant is properly informed is committed to the good judgment of a district court, to its calculation of the relative difficulty of comprehension of the charges, and of the defendant's sophistication and intelligence.

Criminal Law & Procedure : Guilty Pleas : Competency
Due process requires that a defendant be legally competent before entering a plea of guilty. The guilty plea is rendered invalid if the defendant's mental faculties were so impaired that the defendant could not appreciate the charges and consequences of her plea, and could not comprehend her constitutional rights.

Criminal Law & Procedure : Guilty Pleas : Competency
Criminal Law & Procedure : Habeas Corpus : Evidentiary Hearings
A habeas petitioner is not entitled to an evidentiary hearing on mental competency claims unless the evidence casts a real, substantial, and legitimate doubt with respect to the petitioner's mental capacity and ability to assist his counsel. Such evidence must be both positive and unequivocal.

Criminal Law & Procedure : Guilty Pleas : Voluntariness
A guilty plea may be rendered involuntary if evidence shows misunderstanding, duress, or misrepresentation by others demonstrating a constitutional deficiency.

Criminal Law & Procedure : Sentencing : Alternatives : Alternatives Generally
See *18 U.S.C.S. § 3143.*

Criminal Law & Procedure : Sentencing : Sentencing Guidelines
U.S. Sentencing Guidelines Manual § 2D1.1(c)(1) provides for a base level of 38 for one and a half kilograms or more of cocaine base, or crack cocaine.

Criminal Law & Procedure : Counsel : Effective Assistance : Trials
A client is entitled to reasonably effective assistance by her attorney. If claiming ineffective assistance, a petitioner must demonstrate that she received deficient legal representation and suffered actual prejudice from such representation. The burden is on the petitioner to show that absent the errors, the factfinder would have had a reasonable doubt respecting guilt.

Criminal Law & Procedure : Counsel : Effective Assistance : Pleas
In cases involving guilty pleas, a defendant must show that her counsel's representation was deficient and she would not have pled guilty but for her lawyer's inadequate representation.

Criminal Law & Procedure : Counsel : Effective Assistance : Pleas
An attorney must correctly inform a defendant of the direct consequences of her plea. In some instances, legal counsel's gross misinformation on the indirect consequences of the plea may constitute ineffective assistance.

Criminal Law & Procedure : Guilty Pleas : Voluntariness
Criminal Law & Procedure : Counsel : Effective Assistance : Pleas
An attorney's bad guess as to sentencing does not render a guilty plea involuntary. Additionally, an attorney's error in advice to his client may be corrected by the court at a subsequent hearing. When the court informs the defendant that her likely sentence is not capable of prediction and the defendant so acknowledges, a guilty plea is not rendered involuntary by virtue of an attorney's bad estimate of the likely sentence.

Criminal Law & Procedure : Counsel : Effective Assistance : Trials
An attorney has a duty to make a reasonable factual and legal investigation on behalf of his client. The reasonableness of the investigation is evaluated based on the totality of the circumstances facing the attorney.

Criminal Law & Procedure : Defenses : Coercion & Duress
In order to establish a claim of duress, a defendant must show that: (1) she acted under an immediate threat of serious bodily injury; (2) she had a well-grounded belief that the threat would be carried out; and (3) she had no reasonable opportunity to avoid violating the law and the threatened harm. It is not sufficient that a defendant felt a generalized fear of serious bodily harm if she did not commit certain offenses.

Criminal Law & Procedure : Counsel : Effective Assistance : Pleas
In some situations, legal counsel's erroneous advice on whether to withdraw the guilty plea may constitute ineffective assistance. Generally speaking, there must be a reasonable probability that but for counsel's errors, the defendant would have pleaded not guilty and proceeded to trial.

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Sentencing : Capital Punishment : Mitigating Circumstances
A defendant is entitled to reasonably competent legal assistance at sentencing proceedings. Ineffective assistance may exist when counsel fails to object to an improper application of the U.S. Sentencing Guidelines Manual or to clear errors in the presentence report. Similarly, counsel may be ineffective if he fails to present mitigating evidence at sentencing. A sentence imposed without such assistance must be vacated and reimposed to permit mitigating evidence to be fully and freely developed.

Criminal Law & Procedure : Sentencing : Sentencing Guidelines
U.S. Sentencing Guidelines Manual § 2S1.1(b)(2)(F) provides for a five point enhancement for value of funds of more than $ 1,000,000.

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Money Laundering
Criminal Law & Procedure : Sentencing : Sentencing Guidelines
The maximum statutory penalty for money laundering is five years or 60 months. *18 U.S.C.S. § § 1956*(a)(1)(B)(i) and 371.

Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal defendants are entitled to the undivided loyalty of competent counsel. The possibility of a conflict of interest does not necessarily impinge on a defendant's constitutional rights. Rather, a defendant must show that an actual conflict of interest existed and the conflict prejudiced counsel's performance.

Criminal Law & Procedure : Counsel : Effective Assistance : Trials
A criminal defendant may waive the right to conflict-free representation. As with the waiver of any constitutional right, the waiver must be voluntarily, knowingly, and intelligently made. The waiver may be valid even though the defendant does not have specific knowledge or all the implications of such waiver.

COUNSEL:
For US: Fernando Groene, Asst' U.S. Attorney, Office of the U.S. Attorney, Norfolk, VA.

For Defendant: Gerald Thomas Zerkin, Gerald T. Zerkin & Associates, Richmond, VA.

JUDGES:
Robert G. Doumar, UNITED STATES DISTRICT JUDGE.

OPINIONBY:
Robert G. Doumar

OPINION:

[*883] ORDER

Petitioner, Kemba Niambi Smith (hereinafter "Smith"), has filed a petition for a writ of habeas corpus pursuant to *28 U.S.C. § 2255*. In her petition, Smith alleges the following: (1) her guilty plea was not knowing and voluntary; (2) the government breached the terms of her plea agreement; (3) her sentence was unlawful and excessive; (4) her sentence is illegal because it is based upon an unconstitutional distinction between crack cocaine and cocaine hydrochloride; (5) she received ineffective assistance of counsel; and (6) her defense lawyers were laboring under a conflict of interest.

Smith requests that the Court conduct an evidentiary hearing and she has submitted numerous interrogatory and other discovery requests. See Rule 6 & Rule 8, Rules Governing Section 2255 Proceedings. For the reasons set forth, Smith's **[**2]** motion is **DENIED.**

I. Background

Cocaine Ring

Smith was a college student at Hampton University in Hampton, Virginia when she got involved in a drug ring that distributed cocaine and crack cocaine from New York City to the District of Columbia, Virginia, North Carolina, and elsewhere. Presentence Report ("PSR") P 14; Detention Hearing Transcript ("Detention Tr.") 36. Smith was raised in a middle class family **[*884]** in Richmond, Virginia. PSR PP 114-115. Smith's father is an accountant and her mother is a school teacher. Id. Smith enrolled as a freshman student at Hampton University in the fall of 1989. The following spring, in May of 1990, she met Peter Michael Hall (hereinafter "Hall") at a party. PSR P 94. Hall was the principal leader of the cocaine network along with his brother, Wainsworth Marcellus Hall. Detention Tr. 36.

Hall had moved from the New York area to Hampton, Virginia in late 1988 or early 1989. PSR P 18. Once there, Hall devised a scheme for transporting money and drugs along the eastern corridor. PSR P 22. Hall recruited Hampton University students, most of whom were female, to serve as drug couriers. PSR P 22. Typically, cars would be driven **[**3]** to New York City and would be met by Wainsworth Hall and other ring members. Id. The cars would be taken to another location, loaded with drugs in secret compartments, and then driven back south. Id. Once received, the drugs would be sold on the streets. PSR P 14. Originally, cocaine was brought down from New York and sold in its powder form. By the spring of 1990, however, Hall began to cook the powder into cocaine base or "crack" cocaine and the distilled product would be sold. PSR P 14; Guilty Plea Hearing Transcript ("Plea Tr.") 29. Money would be collected and sent to New York by way of drug courier. Detention Tr. 37. In New York, there would be an exchange of money for drugs, and the process would be repeated. Detention Tr. 37.

The cocaine network was profitable and generated at least $ 4,000,000 in receipts based on distribution of over 200 kilograms of cocaine. PSR P 17. The remunerative rewards came at a high price to human life. Two murders were committed by members of the ring, and two co-conspirators were murdered. PSR PP 54, 64; Detention

Tr. 37.

Smith was not a leader in the drug conspiracy, but her involvement was substantial. Detention Tr. 42; PSR P 94. In **[**4]** fact, Smith obtained apartments for Peter Hall under false names, she flew to New York to drop off money, and she drove vehicles concealed with drugs from New York to North Carolina. n1 Sentencing Hearing Transcript ("Sentencing Tr.") 105-108; PSR P 49; Detention Tr. 39-44. Also, Smith purchased a 1992 Jeep Wrangler in her name for the benefit of Peter Hall and his brother Wainsworth Hall. n2 PSR PP 79, 84. From time to time, Smith delivered money to Hampton University students who had been recruited as drug couriers for transport to New York City. Plea Tr. 31.

n1 At sentencing, Smith testified that she did not know at the time that a van she had driven contained a hidden compartment. Sentencing Tr. 107.

n2 Apparently, Peter Hall gave the Jeep to his brother Wainsworth as a birthday present.

When Peter Hall was incarcerated under alias names in Newport News, Virginia for money-laundering charges, in Virginia Beach for selling cocaine, and in New York City for selling cocaine, Smith posted bond through other **[**5]** co-conspirators or through Peter Hall's lawyers. Plea Tr. 31; Sentencing Tr. 118-20. Smith utilized alias names in aiding and abetting the conspiracy. She utilized the name Candace McGhee, Jeanette Morris, and Kemba Maynard to post bond for Peter Hall, to obtain phony driver's licenses, to lease automobiles, and to rent a storage locker to hide incriminating evidence. Plea Tr. 31-32; PSR PP 58, 65; Sentencing Tr. 107-108. In addition, Smith manufactured a fraudulent birth certificate on behalf of a drug member so the member could drive with a false license between New York City and Virginia. PSR P 48; Sentencing Tr. 104-106.

By early 1992, law enforcement authorities were zeroing in on Hall and his situation had grown desperate. Indeed, in January or February 1992, bounty hunters **[*885]** arrived at the home of Smith's parents in Richmond, Virginia and inquired about Hall's whereabouts. Sentencing Tr. 80. Smith was home at the time and spoke with the bounty hunters. Id. After the bounty hunters left, Smith called Hall and told him that bounty hunters were looking for him. Sentencing Tr. 80-81.

In the fall of 1992, Hall moved his end of the drug operation to Charlotte, North Carolina. **[**6]** Sentencing Tr. 82-83. Rather than matriculating at Hampton University for another semester, Smith moved to Charlotte and enrolled in Johnson C. Smith College in Charlotte that fall. Sentencing Tr. 83. In early 1993, Smith withdrew from Johnson C. Smith College and enrolled in Central Piedmont College in Charlotte, North Carolina. Sentencing Tr. 94. Around this time, Smith became pregnant with Hall's baby. Sentencing Tr. 84. Smith suffered a miscarriage and did not carry the baby to term. Id.

In May 1993, Hall returned to Charlotte, North Carolina from New York and learned that law enforcement authorities had searched an apartment he shared with Smith. PSR P 63. Hall was edgy and nervous that a member of the network was cooperating with authorities. Id.; Sentencing Tr. 85. On May 24, 1993, Hall instructed Smith to contact her attorney in Richmond, Virginia to ascertain what law enforcement authorities knew about the cocaine ring. PSR P63; Sentencing Tr. 85.

Hall became increasingly convinced that a co-member of the ring, Derrick Taylor, was an informant for the federal authorities. Sentencing Tr. 92. On May 25, 1993, Hall and Taylor drove a van to Charlotte, North Carolina **[**7]** with another female, who was driving in a separate car. Sentencing Tr. 41. After stopping for lunch in Greensboro, the three individuals switched cars. Sentencing Tr. 41-42. The female and Hall drove in the van and Taylor followed in the other vehicle. Sentencing Tr. 41-42. While in the van, Hall told the female that he was going to kill Taylor. Sentencing Tr. 42. Eventually, the cars pulled off the road and Hall, who was armed with a gun, got out of the van and into the car driven by Taylor. Id. The female drove ahead to a store and waited for Hall, who arrived by himself fifteen to twenty minutes later. Sentencing Tr. 42-43. On the drive back to Charlotte, Hall instructed the female to toss his gun out of the van window. Sentencing Tr. 43. Taylor was later found dead. Id.

Hall phoned Smith on the way back to Charlotte. Sentencing Tr. 43. Either on the phone or shortly thereafter, Hall admitted to Smith that he had shot Taylor. n3 Smith met up with Hall and the female at a hotel in Charlotte. Sentencing Tr. 43. Smith delivered a "getaway" car, a white Acura that Hall used to drive to Atlanta. Id.; PSR P 64. Two days later, on May 28, 1993, Hall called Smith and told her **[**8]** to clear the house in Charlotte of incriminating material and other items belonging to Hall. PSR P 65; Sentencing Tr. 111-112. Smith leased a storage locker in the name of Kemba Maynard and stored weapons, scales, drug trafficking paraphernalia, and implements used to create false identification documents. Id.

n3 Smith testified at her sentencing hearing

that she did not know that Derrick Taylor had been killed when she met Hall in Charlotte. Sentencing Tr. 112. The Government stated that Hall had admitted to Smith that he had shot Taylor and had asked her to remove incriminating evidence from their apartment in Charlotte. Plea Tr. 32. When asked at the guilty plea hearing whether the Government's version of the facts was true and correct, Smith responded that they were. Plea Tr. 39-40.

Once Smith completed her spring finals, she traveled to Atlanta and delivered the storage locker key to Hall. Sentencing Tr. 112. On June 9, 1993, Smith told Hall that federal authorities were interested in interviewing her. **[**9]** PSR P 66; Sentencing Tr. 85-86. Hall instructed Smith to meet with the agents and find out what they knew about the drug ring. Id. Hall further instructed Smith to tell federal agents that **[*886]** she did not know his brother Wainsworth and that she was being supported financially by other men. Id.

Smith met with agents from the Drug Enforcement Administration and Internal Revenue Service in Richmond, Virginia on June 28, 1993. PSR P 68; Sentencing Tr. 92, 137-140. Federal agents proffered a letter of immunity in exchange for truthful information Smith could provide about the cocaine network. Id. Smith was specifically asked about the murder of Derrick Taylor and her involvement and knowledge of the conspiracy. Id. Smith failed to provide information about the activities of the organization. Id. Smith also lied to federal authorities and misled them into believing that she did not know Wainsworth Hall or his role in the ring. Id. Additionally, she lied and told authorities that she knew nothing about Derrick Taylor's murder, and she lied and told federal agents that she was a prostitute. Id. Shortly after the interview, Smith reported back to Hall about her interview. **[**10]** Id.

In August 1993, Smith registered at Virginia Commonwealth University in Richmond, Virginia. Sentencing Tr. 94; PSR P 124. Smith lived with her parents in Richmond and attended classes. Sentencing Tr. 93-94. During the fall term, Smith called Hall repeatedly and wired him around $ 200 on three or four occasions, and she visited Hall in Atlanta on two occasions. Sentencing Tr. 94-96.

Grand Jury Indictment

On December 8, 1993, the Grand Jury for the Norfolk Division of the Eastern District of Virginia returned a sealed, multi-count Indictment against Smith and eleven other co-conspirators including Hall. The Grand Jury charged Smith and the other defendants with numerous violations of the federal narcotics and money laundering laws, operation of a continuing criminal enterprise, murder in furtherance of a continuing criminal enterprise, weapons charges, and substantive drug-related charges. The Court directed warrants to be issued on Smith and the other defendants named in the Indictment. On December 30, 1993, the Court ordered that the Indictment be unsealed.

At the time the Indictment was returned, Smith fled her parents' home and became a fugitive. PSR P 70; Sentencing **[**11]** Tr. 95-97. She followed Peter Hall to Houston, Texas, and for the next nine months, the two eluded authorities. Sentencing Tr. 95-97. While on the lamb, Smith again became pregnant with Hall's child. n4 Sentencing Tr. 99.

n4 Once in Seattle, Smith used the alias Kia April Moore to receive prenatal care and to procure food stamps. Sentencing Tr. 132.

In their absence, a jury trial commenced on June 14, 1994 against three co-conspirators in the drug ring. n5 One of the defendants pled guilty during the first week of the trial. On June 27, 1994, the jury returned a guilty verdict against Wainsworth Hall for the following offenses: 1) conspiracy to possess with intent to distribute and to distribute, in violation of *21 U.S.C. § 846;* 2) engaging in a continuing criminal enterprise, in violation of *21 U.S.C. § 848;* and 3) conspiracy to launder money, in violation of *18 U.S.C. § § 1956*(a)(1)(B)(i) and 371. PSR P 3. Co-defendant Derrick Kelly was acquitted **[**12]** of all counts. PSR P 7. Wainsworth Hall received a life sentence and his convictions and sentence were affirmed on appeal. See *United States v. Hall, 93 F.3d 126 (4th Cir. 1996).*

n5 The Honorable Raymond A. Jackson of the United States District Court for the Eastern District of Virginia (Norfolk Division) presided over the trial.

In late August 1993, Smith and Hall were holed up in Seattle, Washington. Sentencing Tr. 98-99; Detention Tr. 10. Smith was almost six months pregnant and she made the decision to come back home. Id. Smith took a train from Seattle to Richmond and arrived at her parent's home. Sentencing Tr. 98-100. Smith lied to her parents and told them that she had **[*887]** left Richmond because an unidentified associate of Hall's had beaten her, extorted money from her, and threatened her with physical harm. Detention Tr. 10-11; Sentencing Tr. 124. Once in Richmond, Smith contacted federal agents and the United States Attorney's office through her lawyer, Robert Wagner. n6 Sentencing **[**13]** Tr. 101-102.

n6 At sentencing, Smith testified that during the time she was gone, she had no knowledge that an Indictment had been handed down and a warrant issued for her arrest. Smith claimed that her parents informed her about the outstanding warrant when she returned home. Sentencing Tr. 102.

Grand Jury's Superseding Indictment

On August 25, 1994, the Norfolk Division of the Grand Jury returned a sixteen-count Superseding Indictment against Smith and Hall and two other fugitives from the original Indictment. n7 The Grand Jury charged the fugitives with narcotics and money laundering offenses, murder in furtherance of a continuing criminal enterprise, and a firearms offense. The Grand Jury charged Smith under Counts 1, 2, 14, 15 & 16 of the Superseding Indictment. Under Count 1, Smith was charged with conspiracy to possess with intent to distribute and to distribute in excess of five (5) kilograms of cocaine, and in excess of fifty (50) grams of crack cocaine, in violation of *21 U.S.C. § 846*. **[**14]** Under Count 2 and Count 14, Smith was charged with conspiracy to launder money and money laundering, in violation of *18 U.S.C. § § 1956*(a)(1)(B)(i), 371 and 2. Under Count 15, Smith was charged with making false statements to federal agents, in violation of *18 U.S.C. § 1001*. Finally, under Count 16, Smith was charged with forfeiture under *21 U.S.C. § 853*.

n7 The other two fugitives were Eric Marshall and Dirk Ladson.

Detention Hearing

Based on the Superseding Indictment, a new warrant was issued for Smith's arrest on August 25, 1994. On September 1, 1994, Smith surrendered to federal authorities and made an initial appearance before United States Magistrate Judge Tommy E. Miller. Smith pled not guilty and requested a jury trial. On the same day, a detention hearing was held before Judge Miller, who denied bond and ordered detention. Smith's father testified on behalf of his daughter and relayed his daughter's fictitious story that **[**15]** an unnamed drug associate had beaten her up and extorted money from her. Detention Tr. 10-11, 21-22. Smith would later admit at sentencing that this tale of threats and extortion was a fabrication. Sentencing Tr. 124-125.

On September 30, 1994, Smith and her attorney Robert Wagner met with federal agents and Assistant United States Attorney Fernando Groene. Sentencing Tr. 124-125. On that occasion, Smith failed to disclose Peter Hall's location in Seattle, even though she knew he was living there under the alias Curtis Lamont Saunders. Sentencing Tr. 103-104, 125-126. On October 1, 1994, Hall was found murdered in his apartment in Seattle. Sentencing Tr. 125; Plea Tr. 42. Smith found out about Hall's death on October 2, 1994 or October 3, 1994. Sentencing Tr. 104; Plea Tr. 42. Smith and her attorney set up another meeting with federal authorities on October 4, 1994. See Smith's Amended Habeas Petition, at 25.

Guilty Plea Hearing

On October 17, 1994, a guilty plea hearing was held before this Court (the Honorable Richard B. Kellam, presiding). Smith pleaded guilty to Count 1 (narcotics conspiracy), Count 2 (money laundering conspiracy), and Count 15 (false statements **[**16]** to federal agents) of the Superseding Indictment. As part of the plea agreement, the Government promised to dismiss the remaining counts of the Superseding Indictment and original indictment if Smith entered a plea of guilty. Plea Tr. 7. The Court conducted a thorough Rule 11 colloquy and accepted Smith's plea as being **[*888]** voluntarily and knowingly made. Plea Tr. 3-28.

The Court presented the outline of the plea agreement and the counts to which Smith was pleading guilty. Plea Tr. 7-24. The Court also informed Smith about the maximum statutory penalties, fines, and supervised release terms resulting from conviction of those offenses. Plea Tr. 9-12. In addition, the Court informed Smith about the Sentencing Guidelines and how they generally operate in calculating a sentence. Plea Tr. 10. The Court informed Smith about her right to a jury trial, her right to plead not guilty, her right to be confronted by her accusers, her right against self-incrimination, her right to raise defenses, the presumption of innocence at any trial, and the burden of proof on the government to prove her guilt beyond a reasonable doubt. Plea Tr. 12-19. Smith indicated that she understood those rights. Id. **[**17]** Smith stated that she had discussed the charges and had read the indictment with her counsel and was so satisfied with his advice and assistance. Plea Tr. 6-8. The Court asked Smith a second time whether she was satisfied with the advice and assistance of counsel:

Court: Have you had any trouble in communicating with your counsel? That is having your lawyer understand what you had to say about the case, and you understanding what he has had to say about the case?

Smith: No, I haven't had any trouble.

Court: Again, are you satisfied with the advice and

assistance which he has given you up to this time?

Court: Yes, I am.

Plea Tr. 20-21.

The Court reminded Smith that in the plea agreement, she was waiving her right to appeal her sentence:

Court: In the plea bargain and agreement, you have agreed that you will give up any right of appeal that you would have as to any sentence imposed upon you in this case, if the sentence is within the provisions of the statute or law. ... The only time you would have a right to appeal is if the sentence that is imposed is not in accordance with the statute, within the limits provided by statute. Do you understand **[**18]** that?

Smith: Yes, I do.

Plea Tr. 19-20.

The Court asked Smith whether the Government had promised to move for the Court to depart from the guidelines or otherwise promise a reduction in her sentence based on her cooperation. Plea Tr. 24. Smith responded that "it has been indicated that it may happen. No promises have been made." Plea Tr. 24. The Court then advised Smith of her rights under the plea agreement and the consequences of a plea:

Court: Now, they reserve the right, of course, to move for -- ask the court to give you a lesser sentence than provided by the guidelines. They reserve that right. And when the matter is presented to the court, they have agreed that they will bring your cooperation to the attention of the court.

But I want you to understand this. They have a perfect right to move for a lesser sentence. They are not compelled to do so, and there is nothing in the plea bargain agreement which requires them to do so. So while you may have in you mind that they are going to do so or you went them to do so, I want you to understand there is nothing in the plea bargain agreement which requires them to do so. They reserve the right to do it. . **[**19]** . . The court can't compel them to do it. Do you understand that?

Smith: Yes, I do.
[*889]

Court: I just want you to understand, they make the recommendation. The court is not compelled to follow it. So that they may make a recommendation to give you, instead of the minimum sentence under the guidelines, to give you half of the minimum sentence or any portion of it. The court is not compelled to follow that .... That is a matter that the judge has the discretion on whether he will or will not follow it, and I make no suggestion to you that the court would not follow it or that it would follow it. ...

Your counsel is going to ask the court in all probability to give you some reduction in sentence or to make it as light as the guidelines will permit. But that doesn't mean that the court has to do so. Do you understand that?

Smith: Yes, Your Honor.

Plea Tr. 24-26.

In order to make sure Smith understood her rights, the Court continued:

Court: I'm always concerned about it if a defendant comes into court and enters a plea of guilty, having a feeling that the United States attorney is going to move for some reduction of the sentence. And if you are entering **[**20]** a plea of guilty in the case because of your hope of that, you have a right to hope for it, but I want you to understand that is not a legal -- it is not legal and binding in any way on the United States attorney or upon this court, and if they have agreed to you privately they are going to do it, you'd better tell me about it now, because it won't make any difference when the time comes for sentencing.

If there has been any agreement that they are going to move for a reduction of sentence, this is the time to tell me about it, because I'm not going to accept your plea if that's a part of the plea bargain.

Smith: No, No promises have been made to me.

Court: No promise has been made.

Smith: No.

Plea Tr. 26.

The Court accepted the plea and then denied Smith's motion to release her in home detention pending sentencing. Plea Tr. 28, 43-45. The matter was continued for sentencing pending the preparation of a presentence report.

Presentence Report

A presentence report was prepared and distributed to the parties. On December 16, 1994, defense counsel Robert Wagner advised the probation officer of certain objections. Wagner also filed written objections **[**21]** on December 29, 1994, which incorporated his earlier

objections and raised other objections. William Robinson, who was newly-retained defense counsel since the guilty plea hearing, also noted objections to the report and filed his own written objections on December 30, 1994. Taken together, defense counsel's objections were extensive. n8 Among the major **[*890]** objections raised, defense counsel argued that Smith should be attributed with 5 kilograms of crack cocaine based on her alleged dates of involvement in the drug conspiracy, rather than 255 kilograms of crack cocaine as provided in the presentence report. See PSR P 94. Second, defense counsel argued that Smith should be attributed with only $ 3,000 in laundered money based on her involvement in the conspiracy, rather than more than $ 1,000,000 as contained the presentence report. See PSR P 94. Third, defense counsel asserted that Smith should be awarded at least a two level reduction for her minor role in the ring, as provided under U.S.S.G. § 3B1.2(b). Fourth, defense counsel maintained that Smith should not be given an enhancement for obstruction of justice under U.S.S.G. § 3C1.1, or an enhancement for possession of a dangerous **[**22]** weapon under U.S.S.G. § 2D1.1(b)(1). Fifth, defense counsel claimed that Smith should be given a sentence reduction based on duress or coercion under U.S.S.G. § 5K2.12.

n8 Besides the objections outlined above, defense counsel objected to the reference that Smith was a member of a conspiracy or participated in any act that would further the conspiracy. See PSR P 14. In this regard, defense counsel claimed that Smith's knowledge, actions, and intentions were dictated by Peter Hall. Defense counsel objected to the reference that Smith was knowledgeable of Peter Hall's cocaine network prior to September 1991. See PSR P 25. Defense counsel objected to the fact that Smith had typed a false birth certificate as a means to further the conspiracy. See PSR P 48. Defense counsel objected to the suggestion that Smith was aware that money and drugs were concealed in a hidden compartment in a vehicle she and another individual drove from New York to Charlotte, North Carolina in the summer of 1992. See PSR P 49. Defense counsel objected to the suggestion that Smith obtained a false driver's license in order to conceal her true identity or to further the ends of the conspiracy. See PSR P 58. Defense counsel objected to the notion that Smith contacted her attorney in Richmond, Virginia in an effort to find out what information law enforcement agents had gathered against Peter Hall and the ring. See PSR P 63. Defense counsel objected to the notion that Smith was aiding Peter Hall's effort to evade law enforcement after the murder of Derrick Taylor when Smith delivered an Acura automobile to Hall. See PSR P 64. Defense counsel objected to the suggestion that Smith met with law enforcement agents in June 1993 solely to gather information on behalf of Peter Hall. See PSR P 66. Defense counsel objected to the suggestion that Smith had fled her parents' home after learning that the original indictment had been returned by the Grand Jury. See PSR P 70. Finally, defense counsel objected to the suggestion that Smith acquired vehicles utilized in the conspiracy. See PSR PP 74 & 84.

[23]**

January 30, 1995 Hearing

The sentencing hearing was originally scheduled for January 30, 1995. Hearing Transcript ("Tr.") 1. On the same day, Smith filed a motion to withdraw her guilty plea. Id. at 2-3. In addition, the Government petitioned to remove Smith's lawyer William Robinson as counsel based on a potential conflict of interest. Id. at 3. The Government indicated that Robinson had been representing William Foreman, an unindicted co-conspirator who had pled guilty in return for his cooperation. Id. at 3-4, 19. The Government also stated that Robinson had tried to represent co-conspirator Wainsworth Marcellus Hall at his arraignment hearing. Id. at 4. On that prior occasion, the Government had made a similar motion to have Robinson withdrawn. n9 Id. Robinson subsequently withdrew from Wainsworth Hall's case. Id. at 11-13.

n9 In that prior motion, the Government had argued that Robinson had a conflict of interest in representing Wainsworth Hall and William Foreman, since Foreman had provided information to the Grand Jury and was a potential witness at trial. Id. at 4, 19-20, 25.

[24]**

In this matter, the Government stated that William Foreman had been a witness before the Grand Jury and could be a government witness at Smith's trial. Id. at 25. The Government stated that if Mr. Robinson had learned anything from his prior representation, it could affect Smith's substantive rights. Id. at 12-13. The Court had Smith sworn and the Government questioned Smith and made sure she understood Robinson's potential conflict of interest. Id. at 15-19. The Government's questioning ended this way:

Gov't: And do you understand that in the course of that representation, Mr. Robinson might find out something

which directly implicates you in this case?

Smith: Yes, I understand.

Gov't: You understand that the Sixth Amendment to the Constitution of the United States provides that you have a right to effective assistance of counsel and that **[*891]** that effective assistance means that your counsel, your lawyer, must not -- shall not have any conflict of interest?

Smith: I understand that, yes.

Gov't: And that you can waive that conflict after you are knowingly, voluntarily, and intelligently advised of the possibility of a conflict of interest?

Smith: **[**25]** I understand.

Gov't: Do you want to continue these proceedings with Mr. Robinson as a lawyer, even if he might have information regarding your criminal activity in this case?

Smith: Yes, I would like to continue.

Hearing Tr. 18.

The Court decided that on the motion to withdraw the guilty plea, Smith was entitled to separate counsel. Id. at 39. The Court determined that present counsel was a potential witness on the matter. Id.

April 20, 1995 Sentencing Hearing

The matter was continued until April 20, 1995, at which time Smith indicated that she wanted to withdraw her earlier motion to withdraw the guilty plea. Sentencing Tr. 4. The Court conducted a thorough examination of Smith and inquired whether she conferred with counsel on the matter and was satisfied with counsel's advice and assistance. Sentencing Tr. 4-25. As part of that examination, the Court inquired whether Smith had been threatened or coerced into withdrawing her motion to withdraw her plea. Id. The Court also reminded Smith that at the original sentencing hearing, she had waived her right to a conflict of interest involving her attorney Robinson:

Court: At that time **[**26]** I believe you said you had no objection at all to his [Robinson's] appearing, that you waived any right that you might have as to any conflict that might result. Do you remember that?

Smith: Yes.

Court: Now, ... do you have any objection today to his participating in the sentencing?

Smith: No, I do not, Your Honor.

Court: Do you want him to participate in the sentencing?

Smith: Yes, I do.

Court: Even though it should appear at some subsequent time that someone suggests there was a conflict of interest on his part, you want to waive any right to raise that as an objection to anything that occurs during the time of sentencing?

Smith: Yes, I do.

Sentencing Tr. 27-28.

Smith also was asked about her earlier comment at the Rule 11 colloquy about an alleged promise of a reduced sentence. Id. at 6. The exchange went as follows:

Smith: Indirectly I was told that I would get some type of assistance, but later I am finding out that I wouldn't.

Court: Who told you that?

Smith: My attorney, Robert Wagner.

Court: Did the United States Attorney ever make -- anyone from the United States Attorney's office or anyone connected **[**27]** with the prosecution of this case ever suggest to you or indicate to you or make any promise to you that they would ask the court to give you a reduced sentence other than what was called for by the guidelines?

Smith: No. Not directly to me, no.

Court: Well, do you know whether any such comment to your attorney or anyone connected with your defense in the matter?

