

use a dangerous weapon and someone other than that participant received bodily injury, increase by 2 levels. This increase should be applied in addition to any other specific offense characteristic called for in this subsection.

(B) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received serious bodily injury, or if the defendant induced or directed another participant to actually use a dangerous weapon and someone other than that participant received serious bodily injury, increase by 3 levels. This increase should be applied in addition to any other specific offense characteristic called for in this subsection.

(C) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received permanent or life-threatening bodily injury, or if the defendant induced or directed another participant to actually use a dangerous weapon and someone other than that participant received permanent or life-threatening bodily injury, increase by 4 levels. This increase should be applied in addition to any other specific offense characteristic called for in this subsection.”

37. Synopsis of Proposed Amendment: For offenses involving 50 or more marihuana plants, the guidelines use an equivalency of one plant = one kilogram of marihuana. This equivalency reflects the quantities associated with the five- and ten-year mandatory minimum penalties in 21 U.S.C. § 841. For offenses involving fewer than 50 marihuana plants, the guidelines use an equivalency of one plant = 100 grams of marihuana, unless the weight of the actual marihuana is greater. The one plant = 100 grams of marihuana equivalency was selected as a reasonable approximation