Smith: Yes, that comment was made.

Court: All right. And how do you know that?

Smith: Because my attorney told me so.
[*892]

Court: But you did not hear it?

Smith: No, I didn't.

Sentencing Tr. 6.

The Court refreshed Smith's recollection by reading from the plea hearing transcript. Id. at 7-8. In particular, the Court read where Smith had stated that no promises

had been made to her. Id. at 8.

Court: Is that correct that you answered that no promises had been made?

Smith: Yes, that's correct

Court: Well, you were telling the truth then, weren't you?

Smith: Yes, I was telling the truth. There were no promises, but there was just an understanding, that's all.

Court: Well, tell me what the understanding was?

Smith: Just that I would receive some type **[**28]** of reduction, a possibility of reduction after I pled guilty.

Court: Possibility of reduction, is that what was said to you?

Smith: No, that I would receive a reduction after I pled guilty.

Court: Well, if that was the promise that was made to you, since the time you have entered the plea have you had any discussions with anyone in the United States Attorney's office, anyone at all dealing with the prosecution of this case wherein they made any statements to you concerning your sentence?

Smith: No, I have not.

Court: Have there been any discussions so far as you know between your counsel and the United States Attorney's office concerning the making of any motion for a reduction of your sentence?

Smith: Yes, there has been.

Court: All right. And what is that?

***

Smith: Just that the prosecutor said that he wouldn't have any objections to going outside of the sentencing guidelines.

***

Smith: My responsibilities are to assist the government, and after my assistance that they would be willing to offer me a sentence reduction.

Court: Now, is that the reason that you have withdrawn your motion to withdraw the plea?

Smith: **[**29]** No, that's not the complete reason, no. Because of counsel also.

Court: Was that a part of the reason?

Smith: Yes.

Court: Now, as I understand what you are saying, the United States Attorney's office agreed they would make a motion to the court saying they had no objections to the court going outside of the guidelines. Is that what you said?

Smith: Yes.

Court: And is that the total of any promise or understanding which you have had with them?

Smith: Yes.

Court: No other condition or provision?

Smith: No.

Sentencing Tr. 9-10.

The Court read from the guilty plea transcript concerning Smith's rights under the plea agreement and the consequences of her plea. Id. at 10. The Court continued:

Court: You || understand that while the United States Attorney may make the motion for a reduction of sentence or it may say it has no objection to reduction of the **[*893]** court going outside of the guidelines, I want you to understand that after time of sentencing the mere fact that they have no objection to the court going outside of the guidelines has no meaning whatsoever because the court could not bring you back for any change of sentencing **[**30]** except upon a motion made by the United States Attorney for cooperation which has occurred since that time. And it's not merely a statement that he has no objection to it; he must make the motion. Otherwise, the court has no authority whatsoever to do it. ... Do you understand that?

Smith: Yes, I do.

Court: Now, understanding all of that, are you sure that you want to withdraw your motion to withdraw the plea of guilty which you previously entered?

Smith: Yes.

Court: Other than your statement as to what your counsel has told you that the |government| at a Rule 35 motion will make no objection to the court going outside of the guidelines, other than that statement has there been any offer or any inducement of any kind made to you in order to have you agree to withdraw your plea of guilty. . .?

Smith: No, sir.

***

Court: That's the sole offer that's been made to you?

Smith: Yes.

Court: Well, I want you to understand this: It is absolutely an illegal motion. It has no meaning whatsoever. The court could not act upon it even if it wanted to do so. So if that is any inducement to you to withdraw your motion to withdraw the plea, I want **[**31]** you to understand now that you are wasting your time because it has no meaning whatsoever. The court could not grant it even if it wanted to.

Sentencing Tr. 11-14.

Smith's lawyer Robinson represented to the Court that the motion to withdraw the motion to withdraw the plea was not based on this understanding with the Government. Id. at 14-21. Rather, the motion to withdraw was based solely on an understanding that Smith would cooperate with authorities in the hope that they would consider a substantial assistance motion. Id. The Court proceeded to question Robinson and then Smith and Wagner:

Court: Well, to be certain that I understand exactly what you say the agreement is, there is no agreement on the part of the United States Attorney at the time of sentencing to make any motion or to unoppose any motion that be made for a reduction of sentence?

Robinson: Correct.

Court: Your understanding or hope is that because of cooperation which you expect the defendant will give to the United States Attorney's office and/or to the prosecution in this case, that will lead them to file a Rule 35 motion, but there is no agreement by the United States Attorney's **[**32]** office that regardless of what cooperation she may give, that they will file a Rule 35 motion.

Robinson: That is correct.

Court: Am I correct?

Robinson: That is correct.
*** **[*894]**

Court: Okay. Now, Ms. Smith, do you thoroughly understand what we have been discussing?

Smith: Yes, I do.

Court: Do you understand there is no agreement by the United States Attorney's office, no representation by the United States Attorney's office, no representation by the United States Attorney's office or indication by the United States Attorney's office that regardless of what cooperation you may give from this day forward that they will make a Rule 35 motion for a reduction of your sentence? Do you understand that?

Smith: Yes, I do.

Court: It is only a hope on your part?

Smith: Right. Yes, your honor.
***

Court: You want the court to permit you to withdraw, then, the motion to withdraw your guilty plea?

Smith: Yes.

Court: Is that what you want?

Smith: Yes, I do, Your Honor.

Court: You feel you thoroughly understand what you are doing today?

Smith: Yes, I do.

Court: You realize that you are surrendering a right which you **[**33]** may have or the right that you have under the law and the constitution? You are giving up that right in asking the court to permit you to withdraw the plea of guilty. Do you understand that?

Smith: Yes, I do, Your Honor.

Court: And the only promise or indication of any assistance that you would get is your hope that what information you furnish to the prosecution or to the United States Attorney's office or its official will lead them to file the Rule 35 motion. Is that your understanding?

Smith: Yes, Your Honor.

Court: Mr. Robinson, Mr. Wagner, is that your understanding of it, too?

Robinson: It is, Your Honor.

Wagner: Yes, Your Honor.

Sentencing Tr. 20-23.

At this point, the Court allowed the Government to make any objection to the withdrawal of Smith's motion.

Id. at 23. The Government had no objection and made the following statement:

Gov't: I just want the record to be clear in reflecting that contrary to what Ms. Smith inferred or let the court infer, there is no quid pro quo as to why she is withdrawing her plea. The government has not promised her anything now, will not promise her anything later, and did not promise her anything **[**34]** |not contained in| the plea agreement where it states that the parties agree that the United States reserves its options to seek any departure from the applicable sentencing guidelines pursuant to Section 5K or Rule 35(b) of the Federal Rules of Criminal Procedure....

If the government files the motion, it's because the government is satisfied that Miss Smith has complied with the terms of the plea agreement in the paragraphs I cited. So I just want the court to be clear there's no quid pro quo in the motion to withdraw the motion to set aside the plea agreement.

Sentencing Tr. 24.

Accordingly, the Court permitted Smith to withdraw her motion to withdraw her guilty plea. Sentencing Tr. 24.

[*895] At sentencing, Smith's lawyers introduced mitigating evidence that Smith had suffered from "battered woman's syndrome". In support of this defense, Smith's lawyers called numerous experts and lay witnesses, and introduced medical records and other documentary evidence. Among those who testified, Smith's lawyers called Caira Clever Cephas and Candace R. Jeter to the witness stand. Both Ms. Cephas and Ms. Jeter had attended Hampton University with Smith and were members of the cocaine **[**35]** ring. n10 Sentencing Tr. 28-65. Both agreed that Hall was a charismatic man who women found attractive and exciting to be around. Sentencing Tr. 56-57, 59; see also Detention Tr. 71. Both also testified, as did Smith, that Hall had a violent streak and was known to be physically and emotionally abusive. All the witnesses concurred that Smith's relationship with Hall was marked by episodes of brutal rage. According to the witnesses' testimony, Hall slapped, beat, or choked Smith on many instances, and he would often yell and scream at her.

n10 Ms. Cephas testified as a government witness at the trial of Wainsworth Hall and is currently in the Witness Protection Program. Sentencing Tr. 29, 36.

For instance, in the summer of 1991 at a party in Philadelphia, Hall spied Smith talking to another man on the street. Sentencing Tr. 69-71. Hall became upset and, later that night in their hotel room, Hall grabbed Smith by the throat. Sentencing Tr. 71. When Smith tried to defend herself, Hall punched Smith in the face. **[**36]** Id. Smith's face was swollen from the beating and she was treated at a local hospital. Id. at 72-73. Smith lied to doctors and told them that she had hit her head on the windshield during a car accident. n11 Id.; Sentencing Exhibit 1.

n11 To highlight other portions of the testimony, in the summer of 1991 at an apartment, Smith got up to get the door for co-conspirator Derrick Taylor. Sentencing Tr. 73. After Taylor left, Hall yelled at Smith and smacked her and told her "not to jump for anybody else." Sentencing Tr. 73.

On another occasion in the summer of 1992, Peter Hall became upset when he did not like the way a male co-conspirator said good-bye to Smith when leaving Ms. Jeter's apartment. Sentencing Tr. 54-55, 74. Smith voiced her opinion that Hall should speak to the other individual about the matter. Id. Hall smacked Smith and pushed her into the door of the apartment. Sentencing Tr. 54-55, 75. Hall then told Ms. Jeter to leave her apartment. Sentencing Tr. 55. Once she left, Hall threw Smith across the apartment and slapped and beat her, and grabbed her by the neck. Sentencing Tr. 75.

On another occasion, Hall became upset when, at a pool party, a man flirted with Smith and tried to take her bikini top off. Sentencing Tr. 78. Hall claimed that Smith had provoked the flirtation and he began to yell and beat Smith. Sentencing Tr. 79.

In the spring of 1993, Hall and Smith went to Wainsworth Hall's house in Charlotte, North Carolina. Sentencing Tr. 84. Hall became upset when Smith had a conversation with a woman Hall believed to be a lesbian. Id. Smith was pregnant at the time, and Hall hit Smith in the back of the head and in the face. Id.

[37]**

On another occasion, Smith met Hall in Newport News in January or February of 1992 after she had been questioned by authorities at her parent's home. Sentencing Tr. 80. Hall interrogated Smith about the incident and, becoming nervous, Smith stammered with the details. Id. In a mad fury, Hall began to kick and beat Smith with a belt. Sentencing Tr. 81. Hall's beating

caused swelling to Smith's face and body, and Hall told Smith to soak in the bathtub. Id. While in the tub, Hall continued to question her and hit and beat her with a brush. Id. Ms. Cephas was in a nearby room and could hear Hall yelling. Sentencing Tr. 30-31, 80. When Hall left the bedroom where the beating took place, Ms. Cephas went to check on Smith and found her bruised and beaten. Id.

Ms. Cephas also was a girlfriend of Hall. She and Smith both testified that Hall forbid them to use birth control. Sentencing Tr. 48, 81-82. As a result, both Smith and Ms. Cephas got pregnant and had children by Hall. Sentencing Tr. 36, 37.

[*896] Smith's lawyers also called expert witnesses to testify about battered woman's syndrome. Lawyers called Dr. Jo Ann Marie Wilson, who was Smith's treating psychologist. Sentencing **[**38]** Tr. 156-57. In 1990, Smith went to see Dr. Wilson for counseling at a time when she had not yet met Hall. Sentencing Tr. 157, 184. Around the time of her arrest, Smith called Dr. Wilson and resumed her therapy. Sentencing Tr. 158. At the sentencing hearing, Dr. Wilson testified that Smith had suffered from depression, battered woman's syndrome, and post-traumatic stress syndrome around the time of her arrest. Sentencing Tr. 159. Dr. Wilson also testified that Smith was suicidal initially and suffered from poor confidence and low self-esteem, although Smith had become a much "healthier" person after resuming her therapy. Sentencing Tr. 159-60, 171-172.

Dr. Wilson commented on battered woman's syndrome in the context of Smith's relationship with Hall. Dr. Wilson testified that the batterer seeks to control all aspects of a person's life. Sentencing Tr. 166. Dr. Wilson believed there was substantial evidence that Hall sought to control all facets of Smith's life. Id. Dr. Wilson noted that Hall forbid Smith to use birth control. Id. Dr. Wilson noted that Smith had been raised in a home with a dominant father figure and a caretaker mother. Sentencing Tr. 184. Dr. Wilson testified **[**39]** that women raised in such homes sometimes will bond with dominant and abusive men. Id. Dr. Wilson also stated that in an abusive relationship, as she believed Smith's relationship with Hall had been, the batterer's influence is total and complete. Sentencing Tr. 189-197.

Defense counsel also called Dr. Alice L. Twining to testify about battered woman's syndrome theory. Dr. Twining is a licensed psychologist who offered her expert opinion based on a conversation with Dr. Wilson and on the testimony presented at the hearing. Sentencing Tr. 142-43, 153-154. In her testimony, Dr. Twining maintained that a battered woman forms an intense attachment, or "traumatic bonding", when subject to alternating episodes of abuse and kindness. Sentencing Tr. 143-44. According to Dr. Twining, the batterer becomes both abuser and rescuer. Sentencing Tr. 146. Dr. Twining thought that Smith's relationship with Hall fit this pattern of a battered woman. Id. As support for this diagnosis, Dr. Twining claimed that younger women are more susceptible to this pattern of behavior, and the coercion exerted knows no geographical or temporal bounds. Sentencing Tr. 145-49. Dr. Twining concluded that in her **[**40]** expert opinion, Smith was not acting under her own free will. Sentencing Tr. 149-51.

At the close of all the evidence, the Court sentenced Smith to 294 months imprisonment on Count 1 for drug conspiracy. This fell into the middle of the guideline range of 262 - 327 months. The Court also sentenced Smith to sixty (60) months on Count 2 for money laundering, and sixty (60) months for making or concealing materially false statements or facts on Count 15, all of which sentences were to run concurrently. Upon the Government's motion and pursuant to the plea agreement, the Court dismissed Counts 14 and 16 of the Superseding and original indictment. The Court also informed Smith about her right to appeal her sentence notwithstanding the fact that she had waived that right in the plea agreement. Sentencing Tr. 263.

Before imposing sentence, the Court spoke at length about the complicated nature of Smith's case. Ultimately, however, the Court rejected a downward departure on the grounds that Smith had been under duress or had been coerced. The Court could not accept such a defense when Smith had dated Hall for such a long time and had witnessed Hall's violent nature. In the Court's view, **[**41]** Smith understood and appreciated the criminality of Hall's actions. The Court did not believe that Smith committed the offenses solely out of fear. In this sense, the Court rejected the **[*897]** notion that Hall's will over Smith had no geographical or temporal bounds. Sentencing Tr. 251-257.

The Court also concluded that Smith had understood and appreciated the wrongfulness of her own actions. The Court noted that Smith was a college-educated woman who had a sense of right and wrong. In fact, the Court pointed out that Smith grew up in a strong, middle class family with parents who by all indications loved and cared for her. Sentencing Tr. 251-257.

Appeal and Habeas Petition

On April 27, 1995, by counsel William Robinson, Smith filed a notice of appeal to the judgment of the Court. The Government filed a motion to dismiss the appeal on the grounds that Smith knowingly and voluntarily waived her right to appeal her sentence. Smith filed a response to the Government's motion. In the response, Smith argued that her offense conduct was the product of coercion and duress and the trial court should have departed downward from the Sentencing Guidelines. On July 19, 1995, the Fourth Circuit **[**42]** Court of Appeals dismissed Smith's appeal on the motion

of the Government. See United States v. Smith, CA No. 95-5344. Smith filed a petition for writ of certiorari to the United States Supreme Court which was denied.

On April 23, 1997, Smith filed a motion for habeas relief under *28 U.S.C. § 2255*. On June 5, 1997, this Court dismissed the habeas petition as untimely. Smith applied for a certificate of appealability with this Court, and her application was granted on July 11, 1997. Thereafter, Smith filed a notice of appeal to the denial of her habeas petition on July 24, 1997.

On September 15, 1998, the Fourth Circuit Court of Appeals held that the habeas petition was not time-barred. The Court of Appeals therefore vacated this Court's order and remanded the matter for further proceedings. On December 4, 1998, this Court directed the United States to file an answer or other pleadings to Smith's habeas motion. On January 13, 1999, Smith filed an amended habeas motion. On February 2, 1999, the Government filed a response to Smith's habeas motion. On February 24, 1999, Smith filed a traverse to the Government's response. This matter is ripe for decision. **[**43]**

II. Analysis

Smith alleges numerous violations of her constitutional rights. Smith believes that her allegations raise questions of material fact that require an evidentiary hearing and support her request for certain discovery.

Section 2255 provides for an evidentiary hearing unless the evidence conclusively shows that the petitioner is not entitled to relief. *28 U.S.C. § 2255; United States v. Magini, 973 F.2d 261, 264 (4th Cir. 1992)*. Evidentiary hearings are not mandated in every § 2255 proceeding. See Rule 8(a) of the District Court Rules Governing Section 2255 Cases. In fact, where the record, transcripts, files and affidavits are sufficiently adequate, the district court may resolve these disputes without the need for a hearing. See *Fontaine v. United States, 411 U.S. 213, 215, 93 S. Ct. 1461, 36 L. Ed. 2d 169 (1973)*.

A habeas petitioner is not entitled to discovery in the ordinary course of proceedings. See *Bracy v. Gramley, 520 U.S. 899, 117 S. Ct. 1793, 1796-1797, 138 L. Ed. 2d 97 (1997)*. Rule 6 of the Rules Governing § 2255 Proceedings provides that a habeas petitioner must demonstrate good cause in order to obtain discovery. **[**44]** Under the rule, the petitioner must make a preliminary showing that requested documents contain exculpatory or impeaching information in order to compel production. *United States v. Roach, 28 F.3d 729, 734 (8th Cir. 1994)*.

1. Knowing and Voluntary Plea

Smith argues that her guilty plea was not knowing and voluntary. A plea of guilty is constitutionally valid if it is made **[*898]** on a "voluntary" and "intelligent" basis. *Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747 (1970)*. Thus, the defendant must receive "real notice of the true nature of the charge against him". *Smith v. O'Grady, 312 U.S. 329, 334, 61 S. Ct. 572, 574, 85 L. Ed. 859 (1941)*. The "manner of ensuring that the defendant is properly informed is committed to the good judgment of the district court, to its calculation of the relative difficulty of comprehension of the charges and of the defendant's sophistication and intelligence." *United States v. Reckmeyer, 786 F.2d 1216, 1221 (4th Cir. 1986)*.

In this case, the plea agreement waived Smith's right to appeal and did not provide for waiver of collateral remedies under § 2255. The Government could have **[**45]** included a waiver of collateral rights in the plea agreement and chose not to do so. In such event, Smith did not expressly waive her rights to habeas review under the plea agreement. See *United States v. Tayman, 885 F. Supp. 832, 834 (E.D. Va. 1995)*.

All the same, the plea agreement does not bar application of the procedural default rule. Because Smith failed to raise this issue on direct appeal, she is forbidden to recast the issue in her habeas petition unless she can show "cause" and "actual prejudice" or a fundamental miscarriage of justice. *United States v. Frady, 456 U.S. 152, 165, 102 S. Ct. 1584, 1593, 71 L. Ed. 2d 816 (1982); Davis v. United States, 417 U.S. 333, 342, 94 S. Ct. 2298, 2303, 41 L. Ed. 2d 109 (1974);* see also *Bousley v. United States, 523 U.S. 614, 118 S. Ct. 1604, 1610, 140 L. Ed. 2d 828 (1998)* (petitioner's failure to challenge the validity of his plea is subject to procedural default); *United States v. Maybeck, 23 F.3d 888, 890, n.1 (4th Cir. 1994)*. Of course, Smith's plea agreement waived her right to appeal and her notice of appeal was dismissed by the court of appeals on those grounds. Other courts have found that this is **[**46]** not sufficient "cause" for a petitioner's procedural default. See *United States v. Pipitone, 67 F.3d 34, 37-38 (2d Cir. 1995)* (plea agreement as bar to appealing sentence not "cause" justifying collateral review); *United States v. Jones, 1995 U.S. App. LEXIS 13021, No. 94-6209, 1995 WL 321263,* at *1 (4th Cir. May 30, 1995) (per curiam) (unpublished opinion).

In any event, there has been no constitutional dereliction by virtue of the fact that Smith's plea was voluntarily and knowingly made. The Court presented the outline of the plea agreement and the counts to which she was pleading guilty. Plea Tr. 7-24. The Court also informed Smith about the maximum statutory penalties, fines, and supervised release terms resulting from conviction of those offenses. Plea Tr. 9-12. The Court told Smith about the Sentencing Guidelines and how they generally operate in calculating a sentence. Plea Tr. 10.

The Court informed Smith about her right to a jury trial, her right to plead not guilty, her right to be confronted by her accusers, the right against self-incrimination, the presumption of innocence at any trial, and the burden of proof on the government to prove **[**47]** her guilt beyond a reasonable doubt. Plea Tr. 12-19.

Smith indicated that she understood those rights. Id. Smith stated that she had discussed the charges and had read the indictment with her counsel and was so satisfied with his advice and assistance. Plea Tr. 6-8. The Court also reminded Smith that she had waived her right to appeal in the plea agreement and Smith so acknowledged. Plea Tr. 19-20. The Government then recited the facts that it would prove were the case to go to trial. Plea Tr. 28-35. Thereafter, the Court asked Smith whether the facts were true and she admitted that they were. Plea Tr. 39-40.

The Court's inquiry was sufficient and Smith was properly informed as to the charges and the consequences of her guilty **[*899]** plea. n12 The procedural dialogue establishes that Smith understood the consequences of accepting a plea. Smith's answers do not amount to "empty gestures" that may be disregarded at a future date. See *Little v. Allsbrook, 731 F.2d 238, 240, n. 2 (4th Cir. 1984).* In the context of this matter, Smith must be bound by her statements at the plea hearing.

n12 When, in this situation, the plea was knowingly and voluntarily made, there is a strong presumption that the plea is, final and binding. *United States v. Lambey, 974 F.2d 1389, 1394 (4th Cir. 1992)* (en banc).

[48]**

a. *Competency*

Nonetheless, Smith argues that she was legally incompetent at the time of the Rule 11 hearing to make a voluntary and intelligent plea of guilty. Such a claim, if true, may be sufficient to overcome the significant hurdle of procedural default. In fact, due process requires that a defendant be legally competent before entering a plea of guilty. *Shaw v. Martin, 733 F.2d 304, 314 (4th Cir. 1984).* The guilty plea is rendered invalid if the defendant's mental faculties were so impaired that the defendant could not appreciate the charges and consequences of her plea, and could not comprehend her constitutional rights. Id.

Smith believes that an evidentiary hearing and discovery are required because she was under psychological treatment at the time of her guilty plea. The Fourth Circuit has held that a habeas petitioner is not entitled to an evidentiary hearing on mental competency claims unless the evidence casts a "real, substantial, and legitimate doubt with respect to the petitioner's mental capacity and ability to assist his counsel ...." *Lawson v. Dixon, 3 F.3d 743, 753-754 (4th Cir. 1993).* "Such evidence must be both positive **[**49]** and unequivocal." *Id. at 754.*

In this matter, Smith has not cleared this "lofty hurdle" by simply pointing out that she had been seeing a psychologist at the time of the plea hearing. *Lawson, 3 F.3d at 754.* Such evidence does not rise to the level of legal incompetency. The uncontroverted facts are that Smith was alert and in full control of her faculties at the guilty plea hearing. Smith understood the nature of the proceedings and appreciated the charges and consequences of her plea. Plea Tr. 6-40. Although markedly depressed at the time she was arrested, Smith's emotional health had steadily improved from that time forward. In fact, Smith's treating psychologist testified at sentencing that Smith had become a much "healthier person" in the intervening time since she was arrested. Sentencing Tr. 171-172. Smith's arguments add nothing to the factual mix and her claims may be resolved without the need for an evidentiary hearing or discovery.

b. *Battered Woman's Syndrome*

Smith alleges that at the time she pled guilty, she was not informed of the availability of a complete defense. n13 According to Smith, she was a battered woman and lacked the **[**50]** specific intent necessary to support her conspiracy convictions. Relatedly, Smith contends that she had been acting under duress or had been coerced by Hall into committing the offenses.

n13 Smith's allegation of ineffective assistance of counsel is discussed in section 5(a)(3).

Smith failed to raise this issue on appeal and is subject to the procedural default rule on collateral review. *Frady, 456 U.S. at 165, 102 S. Ct. at 1593; Davis, 417 U.S. at 342, 94 S. Ct. at 2303;* see also *Boeckenhaupt v. United States, 537 F.2d 1182 (4th Cir. 1976); Moore v. United States, 934 F. Supp. 724 (E.D. Va. 1996).* Smith waived her right to pursue any defenses in pleading guilty. Plea Tr. 17-19. Her waiver of appeal in the plea agreement may not be sufficient "cause" to overcome the procedural default rule. *Pipitone, 67 F.3d at 38-39; Jones, 56 F.3d 62, 1995 WL 321263,* at *1.

[*900] In any event, Smith's claim that she lacked **[**51]** the statutory intent necessary for conviction has no bearing on the determination that Smith entered a voluntary and knowing plea. See *United States v. Wilson,*

81 F.3d 1300, 1308-1309 (4th Cir. 1996). Smith chose to avoid the risk of presenting her case to a jury, who could have reasonably found that she possessed the requisite "mens rea." See id. Rather than face that risk, Smith entered a guilty plea and benefitted from the government's written promise to move to dismiss the remaining counts of the Superseding Indictment and original indictment.

2. Plea Agreement Breach

Smith claims that the Government breached the terms of their plea agreement. Smith failed to raise this issue on appeal and her collateral attack is controlled by the procedural default rule. *Frady, 456 U.S. at 165, 102 S. Ct. at 1593; Davis, 417 U.S. at 342, 94 S. Ct. at 2303;* see also *Boeckenhaupt, 537 F.2d at 1182; Moore, 934 F. Supp. at 724.* Smith's waiver of appeal in the plea agreement may not be sufficient cause to overcome the formidable barrier of procedural default. *Pipitone, 67 F.3d at 38-39;* **[**52]** *Jones, 56 F.3d 62, 1995 WL 321263,* at *1.

Nevertheless, Smith asserts that the Government made unfair promises that induced her to sign the plea agreement and to withdraw her motion to withdraw her guilty plea. The integrity of the plea bargaining process requires that the plea agreement be given great weight. *United States v. Garcia, 956 F.2d 41, 44-45 (4th Cir. 1992).* Yet the outside possibility of a constitutional deficiency means that the courts do not review plea agreements under strict contract interpretation. *United States v. Carter, 454 F.2d 426 (4th Cir. 1972).* A guilty plea may be rendered involuntary if the evidence shows "misunderstanding, duress, or misrepresentation by others" demonstrating a constitutional deficiency. *Blackledge v. Allison, 431 U.S. 63, 76, 97 S. Ct. 1621, 1630, 52 L. Ed. 2d 136 (1977).*

a. *Release Pending Sentencing*

First, Smith maintains that the Government breached its promise not to oppose releasing her on bond after she pled guilty. Smith was pregnant at the time of the guilty plea hearing and wanted to remain at home until her sentencing. In Smith's view, the Government misled the Court when **[**53]** it stated **[*901]** that the Court had little discretion under the statute to release Smith on bond. In relevant part, *18 U.S.C. § 3143* provides:

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained unless -
(A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or
(ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and

(B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

In this case, Smith pleaded guilty to a drug trafficking charge which is described in *18 U.S.C. § 3142*(f)(1)(C); an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, *21 U.S.C. § 801* et seq. Clearly the Government did not recommend that no sentence **[**54]** of imprisonment be imposed, and the Court could not do so under the Sentencing Guidelines.

At the plea hearing, attorney Wagner told the Court that the Government did not object to Smith's release pending sentencing. Plea Tr. 38. Wagner also understood that the Court had little discretion under the statute:

Your Honor, I know that there are certain rules governing the court under *18 USC Section 1343,* that when someone is to plead guilty to such an offense as this, there may be very little discretion a judge has. But, Your Honor, what I'm asking the court to do is to release Ms. Smith on home detention, and in effect she remains in detention, pending her -- the period of time between now and her sentencing. ...

Plea Tr. 39.

The Government informed the Court that it had no objection and also confirmed attorney Wagner's understanding that the Court has little discretion by the terms of the statute. In the Government's own words:

It is true, the government has no objection. The government has no objection to Ms. Smith being released. However, I told Mr. Wagner, and the government will be remiss if we didn't point out to the court that **[**55]** whether the government has any objection or not, it is academic, because under United States Code Title 18, Section 3143, subsection (a)(2), it appears that once a plea of guilty or a person has been found guilty in a case like this, there is no discretion. ...

Plea Tr. 41.

Both attorney Wagner and the Government correctly informed the Court that under *18 U.S.C. § 3143,* there is little discretion for the Court to release a defendant pending sentencing. Smith has not successfully attacked the constitutional validity of her plea on this basis.

b. *substantial assistance*

Second, Smith contends that the Government

breached its oral and written promise to move for a downward departure based upon substantial assistance. Smith claims that she was induced to withdraw her motion to withdraw her guilty plea based on governmental promises.

As a preliminary matter, the written plea agreement did not obligate the Government in this matter to move for a downward departure based upon substantial assistance. The plea agreement provides in relevant part:

6. The defendant agrees to cooperate fully and truthfully with the United States, and provide all **[**56]** information known to the defendant regarding any criminal activity. In that regard:
a. The defendant agrees to testify truthfully and completely at any grand juries, trials or other proceedings.
b. The defendant agrees to be reasonably available for debriefing and pre-trial conferences as the United States may require.
c. The defendant agrees to provide all documents, records, writings or materials of any kind in the defendant's possession or under the defendant's care, custody, or control relating directly or indirectly to all areas of inquiry and investigation.
d. The defendant agrees that, upon request by the United States, the defendant will voluntarily submit to a government polygraph examination.
***8. The parties agree that the United States reserves its option to seek any departure from the applicable sentencing guidelines, pursuant to Section 5K of the Sentencing Guidelines and Policy Statements, or Rule 35(b) of the Federal Rules of Criminal Procedure, if in its sole discretion, the United States determines that the defendant has provided substantial assistance and that such assistance has been completed.

The Fourth Circuit has held that this exact **[**57]** language does not give rise to an enforceable promise as a matter of contract law. *United States v. Wallace, 22 F.3d 84, 87 (4th Cir. 1994).* According to **[*902]** the Wallace court, the United States retains discretion to conclude whether the defendant cooperated "fully and truthfully" and whether the assistance given was "substantial." Id. Thus, in this case, there was no enforceable promise arising from the plea agreement itself. In its discretion, the Government could refuse to move for a downward departure.

Furthermore, the files and records in this case show conclusively that there were no hidden promises by the Government. At the guilty plea hearing, the Court asked attorney Wagner about the plea agreement:

Court: Does the plea bargain agreement in this case set forth each and every term[] of any agreement negotiated by you with the United States Attorney's office concerning this case?

Wagner: Yes, it does, Your Honor.

Court: Has the defendant been made fully aware of each of those terms?

Wagner: Yes, she has, Your Honor.

Plea Tr. 21.

The Court then asked the Government the same basic question:

Court: Does the plea bargain **[**58]** agreement set forth each and every term of any agreement negotiated by counsel for the defendant with you or any member of your office?

Gov't: It does, Your Honor.

Plea Tr. 22.

The Court then quizzed Smith about what had been discussed:

Court: Ms. Smith, did you hear and understand the questions I asked of your counsel and of the United States Attorney?

Smith: Yes.

Court: Did you hear and understand their answers?

Smith: Yes, I did.

Court: So far as you know, did they answer correctly?

Smith: Yes, Your Honor.

Plea Tr. 22-23.

The Court asked Smith if, independent of the plea agreement, she had been promised that the Government would move for a reduction of her sentence. Smith indicated that the Government said "it may happen" but that "no promises have been made." Plea Tr. 24. The Court explained the terms of the plea agreement, the role of the Court, and the overall consequences of her plea. Plea Tr. 25-26. After explaining these matters in considerable detail, the Court concluded:

Court If there has been any agreement that they are going to move for a reduction of sentence, this is the time to tell me about it, because **[**59]** I'm not going to accept your plea if that's a part of the plea bargain.

Smith: No, No promises have been made to me.

Court: No promise has been made.

Smith: No.

Plea Tr. 26.

After the plea hearing, Smith's attorneys filed a motion to withdraw her guilty plea. Subsequent to that, Smith moved to withdraw her motion to withdraw her guilty plea. At the sentencing hearing, the Court asked Smith about her earlier suggestion at the Rule 11 colloquy about a promise of a reduced sentence. Sentencing Tr. 5-6. Smith indicated that her attorneys had told her that there had been a promise for a reduction of sentence in exchange for her cooperation. The exchange went as follows:

Smith: Indirectly I was told that I would get some type of assistance, but later I am finding out that I wouldn't.

Court: Who told you that?

Smith: My attorney, Robert Wagner.

Court: Did the United States Attorney ever make - anyone from the United States Attorney's office or anyone connected with the prosecution of this case ever suggest to you or indicate to you or make any promise to you that **[*903]** they would ask the court to give you a reduced sentence other than what was called **[**60]** for by the guidelines?

Smith: No. Not directly to me, no.

Court: Well, do you know whether any such comment to your attorney or anyone connected with your defense in the matter?

Smith: Yes, that comment was made.

Court: All right. And how do you know that?

Smith: Because my attorney told me so.

Court: But you did not hear it?

Smith: No, I didn't.

Sentencing Tr. 6.

The Court read from the guilty plea transcript where Smith had stated that "no promises have been made" to her. Id. at 8. The Court also reminded Smith about the terms of the plea agreement and the consequences of pleading guilty. Id. at 8-10.

Smith iterated to the Court that there had been an understanding "that I would receive some type of reduction" after she pled guilty. Id. at 8. Smith elaborated:

Smith: My responsibilities are to assist the government, and after my assistance that they would be willing to offer me a sentence reduction.

Court: Now, is that the reason that you have withdrawn your motion to withdraw the plea?

Smith: No, that's not the complete reason, no. Because of counsel also.

Court: Was that a part of the reason?

Smith: **[**61]** Yes.

Court: Now, as I understand what you are saying, the United States Attorney's office agreed they would make a motion to the court saying they had no objections to the court going outside of the guidelines. Is that what you said?

Smith: Yes.

Court: And is that the total of any promise or understanding which you have had with them?

Smith: Yes.

Court: No other condition or provision?

Smith: No.

***

Court: You || understand that while the United States Attorney may make the motion for a reduction of sentence or it may say it has no objection to reduction of the court going outside of the guidelines I want you to understand that after time of sentencing the mere fact that they have no objection to the court going outside of the guidelines has no meaning whatsoever because the court could not bring you back for any change of sentencing except upon a motion made by the United States Attorney for cooperation which has occurred since that time. And it's not merely a statement that he has no objection to it; he must make the motion. Otherwise, the court has no authority whatsoever to do it. ... Do you understand that?

Smith: Yes, I do.

Court: **[**62]** Now, understanding all of that, are you sure that you want to withdraw your motion to withdraw the plea of guilty which you previously entered?

Smith: Yes.

Court: Other than your statement as to what your counsel has told you that the [government] at a Rule 35 motion will make no objection to the court going outside of the guidelines, other statement has there been any offer or any inducement of any kind **[*904]** made to you in order to have you agree to withdraw your plea of guilty ....

Smith: No, sir.
***
Court: That's the sole offer that's been made to you?

Smith: Yes.

Court: Well, I want you to understand this: It is absolutely an illegal motion. It has no meaning whatsoever. The court could not act upon it even if it wanted to do so. So if that is any inducement to you to withdraw your motion to withdraw the plea, I want you to understand now that you are wasting your time because it has no meaning whatsoever.

Sentencing Tr 9-13.

All the parties represented that there was no hidden agreement that the Government would not object to the Court's departure from the Sentencing Guidelines. Id. at 19, 24. The Court then made sure this was Smith's **[**63]** understanding and her lawyers' understanding of the situation:

Court: Now, Ms. Smith, do you thoroughly understand what we have been discussing?

Smith: Yes, I do.

Court: Do you understand there is no agreement by the United States Attorney's office, no representation by the United States Attorney's office or indication by the United States Attorney's office that regardless of what cooperation you may give from this day forward that they will make a Rule 35 motion for a reduction of your sentence? Do you understand that?

Smith: Yes, I do.

Court: It is only a hope on your part?

Smith: Right. Yes, your honor.
***
Court: And the only promise or indication of any assistance that you would get is your hope that what information you furnish to the prosecution or to the United States Attorney's office or its official will lead them to file the Rule 35 motion. Is that your understanding?

Smith: Yes, Your Honor.

Court: Mr. Robinson, Mr. Wagner, is that your understanding of it, too?

Robinson: It is, Your Honor.

Wagner: Yes, Your Honor.

Sentencing Tr. 20-23.

In the end, Smith's allegation of a hidden oral agreement adds nothing **[**64]** to the original record before the Court and an evidentiary hearing or additional discovery is not warranted. The issue of whether an oral agreement existed was asked and answered in the passing of sentence. All the parties represented that there was no oral agreement separate and apart from the plea agreement. In addition, the Court corrected or clarified an earlier misunderstanding by Smith and cured any possibility of prejudice. See *Lambey, 974 F.2d at 1394-1395* (attorney's error in advice to his client may be corrected or clarified by the court). In fact, at her guilty plea hearing, the Court warned Smith about her rights under the plea agreement and the collateral results of pleading guilty. When Smith sought to withdraw her motion to withdraw her plea, the Court again admonished Smith about her rights and the implications of withdrawing her motion to withdraw the plea. On both occasions, Smith acknowledged that she understood the Court's statements.

When voluntarily and intelligently made, a criminal defendant's plea of guilty is not a mere tentative decision on whether to proceed to trial. In reviewing this matter, this Court can not ignore the fact that Smith **[**65]** is a college-educated woman who **[*905]** grew up in a solid, middle class family. At some point, the Court must be able to rely on the representations of a criminal defendant. See *Lambey, 974 F.2d at 1395.* The criminal justice system demands the finality of the process when constitutional safeguards have been followed. n14 *Hartman v. Blankenship, 825 F.2d 26, 28 (4th Cir. 1987).*

n14 This Court notes that Smith has not offered any evidence suggesting that the Government's refusal is irrational to any legitimate governmental end or is based on a discriminatory motive. See *Wade v United States, 504 U.S. 181, 186, 112 S. Ct. 1840, 118 L. Ed. 2d 524 (1992).* Indeed, the Government makes a determination based on whether the informant has complied "fully and truthfully" and whether such assistance has been "substantial." Prior to

sentencing, Smith did not provide complete, truthful, and substantial information to the Government. Before she was indicted, Smith met with federal agents on June 28, 1993. Smith failed to provide federal agents with information concerning the activities of the cocaine network. Smith lied to federal agents and told them that she did not know Wainsworth Hall and that she knew nothing about Derrick Taylor's murder. Smith reported to Peter Hall after her meeting and reported on what the agents knew about the ring.

Smith was subsequently indicted. After her initial appearance in this matter, Smith and her attorney Wagner met with federal agents on September 30, 1994. At that meeting, Smith failed to disclose Peter Hall's location in Seattle. Smith knew that Peter Hall was living there under the alias Curtis Lamont Saunders. Sentencing Tr. 103-104, 125-26. On October 1, 1994, Hall was found dead at his apartment in Seattle. Only then, Smith met with federal authorities a second time and disclosed Hall's whereabouts and provided information about him. The Government indicates that the information Smith provided then and in subsequent meetings did not amount to substantial assistance.

[66]**

c. *Quantity of Drugs*

Smith claims that the Government orally promised that she would be held attributable for only 5 to 15 kilograms of crack cocaine. At sentencing, the Court attributed 255 kilograms of crack cocaine to Smith. PSR P 94. Smith argues that the final attribution amounts are in contravention of her purported oral agreement with the Government. Smith's claim is without foundation.

First, the Government flatly denies that it made any such promise for attribution of 5 to 15 kilograms of crack cocaine. Second, the attributable amounts are accurate. At the guilty plea hearing, the Government recited the facts it would seek to prove had the case gone to trial. The Government stated that by the middle of 1990, Hall and other ring members were converting powder cocaine into crack cocaine. Plea Tr. 29. Hall met Smith in May of 1990, and the Government stated that she became romantically involved with Hall in the summer of 1990. Plea Tr. 30; PSR P 94. The Government also stated that during the life of the conspiracy, over 200 kilograms of crack cocaine were distributed. Plea Tr. 29. After the Government's recitation of the facts, the Court asked Smith whether the facts had **[**67]** been stated correctly and Smith indicated that they were. Plea Tr. 39-40.

Third, there has been no prejudice from an alleged breach of an oral promise. U.S.S.G. § 2D1.1(c)(1) provides for a base level of 38 for 1.5 kilograms or more of cocaine base, or crack cocaine. Thus, a finding that Smith is responsible for 5 to 15 kilograms, rather than 255 kilograms of crack cocaine has no effect on the applicable guideline range.

Smith insists that she would have been eligible for a reduction under U.S.S.G. § 3B1.2(a) as a minimal participant if she were attributed with 5 to 15 kilograms of crack cocaine. The plain facts contradict this assertion. Smith was certainly not the drug kingpin in the cocaine network. Yet her involvement in the network was direct and extensive. Smith obtained apartments for herself and Hall under false names; she made drug and cash runs to New York City; she manufactured fraudulent birth certificates for drug ring members; she posted bond for Hall; **[*906]** she used aliases for other ends of the drug conspiracy; she lied to authorities about Hall's whereabouts and the scope of the conspiracy; she reported to Hall about what federal agents knew about the drug ring; she **[**68]** provided a "getaway" car to Hall when he was evading arrest for the murder of Derrick Taylor; she removed incriminating evidence at an apartment she shared with Hall in Charlotte, North Carolina; and she fled the jurisdiction and became a fugitive with Hall after an indictment had been returned against them. In sum, Smith was involved in the drug ring, and her involvement was substantial. The actual amount of crack cocaine in this instance does not alter that determination or Smith's overall sentence.

d. *Information Provided by Smith*

Smith contends that the Government breached the terms of the plea agreement and used information provided by Smith to enhance her sentence. See Plea Agreement, at P 7. Smith has made this blanket assertion without any evidentiary support. This claim must be dismissed.

3. Excessive and Unlawful Sentence

Smith claims that her sentence was unlawful and excessive and therefore in violation of her due process rights. In particular, Smith contends that the Court erred in (a) calculating the quantity of drugs; (b) awarding her a two-level enhancement for obstruction of justice; (c) failing to depart downward based on coercion and duress; (d) failing **[**69]** to grant a reduction based on a minimal or mitigating role; and (e) assessing a two-level enhancement for possession of a firearm.

Smith failed to raise these issues on direct appeal and may not collaterally attack them unless she can overcome procedural default. *Frady, 456 U.S. at 165; 102 S. Ct. at 1593.* Smith waived her right to appeal her sentence and such excuse may not be sufficient cause to carve an exception to the procedural default rule. *Pipitone, 67 F.3d at 37-38; Jones, 56 F.3d 62, 1995 WL 321263,* at *1. After reviewing the record and files in this

matter, this Court finds that there was no actual prejudice and no errors amounting to a fundamental miscarriage of justice. See *Davis, 417 U.S. at 346, 94 S. Ct. at 2305.*

Also, this Court notes that a district court's technical application of the Sentencing Guidelines does not necessarily give rise to a constitutional issue. *United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992).* The sentence imposed in this matter is well within the statutory limit and is therefore insulated from section 2255 review. *Fernandez v. United States, 941 F.2d 1488, 1494 (11th Cir. 1991);* **[**70]** *Vaughn, 955 F.2d at 368; United States v. Patterson, 739 F.2d 191, 196 (5th Cir. 1984); United States v. Rowland, 848 F. Supp. 639, 642 (E.D. Va. 1994).*

4. Discrepancy in Penalties for Cocaine Base and Cocaine Powder

Smith argues that the disparity of sentences imposed for offenses involving crack cocaine and powder cocaine is unconstitutional. Smith contends that the relevant provisions of *21 U.S.C. § 841* and the Sentencing Guidelines are unconstitutionally vague and ambiguous, and the distinction in sentencing lacks a rational basis and has a disparate impact on racial minorities in violation of the Equal Protection Clause.

The Fourth Circuit has consistently rejected Smith's claim. *United States v. Burgos, 94 F.3d 849, 876-877 (4th Cir. 1996)* (en banc); *United States v. Fisher, 58 F.3d 96, 99-100 (4th Cir. 1995); United States v. Jones, 18 F.3d 1145, 1151 (4th Cir. 1994); United States v. D'Anjou, 16 F.3d 604, 612 (4th Cir. 1994);* and *United States v. Thomas, 900 F.2d 37, 39-40 (4th Cir. 1990).* Therefore, Smith's claim **[**71]** must be rejected.

5. Ineffective Assistance of Counsel

Smith alleges that her counsel were ineffective during all stages of her proceedings. **[*907]** A client is entitled to "reasonably effective assistance" by her attorney. *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).* If claiming ineffective assistance, a petitioner must demonstrate that she received deficient legal representation and suffered actual prejudice from such representation. *Poyner v. Murray, 964 F.2d 1404, 1425 (4th Cir. 1992).* The burden is on the petitioner to show that "absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland 466 U.S. at 695, 104 S. Ct. at 2069.*

a. *Guilty Plea*

Smith asserts that she was denied reasonably effective representation at the guilty plea phase of her proceedings. In cases involving guilty pleas, a defendant must show that her counsel's representation was deficient and she would not have pled guilty but for her lawyer's inadequate representation. See *Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); Fields v. Attorney Gen., 956 F.2d 1290 (4th Cir. 1992).* **[**72]**

1. Competency

Smith asserts that her lawyers were ineffective in failing to ask the Court to conduct a competency determination. Smith requests an evidentiary hearing and has submitted certain discovery requests. Due process requires that a defendant be legally competent before entering a plea of guilty. *Shaw, 733 F.2d at 314.* The guilty plea is rendered invalid if the defendant's mental faculties were so impaired that the defendant could not appreciate the charges and consequences of her plea, and could not comprehend her constitutional rights. Id.

Smith's arguments do not raise any factual disputes and therefore there is no need for an evidentiary hearing or discovery. The original record shows that Smith was not legally incompetent at her guilty plea hearing. At the hearing, the Court asked Smith and her trial counsel whether she understood the nature of the charges against her and her constitutional rights. The Court asked Smith and her trial counsel whether she understood the consequences of her plea and whether she was acting voluntarily. The Court asked Smith and her trial counsel about her understanding of the plea agreement and about any possible defenses. **[**73]** Smith provided coherent answers to the Court's questions and was in control of her faculties during the plea hearing. See Plea Tr. 6-40. The Court inquired about Smith's state of mind and her competency and Smith stated that she had never suffered from mental illnesses of any kind. Plea Tr. 17. Although Smith's treating psychologist testified at sentencing that Smith had been depressed around the time of her arrest, her psychologist also pointed out that Smith had become a much "healthier person" from that time forward. Sentencing Tr. 171-172. Accordingly, Smith's lawyers were not deficient in their representation when the facts and circumstances did not call into question Smith's legal competence.

2. Direct and Collateral Consequences of Pleading Guilty

Smith next argues that her lawyers failed to advise her about the direct and collateral consequences of pleading guilty. Smith maintains that her counsel failed to tell her about a possible and likely sentence, parole eligibility, and about the ability to withdraw her plea once she entered it. Smith also claims that her attorneys misled her and told her that she would receive a lenient sentence.

An attorney must correctly inform **[**74]** the defendant of the direct consequences of her plea. *Manley v. United States, 588 F.2d 79 (4th Cir. 1978); Hammond v. United States, 528 F.2d 15 (4th Cir. 1975).* Professional standards indicate that legal counsel should

outline the terms of a proposed plea to his client. *Jones v.* **[*908]** *Murray, 947 F.2d 1106 (4th Cir. 1991).* Legal counsel should provide an opinion on probable outcomes and should advise his client as to the strengths and weaknesses of possible alternatives. Id. In some instances, legal counsel's gross misinformation on the indirect consequences of the plea may constitute ineffective assistance. *Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979).*

Even so, an attorney's "bad guess" as to sentencing does not render a guilty plea involuntary. *Little v. Allsbrook, 731 F.2d 238, 241 (4th Cir. 1984).* Additionally, an attorney's error in advice to his client may be corrected by the court at a subsequent hearing. *Lambey, 974 F.2d at 1394-1395.* The court may correct or clarify the earlier erroneous information by the defendant's lawyer. Id. When the court informs the defendant **[**75]** that her likely sentence is not capable of prediction and the defendant so acknowledges, a guilty plea is not rendered involuntary by virtue of an attorney's bad estimate of the likely sentence. Id.

In this case, the record of the guilty plea hearing shows that the Court explained the factual basis of Smith's plea and provided Smith with an opportunity to respond. Smith admitted that she had read and understood the plea agreement and the indictment. The Court informed Smith about her rights under the plea agreement including the waiver of the right to appeal and about the maximum statutory penalties, fines, and supervised release terms for the offenses listed in the indictment. The Court also informed Smith about her constitutional rights and admonished Smith about the consequence of entering a plea. Smith acknowledged that she understood the Court's comments. In addition, the Court warned Smith that her final sentence could not be predicted and Smith acknowledged that she understood that to be the case. The Court questioned Smith about whether anyone had advised her about what sentence she would receive:

Court: Has anyone told you what punishment you are going to receive **[**76]** in this case? Not what you can receive, but has anyone told you what punishment is going to be in this case?

Smith: No, they haven't.

Plea Tr. 10.

At the sentencing hearing, the Court fully questioned Smith on her reasons for withdrawing her motion to withdraw the guilty plea. The Court explained to Smith the consequences of withdrawing her plea. Smith admitted to understanding the Court's advice. Smith and her lawyers both acknowledged the same understanding of the consequences of withdrawing the motion.

The record and files in this matter do not show that the advice received fell below the range of competence demanded of criminal attorneys. There is no direct evidence that Smith was provided with erroneous legal advice. Moreover, the Court cleared up any misunderstanding on the part of Smith during the plea hearing and sentencing hearing. Once explained by the Court, Smith showed an understanding of the plea bargain and the rights and consequences of taking a plea. In the context of her family background and education, there can be no doubt but that Smith understood the ramifications of her decision.

3. Factual and Legal Investigation

Smith contends that her lawyers **[**77]** failed to conduct a reasonable and independent investigation of her role in the drug conspiracy. In this respect, Smith argues that her lawyers unduly relied on factual information compiled by the Government. Smith maintains that her lawyers failed to file any pre-trial motions and did not adequately investigate alternative defenses such as coercion or duress. An attorney has a duty to make a reasonable factual and legal investigation on behalf of his client. *Sneed v. Smith, 670 F.2d 1348 (4th* **[*909]** *Cir. 1982).* The reasonableness of the investigation is evaluated based on the totality of the circumstances facing the attorney. *Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991).*

Smith's claim that her lawyers failed to conduct a reasonable investigation is not supported by affidavits or other evidence. The records and transcripts in this case clearly show that Smith's lawyers were well-informed on the facts surrounding this matter. The guilty plea hearing transcript also reveals that Smith's lawyer Wagner investigated a mitigating defense of duress or coercion. Plea Tr. 36. Attorney Wagner informed the Court that such defense would "become critical at the sentencing **[**78]** here, that Kem Smith was beaten by Peter Michael Hall, beaten regularly by him, and that's one of the reasons that she did what he told her to do, because she feared him." Plea Tr. 36. There is no need for an evidentiary hearing or discovery on this issue where Smith's unsupported allegations are contradicted by the original record.

Nevertheless, Smith contends that her lawyers should have surmised that evidence of duress or coercion supported a complete defense. n15 With psychiatric defenses, the Fourth Circuit has held that trial counsel's failure to explore an insanity defense amounts to ineffective assistance when counsel's action was unreasonable and there was a reasonable probability that the defense would succeed. *Becton v. Barnett, 920 F.2d 1190 (4th Cir. 1990).*

n15 This allegation has also been discussed

in section 1(b) of this opinion.

In this case, the lawyers' tactical decision to present evidence of battered woman's syndrome as a mitigating defense was eminently reasonable and prudent. **[**79]** The Fourth Circuit has not directly ruled on the issue of battered woman's syndrome evidence. Nonetheless, Smith's lawyers were guided by case precedent from other circuits which suggests that the proper place for such evidence is at sentencing. *United States v. Willis, 38 F.3d 170, 174-177 (5th Cir. 1994); United States v. Johnson, 956 F.2d 894, 898-907 (9th Cir. 1992).* Indeed, battered woman's syndrome evidence relies on the subjective feelings of the defendant. Id. Thus, such evidence is not relevant in determining guilt or innocence, but it may be helpful in determining an actual sentence. Id.; see also *United States v. Smith, 987 F.2d 888, 890-891 (2d Cir. 1993)* (subjective evidence not relevant to duress defense in terms of criminal liability). Without explicit guidance from the Fourth Circuit on a novel issue of law, Smith's lawyers chartered a prudent course of action.

Additionally, Smith's lawyers reasonably concluded that the evidence did not meet the elements for a complete defense of duress. In order to establish a claim of duress, the defendant must show that: (1) she acted under an immediate threat of serious bodily **[**80]** injury; (2) she had a well-grounded belief that the threat would be carried out; and (3) she had no reasonable opportunity to avoid violating the law and the threatened harm. See *United States v. King, 879 F.2d 137, 138-139 (4th Cir. 1989).* On the facts of this case, Smith did not have an affirmative defense of duress. It is not sufficient that Smith felt a generalized fear of serious bodily harm if she did not commit certain offenses. See *United States v. Sixty Acres in Etowah County, 930 F.2d 857, 860-861 (11th Cir. 1991).* Smith was not acting under fear of imminent harm when she violated numerous federal laws. She could have discontinued her criminal activity and avoided the feared injury. Therefore, Smith's lawyers sought a downward adjustment in Smith's sentence at the sentencing phase of the proceedings. The attorneys' strategic decision did not fall below the bar of reasonable legal competence. When the alternative legal strategy is reasonable, as is the case here, this Court will not engage in Monday morning **[*910]** quarterbacking to second guess counsel's legal tactics.

4. Government Promises

Smith claims that her lawyers failed to incorporate oral **[**81]** promises made by the Government into the plea agreement. In Smith's view, there was an oral agreement for the Government to file a substantial assistance motion, for Smith to be released on bond pending sentencing, and for there to be an attribution amount of 5 to 15 kilograms of crack cocaine.

There is no merit to this claim. As discussed throughout this opinion, there were no oral promises apart from the written plea agreement. At the guilty plea hearing and at sentencing, the Court conducted an exhaustive inquiry to determine whether there were any oral agreements. The defense lawyers, the Government, and Smith all acknowledged that no promises had been made. There is no reason to conduct an evidentiary hearing or allow discovery on this issue. Smith has not submitted affidavits or other documentary evidence and has relied on the original records, files and transcripts in support of her claim. The original record conclusively shows that this matter was settled at Smith's guilty plea hearing and at sentencing. Given her family background and education level, Smith understood the charges against her and fully acknowledged the consequences of pleading guilty. No additional facts have **[**82]** been alleged necessitating a second hearing on this matter.

b. *Withdrawal of Guilty Plea*

Smith claims that her lawyers' advice to withdraw her motion to withdraw her guilty plea was erroneous and unreasonable. Smith argues that her lawyers unduly relied on an oral promise by the Government to file a substantial assistance motion or not to oppose a motion to depart from the Sentencing Guidelines. In some situations, legal counsel's erroneous advice on whether to withdraw the guilty plea may constitute ineffective assistance. *United States v. DeFreitas, 865 F.2d 80, 82 (4th Cir. 1989); United States v. Moore, 931 F.2d 245, 248 (4th Cir. 1991).* Generally speaking, there must be a reasonable probability that but for counsel's errors, the defendant would have pleaded not guilty and proceeded to trial. Id.

The files and transcripts in this case show that Smith's lawyers did not provide erroneous advice to their client. In response to the Court's questions, all the parties acknowledged that Smith merely hoped to receive a reduction in her sentence if she provided full, truthful, and substantial assistance. All the parties conceded that there was **[**83]** no oral understanding apart from the written plea agreement. For the sake of clarification, the Court asked Smith about her earlier statements at the Rule 11 colloquy concerning promises of leniency and the like. Smith indicated that her attorneys had told her that there had been such promises. Sentencing Tr. 6. The Court refreshed Smith's recollection by reading from the plea hearing transcript where Smith had stated that no promises had been made to her. Id. at 7-10. The Court also reminded Smith about the consequences of accepting a plea in relation to a motion for a reduced sentence. Sentencing Tr. 10-13. In that regard, the Court warned Smith of different consequences than what she indicated to be the case. Id.

After clarifying or correcting Smith's

misunderstanding, the Court made sure that she wished to proceed with her motion to withdraw the motion to withdraw the guilty plea. n16 Id. Smith stated that she understood the Court's comments and wished to withdraw her motion. Id. Defense counsel and the Government agreed **[*911]** with this clarified understanding and reiterated that there were no hidden agreements. Id. If there had been a prior event or advice, the **[**84]** Court untangled any misunderstanding on Smith's part. See *Lambey, 974 F.2d 1389 at 1394-1395.* Smith has not suffered any prejudice from alleged poor lawyerly advice. In the context of her family background and educational level, Smith understood the ramifications for withdrawing her motion. For this reason, Smith's request for an evidentiary hearing and discovery must be rejected. Smith has not raised any factual issues that, if true, would entitle her to relief and thereby require an evidentiary hearing or discovery.

n16 The excerpts from this dialogue are provided in the statement of facts and under section 2(b) of this opinion.

c. *Sentencing*

Smith claims that her lawyers rendered ineffective assistance at sentencing. Smith contends that her lawyers failed to raise objections to the presentence report either by filing written objections or by making objections at the sentencing hearing.

A defendant is entitled to reasonably competent legal assistance at sentencing proceedings. Ineffective **[**85]** assistance may exist when counsel fails to object to an improper application of the Guidelines or to clear errors in the presentence report. *United States v. Breckenridge, 93 F.3d 132, 135-136 (4th Cir. 1996); Smith v. United States, 871 F. Supp. 251, 255-256 (E.D. Va. 1994).* Similarly, counsel may be ineffective if he fails to present mitigating evidence at sentencing. *Deutscher v. Angelone, 16 F.3d 981, 984 (9th Cir. 1994); Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991).* A sentence imposed without such assistance must be vacated and reimposed to permit mitigating evidence to be fully and freely developed. See *Breckenridge, 93 F.3d at 135-136; United States v. Burkley, 511 F.2d 47 (4th Cir. 1975).*

In this matter, a presentence report was prepared and distributed to the parties. On December 16, 1994, attorney Wagner advised the probation officer of certain objections. Wagner also filed written objections on December 29, 1994 incorporating his earlier objections and raising other objections. Attorney Robinson also noted objections to the report and filed his own written objections **[**86]** on December 30, 1994.

Taken together, defense counsel's objections were comprehensive in scope. n17 Among the major objections raised, first, defense counsel argued that Smith should be attributed with 5 kilograms of crack **[*912]** cocaine, rather than 255 kilograms, based on her alleged dates of involvement in the drug conspiracy. Second, defense counsel argued that Smith should be attributed with only $ 3,000 in laundered money, rather than more than $ 1,000,000, based on her limited involvement in the conspiracy. Third, defense counsel asserted that Smith should be awarded at least a two level reduction under U.S.S.G. § 3B1.2(b) for her minor role in the ring. Fourth, defense counsel maintained that Smith should not be given an enhancement reader U.S.S.G. § 3C1.1 for obstruction of justice or an enhancement under U.S.S.G. § 2D1.1(b)(1) for possession of a dangerous weapon. Fifth, defense counsel claimed that Smith should be given a reduction for duress or coercion under U.S.S.G. § 5K2.12. Accordingly, Smith's lawyers provided reasonably competent assistance on this aspect of sentencing.

n17 Indeed, besides the objections outlined above, defense counsel objected to the reference that Smith was a member of a conspiracy or participated in any act that would further the conspiracy. See PSR P 14. In this regard, defense counsel claimed that Smith's knowledge, actions, and intentions were dictated by Peter Hall. Defense counsel objected to the reference that Smith was knowledgeable of Peter Hall's cocaine network prior to September 1991. See PSR P 25. Defense counsel objected to the fact that Smith had typed a false birth certificate as a means to further the conspiracy. See PSR P 48. Defense counsel objected to the suggestion that Smith was aware that money and drugs were concealed in a hidden compartment in a vehicle she and another individual drove from New York to Charlotte, North Carolina in the summer of 1992. See PSR P 49. Defense counsel objected to the suggestion that Smith obtained a false driver's license in order to conceal her true identity or to further the ends of the conspiracy. See PSR P 58. Defense counsel objected to the notion that Smith contacted her attorney in Richmond, Virginia in an effort to find out what information law enforcement agents had gathered against Peter Hall and the ring. See PSR P 63. Defense counsel objected to the notion that Smith was aiding Peter Hall's effort to evade law enforcement after the murder of Derrick Taylor when Smith delivered an Acura automobile to Hall. See PSR P 64. Defense counsel objected to the suggestion that Smith met with law enforcement agents in June

1993 solely to gather information on behalf of Peter Hall. See PSR P 66. Defense counsel objected to the suggestion that Smith had fled her parents' home after learning that the original indictment had been returned by the Grand Jury. See PSR P 70. Finally, defense counsel objected to the suggestion that Smith acquired vehicles utilized in the conspiracy. See PSR PP 74 & 84.

[87]**

At the sentencing hearing, Smith's lawyers called on lay witnesses and expert witnesses, and the lawyers introduced medical records and other documentary records in support of a mitigating defense based on coercion or duress under U.S.S.G. § 5K2.12. Defense counsel called expert psychologists to testify about battered woman's syndrome and how the theory applied to Smith's case. n18 Defense also called numerous members of the community to provide mitigating testimony. Such community members included the former mayor of Richmond, Virginia.

n18 Smith maintains that her lawyers failed to prepare the psychologists for the sentencing hearing. Smith's main argument is that Dr. Twining had not evaluated Smith prior to the hearing. The lawyers' tactical decision was mainly to use Dr. Twining to explain battered woman's syndrome theory. Defense counsel called Dr. Wilson, who was Smith's treating psychologist, to testify about Smith's mental condition. This Court can not conclude that the lawyers' actions fell below the threshold of reasonably competent representation. This Court also points out that Smith is not constitutionally entitled to the effective assistance of a psychiatrist expert. See *Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998).*

[88]**

At the hearing, Smith's lawyer Robinson did make factual concessions to earlier written objections to the presentence report. Sentencing Tr. 220-222. Thus, Robinson conceded the fact that Smith was in possession of a firearm and had obstructed justice in relation to U.S.S.G. § 2D1.1(b)(1) and U.S.S.G. § 3C1.1. The records, files and transcript demonstrate unequivocally that Smith was in possession of a dangerous weapon and had obstructed justice. Indeed, at the guilty plea hearing, the Government recited the facts it would have sought to prove had Smith's case gone to trial. The Government's recitation included such facts as Smith's possession of a firearm and Smith's obstruction of justice by virtue of false statements and omissions to federal authorities. Plea Tr. 32, 34-35. When asked whether the Government had stated the facts correctly, Smith indicated that such was the case. Plea Tr. 39-40.

As to other written objections, Robinson did not specifically raise the objections at the sentencing hearing, but instead he treated them in the context of a duress or coercion defense. Sentencing Tr. 220-222. Among the objections, defense counsel had filed an objection to the attribution **[**89]** amount of 255 kilograms of crack cocaine. Defense counsel argued that Smith did not become involved in the conspiracy until 1992 and should be accorded an attribution amount as low as 5 kilograms. In addition, defense counsel had filed an objection to the attribution of more than $ 1,000,000 in laundered funds. Defense counsel had argued that Smith should only be attributed with $ 3,000 in laundered funds.

Smith's lawyers provided reasonably competent representation-in the context of the situation. Defense counsel had already provided the Court with their written objections to the presentence report. The Court had an opportunity to review those written objections well in advance of the sentencing hearing. Defense counsel made a prudent decision to put forward mitigating evidence of duress and coercion **[*913]** and make all of their arguments in the context of that defense. This Court may not impose the benefit of hindsight and conclude that since the strategy did not work, the lawyers' decision fell below the threshold of reasonable legal competence.

Most important, Smith has suffered no actual prejudice from her criminal lawyers' action. As to the drug attribution amounts, the facts show **[**90]** that Smith became involved with Hall in May of 1990. PSR P 94. In the spring of 1990, the drug network began to convert cocaine powder to crack cocaine. PSR P 14. At the guilty plea hearing, the Government recited the facts it would seek to prove had the case gone to trial. The Government stated that the drug conspiracy was responsible for over 200 kilograms of crack cocaine. When asked whether the Government's version of the facts was true and correct, Smith responded that it was. Plea Tr. 29-30.

In this case, U.S.S.G. § 2D1.1(c)(1) provides for a base offense level of 38 for conspiracy to distribute 1.5 kilograms or more of crack cocaine. Defense counsel had sought an attribution amount of 5 kilograms of crack cocaine. Either way, the difference in atribution amounts would have no material effect on the calculation of Smith's sentence. Smith would not have been eligible for a downward adjustment as a minor figure in the conspiracy based on lower drug amounts alone. The facts clearly show that Smith's involvement in the drug operation was substantial.

As to the laundered amounts, Smith's lawyers had argued that Smith should only be attributed with $ 3,000

in laundered funds. U. **[**91]** S.S.G. § 2S1.1(b)(2)(F) provides for a five point enhancement for value of funds of more than $ 1,000,000. Smith's money laundering conviction of sixty months runs concurrently with her drug conspiracy conviction of two hundred ninety-four months. The enhancement has had no material effect on the term of Smith's sentence. Moreover, there is a serious question whether the imposition of sentence would have been altered without the enhancement. The maximum statutory penalty for money laundering is 5 years or 60 months. See *18 U.S.C. § § 1956*(a)(1)(B)(i) and 371. The Sentencing Guidelines call for an imprisonment range of 78-97 months based on Smith's criminal history and offense level (28/1), and if the value of funds is more than S 1,000,000. Since the statutory maximum was sixty months, the Court only imposed a sixty month sentence in this matter. Without the five level enhancement for laundered funds of more than $ 1,000,000, the Sentencing Guidelines call for a sentence ranging from 46-57 months. The three month differential between the statutory maximum (60 months) and the high end of the guideline range (57 months) is negligible.

d. *Conflict of Interest* **[**92]**

Smith asserts that her lawyers were laboring under a conflict of interest and therefore rendered ineffective legal assistance. In particular, Smith argues that her attorney Wagner was operating under a conflict of interest because Wagner and the Assistant United States Attorney, Fernando Groene, had worked as Assistant Commonwealth Attorneys in Arlington County, Virginia. See Detention Tr. 5. Also, Smith argues that her attorney Robinson was operating under a conflict of interest in his prior representation of William Foreman, who was an unindicted coconspirator and governmental informant, and in his prior representation of Wainsworth Hall.

Criminal defendants are entitled to the undivided loyalty of competent counsel. *Strickland, 466 U.S. at 688; Cuyler v. Sullivan, 446 U.S. 335, 346, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).* The possibility of a conflict of interest does not necessarily impinge on a defendant's constitutional rights. *Cuyler, 446 U.S. at 346; Magini,* **[*914]** *973 F.2d at 264.* Rather, the defendant must show that an actual conflict of interest existed and the conflict prejudiced counsel's performance. Id. Conflicts **[**93]** normally occur when an attorney represents multiple clients, although conflicts may occur with regard to prior representation of a client. See *Hoffman v. Leeke, 903 F.2d 280, 285-286 (4th Cir. 1990).* A conflict may also arise when the attorney's "private interests" diverge with those of his client. *Magini, 973 F.2d at 264.*

Nonetheless, a criminal defendant may waive the right to conflict-free representation. *Cuyler, 446 U.S. at 347; Bridges v. United States, 794 F.2d 1189, 1193 (7th Cir. 1986).* As with the waiver of any constitutional right, the waiver must be voluntarily, knowingly, and intelligently made. *Bridges, 794 F.2d at 1193.* The waiver may be valid even though the defendant does not have specific knowledge or all the implications of such waiver. *Bridges, 794 F.2d at 1194.*

In this case, the facts demonstrate a valid waiver of Smith's right to conflict-free representation in regard to attorney Robinson. At the January 30, 1995 hearing, the Government objected to Robinson's representation of Smith. The Court allowed the Government to question Smith and make sure that she desired **[**94]** to give up her right to conflict-free representation. The Government informed Smith that Robinson represented William Foreman and probably had asked him about the offenses he allegedly committed. Hearing Tr. 16-17. The Government made sure that Smith understood that Robinson may have known about Hall and Wainsworth Hall's drug trafficking activities. Id. at 17. The Government made sure that Smith understood that Robinson had previously represented Wainsworth Hall. Id. Finally, the Government made sure that Smith understood that during the course of his prior representation, Robinson may have learned about events that directly implicated her. Id. at 17-18. The Government's questioning concluded as follows:

Gov't: And do you understand that in the course of that representation Mr. Robinson might find out something which directly implicates you in this case?

Smith: Yes, I understand.

Gov't: You understand that the Sixth Amendment to the Constitution of the United States provides that you have a right to the effective assistance of counsel and that that effective assistance means that your counsel, your lawyer, must not - - shall not have any conflict of interest? **[**95]**

Smith: I understand that, yes.

Gov't: And that you can waive that conflict after you are knowingly, voluntarily, and intelligently advised of the possibility of a conflict of interest?

Smith: I understand.

Gov't: Do you want to continue these proceedings with Mr. Robinson as a lawyer, even if he might have information regarding your criminal activity in this case?

Smith: Yes, I would like to continue.

Hearing Tr. 18.

At sentencing, the Court reminded Smith that she

had waived her right to conflict-free representation:

Court: At that time I believe you said you had no objection at all to his appearing, that you waived any right that you might have as to any conflict that might result. Do you remember that?

Smith: Yes.

Court: Now, ... do you have any objection today to his participating in the sentencing?

Smith: No, I do not, Your Honor.

Court: Do you want him to participate in the sentencing?

Smith: Yes, I do.
[*915]

Court: Even though it should appear at some subsequent time that someone suggests there was a conflict of interest on his part, you want to waive any right to raise that as an objection to anything that **[**96]** occurs during the time of sentencing?

Smith: Yes, I do.

Sentencing Tr. 27-28.

The uncontroverted facts show that Smith voluntarily, knowingly, and intelligently waived her right to conflict-free counsel in regard to attorney Robinson. Criminal defendants have no inherent right to disavow their earlier statements when, as here, appropriate procedures have been followed.

Furthermore, attorney Wagner was not operating under a conflict of interest in this case. The record merely shows that Wagner and Assistant United States Attorney Groene had been Assistant Commonwealth Attorneys in Arlington County, Virginia. Without affidavits or other evidentiary support, however, Smith alleges that an evidentiary hearing and certain discovery are required to determine whether Wagner unduly relied on promises made by Groene.

Collateral proceedings are not an invitation to manufacture issues of fact where none truly exist. The pedestrian facts are that Smith's defense lawyer and the Assistant United States Attorney once worked in the same office. The records and transcripts unambiguously show that there were no secret promises or oral agreements between any parties in these proceedings. **[**97]** Additional discovery and an evidentiary hearing add nothing to the original record and are unwarranted.

III. Conclusion

Ms. Smith was advised time and again by the trial judge of the consequences of her decisions. She affirmatively and intelligently chose a particular course of action, and once her plea of mercy was not favorably received, she desired to reverse and change that course. Every defendant desires a lesser sentence. The finality of judgments requires the court to be wary of re-judging matters previously adjudicated unless clearly unconstitutional. The constitutional safeguards were scrupulously adhered to by the trial judge in this case. Accordingly, Smith's motion under *28 U.S.C. § 2255* is **DENIED**.

Smith is **ADVISED** that she may appeal from this final order by forwarding a written notice of appeal and a new application to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. Said written notice must be received by the Clerk within thirty (30) days of the date of this Order.

The Clerk is **DIRECTED** to mail a copy of this Order to Smith and to the United States **[**98]** Attorney, Eastern District of Virginia, World Trade Center, Suite 1800, 101 West Main Street, Norfolk, Virginia 23510.

IT IS SO ORDERED.

Robert G. Doumar

UNITED STATES DISTRICT JUDGE

Norfolk, VA

August 4th, 1999

[Intervening business.]

The Chair notes the presence of a reporting quorum. The Committee now will return to the pending unfinished business upon which the previous question was ordered on H.R. 4689. The question is on the motion——

Mr. SCOTT. Mr. Chairman, parliamentary inquiry. Could you state the title of the bill, please?

Chairman SENSENBRENNER. H.R. 4689, the "Fairness in Sentencing Act of 2002."

The question is on the motion to report favorably bill H.R. 4689.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it, and the motion to report the bill favorably is agreed to.

Without objection, the chair is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes. And all Members will be given 2 days, as provided by the rules, in which to submit additional, dissenting, supplemental, or minority views.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Cr. No. 98-137 (DSD/AJB)

UNITED STATES OF AMERICA, Plaintiff, v. 1. HERNAN ESPINO, 2. JOSE LUIS VILLANUEVA, a/k/a CURA, 3. JUAN VILLANUEVA MONROY, 4. ALFREDO PRIETO, a/k/a NASARIO SANCHEZ-BARRON, a/k/a MUDO, 5. EDUARD EUGENE COSTILLO, a/k/a MARIO, a/k/a MAYO, 6. ARTURO BAHENA, a/k/a HUGO, 7. RODOLFO IBARRA, a/k/a RUDY, 8. MARIA ANGELICA MENDEZ-PEREZ, 9. KARINA BAHENA, 10. JOEL CERVANTES, 11. STEPHEN TIARKS, 12. MARIA AVALOS, 13. SONIA BARBER, 14. DIANE ZUNIGA, 15. LEONEL ESPINO, and 16. SHAWN SIMONSON, Defendants.	)	**SECOND SUPERSEDING INDICTMENT** (21 U.S.C. § 841) (21 U.S.C. § 846) (21 U.S.C. § 853) (18 U.S.C. § 2)

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT 1
(Conspiracy to Distribute Methamphetamine)

From on or about a date unknown to the Grand Jury, through on or about June 16, 1998, in the State and District of Minnesota and elsewhere, the defendants,

JOSE LUIS VILLANUEVA, a/k/a CURA,
JUAN VILLANUEVA MONROY,
ALFREDO PRIETO, a/k/a NASARIO SANCHEZ-BARRON, a/k/a MUDO,
EDUARD EUGENE COSTILLO, a/k/a MARIO, a/k/a MAYO,

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ARTURO BAHENA, a/k/a HUGO,
RODOLFO IBARRA, a/k/a RUDY,
MARIA ANGELICA MENDEZ-PEREZ,
KARINA BAHENA,
JOEL CERVANTES,
STEPHEN TIARKS,
MARIA AVALOS,
HERNAN ESPINO,
SONIA BARBER,
DIANE ZUNIGA,
LEONEL ESPINO, and
SHAWN SIMONSON,

knowingly and intentionally conspired with each other and with other people, whose names are known and unknown to the Grand Jury, to distribute and to possess with the intent to distribute in excess of one kilogram of a mixture or substance containing a detectable amount of methamphetamine, in violation of Title 21, United States Code, Sections 846, 841(a)(1) and 841(b)(1)(A).

COUNT 2
(Possession With Intent To Distribute Methamphetamine)

On or about April 30, 1998, in the State and District of Minnesota, the defendant,

HERNAN ESPINO,

did knowingly and intentionally possess with intent to distribute approximately 8.8 pounds of a mixture or substance containing a detectable amount of methamphetamine, a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A).

COUNT 3
(Possession With Intent To Distribute Methamphetamine)

On or about May 1, 1998, in the State and District of Minnesota, the defendant,

MARIA AVALOS,

did knowingly and intentionally possess with intent to distribute approximately 8.8 pounds of a mixture or substance containing a detectable amount of methamphetamine, a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and 841(b)(1)(A).

COUNT 4
(Possession With Intent to Distribute Methamphetamine)

On or about June 16, 1998, in the State and District of Minnesota, the defendant,

STEPHEN TIARKS,

did knowingly and intentionally possess with intent to distribute approximately 35.4 pounds of a mixture or substance containing a detectable amount of methamphetamine, a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A).

COUNT 5
(Possession With Intent To Distribute Methamphetamine)

On or about June 16, 1998, in the State and District of Minnesota, the defendants,

KARINA BAHENA, and
JOEL CERVANTES,

each aiding and abetting the other, did knowingly and intentionally possess with intent to distribute approximately 200 grams of a mixture or substance containing a detectable amount of

methamphetamine, a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B), and Title 18, United States Code, Section 2.

COUNT 6
(Possession With Intent To Distribute Methamphetamine)

On or about June 16, 1998, in the State and District of Minnesota, the defendant,

SHAWN SIMONSON,

did knowingly and intentionally possess with intent to distribute approximately 311 grams of a mixture or substance containing a detectable amount of methamphetamine, a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B).

COUNT 7
(Forfeiture Allegations)

Counts 1-6 of this Second Superseding Indictment are hereby realleged and incorporated as if fully set forth herein by reference, for the purpose of alleging forfeitures pursuant to Title 21, United States Code, Section 853(a)(1) and (2).

As a result of the foregoing offenses, the defendants,

JOSE LUIS VILLANUEVA, a/k/a CURA,
JUAN VILLANUEVA MONROY,
ALFREDO PRIETO, a/k/a NASARIO SANCHEZ-BARRON, a/k/a MUDO,
EDUARD EUGENE COSTILLO, a/k/a MARIO, a/k/a MAYO,
ARTURO BAHENA, a/k/a HUGO,
RODOLFO IBARRA, a/k/a RUDY,
MARIA ANGELICA MENDEZ-PEREZ,
KARINA BAHENA,
JOEL CERVANTES,
STEPHEN TIARKS,
MARIA AVALOS, and
HERNAN ESPINO,
SONIA BARBER,
DIANE ZUNIGA,

LEONEL ESPINO, and
SHAWN SIMONSON,

shall forfeit to the United States, any and all property constituting or derived from any proceeds the said defendants obtained directly or indirectly as a result of the said violations and any and all property used or intended to be used in any manner or part to commit and to facilitate the commission of the violations alleged in Counts 1-6 of this Second Superseding Indictment, pursuant to Title 21, United States Code, Sections 841, 846, and 853(a)(1) and (2).

A TRUE BILL

UNITED STATES ATTORNEY

FOREPERSON

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
99-351 (ADM/AJB)

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**SUPERSEDING INDICTMENT**
1. JAIME ROSAS MANCILLA,	)	
2. JUAN GABRIEL ROSAS, a/k/a TONY,	)	(21 U.S.C. § 841) (21 U.S.C. § 846)
3. JESUS IBARRA-TORRES, a/k/a BORREGO,	)	(21 U.S.C. § 853) (18 U.S.C. § 924(c))
4. GUADALUPE JIMENEZ-VILLASENOR, a/k/a GRENAS,	)	(18 U.S.C. § 2)
5. DAVID BAHENA-VERGARA,	)	
6. SERGIO VALDOVINOS DELACRUZ,	)	
7. ALEJANDRO FLORES-ROMERO, a/k/a ALEX,	)	
8. TOMAS BAHENA,	)	
9. HEATHER ANN GENZ,	)	
10. ALECIA COLMENARES,	)	
11. JOSE MAXIMINO PALENCIA MIRA,	)	
12. JUAN ANDRES CONTRERAS,	)	
Defendants.	)	

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT 1
(Conspiracy to Distribute Controlled Substances)

From on or about a date unknown to the Grand Jury, through on or about October 28, 1999, in the State and District of Minnesota and elsewhere, the defendants,

JAIME ROSAS MANCILLA,
JUAN GABRIEL ROSAS,
JESUS IBARRA-TORRES, a/k/a BORREGO,
GUADALUPE JIMENEZ-VILLASENOR, a/k/a GRENAS,
DAVID BAHENA-VERGARA,
SERGIO VALDOVINOS,
ALEJANDRO FLORES-ROMERO, a/k/a ALEX,
TOMAS BAHENA,

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HEATHER ANN GENZ,
ALECIA COLMENARES,
JOSE MAXIMINO PALENCIA MIRA, and
JUAN ANDRES CONTRERAS,

knowingly and intentionally conspired with each other and with other people, whose names are known and unknown to the Grand Jury, to distribute and to possess with the intent to distribute in excess of 500 grams of a mixture or substance containing a detectable amount of methamphetamine, and in excess of 500 grams of a mixture or substance containing a detectable amount of cocaine, controlled substances, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A) and (B), all in violation of Title 21, United States Code, Section 846.

COUNT 2
(Possession With Intent To Distribute Methamphetamine)

On or about October 24, 1999, in the State and District of Minnesota, the defendants,

ALECIA COLMENARES and
JOSE MAXIMINO PALENCIA MIRA,

each aiding and abetting the other, did knowingly and intentionally possess with intent to distribute approximately 32 pounds of a mixture or substance containing a detectable amount of methamphetamine, a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.

COUNT 3
(Possession With Intent To Distribute Methamphetamine)

On or about October 27, 1999, in the State and District of Minnesota, the defendant,

JESUS IBARRA-TORRES, a/k/a BORREGO,

did knowingly and intentionally possess with intent to distribute approximately five pounds of a mixture or substance containing a detectable amount of methamphetamine, a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and 841(b)(1)(A).

COUNT 4
(Possession With Intent to Distribute Methamphetamine)

On or about October 28, 1999, in the State and District of Minnesota, the defendants,

DAVID BAHENA-VERGARA and
HEATHER ANN GENZ,

each aiding and abetting the other, did knowingly and intentionally possess with intent to distribute approximately 15 pounds of a mixture or substance containing a detectable amount of methamphetamine, a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.

COUNT 5
(Possession With Intent To Distribute Controlled Substances)

On or about October 28, 1999, in the State and District of Minnesota, the defendant,

SERGIO VALDOVINOS DELACRUZ,

did knowingly and intentionally possess with intent to distribute approximately two pounds of a mixture or substance containing a detectable amount of methamphetamine, and approximately three ounces of cocaine, controlled substances, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A).

COUNT 6

(Possession of Firearm in Furtherance of Drug Trafficking Crime)

On or about October 28, 1999, in the State and District of Minnesota, the defendant,

SERGIO VALDOVINOS DELACRUZ,

did knowingly possess a firearm, namely a Winchester 20-gauge shotgun, serial number L2119182, during and in relation to a drug trafficking crime, that is, possessing with intent to distribute controlled substances, as set forth in Count 5 of this Indictment, which is a felony subject to prosecution in a court of the United States; all in violation of Title 18, United States Code, Section 924(c).

COUNT 7

(Possession With Intent To Distribute Methamphetamine)

On or about October 28, 1999, in the State and District of Minnesota, the defendant,

TOMAS BAHENA,

did knowingly and intentionally possess with intent to distribute approximately three pounds of a mixture or substance containing a detectable amount of methamphetamine, a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A).

COUNT 8
(Forfeiture Allegations)

Counts 1-6 of this Indictment are hereby realleged and incorporated as if fully set forth herein by reference, for the purpose of alleging forfeitures pursuant to Title 21, United States Code, Section 853(a)(1) and (2).

As a result of the foregoing offenses, the defendants,

JAIME ROSAS MANCILLA,
JUAN GABRIEL ROSAS,
JESUS IBARRA-TORRES, a/k/a BORREGO,
GUADALUPE JIMENEZ-VILLASENOR, a/k/a GRENAS,
DAVID BAHENA-VERGARA,
SERGIO VALDOVINOS,
ALEJANDRO FLORES-ROMERO, a/k/a ALEX,
TOMAS BAHENA,
HEATHER ANN GENZ,
ALECIA COLMENARES,
JOSE MAXIMINO PALENCIA MIRA, and
JUAN ANDRES CONTRERAS,

shall forfeit to the United States, any and all property constituting or derived from any proceeds the said defendants obtained directly or indirectly as a result of the said violations and any and all property used or intended to be used in any manner or part to commit and to facilitate the commission

of the violations alleged in Counts 1-6 of this Indictment, pursuant to Title 21, United States Code, Sections 841, 846, and 853(a)(1) and (2).

A TRUE BILL

UNITED STATES ATTORNEY

FOREPERSON

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MINNESOTA
3 THIRD DIVISION
4
5 ----------
6
7 The United States of America, SENTENCING
8 Plaintiff,
9 -v- Criminal No. 3-95-52
10 Eliseo Rodrigo Romo,
11 Defendant.
12 ----------
13 TRANSCRIPT OF CRIMINAL SENTENCING PROCEEDINGS
14 BEFORE THE HONORABLE CHIEF JUDGE PAUL A. MAGNUSON
15 St. Paul, Minnesota
16 November 17, 1995
17
18 APPEARANCES:
19
20 For the Plaintiff: Mark Larsen
21
22 For the Defendant: Daniel Scott
23
24 (Defendant present.)
25 Official Court Reporter: Jeanne M. Anderson

JEANNE M. ANDERSON, RMR * [redacted]

1
2 Friday morning,
3 November 17, 1995,
10:00 o'clock, a.m.

4 THE COURT: Good morning. We have the matter of the
5 United States versus Romo for sentencing.
6 MR. LARSEN: Good morning, Your Honor. Mark Larsen
7 for the United States.
8 THE COURT: Mr. Larsen.
9 MR. SCOTT JOHNSON: Dan Scott for Eliseo Romo, Your
10 Honor, and he is present and standing beside me.
11 THE COURT: Very well. Counsel, you are in receipt
12 of the presentence investigation report in this matter.
13 According to the note of September 20, there are no objections
14 by either the government or the defendant to the presentence
15 investigation report. Assuming that is true, the Court does
16 adopt the presentence investigation report in totality,
17 paragraphs numbered 1 through 99.
18 The Court on that basis would make the following
19 findings: That the Total Offense Level is 31; the Criminal
20 History Score is I; the guideline range is 108 to 135 months;
21 the supervised release is five years; the fine range is
22 $15,000 to $4 million; there is no eligibility for probation.
23 I don't believe there is a recommendation for departure.
24 There will be a special assessment in the sum of $50. Are
25 there objections to these findings?

1 MR. SCOTT: No, Your Honor, except, of course, there
2 is obviously an issue on whether the safety valve should
3 apply. We would note, Your Honor, that there has been a change
4 in the guidelines as it relates to the safety valve effective
5 two weeks ago.
6 Two weeks ago the Sentencing Commission's new guidelines,
7 or at least a portion of them, came into effect. And one of
8 them says that for offenses that have high offense levels
9 above level 26, or 26 or above, which this is one of the cases
10 that does, that if the safety valve applies, there is an
11 additional two-level reduction in the guideline range. So
12 that if the safety valve applies to get past the mandatory
13 minimum here, and that is a decision that you will be making
14 shortly, then the guidelines will change to 84 to 108 months.
15 For the record, that particular change is found in Section
16 2D1.1(B)(4).
17 MR. LARSEN: Your Honor, I believe the appropriate
18 range, then, would be 87 to 108.
19 MR. SCOTT: Did I say 84?
20 MR. LARSEN: I believe so.
21 MR. SCOTT: That's seven years, right, seven years,
22 three months, correct.
23 THE COURT: 87 to 108? Okay.
24 MR. SCOTT: And the remaining part is on the safety
25 valve. I guess I will go first since I'm the person who wants

1 it.

2 THE COURT: Okay.

3 MR. SCOTT: Your Honor, the safety valve, I keep
4 wanting to call it the circuit breaker, I think that has
5 something to do with the state I live in. The safety valve,
6 Your Honor, requires five items, and I think we are pretty
7 much agreed on the first four; that is, my client doesn't have
8 more than one criminal history point, that this offense did
9 not involve violence, that it did not result in death or
10 serious bodily injury to any person and that my client was not
11 an organizer and leader. I don't think there is an allegation
12 and in fact the guidelines make him a minor player.
13 The argument comes up on the last one, which is whether
14 or not my client has truthfully provided to the government all
15 information and evidence he has concerning the offense or
16 offenses, et cetera, et cetera, under the Rules.
17 We believe that he has. The government has told you that
18 they are not satisfied of that. And I would like to go
19 through some of the facts we have here on why I think we are
20 right before, and then they can argue against it.
21 A lot of what took place in this case didn't take place
22 here, Your Honor, it took place in Colorado. This case came
23 here on a Rule 20 plea. There had been negotiations in
24 Colorado, there had been proffers in Colorado, and my client
25 was arrested and the crime took place in Colorado.

1 He spoke to the government before ever coming here about
2 what the offense was, who was involved in it, and what each of
3 their parts were. In fact, there is a plea agreement which
4 was apparently signed or filed in April, signed and dated
5 April 18th, 1995. And the copy I have says it was filed on
6 April 19th, 1995. In it it goes through a factual basis that
7 is drawn from my client's statements. It doesn't talk about
8 just his arrest on February 5th of 1995, it goes back to
9 October of 1994. It goes through the parts that other people
10 had. October 15th, 1994 Richard Torres and Anastacio Martinez
11 transported 8 pounds of marijuana and 8 ounces of
12 methamphetamine from Arizona to Minnesota, passing through
13 Colorado.
14 Funds were gathered by Martinez with Defendant Romo
15 present and turned over to Torres who returned to Arizona and
16 then paid the source of supply, a person named Chincho for the
17 drugs. The process was repeated in November of 1984.
18 In December of 1994 it was repeated again, again between
19 Richard Torres and Anastacio Martinez. In January, it was
20 repeated again in 1995, and in February it happened again and
21 that is when my client was arrested. Those facts that are in
22 that plea agreement were drawn from my client's statements to
23 the government.
24 My client on April 14th, just before that agreement was
25 drawn up, sat down with the government and explained to the

1 government what was happening in this case. He told them that
2 the person who was the source of supply that they knew of in
3 Minneapolis was a fellow named Torres. That happened to be
4 the person he was arrested with. That Torres' connection is
5 that his brother-in-law was Anastacio Martinez. That Mr.
6 Romo's job was to collect the money from the various people
7 who were buying drugs from Mr. Martinez, and to make sure the
8 money got Mr. Torres; that he was bag man and he had been that
9 for some time. And he went over the sales with them.
10 He stated that he was involved in this particular
11 transportation because Mr. Martinez, who was bringing the
12 money back the time before spent some of it and got himself in
13 trouble because he had spent some of the money. And he wasn't
14 supposed to spend it in Las Vegas.
15 He identified the people who were involved in
16 Minneapolis. And the government said that he hasn't done
17 that. The report that I have shows Mr. Romo naming names,
18 Anastacio Anselmo Martinez, who was the person with Mr.
19 Torres. When they asked him, "Well, who are you picking up
20 money from," he didn't say Chincho Lanue or Santiago "I don't
21 know his last name," like the other defendant in this case
22 did. He said Alex Santiago, Dan Tackleberry, Peter Estrada
23 and Mike Rentier were the people that he was picking up the
24 money from in St. Paul.
25 When they said, "Well, who else is involved," he told

1 them back in April, he said, "The Torres and Martinez family
2 were heavily involved..." And I am quoting from the agent's
3 report, "...In the distribution of narcotics. Martinez father
4 was known as Big Taco, and Uncle John Martinez and a brother
5 Jesse Martinez were identified by Romo."
6 He named names. He told them what was happening. He
7 named his part. He went through each of them. He told Ms.
8 Gustaveson when he was going through that same set of facts
9 with her, he went through and they said, "Well, why were you
10 picking up the money?" He said, because I am not a close
11 enough relative to these other people. So if I ran off with
12 the money, they could shoot me without causing a war between
13 the various families who were involved. He has never hid his
14 involvement, except when he was first arrested, where he did,
15 denied who he was. He has never hid what his portion in this
16 case is, and I think it is fairly -- I think he has been
17 fairly accurate with it.
18 He has sat down with the Probation Office and gone over
19 who each of the people were that he could think of, as he has
20 done with us. I mean, I have a set of notes where he has
21 named who each of these people are, who Alex Santiago's
22 associates are. And I understand that he has told much the
23 same information to the Probation Office and may have even
24 given them a copy of the same notes.
25 What we are not talking about for the safety valve is

1 whether or not my client is out making cases for the
2 government or testifying for the government in any of those
3 matters where the government would move for a downward
4 departure.
5 What we are talking about is was he supplying information
6 as to what he was doing wrong and the connections that he had
7 with the other people that were doing wrong that resulted in
8 his conviction. And not just -- and the way the rule says it,
9 not just the very case of your conviction, but what the crime
10 was that you were involved in. He did so. He gave them facts
11 all the way back to the fall before and told them how it
12 worked.
13 There is an interesting little twist, here. Mr. Torres
14 was also talking to the government and presumably telling them
15 everything he knew. Mr. Torres came to the government, first.
16 I tell my clients that if you get to the government first, you
17 get to create the truth, because the truth gets in the
18 government's mind based upon what they believe. And then
19 after that, anyone who disagrees with the truth that is in the
20 government's mind is a liar. So, if you get there first, you
21 get to set what the truth is.
22 Mr. Torres said, when he talked to the government, first
23 time he said, "Well, I got my drugs from Santiago Lanue. I
24 don't know who this Santiago is." Well, they talked to him
25 some more and he said, "Well, really I didn't get the drugs

1 from Santiago, I got them from Chincho."
2 "Who is Chincho?"
3 "I don't know who he is, I just buy drugs from him. And
4 I wasn't really involved in drugs before this. This was sort
5 of a new thing for me. I wasn't really involved in drugs
6 before this and it never would have happened if Mr. Romo
7 hadn't asked me about it."
8 It sort of leaves out the fact that he is also married to
9 Mr. Martinez's -- or actually, his girlfriend is Mr. Martinez'
10 sister. But he couldn't see that there was any connection
11 between the fact that he knew the drug dealer here and that he
12 had a close family relationship with the drug dealer here.
13 But, it never occurred to him he was involved in drugs until
14 one day an offhand remark came from Mr. Romo. And yet at the
15 same time he said, "Yes, I was dealing with Mr. Martinez
16 selling drugs." Well, he got there first, so he got to set
17 the tone. When it came time to name names, he didn't name
18 names, he named aliases. And presumably, it could protect
19 himself.
20 My client came in second. He named names. He gave an
21 accurate picture. He gave a picture that tied everything
22 together and showed what was really happening. And he did so
23 not just naming people that the government could never find,
24 but naming people that they could find.
25 Now, one of the problems that has come up in this case is

1 that the DEA in Denver, apparently, sent the reports here, but
2 to no particular agent, because after all what do they care
3 about Minnesota. So that the prosecutor here never even saw
4 those reports until September of this year, well after the
5 plea, in fact well after my client's bond got revoked. It was
6 the first time he ever saw the reports. Although, they were
7 around and I am reading from them, and in fact the prosecutor
8 sent them to me. But, as he said on September 6th, he didn't
9 even know on September 6th what happened in Colorado. That is
10 the problem that moving cases back and forth -- things can get
11 lost between one office and the next one, one DEA office and
12 the next and one prosecutor's office and one defense lawyer's
13 office and the next. But, it doesn't change that my client
14 was willing to cooperate then, was willing to cooperate
15 throughout.
16 We don't know what was done with the information. There
17 is another interesting twist here, Your Honor, is that I
18 believe that the government was already investigating a number
19 of these people, independent of anything having to do with Mr.
20 Romo, this was an accidental arrest in Denver because they
21 stopped a car. And the reason I believe that is because they
22 were running a wiretap and they arrested people who were
23 associated close and far to the same people my client was
24 naming. Because it was a marijuana case, it never went
25 federal. One defendant went federal, the rest went state,

1 because all they got was marijuana. They were looking for
2 more, but all they got was marijuana. So, they made it a
3 state case instead of a federal case.
4 Mr. Santiago was arrested. His house was searched
5 sometime during the summer, and I can't tell you whether it
6 was with the same investigation or not. It puts my client in
7 an interesting spot, because basically the government later on
8 was working the case against the same people that my client
9 was talking about. They didn't need him.
10 At the other end, they had already nailed his source, Mr.
11 Torres. And Mr. Torres, whether he went on and helped the
12 government find Mr. Chincho or not, I don't know, but my
13 client was in the middle. So, my client can't give them
14 anything in this case that will require them to file a motion
15 for a downward departure. We explored trying to help out the
16 state, but that didn't work out. So that he has sort of been
17 in a position where it was a nice try, but he couldn't provide
18 substantial assistance. And I guess the government is within
19 their rights to do that. I think it is a close case. But, I
20 do not think they are within their rights to say that he has
21 not provided the information that he knew about this offense.
22 And therefore, I think he should apply -- he should
23 qualify for the safety valve. Unfortunately, the safety valve
24 only gets him down, even at the bottom, at seven years, four
25 months. So, it will be well after the turn of the century

1 before he gets anywhere close to release, even at that number,
2 whereas a downward departure would have done much better for
3 him. That is my argument, Your Honor, as it relates to the
4 safety valve. I am not going to talk too much about my
5 client's background until after you make the other ruling.
6 THE COURT: Thank you. Mr. Larsen, any comments?
7 MR. LARSEN: Yes. Thank you, Your Honor.
8 I think counsel is correct, that problems do arise in
9 cases when they get shifted back and forth from one district
10 to another. And as this Court I am sure will recall, this is
11 certainly not the first problem we have had with this case as
12 a result of it being shifted back and forth.
13 Among other things, though, relating to the application
14 of the safety valve in this case, counsel makes much of a plea
15 agreement previously filed with the Court. As I think the
16 Court's review of the various DEA-6's would reflect that
17 we have submitted to the Court under seal, much of the
18 information contained in that plea agreement stemmed not from
19 this defendant, Mr. Romo, but rather Mr. Torres. Thus the
20 source of the information contained in the plea agreement
21 certainly wasn't this defendant.
22 Your Honor, if this defendant standing before you wanted
23 to take advantage of the safety valve, he had, I would
24 respectfully submit, multiple opportunities to come forward;
25 but, he never did. And it is because of the tragic

1 consequences caused by the application of mandatory minimums
2 that we really tried to get him to come forward, and we just
3 couldn't succeed. We wrote to his lawyer twice and had a
4 conversation with Mr. Scott downstairs, I think it was on a
5 rainy Sunday afternoon about trying to get his client in. We
6 just couldn't accomplish it.
7 Your Honor, if this man had ever wanted to sit down and
8 tell the government the truth, he would have done that; but,
9 he didn't. His decision not to come forward and tell us the
10 truth is corroborated by the presentence report, itself, which
11 the Court has already adopted.
12 It took us -- not us in the sense of the government, but
13 it took this probation officer three visits out to Mr. Romo
14 before he would even say that he had even reasonable cause to
15 believe that maybe methamphetamine was in the car in his
16 luggage that day. That is not consistent with a man who is
17 telling us the truth, Your Honor. It is consistent with a man
18 who at most minimizes what he knows, who he knows, and how
19 this conspiracy worked.
20 Although counsel makes a very eloquent argument
21 concerning application of the safety valve, the facts in this
22 case do not support it. And I say that with some measure of
23 regret, frankly. I don't want subjectively to see application
24 of mandatory minimums in every case across the board, but this
25 is not a case where the guidelines provide for a downward

1 adjustment based upon application of the safety valve
2 exception.
3 MR. SCOTT: Let me add one point, Your Honor,
4 relating to our conversations with the probation officer. I
5 oftentimes find myself in this spot where you have to shoehorn
6 the facts to fit within the particular charge brought.
7 My client cheerfully -- and I was there so I know he was
8 cheerful when he was talking about it. He cheerfully admitted
9 all of his part in here, cheerfully admitted being the bag
10 man, how everything worked, when it all worked. He talked
11 about how much trouble Mr. Martinez was in because he spent
12 the money in Vegas. And he said, you know, I knew that the
13 drugs were coming back, but, you know, I wasn't absolutely
14 positive they were in the car.
15 Well, that doesn't make him any less guilty, not even one
16 whit less guilty of the offense, not even the slightest bit.
17 But, it became a hammering point between the Probation Office
18 and him as to exactly how much he knew. And it is like when
19 you are talking to somebody who has got stolen property, they
20 don't sit down and talk to the person on the other side and
21 say: Now, where did you steal this and where did it come
22 from? They just know. So, when you start pegging him down,
23 well, did he tell you? No, he didn't tell you. Well, then
24 you can't be guilty if he didn't tell you. You start sliding
25 in areas that just aren't legally true. I think that is where

1 he ended up in this case. It wasn't that he wasn't telling
2 them everything he knew, it was that both sides got hung up,
3 somewhat, on exactly what was said.
4 He was saying, well, the stuff had come back. It didn't
5 come back from the car each time. Sometimes it came back on
6 the plane. And I wasn't absolutely positive it was coming
7 back, exactly which way, but, yeah, I was on my way back. I
8 brought the money down. The drugs were coming up and I knew
9 they were being brought up. And I was aiding and abetting in
10 that all of the way. Exactly what the knowledge is there
11 became, I think, tempest and a teapot, and not particularly
12 relevant, either, legally or otherwise.
13 That is all I have, Your Honor.
14 THE COURT: Okay, thank you.
15 Counsel, I need to take the motion that you have just
16 made under advisement for about five minutes because there is
17 something I need to review. I will be with you again,
18 momentarily.
19 MR. LARSEN: Thank you, Your Honor.
20 (Recess.)
21 THE COURT: Counsel, I thank you for bearing with
22 me.
23 I had to take just a minute to do some reviewing of the
24 new rules. Is there anything further to come to the Court's
25 attention, first of all, with respect to either a -- well, any

1 matter relating to a departure from the minimum mandatory.
2 MR. SCOTT: No, nothing on that issue, Your Honor,
3 no.
4 MR. LARSEN: Nothing further from the government,
5 Your Honor.
6 THE COURT: Counsel, the Court has had opportunity
7 to review this matter. And I don't take it very lightly,
8 because I share the view that I know is completely shared in
9 this courtroom, and that is, genuinely, an abhorrence to
10 minimum mandatory sentences. They disturb me greatly. And I
11 have long longed for the concept of the safety valve type of
12 factor to be permitted to come into play as they relate to
13 these circumstances.
14 The Court has had opportunity in this case to now give
15 consideration to the motion for the application of the safety
16 valve upon the government not making the motion for
17 substantial assistance with it. After a review of the four
18 factors that the Court is to consider, I do find that -- or
19 the five factors, I mean -- I do find that it is the latter
20 factor that is in controversy in this matter, and that it is,
21 not later than today, that the defendant has truthfully
22 provided the government with all information and evidence the
23 defendant has concerning the offense or offenses that were
24 part of the same course of conduct, or a common scheme or
25 plan.

1 The Court has had the opportunity to review all matters
2 that have been submitted on this, including the matters that
3 have been submitted under seal. Having reviewed those
4 matters, I frankly come to the conclusion, Mr. Romo, that you
5 are making an unfortunate choice, but you have made the
6 choice, and that is that you are putting the gangs ahead of
7 the courts and you are putting the gangs ahead of the other
8 factors that come into play with respect to this. For this
9 reason I deny the motion and I am going to apply the minimum
10 mandatory sentence in this case.
11 Is there further information to come to the Court's
12 attention before sentence is imposed?
13 MR. SCOTT: Your Honor, two things. Obviously, it
14 is going to be a long time until my client gets out. We would
15 ask you to do two things, one now, and one as time goes
16 along. The first is I would like you to recommend that he
17 serve his time in an institution where the drug treatment
18 programs are available. I think he needs drug treatment. His
19 use of controlled substances while he was being monitored
20 shows that he has trouble controlling his use since he knew he
21 would be caught; and he used, anyway. That shows, in my mind,
22 that he can't control his use, even if it is sporadic. And he
23 should be going through treatment. It will give him at least
24 something positive during the eight years or so he has to
25 spend in federal prison for this offense.

1 I would also ask you to recommend that if he otherwise
2 qualifies, as he gets later into his sentence, to be eligible
3 for the intensive -- the boot camp, I won't go through all of
4 the words -- the boot camp, that they consider it in the last
5 30 months of this sentence. That will depend on how he does
6 in the institution, whether the Bureau of Prisons will make
7 him eligible or not; but, your acquiescence is required.
8 I ask you for two reasons. One is that if I was sitting
9 in his shoes and going into the prison now, I would have a not
10 positive attitude. I would be bitter. I would be mad. I
11 would believe that I was put in jail for as much political
12 reasons as otherwise. That is not conducive to having Mr.
13 Romo end up being a productive citizen when he is out.
14 If he goes in with two things: One, an idea that he
15 should go through drug treatment because, one, it will help
16 him, and two, it will shorten his sentence, that would be
17 good; and two, if he is aiming at a position where he knows
18 that it will be his actions in the institution that will have
19 a major effect on whether or not he can go into the boot camp
20 in the last 30 months of his sentence, he will then have
21 basically two reasons to not let his bitterness control his
22 life. And those two may not be enough. I don't know as they
23 would be when I was 21 going into prison, but at least they
24 are there and their encouragements. And if there is anything
25 to the system that you reward people for -- you tell people

1 that if they do something you will reward them, they are more
2 likely to do it, this is the time to do that. Otherwise, he
3 is going to come out in 2003 and you will revoke his
4 supervised release shortly thereafter, because he won't be
5 ready. So, I would ask you to make those two
6 recommendations. That is all I have to say.
7 THE COURT: Thank you. Mr. Romo, do you have any
8 comments to make before sentence is imposed?
9 DEFENDANT ROMO: Yeah, I just would like to address,
10 um, I didn't understand what your comment between the -- I put
11 gang in front of the -- or -- I didn't really understand your
12 comment.
13 THE COURT: I think you do. Mr. Larsen, any
14 comments?
15 MR. LARSEN: Your Honor, the government would only
16 ask that the Court sentence the defendant to the lowest
17 available point; but, nevertheless, unfortunately, it is
18 consistent with the statutory mandatory minimum.
19 THE COURT: Thank you. Mr. Romo, let me talk for
20 just a minute before I impose sentence upon you. The first
21 comment I would want to make is your sentence is, quite
22 candidly, a difficult sentence to render in this sense, and
23 that is that it so happens that the comments that your lawyer
24 has just made with respect to your person are comments that
25 this Court understands very thoroughly. Long periods of

1 incarceration are not, are not things that this Court likes to
2 impose upon people.
3 I agree with the aspect of the hopelessness that
4 unfortunately, but nevertheless, does set in upon people. You
5 said you didn't understand what I was talking about. Mr.
6 Romo, your conduct in this case, your conduct involved in this
7 drug business, your conduct involving other matters that are
8 outside of this case but are contained within the presentence
9 investigation report is purely reprehensible conduct. It is
10 the kind of conduct that a civil society cannot stand. And it
11 is the kind of conduct that is wrong. And I will tell you
12 that one of the things that distresses me so very, very much
13 with respect to you is that you are a person that did not fit
14 the mold. I see an awful lot of people that stand here. And
15 I see an awful lot of people that stand beside Mr. Scott,
16 beside Mr. Larsen that get put in jail for a very long time.
17 But, the one thing that is different between most of those
18 people and you is that they don't have a room full of family
19 supportive of them. You have it. I have received the
20 letters, I read the letters, I reviewed the matters with
21 respect to your family. And frankly, it tears me apart to see
22 what happens to a family because of your conduct. It is
23 unfortunate, but you are one person that has had, continues to
24 have and does have that kind of support behind you. And that
25 notwithstanding, you have taken on your own shoulders the kind

1 of action that you have.

2 Now, why do we get so upset about this drug business? It
3 is very straightforward. It is a dirty, bad business. People
4 die because of that business. People's lives are destroyed
5 because of that business. And because it is a bad business,
6 people that are involved in that business are going to spend
7 time in prison. And the time is not only involved in just
8 that, but the time is involved because of the associates that
9 are involved in this whole drug business and the nature of the
10 people that are involved in it and what they put first,
11 second, and third in their life, versus what they put in
12 that's important in life. And the kinds of activities of the
13 associates also are not appropriate. Yes, you wondered, and
14 you said you didn't understand. I hope you do now understand,
15 because it needs to be very clear.

16 Having said that and pursuant to the Sentencing Reform
17 Act of 1984, it is the judgment of the Court that you, Mr.
18 Romo, are hereby committed to the custody of the Bureau of
19 Prisons for imprisonment for a term of ten years; that upon
20 release from imprisonment, you shall be placed on supervised
21 release for a term of five years. During that five-year
22 period of supervised release, you shall not commit any crimes,
23 federal, state or local, you shall abide by the standard
24 conditions of supervised release as recommended by the
25 Sentencing Commission. You shall not possess any firearms or

1 other dangerous weapons. You shall participate as instructed
2 by the probation officer in a program approved by the United
3 States Probation Office for treatment of narcotic addiction or
4 drug dependency which may include counseling or testing to
5 determine if you have reverted to the use of drugs. You shall
6 not associate with any member, prospect or associate member of
7 the Latin Gangster Disciples Gang, or any other gang. If you
8 are found to be in the company of such individuals while
9 wearing the clothing, colors, insignia of the Latin Gangster
10 Disciples Gang, or any other gang, the Court will presume that
11 this association was for the purpose of participating in gang
12 activities.
13 You shall be required to undergo mandatory drug testing
14 as set forth in 18 U.S.C. Sections 3563A and 3583D. The Court
15 does not order a fine. The Court does not order restitution
16 because it is not applicable. The Court, however, does order
17 a special assessment in the sum of $50. That $50 special
18 assessment is due and payable today. The Court has imposed
19 this sentence within the range applicable to you under the
20 minimum mandatory statute for the offense because the facts
21 found are the kind contemplated by the minimum mandatory
22 sentence. There are no aggravating or mitigating
23 circumstances that were not adequately considered by the
24 Sentencing Commission pursuant to this statute. You are
25 placed on notice that you do have and the government does have

1 ten days from this date to file a notice of appeal of the
2 sentence. During that ten-day period, the Court will retain
3 the presentence investigation report in chambers under seal.
4 In the event of an appeal, the Court will forward the
5 presentence investigation report to the Eighth Circuit Court
6 of Appeals.
7 The Court does further recommend that your place of
8 confinement be an appropriate facility nearest to your
9 family;, that in addition to that, the Court recommends to the
10 Bureau of Prisons that you be afforded an opportunity to have
11 drug treatment during the time of your incarceration. And
12 finally, it is the recommendation of the Court that during
13 the last 30 months of your imprisonment, that in the event you
14 are otherwise eligible, that you during that 30-month period
15 receive the opportunity for the intensive confinement program
16 of the Bureau of Prisons.
17 Is there anything further to come to our attention?
18 MR. LARSEN: Nothing further from the government,
19 Your Honor.
20 THE COURT: Okay, thank you very much.
21 MR. LARSEN: Your Honor, I would, however -- excuse
22 me, I spoke too soon. If we could ask that the remaining
23 counts of the indictment in the District of Colorado be
24 dismissed?
25 THE COURT: Okay.

JEANNE M. ANDERSON, RMR * [redacted]

1 MR. LARSEN: Thank you.
2 THE COURT: Frankly, on a Rule 20 I kind of lost
3 track of what you do with those.
4 MR. LARSEN: Thank you, Your Honor.
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11 Certified by:
12 Jeanne M. Anderson, RPR-CM
13 Official Court Reporter
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1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

3 Criminal No. 01-228(JMR/FLN)

4

5 -
United States of America,
6 Plaintiff,

7 -v-

8 Eduardo Pelayo-Ruelas,
Defendant.
9 -

10 Sentencing, August 2, 2002

11 TRANSCRIPT OF PROCEEDINGS

12 HAD BEFORE THE HONORABLE CHIEF JUDGE JAMES M. ROSENBAUM

13 Minneapolis, Minnesota

14

15 APPEARANCES:
For the Government Nathan P. Petterson
16 Assistant U.S. Attorney
600 U.S. Courthouse
17 300 South Fourth Street
Minneapolis, MN 55415
18 For the Defendant Manvir K. Atwal
Assistant Federal Public Defender
19 107 U.S. Courthouse
300 South Fourth Street
20 Minneapolis, MN 55415

21

22

23

24

25 Official Reporter: Dawn M. H. Hansen, RMR, CRR

1 P R O C E E D I N G S

2 THE CLERK: Your Honor, the matter on the

3 calendar is United States of America versus Eduardo

4 Pelayo-Ruelas. Criminal 01-228. Would counsel please

5 state their appearance for the record?

6 MR. PETTERSON: Good morning, Your Honor, Nate

7 Petterson appearing for the United States.

8 THE COURT: Mr. Petterson, good morning.

9 MS. ATWAL: Good morning, Your Honor, Manny

10 Atwal, A-T-W-A-L, on behalf of Mr. Pelayo, present in the

11 court.

12 THE COURT: Ms. Atwal, good morning.

13 THE INTERPRETER: Good morning.

14 THE COURT: Ms. Interpreter, would you please

15 raise your hand.

16 THE INTERPRETER: M, period, Graciela Gonzalez.

17 G-R-A-C-I-E-L-A, G-O-N-Z-A-L-E-Z.

18 THE COURT: And would you please raise your right

19 hand.

20 (Interpreter sworn. All answers given through

21 the interpreter unless otherwise indicated.)

22 THE COURT: Thank you.

23 THE INTERPRETER: You're welcome, Your Honor.

24 THE COURT: Good morning, Mr. Pelayo-Ruelas. The

25 matter is before the Court for sentencing. I have received

1 a presentence investigation in this case. Mr.
2 Pelayo-Ruelas, have you received a copy?
3 THE INTERPRETER: Yes.
4 THE COURT: And have you had a chance to go over
5 it, and review it with your lawyer?
6 THE INTERPRETER: Yes.
7 THE COURT: And I know, counsel, that you've also
8 received a copy; is that correct, Ms. Atwal?
9 MS. ATWAL: Yes, Your Honor.
10 THE COURT: And the United States has also
11 received a copy?
12 MR. PETTERSON: Yes, Your Honor.
13 THE COURT: All right. There were no substantive
14 objections. The only objection had to do with some
15 questions about whether or not somebody was following a car
16 in relationship with how they were going to find a, some
17 other home. But those are not things that really impact
18 sentencing; is that fair?
19 MS. ATWAL: Yes, Your Honor. In fact, I'm
20 actually withdrawing that objection.
21 THE COURT: All right. Umm, and so I will -- and
22 the United States had no objections, right?
23 MR. PETTERSON: That's correct, Your Honor.
24 THE COURT: I will adopt the findings of the
25 presentence investigation as my findings of fact in this

1 case.

2 And then I will go to the Guidelines. And it appears

3 that the defendant, having gone to trial and denied guilt,

4 ah, is not entitled to a reduction for acceptance of

5 responsibility. That's within the contemplation of 3E1.1

6 of the Guidelines.

7 And so I calculate the Guideline level to be 32.

8 There is a base offense level of 36. That is for, ah,

9 at least 5, but fewer than 15, kilograms of

10 methamphetamine, under 2D1.1(c)(2).

11 It does appear to the Court that the defendant was a

12 minimal participant in the enterprise, and four points are

13 taken off under 3B1.2(a).

14 The criminal history calculates to a III, with five

15 criminal history points, calling for a presumptive

16 Guideline sentence of 151 to 188 months, with a statutory

17 mandatory minimum of 120 months.

18 There's a five-year term of supervised release.

19 A dollar fine that the defendant cannot pay.

20 No call for restitution.

21 There's $200 in special assessments.

22 And I'm aware that there are some questions about the

23 criminal history and perhaps other parts of the Guidelines.

24 Anything you want to say about that, counsel?

25 MS. ATWAL: Yes, Your Honor. I'd respectfully

1 request for a departure based on overstated criminal
2 history. I stated in my sentencing memorandum, four of
3 these points come from an escape charge back in Washington.
4 That escape charge is very similar to
5 supervised-release-type violation that we have in federal
6 court for a probation-type violation in state court. With
7 that escape charge he got two points because he was
8 incarcerated for a period of time. He had an additional
9 two points for recency. Had it not been for that, for
10 Washington actually charging him with an additional
11 offense, he wouldn't have those points and would be in a
12 Criminal History Category I.
13 Further, he did complete his probation and was doing so
14 well after that, that they discharged him upon his
15 attorney's request. I would ask that those four points be
16 taken off, which leaves him with a criminal history point
17 of 1, Criminal History Category I.
18 THE COURT: The United States?
19 MR. PETTERSON: Your Honor, the government has no
20 position on that issue.
21 THE COURT: The Court is in accord. The
22 defendant, it would have been nicer if the defendant would
23 have behaved better, but if the defendant would have really
24 behaved well, of course he wouldn't be in this trouble
25 either, but the facts are realistically, he had an offense,

1 apparently it is the practice in that community to consider
2 a failure to appear for regular meetings with your
3 probation officer a form of escape, and he winds up with
4 that, and I think that is not what the Guidelines had in
5 mind, and it's certainly not what the Court thinks of when
6 it thinks of those kind of crimes. Therefore, I find it
7 appropriate to adjust his criminal history.
8 Ah, I find that, ah, under, ah, 4A1.3 of the Guidelines
9 a departure is appropriate. The Category III does
10 significantly overstate his criminal history. He had not
11 been previously incarcerated for a period even longer than
12 120 days, and each of the criminal history points stems
13 from a single incident in 1998. This includes two points
14 for a failure to meet with the probation officer and two
15 points for committing a crime while on probation, the
16 present crime. While there's no question that probation is
17 important, ah, it seems to me that, to keep multiplying the
18 points off of what happened in the past is not really what
19 is in mind here. And therefore, I adjust the criminal
20 history down to a I and set the Guideline level at that
21 range. 121 to 151.
22 Now then, is there anything you want to say before the
23 sentence is imposed, Ms. Atwal?
24 MS. ATWAL: Your Honor, I would ask that he be
25 sentenced to the lower end, to the 121 months, given the

1 facts of the case as was heard in trial. I understand the
2 jury convicted Mr. Pelayo.
3 I'd ask that the Court take into consideration his
4 mum's request that he be placed -- that the defendant be
5 placed in a prison closer to his home. That prison would
6 be Sheridan, Oregon. I have nothing further, Your Honor.
7 THE COURT: Thank you. Mr. Pelayo-Ruelas, is
8 there anything you want to say before I impose sentence in
9 this case?
10 THE INTERPRETER: I would like to request that I
11 be allowed to complete my sentence in jail, in prison near
12 my family.
13 THE COURT: Anything else?
14 THE DEFENDANT: (Shaking head.)
15 THE COURT: Anything you want to say on behalf of
16 the United States, counsel?
17 MR. PETTERSON: No, Your Honor.
18 THE COURT: Sir, you made a bad mistake. It
19 wasn't a mistake in the sense that you blundered into
20 something. But you made a terrible decision, and when you
21 made that decision, you got yourself tangled up with the
22 Fed. It's not something you want to do, and I will tell
23 you it is not something you will want to do again. You
24 will be ordered, after your incarceration, to leave the
25 United States. If you come back, they will catch you, and

1 you'll come back to me. You will owe me five years at that
2 time, and I will take them back. Worse than that, if you
3 commit another crime, you'll be a three-time dope dealer,
4 offender, and they'll burn you. You'll just plain be done.
5 You won't get back out almost ever. Do you understand
6 that?
7 THE INTERPRETER: Yes.
8 THE COURT: All right. You can't do that.
9 THE INTERPRETER: No.
10 THE COURT: All right. Sir, I will sentence you
11 to the lowest level that's available. You'll do the ten.
12 After that I presume that they will deport you, and after
13 that you may not come back. Simple rules. All right.
14 I tell you, Eduardo Pelayo-Ruelas, that you were
15 charged in Count 1 of an indictment with conspiracy to
16 distribute a substance containing methamphetamine, in
17 violation of 21 United States Code Sections 846, and
18 841(b)(1)(A); and in Count 2 of an indictment with
19 possessing with intent to distribute a substance containing
20 methamphetamine and aiding and abetting in violation of 21
21 United States Code Section 841(b)(1)(A), and 18 United
22 States Code Section 2.
23 Based upon your conviction by jury verdict, a
24 conviction I find was well-supported by evidence, it is
25 considered and adjudged that you are guilty of those

1 offenses, and therefore it is adjudged that you are
2 committed to the custody of the Bureau of Prisons for
3 imprisonment for a term of 120 months on each count, to be
4 served concurrently.
5 You'll be given credit for the time which you have
6 served.
7 I will recommend that you be confined at Sheridan,
8 Oregon, for the service of your confinement. That is the
9 closest federal correctional agency to your home. You know
10 and understand that I cannot guarantee you go there, and if
11 they want to send you someplace else, that's their
12 pleasure, but I will recommend that you be placed there.
13 It is also ordered that you serve a term of supervised
14 release of five years. That means when you get out, five
15 more years will begin.
16 During that time, you must comply with state, federal,
17 and local laws, comply with the rules and regulations of
18 the probation office, abide by the standard conditions of
19 supervised release.
20 You may not possess a firearm or a dangerous weapon,
21 which would not only violate my supervised release, but
22 would be another felony.
23 You will comply with the rules and regulations of the
24 Immigration and Naturalization Service, and if deported,
25 you may not return to this country. If you do come back,

1 you must have the prior written permission of the Attorney
2 General of the United States. And must report immediately
3 to the nearest United States Probation Office, not later
4 than 72 hours after reentry. You'll get this information
5 in writing.
6 You are obligated to pay a special assessment. That's
7 in the amount of $200. You owe that sum immediately.
8 I do not impose a fine. You do not have the funds with
9 which to pay one.
10 You are in custody, and you will remain in custody, as
11 I indicated.
12 You will receive credit for the time which you have
13 served.
14 You have a right to appeal from the sentence which I
15 have imposed and must do so within ten days. If you fail
16 to take that appeal, or of your conviction within ten days,
17 you'll have waived it. Which means you have ten days to
18 instruct your lawyer to place an appeal.
19 I just sentenced you to one month less than the
20 Guidelines. The Guidelines were calculated by a computer
21 which apparently was not satisfied with the fact that ten
22 years is 120 months. And so we have a ridiculous extra
23 month which I have taken off. Now, that represents an
24 illegal departure, and if the United States wants to
25 appeal, I presume that they will have a right to take that

1 appeal. My guess is that they will decline, but if they
2 do, and you need a lawyer to defend you, one will be
3 appointed at no cost.
4 Sir, you are a very young man and you're going to go to
5 jail for a very long time. You've made some terrible
6 decisions in your life, and you now had better figure out
7 how to make better ones or you will not have much life to
8 live. I hope, and I recommend that you do so, and I wish
9 you well, but you must not come back to the United States.
10 That will be the order of the Court. Thank you, counsel.
11 MR. PETTERSON: Thank you, Your Honor.
12 (Court is in recess.)
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1 CERTIFICATE

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5 I, Dawn Marie Higby Hansen, do certify that the above

6 and foregoing 11 pages of transcript is a true, correct,

7 and accurate transcription of my stenographic notes taken

8 in the above proceedings.

9

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11 _____ _____

12 Date Dawn Marie Higby Hansen

13 Official Court Reporter

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GUIDELINES MANUAL

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

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

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the

defendant; and

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

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

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

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

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

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

   (i) in furtherance of the jointly undertaken criminal activity; and

   (ii) reasonably foreseeable in connection with that criminal activity.

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

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

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

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

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

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

Illustrations of Conduct for Which the Defendant is Accountable

(a) Acts and omissions aided or abetted by the defendant

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

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

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

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

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

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

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

(1) *Defendant D pays Defendant E a small amount to forge an endorsement on an $800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the $15,000 because the fraudulent scheme to obtain $15,000 was not in furtherance of the criminal activity he jointly undertook with Defendant D (i.e., the forgery of the $800 check).*

(2) *Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount ($55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity.*

(3) *Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions in furtherance of the importation of that shipment that were reasonably foreseeable (see the discussion in example (a)(1) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not in furtherance of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).*

(4) *Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly,*

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

(5) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (i.e., the one delivery).

(6) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.

(7) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R.

(8) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants

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

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

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

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

5. *If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. See, e.g., §2K1.4 (Arson; Property Damage by Use of Explosives); §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (e.g., §2A2.2 (Aggravated Assault); §2B3.1 (Robbery)) or to actual, attempted or intended harm (e.g., §2B1.1 (Theft, Property Destruction, and Fraud); §2X1.1 (Attempt, Solicitation, or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred. When not adequately taken into account by the applicable offense guideline, creation of a risk may provide a ground for imposing a sentence above the applicable guideline range. See generally §1B1.4 (Information to be Used in Imposing Sentence); §5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the determination of the offense level should be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) and the applicable offense guideline.*

6. *A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. For example, in §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), subsection (b)(2)(B) applies if the defendant "is convicted under 18 U.S.C. § 1956". Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) ("if the offense was committed by the means set forth in 18 U.S.C. § 2242").*

   Unless otherwise specified, an express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. For example, §2S1.1(b)(2)(B) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) in a case in which the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956 but would not be applied in a case in which the defendant is convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957. See Application Note 3(C) of §2S1.1.

7. *In the case of a partially completed offense (e.g., an offense involving an attempted theft of $800,000 and a completed theft of $30,000), the offense level is to be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to §2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under §2X1.1(c)(1).*

8. *For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commentary

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

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

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

PART D - OFFENSES INVOLVING DRUGS

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.

(4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.

(5) (Apply the greater):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.

(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

(6) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

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

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
(1) ● 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); ● 150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); ● 1.5 KG or more of Cocaine Base; ● 30 KG or more of PCP, or 3 KG or more of PCP (actual); ● 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice"; ● 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual); ● 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); ● 12 KG or more of Fentanyl; ● 3 KG or more of a Fentanyl Analogue; ● 30,000 KG or more of Marihuana; ● 6,000 KG or more of Hashish; ● 600 KG or more of Hashish Oil; ● 30,000,000 units or more of Schedule I or II Depressants; ● 1,875,000 units or more of Flunitrazepam.	**Level 38**
(2) ● At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); ● At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); ● At least 500 G but less than 1.5 KG of Cocaine Base; ● At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); ● At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice"; ● At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual); ● At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); ● At least 4 KG but less than 12 KG of Fentanyl; ● At least 1 KG but less than 3 KG of a Fentanyl Analogue; ● At least 10,000 KG but less than 30,000 KG of Marihuana; ● At least 2,000 KG but less than 6,000 KG of Hashish; ● At least 200 KG but less than 600 KG of Hashish Oil; ● At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants; ● At least 625,000 but less than 1,875,000 units of Flunitrazepam.	**Level 36**
(3) ● At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); ● At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	**Level 34**

- At least 150 G but less than 500 G of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
- At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice";
- At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);
- At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 1.2 KG but less than 4 KG of Fentanyl;
- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of 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 Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam.

(4) **Level 32**

- At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 50 G but less than 150 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
- At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
- At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
- At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 400 G but less than 1.2 KG of Fentanyl;
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of 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 Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam.

(5) **Level 30**

- At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 35 G but less than 50 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";

- At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
- At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 280 G but less than 400 G of Fentanyl;
- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- At least 43,750 but less than 62,500 units of Flunitrazepam.

(6) **Level 28**

- At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 20 G but less than 35 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
- At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";
- At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 160 G but less than 280 G of Fentanyl;
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of 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 Schedule I or II Depressants;
- At least 25,000 but less than 43,750 units of Flunitrazepam.

(7) **Level 26**

- At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 5 G but less than 20 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
- At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
- At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
- At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 40 G but less than 160 G of Fentanyl;
- At least 10 G but less than 40 G of a Fentanyl Analogue;

- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil;
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- At least 6,250 but less than 25,000 units of Flunitrazepam.

(8) **Level 24**

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

(9) **Level 22**

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

(10) **Level 20**

- At least 40 G but less than 60 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 200 G but less than 300 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 2 G but less than 3 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
- At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
- At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
- At least 400 MG but less than 600 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 16 G but less than 24 G of Fentanyl;
- At least 4 G but less than 6 G of a Fentanyl Analogue;
- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants or Schedule III substances;
- At least 2,500 but less than 3,750 units of Flunitrazepam.

(11) **Level 18**

- At least 20 G but less than 40 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 1 G but less than 2 G of Cocaine Base;
- At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
- At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";
- At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
- At least 200 MG but less than 400 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 8 G but less than 16 G of Fentanyl;
- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants or Schedule III substances;
- At least 1,250 but less than 2,500 units of Flunitrazepam.

(12) **Level 16**

- At least 10 G but less than 20 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 50 G but less than 100 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

- At least 500 MG but less than 1 G of Cocaine Base;
- At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
- At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice";
- At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
- At least 100 MG but less than 200 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 4 G but less than 8 G of Fentanyl;
- At least 1 G but less than 2 G of a Fentanyl Analogue;
- At least 10 KG but less than 20 KG of 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 Schedule I or II Depressants or Schedule III substances;
- At least 625 but less than 1,250 units of Flunitrazepam.

(13) **Level 14**

- At least 5 G but less than 10 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 250 MG but less than 500 MG of Cocaine Base;
- At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
- At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
- At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
- At least 50 MG but less than 100 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 2 G but less than 4 G of Fentanyl;
- At least 500 MG but less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of 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 Schedule I or II Depressants or Schedule III substances;
- At least 312 but less than 625 units of Flunitrazepam.

(14) **Level 12**

- Less than 5 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
- Less than 25 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- Less than 250 MG of Cocaine Base;
- Less than 5 G of PCP, or less than 500 MG of PCP (actual);
- Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";

- Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);
- Less than 50 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- Less than 2 G of Fentanyl;
- Less than 500 MG of a Fentanyl Analogue;
- At least 2.5 KG but less than 5 KG of Marihuana;
- At least 500 G but less than 1 KG of Hashish;
- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants or Schedule III substances;
- At least 156 but less than 312 units of Flunitrazepam;
- 40,000 or more units of Schedule IV substances (except Flunitrazepam).

(15) **Level 10**
- At least 1 KG but less than 2.5 KG of Marihuana;
- At least 200 G but less than 500 G of Hashish;
- At least 20 G but less than 50 G of Hashish Oil;
- At least 1,000 but less than 2,500 units of Schedule I or II Depressants or Schedule III substances;
- At least 62 but less than 156 units of Flunitrazepam;
- At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).

(16) **Level 8**
- At least 250 G but less than 1 KG of Marihuana;
- At least 50 G but less than 200 G of Hashish;
- At least 5 G but less than 20 G of Hashish Oil;
- At least 250 but less than 1,000 units of Schedule I or II Depressants or Schedule III substances;
- Less than 62 units of Flunitrazepam;
- At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
- 40,000 or more units of Schedule V substances.

(17) **Level 6**
- Less than 250 G of Marihuana;
- Less than 50 G of Hashish;
- Less than 5 G of Hashish Oil;
- Less than 250 units of Schedule I or II Depressants or Schedule III substances;
- Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
- Less than 40,000 units of Schedule V substances.

*Notes to Drug Quantity Table:

PART B - ROLE IN THE OFFENSE

Introductory Commentary

This Part provides adjustments to the offense level based upon the role the defendant played in committing the offense. The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), i.e., all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction.

When an offense is committed by more than one participant, §3B1.1 or §3B1.2 (or neither) may apply. Section 3B1.3 may apply to offenses committed by any number of participants.

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

§3B1.1. Aggravating Role

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

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by **3** levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by **2** levels.

Commentary

Application Notes:

1. *A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.*

2. *To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.*

3. *In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.*

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

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

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

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

§3B1.2. Mitigating Role

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

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

Commentary

Application Notes:

1. *Definition.—For purposes of this guideline, "participant" has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).*

2. *Requirement of Multiple Participants.—This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.*

3. *Applicability of Adjustment.—*

   (A) Substantially Less Culpable than Average Participant.—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant.

   A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.

   (B) Conviction of Significantly Less Serious Offense.—If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 14 under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

   (C) Fact-Based Determination.—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case. As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

4. *Minimal Participant.—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant. It is intended that the downward adjustment for a minimal participant will be used infrequently.*

5. *Minor Participant.— Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants, but whose role could not be described as minimal.*

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

CHAPTER FOUR - CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

PART A - CRIMINAL HISTORY

Introductory Commentary

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

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

Historical Note: Effective November 1, 1987.

§4A1.1. Criminal History Category

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

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while

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

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

Commentary

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

Application Notes:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. *§4A1.1(d). Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). For the purposes of this item, a "criminal justice sentence" means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this item to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. See §4A1.2(m).*

5. *§4A1.1(e). Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) less than two years following release from confinement on a sentence counted under §4A1.1(a) or (b). This also applies if the defendant committed the instant offense while in imprisonment or escape status on such a sentence. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). However, if two points are added under §4A1.1(d), only one point is added under §4A1.1(e).*

6. *§4A1.1(f). Where the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as related cases but did not arise from the same occasion (i.e., offenses committed on different occasions that were part of a single common scheme or plan or were consolidated for trial or sentencing; see Application Note 3 of the Commentary to §4A1.2), one point is added under §4A1.1(f) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(f). "Crime of violence" is defined in §4B1.2(a); see §4A1.2(p).*

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

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

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

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

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

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

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

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

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

(a) prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses);

(b) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;

(c) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;

(d) whether the defendant was pending trial or sentencing on another charge at the time of the instant offense;

(e) prior similar adult criminal conduct not resulting in a criminal conviction.

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

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

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

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

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

Commentary

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 381); November 1, 1992 (see Appendix C, amendment 460).

SENTENCING TABLE
(in months of imprisonment)

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

Commentary to Sentencing Table

Application Notes:

1. *The Offense Level (1-43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I-VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "Life" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24-30 months of imprisonment.*

2. *In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.*

3. *The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A, except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal). The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.*

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

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

(a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth verbatim below:

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five

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

Commentary

Application Notes:

1. *"More than 1 criminal history point, as determined under the sentencing guidelines," as used in subsection (a)(1), means more than one criminal history point as determined under §4A1.1 (Criminal History Category).*

2. *"Dangerous weapon" and "firearm," as used in subsection (a)(2), and "serious bodily injury," as used in subsection (a)(3), are defined in the Commentary to §1B1.1 (Application Instructions).*

3. *"Offense," as used in subsection (a)(2)-(4), and "offense or offenses that were part of the same course of conduct or of a common scheme or plan," as used in subsection (a)(5), mean the offense of conviction and all relevant conduct.*

4. *Consistent with §1B1.3 (Relevant Conduct), the term "defendant," as used in subsection (a)(2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.*

5. *"Organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines," as used in subsection (a)(4), means a defendant who receives an adjustment for an aggravating role under §3B1.1 (Aggravating Role).*

6. *"Engaged in a continuing criminal enterprise," as used in subsection (a)(4), is defined in 21 U.S.C. § 848(c). As a practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who "engaged in a continuing criminal enterprise" but is convicted of an offense to which this section applies will be an "organizer, leader, manager, or supervisor of others in the offense."*

7. *Information disclosed by the defendant with respect to subsection (a)(5) may be considered in determining the applicable guideline range, except where the use of such information is restricted under the provisions of §1B1.8 (Use of Certain Information). That is, subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant.*

8. *Under 18 U.S.C. § 3553(f), prior to its determination, the court shall afford the government an opportunity to make a recommendation. See also Fed. R. Crim. P. 32(c)(1), (3).*

9. *A defendant who meets the criteria under this section is exempt from any otherwise applicable statutory minimum sentence of imprisonment and statutory minimum term of supervised release.*

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

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

PART K - DEPARTURES

1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES

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

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

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

Commentary

Application Notes:

1. *Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.*

2. *The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.*

3. *Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.*

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

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

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

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

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

* * * * *

2. OTHER GROUNDS FOR DEPARTURE

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

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

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

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

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

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

Commentary

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

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

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

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

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

TERMED APPEAL
INTERP 4TH

U.S. District Court
District of Minnesota

CRIMINAL DOCKET FOR CASE #: 01-CR-228-ALL

USA v. Pelayo-Ruelas

Filed: 08/14/01

Other Dkt # 0:01-m -00259

Case Assigned to: Chief Judge James M Rosenbaum
Case Referred to: Magistrate Judge Franklin L Noel

EDUARDO PELAYO-RUELAS (1)
defendant
[term 08/02/02]

Manvir Kaur Atwal
[term 08/02/02]
[COR LD NTC pda]
Federal Public Defender
[redacted]

Pending Counts:	Disposition
21:846 Conspiracy to possess with intent to distribute methamphetamine (1)	Custody of BOP for 120 months, deft to be given credit for time served, 5 yrs supervised release, spec assmt of $200.00 (1)
21:841(a)(1) and 841(b)(1)(A) & 18:2 Possession with intent to distribute methamphetamine / aiding & abetting (2)	Custody of BOP for 120 months, deft to be given credit for time served, 5 yrs supervised release, spec assmt of $200.00 (2)

Offense Level (opening): 4

Terminated Counts:

NONE

Proceedings include all events.
0:01cr228-ALL USA v. Pelayo-Ruelas

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Complaints	Disposition
COMPLAINT - possess with intent to distribute methamphetamine in violation of 21:846 [0:01-m -259]	

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Case Assigned to: Chief Judge James M Rosenbaum
Case Referred to: Magistrate Judge Franklin L Noel

MIGUEL ANGEL LARIOS (2) defendant [term 06/13/02]	Robert D Miller [term 06/13/02] FAX [redacted] [COR LD NTC cja] Miller Law Office [redacted]

Pending Counts:	Disposition
21:846 Conspiracy to possess with intent to distribute methamphetamine (1)	Custody of BOP for 120 months on counts 1 & 2 to be served concurrently; 5 years supervised release; $200.00 spec assmt (1)
21:841(a)(1) and 841(b)(1)(A) & 18:2 Possession with intent to distribute methamphetamine / aiding & abetting (2)	Custody of BOP for 120 months on counts 1 & 2 to be served concurrently; 5 years supervised release; $200.00 spec assmt (2)

Offense Level (opening): 4

Terminated Counts:

NONE

Proceedings include all events.
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Complaints	Disposition
COMPLAINT - possess with intent to distribute methamphetamine in violation of 21:846 [0:01-m -259]	

==========

Case Assigned to: Chief Judge James M Rosenbaum
Case Referred to: Magistrate Judge Franklin L Noel

PEDRO FIGUEROA-VEJAR (3) aka Roberto Espinoza Olea defendant [term 01/09/02]	Steven Eugene Wolter [term 01/09/02] FAX 6123710574 [COR LD NTC cja] Kelley Law Office [redacted]

Pending Counts:

NONE

Terminated Counts:	Disposition
21:846 Conspiracy to possess with intent to distribute methamphetamine (1)	dismissed (1)
21:841(a)(1) and 841(b)(1)(A) & 18:2 Possession with intent to distribute methamphetamine / aiding & abetting (2)	dismissed (2)

Offense Level (disposition): 4

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Complaints

Disposition

COMPLAINT - possess with intent to distribute methamphetamine in violation of 21:846
[0:01-m -259]

U. S. Attorneys:

Nathan Paul Petterson
[COR LD NTC]
US Attorney
600 US Courthouse
300 4th St S
Mpls, MN 55415
[redacted]

Proceedings include all events.
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7/20/01	1	COMPLAINT by USA Nathan Paul Petterson with attached affidavit of Timothy J. Shanley against defendants Eduardo Pelayo (1), Miguel Angel Larios (2), and Pedro Figueroa-Vejar (3) by Magistrate Judge E. S. Swearingen. 5 pgs [0:01-m -259] (mf) [Entry date 07/24/01]
7/20/01	--	BENCH WARRANT issued for Eduardo Pelayo, Miguel Angel Larios, and Pedro Figueroa-Vejar by Magistrate Judge E. S. Swearingen. [0:01-m -259] (mf) [Entry date 07/24/01]
7/20/01	2	MINUTES: before Magistrate Judge E. S. Swearingen first appearance of Eduardo Pelayo (1); deft ordered preliminary and detention hearing set for 2:00 on 7/24/01 before JMM; tape: 01-36-184-360. 1 pg [0:01-m -259] (mf) [Entry date 07/24/01]
7/20/01	4	MINUTES: before Magistrate Judge E. S. Swearingen first appearance of Miguel Angel Larios; deft ordered detained; preliminary and detention hearing set for 2:00 on 7/24/01 before JMM; tape: 01-36-184-360. 1 pg [0:01-m -259] (mf) [Entry date 07/24/01]
7/20/01	6	MINUTES: before Magistrate Judge E. S. Swearingen first appearance of Pedro Figueroa-Vejar (3); deft ordered detained; preliminary and detention hearing set for 2:00 on 7/24/01 before JMM; tape: 01-36-184-360. 1 pg [0:01-m -259] (mf) [Entry date 07/24/01]
7/23/01	3	TEMPORARY ORDER OF DETENTION of Eduardo Pelayo by Magistrate Judge E. S. Swearingen. (dated 7/20/01) (copies dist'd) 1 pg [0:01-m -259] (mf) [Entry date 07/24/01]
7/23/01	5	TEMPORARY ORDER OF DETENTION of Miguel Angel Larios by Magistrate Judge E. S. Swearingen (dated 7/20/01) (copies dist'd). 1 pg [0:01-m -259] (mf) [Entry date 07/24/01]
7/23/01	7	TEMPORARY ORDER OF DETENTION of Pedro Figueroa-Vejar by Magistrate Judge E. S. Swearingen (dated 7/20/01) (copies dist'd). 1 pg [0:01-m -259] (mf) [Entry date 07/24/01]
7/24/01	8	MINUTES: before Magistrate Judge John M. Mason as to Eduardo Pelayo; preliminary and detention hearing held on 7/24/01; interpreter Nadia Smith present; tape: 354, #756. 1 pg [0:01-m -259] (mf) [Entry date 07/24/01] [Edit date 07/24/01]

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7/24/01	9	MINUTES: before Magistrate Judge John M. Mason as to Miguel Angel Larios (2); preliminary and detention hearing held on 7/24/01; interpreter Nadia Smith present; tape: 354, #756. 1 pg [0:01-m -259] (mf) [Entry date 07/24/01]
7/24/01	10	MINUTES: before Magistrate Judge John M. Mason as to Pedro Figueroa-Vejar (3); preliminary and detention hearing held on 7/24/01; interpreter Nadia Smith present; tape: 354, #756. 1 pg [0:01-m -259] (mf) [Entry date 07/24/01]
7/24/01	11	WITNESS LIST of plaintiff USA as to defendants Eduardo Pelayo (1), Miguel Angel Larios (2), and Pedro Figueroa-Vejar (3). 1 pg [0:01-m -259] (mf) [Entry date 07/24/01]
7/30/01	12	BENCH Warrant returned executed as to Eduardo Pelayo (1) on 7/19/01. 1pg [0:01-m -259] (sc) [Entry date 07/31/01]
7/30/01	13	BENCH Warrant returned executed as to Miguel Angel Larios (2) on 7/19/01. 1pg [0:01-m -259] (sc) [Entry date 07/31/01]
7/30/01	14	BENCH Warrant returned executed as to Pedro Figueroa-Vejar (3) on 7/19/01. 1pg [0:01-m -259] (sc) [Entry date 07/31/01]
7/31/01	16	CJA Form 20 Copy 4 (Appointment of Counsel) appointing Robert D. Miller, as to defendant Miguel Angel Larios (2). 1pg [0:01-m -259] (lg) [Entry date 08/02/01]
7/31/01	17	CJA Form 20 Copy 4 (Appointment of Counsel) appointing Steven Wolter, as to defendant Pedro Figueroa-Vejar (3). 1pg [0:01-m -259] (lg) [Entry date 08/02/01]
8/1/01	15	ORDER OF DETENTION of Eduardo Pelayo (1), Miguel Angel Larios (2) and Pedro Figueroa-Vejar (3) by Magistrate Judge John M. Mason (dated 8/1/01) (copies dist'd). 3pg(s) [0:01-m -259] (lg) [Entry date 08/01/01]
8/14/01	18	INDICTMENT assigned to Chief Judge James M. Rosenbaum & referred to Magistrate Judge Franklin L. Noel by USA Nathan Paul Petterson. Counts filed against Eduardo Pelayo-Ruelas (1) count(s) 1, 2, Miguel Angel Larios (2) count(s) 1, 2, Pedro Figueroa-Vejar (3) count(s) 1, 2. (2 pages) (ps) [Entry date 08/15/01]

Proceedings include all events.
0:01cr228-ALL USA v. Pelayo-Ruelas

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8/22/01	19	MINUTES before Magistrate Judge Franklin L. Noel re defts Eduardo Pelayo-Ruelas, Miguel Angel Larios, & Pedro Figueroa-Vejar ARRAIGNED: not guilty plea entered; attys present; disclosures due 8/29/01; pretrial motions due 9/5/01; motion hearing set for 9:00 a.m. on 9/12/01 before FLN; Voir Dire / Jury Instructions due 10/15/01; jury trial set for 9:00 a.m. on 10/22/01 before JMR; interpreter David Hreha present; defts in custody. Court Reporter: Jeanne Whalen & tape. (1 page) (ps) [Entry date 08/24/01]
8/28/01	20	ARRAIGNMENT ORDER by Magistrate Judge Franklin L. Noel (Date Signed: 8/29/01) as to Eduardo Pelayo-Ruelas (1) Miguel Angel Larios (2) and Pedro Figueroa-Vejar (3). Same as minutes, Doc. #19. 2 pg(s) (lg) [Entry date 08/29/01]
9/5/01	21	MOTION for disclosure of 404 evidence by Eduardo Pelayo-Ruelas (1). 1 pg(s) (dd) [Entry date 09/06/01]
9/5/01	22	MOTION for gov't agents to rtn rough notes by Eduardo Pelayo-Ruelas (1). 2 pg(s) (dd) [Entry date 09/06/01]
9/5/01	23	MOTION to suppress statements, admissions & answers by Eduardo Pelayo-Ruelas (1). 2 pg(s) (dd) [Entry date 09/06/01]
9/5/01	24	MOTION to suppress evidence obtained as a result of search & seizure by Eduardo Pelayo-Ruelas (1). 2 pg(s) (dd) [Entry date 09/06/01]
9/5/01	25	MOTION for discovery & inspection by Eduardo Pelayo-Ruelas(1). 3 pg(s) (dd) [Entry date 09/06/01]
9/5/01	26	MOTION to compel atty for the govt to disclose evidence favorable to deft by Eduardo Pelayo-Ruelas (1). 3 pg(s) (dd) [Entry date 09/06/01]
9/5/01	27	MOTION/MEMORANDUM to suppress evidence based upon illegal search by Miguel Angel Larios (2). 4 pg(s) (dd) [Entry date 09/06/01]
9/5/01	28	MOTION/MEMORANDUM to suppress evidence based upon illegal arrest by Miguel Angel Larios (2). 4 pg(s) (dd) [Entry date 09/06/01]
9/5/01	29	MOTION/MEMORANDUM for gov't agents to rtn rough notes by Pedro Figueroa-Vejar (3). 4 pg(s) (dd) [Entry date 09/06/01]
9/5/01	30	MOTION/MEMORANDUM for disclosure of post-conspiracy statements of co-defts by Pedro Figueroa-Vejar (3). 4 pgs (dd) [Entry date 09/06/01]
9/5/01	31	MOTION/MEMORANDUM for disclosure of 404 evidence by Pedro Figueroa-Vejar (3). 4 pg(s) (dd) [Entry date 09/06/01]

9/5/01	32	MOTION/MEMORANDUM for discovery by Pedro Figueroa-Vejar (3). 14 pg(s) (dd) [Entry date 09/06/01]
9/5/01	33	MOTION/MEMORANDUM to compel the govt to disclose favorable evidence by Pedro Figueroa-Vejar (3). 3 pg(s) (dd) [Entry date 09/06/01]
9/5/01	34	MOTION for disclosure of exculpatory evidence by Pedro Figueroa-Vejar (3). 2 pg(s) (dd) [Entry date 09/06/01]
9/5/01	35	MOTION/MEMORANDUM to suppress eyewitness identification by Pedro Figueroa-Vejar (3). 4 pg(s) (dd) [Entry date 09/06/01]
9/5/01	36	MOTION/MEMORANDUM to disclose & make informants available for interview by Pedro Figueroa-Vejar (3). 3 pg(s) (dd) [Entry date 09/06/01]
9/5/01	37	MOTION/MEMORANDUM for early disclosure of Jencks Act material by Pedro Figueroa-Vejar (3). 6 pg(s) (dd) [Entry date 09/06/01]
9/5/01	38	MOTION/MEMORANDUM to compel production of sentencing guidelines information by Pedro Figueroa-Vejar (3). 9 pg(s) (dd) [Entry date 09/06/01]
9/5/01	39	MOTION/MEMORANDUM for discovery confessions or statements in the nature of confessions by Pedro Figueroa-Vejar (3). 4 pg(s) (dd) [Entry date 09/06/01]
9/5/01	40	MOTION/MEMORANDUM to suppress confessions or statements in the nature of confessions by Pedro Figueroa-Vejar (3). 4 pg(s) (dd) [Entry date 09/06/01]
9/5/01	41	MOTION for discovery physical evidence obtained as a result of search & seizure by Pedro Figueroa-Vejar (3). 2 pg(s) (dd) [Entry date 09/06/01]
9/5/01	42	MOTION to suppress physical evidence obtained as a result of search & seizure by Pedro Figueroa-Vejar (2). 2 pg(s) (dd) [Entry date 09/06/01]
9/5/01	43	MOTION/MEMORANDUM for discovery & inspection of products of records & electronic surveillance by Pedro Figueroa-Vejar (3). 3 pg(s) (dd) [Entry date 09/06/01]
9/5/01	44	MOTION/MEMORANDUM for list of govt witnesses by Pedro Figueroa-Vejar (3). 3 pg(s) (dd) [Entry date 09/06/01]
9/18/01	45	TRANSCRIPT OF PRELIMINARY/DETENTION HEARING held 7/24/01 before JMM as to Eduardo Pelayo-Ruelas. (Court Reporter: Lisa M. Johson) 50 pages (SEPARATE) (ps) [Entry date 09/18/01]

Proceedings include all events. TERMED
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10/3/01	46	MINUTES before Magistrate Judge Franklin L. Noel re MOTION HEARING as to Eduardo Pelayo-Ruelas, Miguel Angel Larios, and Pedro Figueroa-Vejar: All pretrial motions ruled on except for motions to suppress. Adam Castilleja and Harry Tideswell IV testify. Deft Pelayo-Ruelas orally moves to disclose identity of informant. Deft Figueroa-Vejar's motion to suppress, Doc. #35, is moot. Briefs due from deft 10/9/01 govt 10/12/01. Interpreter Beatriz Cabrera present. Defts in custody. Court Reporter: Kristine Mousseau. (1 page) (ps) [Entry date 10/04/01]
10/9/01	47	MEMORANDUM by deft Eduardo Pelayo-Ruelas in support of motions to suppress [24-1] [23-1] and oral motion to disclose informant. (9 pages) (ps) [Entry date 10/10/01]
10/9/01	48	SUPPLEMENTAL MEMORANDUM by deft Pedro Figueroa-Vejar in support of motion to suppress physical evidence obtained as a result of search & seizure [42-1]. 5 pages (ps) [Entry date 10/10/01]
10/12/01	50	MEMORANDUM by plaintiff USA in opposition to defts' motions to suppress and to disclose informant as to defts Eduardo Pelayo-Ruelas (1), Miguel Larios (2) and Pedro Figueroa-Vejar (3). 14pgs (lg) [Entry date 10/16/01]
10/15/01	49	LETTER to court from counsel for defendant Miguel Angel Larios (2) that following the hearing in this matter, the court invited the parties to submit written memoranda in support of their positions. The purpose of this letter is point out that we included our memorandums with the motions that were filed. Accordingly, we rest on those submissions as well as our arguments at the hearing. We wish to correct a typographical error in our Memorandums, however. On the front page of both of our Memorandums we incorrectly wrote: This person, eventually identified as Eduardo Pelayo, was stopped near the motel minutes after he left the motel. Mr. Pelayo and questioned. "Mr. Pelayo" is a typographical error and should be deleted. Second, the next sentence should read "Mr. Pelayo spoke only Spanish". 1pg (copy sent to FLN) (lg) [Entry date 10/16/01] [Edit date 10/16/01]
10/23/01	51	ORDER (Magistrate Judge Franklin L. Noel / date signed 10/23/01) AS TO DEFT EDUARDO PELAYO-RUELAS (1) granting motion for disclosure of 404 evidence [21-1]; granting motion for gov't agents to rtn rough notes [22-1]; granting motion for discovery & inspection [25-1]; granting motion to compel atty for the govt to disclose evidence favorable to deft [26-1] (cc: all counsel). 2pgs (lg) [Entry date 10/24/01]

10/23/01 52 ORDER (Magistrate Judge Franklin L. Noel / date signed 10/23/01) AS TO DEFT PEDRO FIGUEROA-VEJAR (3) granting motion for gov't agents to rtn rough notes [29-1], denying motion for disclosure of post-conspiracy statements of co-defts [30-1], granting motion for disclosure of 404 evidence [31-1], granting motion for discovery [32-1], granting motion to compel the govt to disclose favorable evidence [33-1], granting motion for disclosure of exculpatory evidence [34-1], denying motion for early disclosure of Jencks Act material [37-1], denying motion to compel production of sentencing guidelines information [38-1], the motion for discovery confessions or statements in the nature of confessions [39-1] is withdrawn as moot, the motion for discovery physical evidence obtained as a result of search & seizure [41-1] is withdrawn as moot, the motion for discovery & inspection of products of records & electronic surveillance [43-1] is withdrawn as moot, denying motion for list of govt witnesses [44-1] (cc: all counsel). 2pgs (lg) [Entry date 10/24/01]

10/23/01 53 REPORT and RECOMMENDATION by Magistrate Judge Franklin L. Noel date signed: 10/23/01 AS TO DEFT EDUARDO PELAYO-RUELAS (1) recommends motion to suppress statements, admissions & answers [23-1] be GRANTED, recommends motion to suppress evidence obtained as a result of search & seizure [24-1] be DENIED. RR Ruling deadline set for 11/22/01 for Eduardo Pelayo-Ruelas (1) (cc: all counsel). 13pgs (lg) [Entry date 10/24/01]

10/23/01 54 REPORT and RECOMMENDATION by Magistrate Judge Franklin L. Noel date signed: 10/23/01 AS TO DEFT MIGUEL ANGEL LARIOS (2) recommends motion to suppress evidence based upon illegal search [27-1] be DENIED, recommends motion to suppress evidence based upon illegal arrest [28-1] be DENIED AS MOOT. RR Ruling deadline set for 11/22/01 for Miguel Angel Larios (2) (cc: all counsel). 13pgs (lg) [Entry date 10/24/01]

10/23/01 55 REPORT and RECOMMENDATION by Magistrate Judge Franklin L. Noel date signed: 10/23/01 AS TO DEFT PEDRO FIGUEROA-VEJAR (3) recommends that the motion to suppress confessions or statements in the nature of confessions [40-1] be GRANTED, recommends that the motion to suppress physical evidence obtained as a result of search & seizure [42-1] be GRANTED, the motion to suppress eyewitness identification [35-1] be DENIED AS MOOT and recommending deft's motion to disclose & make informants available for interview [36-1] be DENIED. RR Ruling deadline set for 11/22/01 for Pedro Figueroa-Vejar (3) (cc: all counsel). 13pgs (lg) [Entry date 10/24/01]

10/23/01	56	EXHIBIT LIST by plaintiff USA as to defts Eduardo Pelayo-Ruelas (1), Miguel Angel Larios (2) and Pedro Figueroa-Vejar (3) from motion hearing held on 10/3/01. 2pgs (lg) [Entry date 10/24/01]
11/7/01	57	OBJECTIONS & supporting memorandum by pltf USA to Report & Recommendations [55-1], [54-1], & [53-1] as to all defts'. 9 pgs (dd) [Entry date 11/08/01]
11/16/01	58	TRANSCRIPT OF MOTION HRG held 10/03/01 before Noel as to deft Eduardo Pelayo-Ruelas (1), Miguel Angel Larios (2), Pedro Figueroa-Vejar (3). (Court Reporter: Kristine Mousseau). 66 pgs (SEPARATE) (dd) [Entry date 11/19/01]
11/19/01	59	AFFIDAVIT of Steven E. Wolter by defendant Pedro Figueroa-Vejar. 3 pgs (mf) [Entry date 11/20/01]
11/19/01	60	MEMORANDUM by defendant Pedro Figueroa-Vejar in opposition to the govt's objections to report & recommendation [57-1]. 9 pgs (mf) [Entry date 11/20/01]
11/27/01	61	MEMORANDUM by defendant Eduardo Pelayo-Ruelas (1) in opposition to the govt's objections to Report and Recommendation [57-1]. 3pgs (lg) [Entry date 11/28/01]
1/2/02	62	MOTION in limine to exclude prior conviction by Eduardo Pelayo-Ruelas (1). 2 pg(s) (dd) [Entry date 01/09/02]
1/8/02	63	ORDER (Chief Judge James M. Rosenbaum / date signed 1/7/02) denying motion to suppress statements obtained as a result of search & seizure [40-1] as to Pedro Figueroa-Vejar (3), granting motion to suppress physical evidence obtained as a result of search & seizure [42-1] as to Pedro Figueroa-Vejar (3), granting motion to suppress eyewitness identification [35-1] as to Pedro Figueroa-Vejar (3), granting motion to suppress statements obtained as a result of search & seizure [23-1] as to Eduardo Pelayo-Ruelas (1), denying motion to suppress evidence obtained as a result of search & seizure [24-1] as to Eduardo Pelayo-Ruelas (1), denying motion to suppress evidence based upon illegal search as to Miguel Angel Larios (2) [27-1], finding the motion to suppress evidence based upon illegal arrest [28-1] moot as to Miguel Angel Larios (2), denying motion to disclose & make informants available for interview [36-1] as to Eduardo Pelayo-Ruelas (1) & # 45 as to deft Pedro Figueroa-Vejar (3) (cc: all counsel). 10 pgs (dd) [Entry date 01/09/02] [Edit date 01/09/02]
1/8/02	64	MINUTES: before Chief Judge James M. Rosenbaum JURY IMPANELED AND SWORN as to defts Eduardo Pelayo-Ruelas (1) and Miguel Angel Larios (2). Interpreters Luis Olvera and Gerald Burneister-Oliveros (Spanish w/Betmar) present. Court Reporter: Dawn Hansen. 1pg (lg) [Entry date 01/11/02]

1/8/02	65	JURY PANEL RECORD as to Eduardo Pelayo-Ruelas (1) and Miguel Angel Larios (2). 1pg (lg) [Entry date 01/11/02]
1/9/02	66	ORDER FOR DISMISSAL OF INDICTMENT (Chief Judge James M. Rosenbaum / date signed 1/8/02) the indictment is dismissed as to Pedro Figueroa-Vejar (3) (cc: all counsel, USM & PTS). 1pg (lg) [Entry date 01/11/02]
1/9/02	67	MINUTES before Chief Judge James M. Rosenbaum for FIRST DAY TRIAL as to Eduardo Pelayo-Ruelas (01) and Miguel Angel Larios (02): interpreters Luis Olivera & Gerald Bruneister-Oliveros present. Court Reporter: Dawn Hansen. (1 page) (ps) [Entry date 01/14/02]
1/14/02	68	MINUTES before Chief Judge James M. Rosenbaum for LAST DAY JURY TRIAL/VERDICT RETURNED as to Eduardo Pelayo-Ruelas(01) and Miguel Angel Larios (02): closing arguments made; jury charged; defts Eduardo Pelayo-Ruelas and Miguel Angel Larios are found guilty as charged in Counts 1 & 2; jury instructed regarding drug quantity; jury question #1 rec'd and answered by court; supplemental verdict returned; jurors polled & all concur; jurors excused; exhibits returned to counsel; PSI Report ordered; defts in custody. Court Reporter: Dawn Hansen. (1 page) (ps) [Entry date 01/16/02]
1/14/02	69	JURY QUESTION & RESPONSE FROM THE COURT as to Eduardo Pelayo-Ruelas and Miguel Angel Larios. (3 pages) (ps) [Entry date 01/16/02]
1/14/02	70	VERDICT as to Eduardo Pelayo-Ruelas (01) finding the deft guilty as charged in Counts 1 and 2 of the indictment. (1 page) (ps) [Entry date 01/16/02]
1/14/02	71	VERDICT as to Miguel Angel Larios (02) finding the deft guilty as charged in Counts 1 & 2 of the indictment. (1 page) (ps) [Entry date 01/16/02]
1/14/02	72	SUPPLEMENTAL VERDICT as to Eduardo Pelayo-Ruelas (01). (2 pages) (ps) [Entry date 01/16/02]
1/14/02	73	SUPPLEMENTAL VERDICT as to Miguel Angel Larios (02). 2 pgs (ps) [Entry date 01/16/02]
1/23/02	74	AMENDED ORDER (Chief Judge James M. Rosenbaum / 1/22/02 / nunc pro tunc 1/7/02) as to Eduardo Pelayo-Ruelas (01), Miguel Angel Larios (02), Pedro Figueroa-Vejar (03) amending order filed 1/8/02 [rulings on motions does not change] (cc: all counsel) 10 pages (ps) [Entry date 01/24/02]
4/3/02	75	POSITION of deft with respect to sentencing Miguel Angel Larios (02). (6 pages) (ps) [Entry date 04/03/02]

5/8/02	76	MOTION and ORDER FOR CHANGE OF CUSTODY as to Miguel Angel Larios (2) by Magistrate Judge E. S. Swearingen (cc: all counsel, PTS & USM). 2pgs (mik) [Entry date 05/09/02]
6/13/02	77	MINUTES: before Chief Judge James M. Rosenbaum SENTENCING Miguel Angel Larios (2) to counts 1 & 2. Custody of BOP 120 months on counts 1 & 2 to be served concurrently; 5 years supervised release; $200.00 spec assmt. Deft remanded to custody of USM. Court Reporter: Dawn Hansen. 1pg (lg) [Entry date 07/30/02]
7/26/02	78	JUDGMENT/STATEMENT OF REASONS as to defendant Miguel Angel Larios (3) by Chief Judge James M. Rosenbaum (dated 7/19/02) (Copies dist'd). 4pg(s) (lg) [Entry date 07/30/02]
7/29/02	79	POSITION of dft with respect to sentencing Eduardo Pelayo-Ruelas (1). 2pgs (lg) [Entry date 07/30/02]
7/29/02	80	MOTION for downward departure by Eduardo Pelayo-Ruelas (1). 2pg(s) (second part of doc # 79) (lg) [Entry date 07/30/02]
8/2/02	81	MINUTES: before Chief Judge James M. Rosenbaum SENTENCING Eduardo Pelayo-Ruelas (1) counts 1 & 2 - Custody of BOP for 120 months, deft to be given credit for time served, 5 yrs supervised release, spec assmt of $200.00. Deft's motion for downward departure [80-1] is granted. Court Reporter: Dawn Hansen. 1 pg (dd) [Entry date 08/12/02]
8/5/02	83	NOTICE OF APPEAL to the 8th Circuit Court of Appeals by defendant Eduardo Pelayo-Ruelas (1) from judgment dated 8/9/02 [82-1] (cc: all counsel, deft & Court Reporters) 2pgs (dd) [Entry date 08/12/02]
8/9/02	82	JUDGMENT/STATEMENT OF REASONS as to defendant Eduardo Pelayo-Ruelas (1) by Chief Judge James M. Rosenbaum (dated 8/9/02) (Copies dist'd) 5 pg(s) (dd) [Entry date 08/12/02]
8/12/02	--	DELIVERED TWO CERTIFIED COPIES of each of the following to the Court of Appeals, St. Paul Office: Revised information sheet, Notice of Appeal, Order or Judgment and Docket entries as to defendant Eduardo Pelayo-Ruelas (1) (dd) [Entry date 08/12/02]
8/13/02	--	Three (3) sealed PSIs sent to USCA, St. Paul, as to Eduardo Pelayo-Ruelas (01). (ps) [Entry date 08/13/02]
8/14/02	--	NOTIFICATION BY CIRCUIT COURT of Appellate Docket Number 02-3056 as to defendant Eduardo Pelayo-Ruelas (1). (lg) [Entry date 08/14/02] [Edit date 08/14/02]
8/14/02	--	Sent to USCA, St Paul, transcript, Doc. #58, as to Eduardo Pelayo-Ruelas (01). (ps) [Entry date 08/14/02]

8/14/02	84	TRANSCRIPT OF attempted change of plea held 1/8/02 before JMR as to defendant Miguel Angel Larios (2) (Court Reporter: Timothy J. Willette). 25pg(s) (SEPARATE) (lg) [Entry date 08/15/02]
8/21/02	--	Sent to USCA, St Paul, three (3) designated clerk's records as to Eduardo Pelayo-Ruelas (1). (lg) [Entry date 08/21/02]
8/22/02	85	Clerk's Record on Appeal delivered to the 8th Circuit Court as to Eduardo Pelayo-Ruelas (1) (cc: Counsel). 3pgs (lg) [Entry date 08/22/02]
9/26/02	86	TRANSCRIPT OF TRIAL held 1/14/02 before JMR as to Eduardo Pelayo-Ruelas (01) and Miguel Angel Larios (02). (Court Reporter: Dawn Hansen). 100 pages (SEPARATE) (ps) [Entry date 10/01/02]
9/26/02	87	TRANSCRIPT OF SENTENCING held 8/2/02 before JMR as to defendant Eduardo Pelayo-Ruelas (01). (Court Reporter: Dawn Hansen). 12 pages (SEPARATE) (ps) [Entry date 10/01/02]
10/1/02	--	Sent to USCA, St Paul, transcripts, Doc.#'s 86 & 87, as to Eduardo Pelayo-Ruelas (01). (ps) [Entry date 10/01/02]

PROCEEDINGS BEFORE UNITED STATES JUDGE JAMES M. ROSENBAUM

SENTENCING

CRIMINAL NO. [redacted] 01-228 (JMR /FLN) Date of Hrg: 6-13-02
Judge MJ

Court Reporter: Dawn Hansen

Interpreter _____ Language ___

PROBATION OFFICER -

UNITED STATES OF AMERICA, Plaintiff, — Nathan Petterson, Government's Counsel

v.

(1) Miguel Angel Larios, Defendant. — Robert Miller, Defendant's Counsel
Deft #

The Clerk is directed to change the defendant's name from _____

to _____ **and add the indicted name as an alias.**

(x) Custody of the Bureau of Prisons for (Ct. 1 & 2 - 120 months. Deft. given credit for time served. Def to participate in the 500 hour substance or alcohol abuse program.

( ) Voluntary Surrender on _____ (date).
(XX) Supervised Release for 5 years, with conditions as outlined on the Judgment & Commitment Order.

( ) Probation for _____, with conditions as outlined on the Judgment Order.

( ) Restitution ordered in the total amount of $ _____. To be paid to the following victims in the following amounts: _____

( ) Fine in the amount of $_____ ( ) Interest is waived
(XX) Special Assessment in the amount of $ 200.00 for Ct. 1 & 2.
(XX) Remaining counts are dismissed on motion of the U.S. Attorney.
(XX) Defendant Advised of Appeal Rights.
(XX) Defendant returned to/taken into the custody of the U.S. Marshal.
( ) Defendant's bond continued until voluntary surrender date.

() The Court recommends a facility in the State of____

Signature of Deputy Clerk or Officer of the Court

United States District Court

FAX COVER SHEET

To:	Jay Apperson
Fax:	[redacted]
From:	Katherine Moerke
	Phone: [redacted]
	Fax: [redacted]
Date:	September 26, 2002
Pages:	4 (including this cover sheet)

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MINNESOTA
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6 United States of America,) CR 01-228 (2) (JMR/FLN)
7 Plaintiff,)
8 -v-)
9 Miguel Angel Larios,) June 13, 2002
10 Defendant.) 10:00 o'clock, a.m.
St. Paul, Minnesota
11 ----------
12
13
14 BEFORE THE HONORABLE CHIEF JUDGE JAMES M. ROSENBAUM
15 UNITED STATES DISTRICT COURT JUDGE
16 CRIMINAL SENTENCING PROCEEDINGS
17
18
19
20 * * *
21
22
23 JEANNE M. ANDERSON
24 Registered Merit Reporter
[redacted] Minnesota 55101
25

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16 THE COURT: Okay. And by the way, the reason I
17 cleared out the courtroom is because this transcript is a
18 secret transcript, it is sealed. Okay?
19 And anything you tell the Government, they are not going
20 make public either, okay? They may use it for whatever
21 purpose they need to use it, that is a different thing. They
22 are not going to burn you out in this deal. I just hate to
23 see somebody throw their life and their time away. I was 19
24 once. It wasn't recently, but it is time to make a real good
25 decision. Okay?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: With that, I will close the record and I

3 will step off the Bench. You do whatever you want to do. If

4 the answer is no, the answer is no, that is fine. You already

5 know what I am going to sentence you to, we have got no more

6 secrets left. All right?

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UNITED STATES DISTRICT COURT
District of Minnesota

UNITED STATES OF AMERICA

v.

ALFREDO PRIETO
Name of Defendant

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 98-137(4)(DSD/AJB)

Thomas Dunnwald
Defendant's Attorney

THE DEFENDANT:

[x] was found guilty on count 1 of the Second Superseding Indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846, 841(a)(1) and (b)(1)(A)	Conspiracy to Distribute and Possess with Intent to Distribute Methamphetamine	06/16/98	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)
[ ] Count(s) (is)(are) dismissed on the motion of the United States.

7-18-00

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant Information:

Soc. Sec. No.: [redacted]
Date of Birth.: [redacted]
USM No.: [redacted]

Residence Address:

[redacted]

Mailing Address: (If different from residence address)

July 2, 1999
Date of Imposition of Sentence

Judge David S. Doty, United States District Judge

July 2, 1999
Date

Filed JUL 2 1999
Francis E. Dosal, Clerk
Judgment Entd_____
Deputy Clerk_____

ENTERED
11/4/99

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer 10 days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risk that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: ALFREDO PRIETO
Case Number: 98-137(4)(DSD/AJB)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapons.

2. The defendant shall comply with the rules and regulations of the Immigration and Naturalization Service (INS) and, if deported from this country, either voluntarily or involuntarily, not reenter the United States illegally. Upon any reentry to the United States during the period of court-ordered supervision, the defendant shall report to the nearest U.S. Probation Office within 72 hours.

3. The defendant shall undergo mandatory drug testing as set forth by 18 U.S.C. §§ 3563(a) and 3583(d).

Defendant: ALFREDO PRIETO
Case Number: 98-137(4)(DSD/AJB)

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth on Sheet 5, Part B:

	Assessment	Fine	Restitution
Totals:	$100.00		

[] If applicable, restitution amount ordered pursuant to plea agreement . . . . . $

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Sheet 5, Part B, may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[] The interest requirement is waived.

[] The interest requirement is modified as follows:

RESTITUTION

] The determination of restitution is deferred, until . An Amended Judgment in a Criminal Case will be entered after such determination.

] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:			

] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[] The interest requirement is waived.

[] The interest requirement is modified as follows:

Payments are to be made to the Clerk, U.S. District Court, for disbursement to the victim.

* Findings for the total amount of losses are under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Defendant: ALFREDO PRIETO
Case Number: 98-137(4)(DSD/AJB)

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [x] in full immediately; or

B [] $ immediately, balance due (in accordance with C, D, or E); or

C [] not later than ; or

D [] in installments to commence days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [] in installments of $ over a period of year(s) to commence days after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

[] Joint and Several

[] The defendant shall pay the costs of prosecution.

[] The defendant shall pay the following court cost(s):

[] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the Clerk U.S. District Court and sent to the United States District Court, attention Financial Department, 300 South 4th Street, Minneapolis, Minnesota 55415.

Defendant: ALFREDO PRIETO
Case Number: 98-137(4)(DSD/AJB)

STATEMENT OF REASONS

[] The court adopts the factual findings and guideline application in the presentence report.

OR

[x] The court adopts the factual findings and guideline application in the presentence report except (see attachment if necessary):

See attachment.

Guideline Range Determined by the Court:

Total Offense Level: 44.

Criminal History Category: I.

Imprisonment Range: Life imprisonment.

Supervised Release Range: 5 years

Fine Range: $25,000 to $4,000,000

[x] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $

[] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[] For offenses committed on or after September 13, 1994, but before April 23, 1996, that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[] Partial restitution is ordered for the following reason(s):

[] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[x] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

See attached.

OR

[] The sentence departs from the guideline range

[] upon motion of the government, as a result of defendant's substantial assistance.

[] for the following reason(s):

DEFENDANT: ALFREDO PRIETO
CRIMINAL NO.: 98-137(4)(DSD/AJB)

I. FINDINGS OF FACT

The court adopts those factual statements contained in the presentence investigation report as to which no objections have been filed. Defendant, however, has objected to a number of the factual statements contained in the report. Specifically, defendant objects to the factual findings contained in paragraphs 20, 27, 30, 41, 44, 51, 52, 55, 56, and 63-65. The court will address each in turn.

Defendant first objects to the statement in paragraph 20 that the description of the offense conduct contained in the PSR is based on investigative materials from the Drug Enforcement Agency and Minnesota Bureau of Criminal Apprehension. To the extent the probation officer used materials in addition to those provided as discovery to the defendant or introduced as exhibits at trial, defendant requests that where such material forms the basis for statements in the report, the underlying documentation or statement be noted and described. At the evidentiary hearing held several weeks ago, defendant also requested to review all the materials provided to the probation officer by the U.S. Attorney's Office.

Under the Sentencing Guidelines, the PSR plays a critical role in determining a defendant's sentence. For this reason, the report must be as complete as possible and include as much relevant information concerning the background, character, and conduct of a defendant to assist the court in determining the appropriate sentence. In preparing the PSR, the probation officer culls through information provided to her by a number of sources, including the government and the defendant. After gathering all this information, the probation officer prepares a relevant, coherent, and substantiated report, which is disclosed to the court and the parties and which is subject to review and challenge by the parties.

To assure candor and the free flow of information to the court, the probation officer should not be subject to disclosure of information gathered in preparation of the PSR. See U.S. v. Sherlin, 67 F.3d 1208, 1217 (6th Cir. 1995); U.S. v. Jackson, 978 F.2d 903 (5th Cir. 1992), cert. denied, 113 S. Ct. 2429 (1993). The court is required to make findings of fact regarding that information in the final report to which defendant objects; materials gathered by the probation officer but not reported in the PSR have no role in the sentencing process. Probation materials are presumptively confidential court materials, for which the court determines the extent of disclosure. See U.S. v. Charmer Industries, Inc., 711 F.2d 1164, 1170 (2nd Cir. 1983). The general rules of criminal discovery, including Brady, Giglio, and the Jencks Act, have not been applied to probation materials. Thus, defendant has no right to examine all the materials reviewed by the probation officer in reviewing the PSR.

The defendant also does not have the right to have the underlying documentation for each statement in the PSR disclosed to him. If defendant objects to a statement in the

report, the court must resolve the dispute utilizing the preponderance of the evidence standard or determine that such statement will not be taken into account in sentencing defendant. Here, defendant has objected to a number of specific factual statements; accordingly, the court will now resolve such disputes.

In paragraph 27, defendant objects to the assertion that Hernan Espino, upon his arrest, instructed his wife to contact defendant. Defendant maintains that this statement is not supported by any material known to the defense, and because such assertion is unfounded it should be removed. The court has reviewed Government Exhibit 102A and the record from trial, and concludes that the PSR should be modified to reflect that co-defendant Espino asked his wife whether Jose Luis Villanueva and defendant had left Minnesota to go back to California, and that Espino told his wife that she should have gone to California with Villanueva. The court notes that while this information is relevant because it ties defendant to co-defendants Espino and Villanueva, this is a factual dispute that does not impact the sentencing guidelines for this defendant.

In paragraph 30, defendant contends that the conclusion of DEA agents that defendant was responsible for the packaging and delivery of all three packages of methamphetamine is unsupported by any material known to the defense. The court finds, however, that a preponderance of the evidence supports the agents' conclusion that Monroy and defendant were responsible for all three packages of methamphetamine seized by postal inspectors in late April 1998. All three packages were similar in size and weight, had identical packaging, and were sent at approximately the same time from different locations in California. All the packages contained bundles of approximately four kilograms of methamphetamine wrapped in plastic and grease, and were surrounded by packaging materials in a cardboard box. All three packages were sent to Minnesota when defendant was in this state, and shortly after their seizure defendant returned to California. The packages arrived when defendant was working closely with Monroy, and were sent to addresses associated with Monroy. Defendant was also directly tied to the package delivered to Maria Avalos. Because of all these factors, it was reasonable for agents to conclude that defendant was tied to all three packages.

In paragraph 41, defendant maintains that no support is offered for the assertion that he and co-defendant Castillo returned together to Minnesota from California on June 8, 1998. However, in Government Exhibit 133A, Monroy tells Bahena that his nephew, Castillo, and defendant are coming by airplane and that he is going to the airport to pick them up. This exhibit is corroborated by a Sun Country Airlines ticket for Castillo dated June 8, 1998, from Los Angeles to Minneapolis. The court therefore finds the PSR to be accurate, but does note that this factual dispute does not impact the guidelines for this defendant.

Defendant next objects to several assertions in paragraph 44. Specifically, he objects to the statement that he was called by Villanueva after Villanueva had been

dropped off at the Denver airport and told to come back to the airport to pick up the gun which had been packed in Villanueva's suitcase. Also, defendant objects to the statement that he transferred a child's pool full of money into Tiarks's truck after defendant's own vehicle broke down in Utah. Defendant maintains that neither of these statements is supported by any material known to him.

The court resolves this factual objection by referring to the trial testimony of Sonia Barber. Barber testified that after she dropped Villanueva (Cura) at the airport in Denver, he called her back to the airport to pick up a gun that defendant had put in Villanueva's suitcase. Barber testified that Villanueva told her that defendant had put the gun in the suitcase. As for the swimming pool, Barber testified that defendant and Castillo transferred all of their material to Tiarks's truck after defendant's truck broke down. She also testified that upon the group's arrival in California defendant took the swimming pool out of Tiarks's truck, and kept the money contained therein. The PSR should be modified to reflect these clarifications.

In paragraph 51, defendant objects to the statement that in April 1998 Barber was with Tiarks, Monroy, Villanueva, and defendant and saw 3 pounds of cocaine in the dryer at Monroy's house. Defendant contends that both Tiarks and Zuniga denied this incident. Defendant also objects to Barber's statement that he often talked about making deliveries of drugs, contending that such statement is unsupported by any material known to the defense.

Barber testified at trial that she saw Monroy drying three to four pounds of cocaine in his dryer, and that defendant was one of the people present. Tiarks, during his trial testimony, did not remember defendant being present. The court need not resolve this factual dispute, however, as the cocaine at issue was not attributed to defendant for sentencing purposes, and the court will not rely on this information. Barber also testified at trial that defendant often talked about making deliveries of drugs and that defendant was a drug distributor. The court therefore over-rules defendant's second objection to this paragraph.

In paragraph 52, defendant objects to the assertion that defendant met Tiarks in February 1998, claiming such statement is unsupported by any material known to the defense. Defendant also points out that Tiarks's statement regarding the dryer incident contradicts Barber's account. Tiarks testified at trial that he worked on a truck belonging to defendant in the Spring of 1998, and drove with defendant to California in May 1998. While there appears to be some dispute regarding exactly when Tiarks and defendant first met, the court need not resolve this dispute for purposes of sentencing. As for the dryer incident, the court has already reviewed the testimony of Barber and Tiarks regarding defendant's presence during the drying of the cocaine, and has determined that this dispute also need not be resolved.

In paragraph 55, defendant objects to the statements from Diane Zuniga's proffer statement that defendant paid $2000 to Avalos for accepting a package of drugs, was jointly responsible for a shipment of drugs with Monroy, and that defendant was the sole contact with the source of those drugs, again contending that such statements are unsupported by any material known to the defense. Defendant also contends that Zuniga's statement that she had seen weapons at Monroy's apartment is unclear as to time and context.

Zuniga testified at trial. She stated that the drugs sent to Avalos's house were defendant's drugs. Zuniga also testified that defendant's source for these drugs was a Cuban, who would kill Avalos and her family, and possibly Monroy and Zuniga, if Avalos could not produce the search warrant papers to prove that none of them had stolen the drugs. Zuniga further testified that defendant and Monroy agreed to pay Avalos for receiving the package, even though it was seized. The time and context of Zuniga's observation of the weapons in Monroy's apartment is also clear as to time and context. The PSR relates that Zuniga saw a machine gun and three handguns in Monroy's apartment following Monroy's arrest in June 1998. Monroy was arrested on June 15, 1998, and Zuniga was arrested one day later on June 16, 1998. Thus, Zuniga must have seen the weapons during the time between the arrests.

Defendant contends that he should not be included in the summary contained in paragraph 56, contending that the assertions of the PSR do not support defendant's inclusion. Paragraph 56 concludes that defendant was one of a group of individuals responsible for the importation and distribution of large quantities of methamphetamine in the State of Minnesota. The court finds that this statement is supported by a preponderance of the evidence in this case. Indeed, in convicting defendant on the conspiracy count, the jury concluded that defendant was involved in drug trafficking beyond a reasonable doubt.

Defendant next objects to all of the assertions contained in paragraph 63 of the PSR, which is a summary of his involvement in the instant offense. Specifically, defendant objects to the statements concerning his participation in the conspiracy, his supervision of others, his participation in the seized packages of methamphetamine and both shipments of this drug, his role in the offense, and his carrying of weapons. Defendant contends all of these statements are unsupported by any material known to him.

The court discusses defendant's control and influence over Castillo, Barber, Tiarks and others, and defendant's accountability for the seized packages and the first and second shipments of drugs elsewhere. The court finds all these statements to be accurate. As for the statement that defendant "was often seen carrying firearms during the course of his drug trafficking activities," the court finds that this statement should be changed to reflect that defendant possessed weapons in connection with his drug activities. Defendant objects to the statement in paragraph 64 that Castillo delivered drugs

and money for defendant. Defendant contends that because Castillo is only responsible for one delivery to Espino, he was logically directed by Monroy in that conduct and not by defendant.

This argument, however, overlooks the substantial amount of record evidence showing that defendant controlled and influenced Castillo. Castillo accompanied defendant to California in mid-May 1998 with Tiarks and Barber. Monroy had kicked Castillo out of his house, and defendant assumed responsibility for Castillo. See Government Exhibit 129A. Monroy stated that Castillo was defendant's gopher. See Government Exhibit 132A.

On June 8, 1998, defendant sent the first load to Minnesota, and accompanied Castillo back to Minnesota to distribute the drugs. When the drugs arrived on June 12, 1998, Castillo called a customer named Jose and told Jose that he should page defendant. See Government Exhibit 151A.

The evidence demonstrates that Castillo was supervised by both Monroy and defendant during the course of this drug conspiracy. Once Monroy lost interest in Castillo, defendant took him under his wing. After Castillo left Minnesota for California with defendant, defendant controlled and influenced him through the time they returned to Minnesota to distribute the first shipment of methamphetamine. The court therefore concludes that a preponderance of the evidence supports the statement in paragraph 64 that Castillo delivered drugs for defendant.

Finally, in paragraph 65, defendant points to the contrast between Sonia Barber's characterization as a minor participant and the defendant's characterization as a manager as evidence of the inconsistency of the PSR in dealing with cooperating defendants and those convicted after trial.

The evidence, however, demonstrates that defendant is more culpable than Barber. Indeed, Barber was supervised by Monroy, Cura, and at times defendant himself. Defendant had multiple sources of methamphetamine and his own customers. As will be discussed more fully below, defendant was an organizer and leader of this conspiracy.

APPLICATION OF GUIDELINES TO FACTS

The court adopts the probation officer's conclusions as to the applicable guidelines as to which no objections have been filed. Defendant asks that the court provide a basis for attributing to him approximately 35 kilograms of methamphetamine. Defendant also objects to the conclusion in paragraph 76 that he not be afforded credit for acceptance of responsibility, to the conclusion in paragraph 79 that he be given a two-level enhancement for possession of a firearm and the conclusion in paragraph 81 that he be afforded a three-level increase for his role in the offense. The court resolves these objections as follows:

1. Calculation of Base Offense Level

Defendant requests a calculation of his base offense level. The PSR holds defendant responsible for at least 35 kilograms of methamphetamine, with a corresponding base offense level of 38. The court holds defendant responsible for the following drugs: 1) the 11.8 kilograms of methamphetamine seized from the three packages in April 1998; 2) the first shipment of methamphetamine totaling 6.8 kilograms; and 3) the 15.8 kilograms of methamphetamine in the second shipment. This totals 34.4 kilograms.

The three packages seized by postal inspectors were similar in size, weight, and appearance, and each contained bundles of methamphetamine wrapped in plastic and grease. The packages were all sent from California to addresses associated with Monroy, with whom defendant was working closely. Defendant admitted the package seized from Maria Avalos belonged to him, and it is more likely than not that he was responsible for all three packages. Even if Monroy or Cura was ultimately responsible for the packages, their actions were reasonably foreseeable to defendant, in that they were in furtherance of the drug conspiracy. Defendant is therefore held responsible for the 11.8 kilograms seized from the three packages.

Defendant is also held responsible for the 6.8 kilograms contained in the first shipment of methamphetamine to Minnesota on June 8, 1998, and the second shipment of 15.8 kilograms on June 16, 1998. As evidenced by the wiretap communications, defendant sent the first load to Monroy from California and then flew to Minnesota to distribute it. Defendant also had Nano load the second shipment into Tiarks's truck for Tiarks to drive back to Minnesota from California. Tiarks was to await word from defendant about what to do once Tiarks arrived in the Twin Cities. It was not only reasonably foreseeable to defendant that Nano sent Tiarks to Minnesota with the methamphetamine, but defendant had actual knowledge of the trip. Government Exhibits 125A, 126A, 129A, 132A, 133A, 146A, 148A, 151A-155A, and 157A provide details regarding defendant's participation in arranging the two shipments.

It should also be noted that while defendant is accountable for 34.4 kilograms of methamphetamine, under the Sentencing Guidelines only 15 kilograms is necessary to reach offense level 38, an amount far exceeded in this case.

2. No Reduction for Acceptance of Responsibility

Defendant maintains that the statement in paragraph 76 that he denied any involvement in the offense is wrong. Defendant maintains that he clearly admitted his involvement in the conspiracy during his presentence interview.

During the evidentiary hearing held on June 16, 1999, defendant denied selling and distributing drugs in Minnesota and denied arranging for loads of methamphetamine to

come to Minnesota. See Transcript at 14. This denial, when combined with the fact that defendant put the government to its burden of proof at trial, leads to the result that no credit for acceptance of responsibility will be afforded defendant.

3. Enhancement for Possession of Firearm

Defendant maintains that the statement in paragraph 79 that defendant "was known to have possessed firearms throughout the conspiracy" and the corresponding 2-level enhancement for possession of a handgun is not warranted because no specific facts tying him to any weapons exist.

A two-level increase in the offense level is called for by § 2D1.1(b)(1) of the Guidelines if a dangerous weapon was possessed during the course of the drug conspiracy. This enhancement is applicable if the government proves by a preponderance of the evidence that a weapon was used by defendant or co-conspirators to further the drug conspiracy and the possession was reasonably foreseeable to defendant. U.S. v. Tauil-Hernandez, 88 F.3d 576, 579 (8th Cir. 1996). The crucial inquiry is whether "'it is not clearly improbable that the weapon had a nexus with the criminal activity.'" Id. at 580 (quoting U.S. v. Richmond, 37 F.3d 418, 419 (8th Cir. 1994), cert. denied, 115 S. Ct. 1163 (1995)). In a conspiracy case such as this, a sufficient nexus is established if "'the weapon was found in the same location where drugs or drug paraphernalia were stored, or where part of the conspiracy took place.'" Id. (quoting U.S. v. Payne, 81 F.3d 759, 763 (8th Cir. 1996)).

In this case, a great deal of evidence was introduced at trial tying defendant to multiple firearms used during the course of this drug conspiracy. The court will review some of that evidence. Diane Zuniga testified that after authorities seized the package of drugs from Maria Avalos on May 1, 1998, defendant was one of several people at Monroy's house on Concordia Avenue who was getting drug money and weapons ready to go in light of the seizure. Part of the drug conspiracy took place at Monroy's home, as drug money was stored there. This evidence alone establishes that either defendant himself or his co-conspirators possessed weapons in furtherance of the conspiracy, and that defendant was present and had actual knowledge of the possession of weapons.

There is, however, further evidence supporting the enhancement. Defendant was involved in planning and implementing a drug-related trip to California in mid-May. The purpose of the trip was to transport drug money to California and pick up a large quantity of drugs. Sonia Barber testified that after she dropped Cura off at the Denver airport, she was instructed to return to the airport to pick up a gun that Cura told her defendant had put in his suitcase. When defendant's truck later broke down in Utah, defendant and Castillo took everything out of the broken truck and into Tiarks's truck, including the gun and the drug money.

Barber. Defendant objects that these assertions are unsupported by any material known to the defense and are contradicted by other portions of the PSR. Defendant contends he had no supervisory authority over these individuals and that no upward adjustment is warranted on this basis.

Guideline Section 3B1.1 provides that "If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," the offense level should be increased by four levels. A 3-level enhancement is warranted if a defendant is a "manager or supervisor," but not an "organizer or leader." Application Note 4 to Guideline Section 3B1.1 provides some factors the court should consider when determining whether a 3 or 4 level enhancement is appropriate. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. The Eighth Circuit has held that a four-level enhancement applies to a defendant who employs or otherwise arranges for intermediaries to sell his drugs. U.S. v. Miller, 91 F.3d 1160, 1163 (8th Cir. 1996). Defendant must control or influence others. Id. at 1163-64. The Eighth Circuit has broadly interpreted the terms "leader" and "organizer" and the Guidelines require only that defendant organized or led one participant to trigger the four-level enhancement. U.S. v. McCullen, 86 F.3d 135, 138 (8th Cir. 1996).

The evidence received at trial shows that defendant was more than a manager or supervisor. Defendant was an organizer and leader of a drug ring that imported large quantities of methamphetamine from California to Minnesota. The evidence demonstrates that he not only controlled and influenced Castillo, Tiarks, and Barber, but also Zuniga, Avalos, and others as well.

First, the drugs seized from Avalos on May 1, 1998, belonged to defendant, who passed on a threat to have Avalos and others killed if they couldn't show that they did not steal the drugs which were seized. Shortly after Avalos gave defendant the search warrant papers, defendant went to Barber's residence and told her to hold on to them.

Tiarks testified that after Cura was arrested in Denver defendant took over. Defendant used Tiarks's cell phone to find out what happened to Cura, and told Tiarks and Barber that he would take care of things until they found out what to do. Defendant told Tiarks and Barber where to go and stay and how the plans would change. Tiarks further testified that he and Barber did whatever defendant told them to do once they reached California. Defendant also controlled and influenced Castillo on this trip, as previously detailed.

Once Monroy was arrested, defendant took control in Minnesota. Zuniga testified that she had to contact defendant to get him to take the drugs and weapons out of

Monroy's house. Defendant told Barber to wait for Tiarks to arrive with the second shipment, and to call him when Tiarks arrived. Tiarks testified that if he had reached the Twin Cities with the methamphetamine in his truck, he was going to wait for direction from defendant because Monroy had been arrested.

Because defendant controlled and influenced these people, a four level enhancement is warranted, despite the recommendation in the PSR that a three-level enhancement be given. Such an increase is not a violation of defendant's due process rights and is allowed by applicable Eighth Circuit precedent. See U.S. v. Milton, 153 F.3d 891, 897 (8th Cir. 1998); U.S. v. Adipietro, 983 F.2d 1468, 1473-74 (8th Cir. 1993).

Defendant has moved for a downward departure pursuant to Sentencing Guideline § 5K2.0. Under this Guideline and 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds that there exists a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. The Sentencing Commission has provided certain potential mitigating factors in the Guidelines and either forbids, discourages, or encourages their consideration. See Koon v. U.S., 116 S. Ct. 2035, 2044-45 (1996).

Defendant's motion is based on a number of factors, including his lack of any significant criminality, his reported diabetes, his actual role in the overall conspiracy, the extent to which he acted out of fear and duress, his limited education and lack of "cultural knowledge," and the otherwise inequitable sentences being given to others similarly situated in this case but for their cooperation with law enforcement officers.

The court has considered all of these arguments proffered by defendant, but finds that a downward departure is not warranted in this case. Defendant's lack of a criminal history is already taken into account by the Sentencing Table, and his sentence is based on his having a criminal history category of I. Defendant's reported diabetes is not a relevant factor in this case. See Guideline Section 5H1.4. Defendant's role has been extensively discussed today, and as one of the most culpable defendants in this case defendant clearly does not deserve a downward departure on this basis. There is no evidence that defendant, in committing the instant offense, was acting out of fear or duress. Indeed, the evidence shows just the contrary, that defendant instilled fear in others. Education and cultural knowledge are not relevant. See Guideline Section 5H1.2 and 5H1.10. As for defendant's inequity argument, it is clear to the court that none of the defendants who cooperated with the government were similarly situated to defendant, and therefore do not deserve the same sentence imposed today. After considering the facts specific to this case, the court concludes that nothing removes this case from the "heartland" of similar offenses. No downward departure will be given.

STATEMENT OF REASONS FOR SENTENCE IMPOSED

The court finds that a sentence of life imprisonment is appropriate in this case. In imposing this sentence, the court has considered the nature and circumstances of the offense and the history and characteristics of the defendant. Among other factors, the court has taken into account the massive quantity of drugs involved and defendant's role as one of the leaders and organizers of this drug conspiracy. It is the court's belief that the sentence imposed reflects the seriousness of the offense, promotes respect for the law, provides just punishment, affords adequate deterrence to criminal conduct and protects the public from further crimes of the defendant.

AO245B (Rev. 8/96) Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
District of Minnesota

UNITED STATES OF AMERICA

v.

JUAN VILLANUEVA MONROY
Name of Defendant

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 98-137(3)(DSD/AJB)

Richard H. Kyle, Jr.
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) .

pleaded nolo contendere to count(s) which (was) (were) accepted by the court.

x] was found guilty on count 1 of the Second Superseding Indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
1 USC 846, 841(a)(1) nd (b)(1)(A)	Conspiracy to Distribute and Possess With Intent to Distribute Methamphetamine	06/16/98	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed urnuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)

Count(s) (is)(are) dismissed on the motion of the United States.

[72 (3.00)]

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 0 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments mposed by this judgment are fully paid.

Defendant Information:

Soc. Sec. No.: [redacted]
Date of Birth: [redacted]
USM No.: [redacted]

June 14, 1999
Date of Imposition of Sentence

Judge David S. Doty, United States District Judge

June 14, 1999
Date

Residence Address:

[redacted]

Mailing Address: (If different from residence address)

Filed JUN 15 1999
Francis E. Dosal, Clerk
Judgment Ent
Deputy Clerk

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned or a total term of:

Life Imprisonment.

x] The Court makes the following recommendations to the Bureau of Prisons:

Incarceration in a facility in the Los Angeles, California area.
Defendant be afforded review under 18 U.S.C. Section 1400.

x] The defendant is remanded to the custody of the United States Marshal.

] The defendant shall surrender to the United States Marshal for this district:
[] at
[] as notified by the United States Marshal.

] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[] before 2:00 p.m. on .
[] as notified by the United States Marshal.
[] as notified by the U.S. Pretrial Services Office.

RETURN

'have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy U.S. Marshal

\ true copy to _____ sheet(s)
:f the record in my custody
Certified _____, 19___
'rancis E. Dosal, Clerk
y _____
Deputy Clerk

'efendant: JUAN VILLANUEVA MONROY
:ase Number: 98-137(3)(DSD/AJB)

SUPERVISED RELEASE

'pon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

he defendant shall report to the probation office in the district to which the defendant is released within 72 hours of :lease from the custody of the Bureau of Prisons.

be defendant shall not commit another federal, state, or local crime.
he defendant shall not illegally possess a controlled substance.

or offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to ne drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by ie probation officer.

The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that e defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised lease in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this dgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth low). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

the defendant shall not leave the judicial district without permission of the court or probation officer;
the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
the defendant shall support his or her dependents and meet other family responsibilities;
the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
the defendant shall notify the probation officer 10 days prior to any change in residence or employment;
the defendant shall refrain from excessive use of alcohol;
the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.

The defendant shall undergo mandatory drug testing as set forth by 18 U.S.C. § 3563(a) and § 3583(d).

The defendant shall comply with the rules and regulations of the Immigration and Naturalization Service (INS) and, if deported from this country, either voluntarily or involuntarily, not reenter the United States illegally. Upon any reentry to the United States during the period of court-ordered supervision, the defendant shall report to the nearest U.S. Probation Office within 72 hours.

Defendant: JUAN VILLANUEVA MONROY
Case Number: 98-137(3)(DSD/AJB)

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth on Sheet 5, Part B:

	Assessment	Fine	Restitution
Totals:	$100.00		

☐ If applicable, restitution amount ordered pursuant to plea agreement . . . . . $

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on the Sheet 5, Part B, may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred, until . An Amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:			

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

Payments are to be made to the Clerk, U.S. District Court, for disbursement to the victim.

** Findings for the total amount of losses are under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

Defendant: JUAN VILLANUEVA MONROY
Case Number: 98-137(3)(DSD/AJB)

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [x] in full immediately; or

B [] $ immediately, balance due (in accordance with C, D, or E); or

C [] not later than ; or

D [] in installments to commence days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [] in installments of $ over a period of year(s) to commence days after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

[] Joint and Several

[] The defendant shall pay the costs of prosecution.

[] The defendant shall pay the following court cost(s):

[] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the Clerk U.S. District Court and sent to the United States District Court, attention Financial Department, 300 South 4th Street, Minneapolis, Minnesota 55415.

STATEMENT OF REASONS

[] The court adopts the factual findings and guideline application in the presentence report.

OR

[x] The court adopts the factual findings and guideline application in the presentence report except (see attachment if necessary):

See attachment.

Guideline Range Determined by the Court:

Total Offense Level: 44.

Criminal History Category: I.

Imprisonment Range: Life imprisonment.

Supervised Release Range: 5 years

Fine Range: $25,000 to $4,000,000

[x] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $

[] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[] Partial restitution is ordered for the following reason(s):

[] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[x] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

The massive amount of drugs involved and defendant's role as one of the leaders and organizers of this drug conspiracy.

OR

The sentence departs from the guideline range

[] upon motion of the government, as a result of defendant's substantial assistance.

[] for the following reason(s):

DEFENDANT: **JUAN VILLANUEVA**
CRIMINAL NO.: **98-137(3)(DSD/AJB)**

FINDINGS OF FACT

The court adopts those factual statements contained in the presentence investigation report as to which no objections have been filed. Defendant, however, has objected to a number of the factual statements contained in the report. Specifically, defendant objects to the factual findings contained in paragraphs 51, 52, 55, and 62 regarding his possession of one or more firearms during the commission of this offense and to those numerous portions of the presentence investigation report summarized in paragraph 74 that attribute to him approximately 55 kilograms of methamphetamine. The court will address each in turn.

1. **Possession of Firearms**

Defendant objects to Sonia Barber's reference in paragraph 51 to his alleged sale of an M-16 rifle to an unindicted coconspirator, to the statement in paragraph 52 that Stephen Tiarks saw defendant carry firearms during the course of his drug dealing, and to the statement in paragraph 55 that co-defendant Zuniga saw a machine gun and three handguns in defendant's apartment after his arrest in June 1998. Defendant also objects to the statement in paragraph 62 that he "was often seen carrying firearms during the course of his drug trafficking activities[.]" Defendant denies ownership or knowledge of these guns and contends that the government presented no evidence at trial regarding these guns.

The testimony at trial did not touch upon defendant selling an M-16 rifle to an unindicted coconspirator as detailed in paragraph 51, and this statement should therefore be struck from the report. The statements in paragraphs 52 and 55, however, were supported by testimony offered at trial. Co-defendant Tiarks testified that most of the time Tiarks saw defendant during the course of the conspiracy, defendant possessed a gun. Both Diane Zuniga and Sonia Barber testified that the night of defendant's arrest there were weapons at his apartment. The testimony of Tiarks, Zuniga, and Barber was given under oath and was subject to lengthy cross-examination, and the court finds it is sufficiently reliable. The court therefore over-rules defendant's objections to the statements in paragraphs 52, 55, and 62 of the report.

2. **Drug Quantity**

Defendant generally objects to those paragraphs of the background and summary sections of the presentence investigation report that attribute to him 55 kilograms of methamphetamine. Defendant claims the government's evidence against him is based on intercepted telephone calls arising from a flawed wiretap and testimony of government witnesses which is not credible.

The court has reviewed the background and summary sections of the presentence investigation report, and finds the information presented therein to be consistent with the evidence received at trial. The report clearly documents each instance the defendant was involved in the distribution of a particular quantity of methamphetamine, and it is clear from the evidence presented at trial that he is accountable for approximately 55 kilograms of the drug. The testimony of Special Agent Shanley and the intercepted wiretap calls show that defendant was responsible for organizing, receiving, and distributing both the first and second shipment of methamphetamine, totaling 22.7 kilograms. Defendant should also be held accountable for the package sent to Maria Avalos and the packages sent from Cura to the apartment building of Arturo Bahena, defendant's biggest customer. Defendant also distributed at least nine pounds of methamphetamine to "Sony." Barber, Tiarks, and Zuniga testified that they received packages of drugs for defendant.

While defendant challenges the wiretap and cooperating witness testimony, such evidence was presented at trial and must have been relied on by the jury in returning its guilty verdict. The conclusion in paragraph 74 that defendant is responsible for at least 55 kilograms of methamphetamine is therefore accurate. It must also be noted that only 15 kilograms is required to place defendant at base offense level 38, an amount that is far exceeded in this case.

APPLICATION OF GUIDELINES TO FACTS

The court adopts the probation officer's conclusions as to the applicable guidelines as to which no objections have been filed. Defendant does object to the conclusion in paragraph 75 that he be given a two-level enhancement for possession of a firearm and the conclusion in paragraph 77 that he be afforded a four-level increase for his role in the offense. The court resolves these objections as follows:

1. Enhancement for Possession of Firearm
   a. Defendant's Contention

Defendant maintains that the 2-level enhancement for possession of a handgun in paragraph 75 is not warranted because the government has not proven by a preponderance of the evidence that he possessed firearms during the alleged conspiracy or that the weapons were connected to the offense. He contends that the testimony of co-defendants Barber, Tiarks, and Zuniga regarding his possession of guns is vague and contradictory and cannot alone form the basis of a two-point enhancement.

   b. Court's Resolution

A two-level increase in the offense level is called for by § 2D1.1(b)(1) of the Guidelines if a dangerous weapon was possessed during the course of the drug conspiracy. Tiarks testified that he saw defendant in possession of guns on many

occasions, both at Sonia Barber's residence and at defendant's own residence. Barber also testified that defendant kept a firearm at his house. Both of these residences were used during the course of the conspiracy to store drugs, drug money, and drug paraphernalia. Indeed, the testimony provided by Tiarks and Barber established that defendant used his residence to receive, store, and package drugs.

Barber and Zuniga both testified that the night defendant was arrested there were drugs and guns at defendant's residence. Barber also testified that defendant used her home for drug transactions with a customer named "Sony," and that "Sony" paid defendant for drugs with guns. The Eighth Circuit has held that exchanging guns for drugs is sufficient to establish a nexus for a two-level increase under § 2D1.1(b)(1). See U.S. v. Rogers, 150 F.3d 851, 868 (8th Cir. 1998).

The evidence at trial demonstrated that defendant possessed weapons in association with his drug dealing on other occasions as well. Diane Zuniga testified that after police seized the drugs at Maria Avalos's house in May 1998, defendant and others were at defendant's residence on Concordia, they had guns, and were distributing the drug money that had been stored in one of defendant's children's upstairs bedrooms.

On other occasions, testimony revealed that defendant's co-conspirators possessed guns in furtherance of their drug dealing, and that this possession was reasonably foreseeable to defendant, given that defendant had seen them with guns and drug money in the past.

A preponderance of the evidence clearly supports the conclusion that defendant possessed a weapon during the course of the conspiracy, and the weapon had a nexus with his criminal drug activities. A two-level enhancement is therefore clearly warranted.

2. Adjustment for Role in the Offense

a. Defendant's Contention

Defendant contends that a four-level increase under Guideline Section 3B1.1(a) is not warranted. He maintains that co-defendant Villanueva exercised sole decision-making authority from California, and that co-defendant Prieto orchestrated the final two shipments from California to Minnesota. He contends that others were responsible for recruiting members of the conspiracy and that there is no evidence he made any money from his alleged drug dealing.

b. Court's Resolution

Guideline Section 3B1.1 provides that "if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," the

offense level should be increased by four levels. A 3-level enhancement is warranted if a defendant is a "manager or supervisor," but not an "organizer or leader." Application Note 4 to Guideline Section 3B1.1 provides some factors the court should consider when determining whether a 3 or 4 level enhancement is appropriate. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. The Eighth Circuit has held that a four-level enhancement applies to a defendant who employs or otherwise arranges for intermediaries to sell his drugs. U.S. v. Miller, 91 F.3d 1160, 1163 (8th Cir. 1996). Defendant must control or influence others. Id. at 1163-64.

DEFENDANT'S DOWNWARD MOTION

The evidence received at trial shows that defendant was more than a manager or supervisor. Defendant was an organizer and leader of a drug ring that imported large quantities of methamphetamine from California to Minnesota. Defendant supplied drugs to others for distribution, directed the activities of numerous criminal participants, including Sonia Barber, Stephen Tiarks, Arturo Balsera, Diane Zuniga, Martina Zuniga, and Edward Castillo, and made a great deal of money. A four-level increase is therefore warranted.

Defendant has moved for a downward departure pursuant to Sentencing Guideline § 5K2.0. Under this Guideline and 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds that there exists a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. The Sentencing Commission has provided certain potential mitigating factors in the Guidelines and either forbids, discourages, or encourages their consideration. See Koon v. U.S., 116 S. Ct. 2035, 2044-45 (1996).

Defendant's motion is based on extraordinary family circumstances and conditions of confinement. Defendant maintains that he is the father of two teenage sons, whom he has raised since his divorce a number of years ago. Defendant claims he is the sole source of financial support to his sons. He avers that since his arrest his sons have returned to Mexico to live with their biological mother; however, because the mother is unable to financially support the boys their living conditions are, in the defendant's words, "desperate." Defendant also maintains that a downward departure is warranted from a life sentence because such a sentence would mean defendant is unlikely to ever see his boys again, as they will be unable to obtain a visitor's visa to visit their father in prison. Finally, defendant contends that his status as a deportable alien results in unusual or exceptional hardship in his conditions of confinement.

The court has considered all of these arguments proffered by defendant, but finds that a downward departure is not warranted in this case. While the court empathizes with defendant's family, the hardship imposed by defendant's incarceration is no different than the difficulty experienced by many families when the primary wage earner is incarcerated. See Guideline Section 5H1.6 ("Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."). While defendant's boys have been forced to return to Mexico, this is not a basis for a departure because, as illegal aliens, the boys were never legitimately in this country to begin with. As for the fact that defendant may never see his sons again due to the difficulties inherent in visiting their father in prison in the United States, the court disagrees with defendant when he argues that he "deserves" a sentence that will allow him to see his sons again. Defendant was a leader of one of the largest drug conspiracies in this state's history. Defendant supplied drugs to others for distribution and directed the activities of numerous other participants in the conspiracy. After considering the facts specific to this case, the court concludes that nothing removes this case from the "heartland" of similar offenses.

AO 245B (Rev. 8/96) Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

v.

ARTURO BAHENA
Name of Defendant

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 98-137(6)(DSD/AJB)

Kevin M. O'Brien
Defendant's Attorney

THE DEFENDANT:

[x] pleaded guilty to count 1 of the Second Superseding Indictment.
[] pleaded nolo contendere to count(s) which (was) (were) accepted by the court.
[] was found guilty on count(s) after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846, 841(a)(1) and (b)(1)(A)	Conspiracy to Distribute and Possess With Intent to Distribute Methamphetamine	06/16/98	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on count(s)
[] Count(s) (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant Information:

Soc. Sec. No.: [redacted]
Date of Birth.: [redacted]
USM No.: [redacted]

May 25, 1999
Date of Imposition of Sentence

Judge David S. Doty, United States District Judge

May 26, 1999
Date

Residence Address:
[redacted]

Mailing Address: (if different from residence address)

Filed MAY 26 1999
Francis E. Dosal, Clerk
Judgment Entd
Deputy Clerk
(distd)

(547)

Defendant: ARTURO BAHENA
Case Number: 98-137(6)(DSD/AJB)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

320 months.

[x] The Court makes the following recommendations to the Bureau of Prisons:

Incarceration in a facility close to defendant's wife Maria Angelica Mendez-Perez, Cr. No. 98-137(8) and sister Karina Bahena, Cr. No. 98-137(9).

[x] The defendant is remanded to the custody of the United States Marshal.

[] The defendant shall surrender to the United States Marshal for this district:
[] at
[] as notified by the United States Marshal.

[] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[] before 2:00 p.m. on .
[] as notified by the United States Marshal.
[] as notified by the U.S. Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy U.S. Marshal

A true copy in _____ sheet(s)
of the record in my custody.
Certified _____, 19___
Francis E. Dosal, Clerk
By _____
Deputy Clerk

Defendant: ARTURO BAHENA
Case Number: 98-137(6)(DSD/AJB)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer 10 days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risk that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: ARTURO BAHENA
Case Number: 98-137(6)(DSD/AJB)

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth on Sheet 5, Part B:

	Assessment	Fine	Restitution
Totals:	$100.00		

[] If applicable, restitution amount ordered pursuant to plea agreement . . . . . $

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612 (f). All of the payment options on the Sheet 5, Part B, may be subject to penalties for default and delinquency pursuant to 18 U.S.C § 3612 (g).

[] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[] The interest requirement is waived.

[] The interest requirement is modified as follows:

RESTITUTION

[] The determination of restitution is deferred, until . An Amended Judgment in a Criminal Case will be entered after such determination.

[] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment

Totals:

Payments are to be made to the Clerk, U.S. District Court, for disbursement to the victim.

** Findings for the total amount of losses are under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

Defendant: ARTURO BAHENA
Case Number: 98-137(6)(DSD/AJB)

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [x] in full immediately; or

B [] $ immediately, balance due (in accordance with C, D, or E); or

C [] not later than ; or

D [] in installments to commence days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [] in installments of $ over a period of year(s) to commence days after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

[] Joint and Several

[] The defendant shall pay the costs of prosecution.

[] The defendant shall pay the following court cost(s):

[] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the **Clerk U.S. District Court** and sent to the **United States District Court, attention Financial Department, 300 South 4th Street, Minneapolis, Minnesota 55415.**

ATTACHMENT

DEFENDANT: **ARTURO BAHENA**
CRIMINAL NO.: **98-137(6)(DSD/AJB)**

I. FINDINGS OF FACT

The court adopts those factual statements contained in the presentence investigation report as to which no objections have been filed. Defendant, however, has objected to a number of the factual statements contained in the report. Specifically, defendant objects to the factual findings contained in paragraphs 25, 32, 39, and 41-48. The court will address each in turn.

First, Paragraph 32 of the report details that during the execution of search warrants at the apartments adjacent to the apartment of defendant, he was intercepted in a telephone conversation with his wife and co-defendant Maria Angelica Mendez-Perez in which she told defendant there were squad cars outside. Defendant, responded "We're the heaviest, look, the heaviest in Minnesota." Defendant maintains this translation is faulty and that in addition to the possible meaning of heavy, "pesado" may also mean annoyed, tiresome, and difficult."

Although the translated materials were used during the trial, the interpreter testified to the accuracy of the translations, and the alternative definitions posited by defendant are somewhat nonsensical, the court will not consider this statement in sentencing defendant, and therefore need not resolve this factual dispute.

Defendant also objects to paragraph 39 of the presentence investigation report, which details conversations between defendant and Jason Johnson in which they discussed drugs, specifically methamphetamine. Defendant contends that the telephone conversations do not reveal the type of drug which was being discussed, and it is speculative to state that they were discussing methamphetamine.

The court notes that after his arrest Jason Johnson told the government he had purchased methamphetamine from Bahena on June 11, 1998, the date of the calls in controversy. It is therefore reasonable to conclude that the drug discussed was methamphetamine.

Defendant next objects to the finding in paragraph 25 of the report that in an April 24, 1998, telephone conversation, defendant and co-defendant Monroy discussed 7 pounds of methamphetamine which defendant told Monroy to drop off at Karina Bahena's home. The report also mentions a second conversation in which defendant and Monroy discussed the collection of money. Defendant objects to the suggestion that he and Monroy discussed methamphetamine during their April 24 conversation, and maintains that the conversation does not make clear either the quantity or type of drug they were discussing. Defendant therefore contends the report is speculative and he should not be

II. APPLICATION OF GUIDELINES TO FACTS

The court adopts the probation officer's conclusions as to the applicable guidelines as to which no objections have been filed. Defendant does object to the conclusion in paragraph 76 that his base offense level should be 38, to the conclusion in paragraph 77 that a 2 level enhancement for possession of a handgun is warranted, and the conclusion in paragraph 79 that a 4 level enhancement is warranted because defendant was an organizer or leader of this drug conspiracy. The court resolves these objections as follows:

1. Base Offense Level

Defendant first contends that he should be held responsible for between five and fifteen kilograms of methamphetamine, rather than approximately 25 kilograms as detailed in the presentence investigation. This amount consists of approximately four kilograms of methamphetamine which defendant sold to Shawn Simonson, the three kilograms of methamphetamine discussed with co-defendant Monroy on April 24, 1998, and the approximately two kilograms of methamphetamine received from Monroy in June 1998. Defendant maintains that the presentence investigation report erroneously attributes to him the 16 kilograms seized from co-defendant Tiarks. Defendant therefore believes the correct base offense level is 36, not 38 as detailed in the presentence investigation report.

The court, however, agrees with the conclusion reached in the presentence investigation report that defendant's base offense level should be 38 based on the amount of drugs involved here. The evidence demonstrates that defendant was well aware of the second shipment of methamphetamine, for which he denies liability, and that he knew how much of the drug was planned for the shipment. Indeed, the evidence shows that defendant was to receive at least the majority if not all of the drugs involved in the second shipment. Because defendant is responsible for more than 15 kilograms of methamphetamine, the correct base offense level is 38.

2. Enhancement for Possession of Handgun

Defendant next objects to the conclusion in paragraph 77 of the presentence investigation report that he be given a 2 level enhancement for possession of a handgun pursuant to Guideline Section 2D1.1(b)(1). The gun at issue was found in defendant's sister's apartment, where she had stored the gun under her mattress. Defendant maintains that this firearm was not possessed, by him or his sister, in connection with the offense and the requisite nexus between the possession of the gun and the conspiracy has not been proven.

The court finds that a preponderance of the evidence does not establish a nexus between the defendant's possession of the gun and the commission of the underlying drug

trafficking offense. The fact that defendant had his sister store the gun for him will be taken into account in determining his role in the offense.

3. Adjustment for Role in the Offense

Finally, defendant objects to the 4 level increase applied in paragraph 79 for his role in the offense. The presentence investigation concludes that because defendant was an organizer or leader of a criminal activity that involved five or more participants, the offense level should be increased by 4 levels. The court notes that while the report indicates this enhancement is given pursuant to Section 3D1.1(a), the Guideline Section at issue is actually 3B1.1(a), and the report should be amended in this regard. Defendant contends that only a 3 level increase pursuant to Section 3B1.1(b) should be given because defendant was only a manager or supervisor, but not an organizer or leader. Defendant argues that his role was that of a drug distributor one rung on the ladder below co-defendants Monroy, Villanueva, and Prieto. Defendant contends that because he was not involved in the planning or financing of the second shipment, a 3 level enhancement correctly reflects his role in the offense.

Application Note 4 to Guideline Section 3B1.1 provides some factors the court should consider when determining whether a 3 or 4 level enhancement is appropriate. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

The evidence shows that defendant was more than a manager or supervisor. He controlled the actions of his sister and wife, and is responsible for the lengthy periods of imprisonment visited on them. Defendant supplied large quantities of drugs to a number of his co-defendants and was in constant contact with the individuals who supplied him with his drugs. The telephone transcripts show that defendant, through his contact with co-defendants Monroy and Villanueva, was in complete control of the shipments of drugs that were destined for him and was a main participant in this extensive drug conspiracy. In sum, he was a key player in the conspiracy. Defendant earned a great deal of money from his criminal activities, as evidenced by the $113,000 sewn into the lining of his clothing when he was on his way to Mexico. Based on the evidence present in the record from the trial and other proceedings in this case, the court agrees with the presentence investigation report that a 4 level enhancement is warranted in this case.

AO 245B (Rev. 8/96) Sheet 1 - Judgment in a Criminal Case

United States District Court

District of Minnesota

UNITED STATES OF AMERICA
v.
JESUS IBARRA-TORRES

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 99-351(2)

Frederick Goetz
Defendant's Attorney

THE DEFENDANT:

[✓] pleaded guilty to count 1 of the Indictment.
[ ] pleaded nolo contendere to counts(s) ___ which was accepted by the court.
[ ] was found guilty on count(s) ___ of the Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involves the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. 846	Narcotics	Unknown-10/28/99	1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on counts(s) ___ and is discharged as to such count(s).
[✓] Counts 3 and 8 of the Indictment are dismissed on the motion of the United States.

Special Assessment Amount $ 100 in full and immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: [redacted]
Defendant's Date of Birth: [redacted]
Defendant's USM No.: [redacted]
Defendant's Residence Address:
[redacted]

Defendant's Mailing Address:

September 29, 2000
Date of Imposition of Judgment

Signature of Judicial Officer

ANN D. MONTGOMERY, United States District Judge
Name & Title of Judicial Officer

October 2, 2000
Date

Filed OCT 02 2000
Francis E. Dosal, Clerk
Judgment Entd
Deputy Clerk
(Dist 'd)

A true copy in 5 sheet(s) of the record in my custody.
Certified _____, 2000
by _____
Deputy Clerk

(402)

CASE NUMBER: 99-351(2)
DEFENDANT: JESUS IBARRA-TORRES

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 188 months.

[✔] The court makes the following recommendations to the Bureau of Prisons:
It is recommended that defendant be incarcerated at an institution in California.

[✔] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at ___ on ___.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] before _ on ___.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13,1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[✔] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit home or her at an time a home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not possess any firearms or other dangerous weapons.
2. The defendant shall comply with the rules and regulations of the Immigration and Naturalization Service (INS) and, if deported from this country, either voluntarily or involuntarily, not reenter the United States illegally. Upon and reentry to the United States during the period of court-ordered supervision, the defendant shall report to the nearest U.S. Probation Office within 72 hours.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[✔] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): The court has determined that the total offense level of 38 is appropriate reflecting the quantity of methamphetamine as 55 pounds or more, a 3-level role adjustment for defendant's role as a supervisor or manager, and no increase for the use of a minor in the commission of an offense.

Guideline Range Determined by the Court:

Total Offense Level: 38

Criminal History Category: I

Imprisonment Range: 235 to 293 months

Supervised Release Range: 5 to __ years

Fine Range: $ 25,000 to $ 4,000,000

[✔] Fine is waived or is below the guideline range, because of inability to pay.

Total Amount of Restitution: $__

[ ] Full restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s).

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[x] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons: A sentence of 188 months reflects the severity of the defendant's criminal behavior and serves the ends of justice.

OR

[x] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[x] for the following specific reasons: Defendant has waived a hearing and consented to administrative deportation. This allows a discretionary downward departure equivalent to a 2-level reduction. United States v. Cruz-Ochoa, 85 F.3d 325 (8th Cir. 1996). The court has also stated reasons for a downward departure on the record.

DISSENTING VIEWS

These views dissent from the Committee Report on H.R. 4689, the "Fairness in Sentencing Act of 2002." H.R. 4689 is legislation that disapproves of amendment 4 of the "Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary," submitted by the United States Sentencing Commission to Congress on May 1, 2002. If enacted, the bill would prevent individuals who perform low-level drug trafficking functions from qualifying for a mitigating role adjustment under the United States Sentencing Guidelines ("Sentencing Guidelines").

BACKGROUND AND SUMMARY

Pursuant to the responsibilities outlined in the Sentencing Reform Act of 1984, on May 1, 2002, the United States Sentencing Commission ("Commission") transmitted to Congress its proposed amendments to the Sentencing Guidelines. Amendment 4, of the proposed amendments, seeks to modify § 2D1.1(a)(3)[1] of the guidelines to provide a maximum base offense level of 30 (which corresponds to 97 to 121 months imprisonment for a first-time offense) if the defendant receives and adjustment under § 3B1.2.[2] The Sentencing Commission chose to provide a maximum base offense level in order to limit the sentencing impact of drug quantity for offenders who perform relatively low-level trafficking functions, have little authority in the drug trafficking organization, and have a lower degree of individual culpability (e.g. "mules" or "couriers" whose most serious trafficking function is transporting drugs). Other aggravating adjustments in the trafficking guideline (e.g. the weapon enhancement at § 2D1.1(b)(1)) would continue to apply and enable the base level to be increased above 30, if necessary.

The manner in which the current sentencing guidelines are applied justify the need for the amendment. Under the current guidelines, the quantity of drugs involved in committing an offense is used as a proxy for determining the appropriate sentence for an individual offender. Under most instances, this system ensures that offenders who perform higher trafficking functions, such as organizers, manufacturers, supervisors, and managers are imprisoned for longer periods of time. However, in several other instances, the system leads to anomalus results. Particularly, in the cases of low-level offenders who perform minor trafficking functions as a part of a larger criminal enterprise.

H.R. 4689 chooses to ignore these abnormalities. The bill prevents low-level, first-offense drug offenders from receiving a miti-

[1] § 2D1.1(a)(3) instructs a judge to use the Drug Quantity Table to determine the appropriate offense level for drug offenders.

[2] § 3B1.2 provides a two to four level reduction, if the court makes a finding of fact that the defendant played a part in the committing the offense that makes him substantially less culpable than the average participant.

gating role adjustment under the sentencing guidelines. The bill, specifically, seeks to overturn the U.S. Sentencing Commission's studied and reasoned finding that true "fairness" mandates that low-level offenders receive less time than those who actually plan, control and profit from the criminal enterprise.

CONCERNS

1. H.R. 4689 promotes an overly broad sentencing scheme which prevents low-level offenders from being sentenced according to their actual level of culpability.

Prior to promulgating amendment 4, the Sentencing Commission conducted an intensive study of Federal cocaine cases sentenced in FY 2000 and found that powder cocaine offenders classified as "renters, loaders, lookout, users, and others" on average were held accountable for greater drug quantities (7,320 grams) than powder cocaine offenders classified as managers and supervisors (5,000 grams) or wholesalers (2,500 grams). The study went on to find that couriers and mules were held accountable for almost as much powder cocaine (4,950 grams) as managers and supervisors, and, often times, more than wholesalers.

Because the quantity of drugs involved in a criminal enterprise are used as a proxy for determining the appropriate sentence, the Commission's finding clearly prove that offenders who commit low-level trafficking functions on average are receiving longer sentences than high-level offenders. The Commission's amendment seeks to address this abnormality by offering a mitigating adjustment. Unfortunately, H.R. 4689 favors a broader sentencing scheme which ignores an individual's true culpability.

2. H.R. 4689 contradicts the advice and wisdom of judges, legal scholars and criminal law experts.

For some time, judges, practitioners and others have expressed concern that the guidelines do not strike the appropriate balance in regard to the sentencing of high- and low-level offenders. They have argued that as the initial determinant of an offense's seriousness (ie. before other aggravating and mitigating sentencing guideline adjustments are applied), quantity-based penalties in excess of 10 years imprisonment are inappropriately and unnecessarily long to achieve the purposes of sentencing as set forth in the Sentencing Reform Act of 1984. These beliefs were also reflected as far back as 1992, when then-Chairman William H. Wilkins, who is the current chairman of the Criminal Law Committee of the Judicial Conference of the United States, moved to adopt an amendment to the guidelines that would have limited the impact of drug quantity for certain mitigating role defendants.[3]

Finally, these sentiments were echoed in testimony delivered before the House Subcommittee on Crime, Terrorism, and Homeland Security. As part of his testimony before the Subcommittee, James M. Rosenbaum, Chief Judge of the U.S. District Court of Min-

[3] The amendment failed 3 to 2, but only because the two commissioners who voted against it wanted to decrease further the impact of drug quantity on the penalties for those offenders. Testimony of Charles Tetzlaff, General Counsel of the United States Sentencing Commission, before the House Subcommittee on Crime, Terrorism, and Homeland Security on May 14, 2002.

nesota, discussed several cases coming before his court where he had no choice under the existing guidelines and was forced to sentence minimal role offenders to as much time as more culpable offenders. He concluded his testimony by stating that such sentences were "improper" in his opinion and offered his support for the Commission's guideline amendment.[4]

CONCLUSION

The Commission's amendment is designed to reduce unfairness and disparity in the sentencing of codefendants with unequal culpability in a crime. Drug kingpins or other major players in a criminal enterprise would not qualify for a minimal role adjustment. Most of those individuals qualifying for this consideration receive very little, if any, profit from the criminal enterprise and generally have no knowledge of the quantity or value of the drugs transacted by the enterprise.

In our opinion, it is not fair to treat couriers, mules, gophers and lookouts who have no knowledge of the full scope of the drug trafficking activity the same as high-level offenders. We agree with the more reasoned approach being advanced by the Sentencing Commission, the U.S. Judicial Conference and many leading scholars.

JOHN CONYERS, JR.
BARNEY FRANK.
ROBERT C. SCOTT.
MELVIN L. WATT.

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[4] Testimony of Judge James M. Rosenbaum, Chief Judge of the US District Court in Minnesota, before the House Subcommittee on Crime, Terrorism, and Homeland Security on May, 14, 2002.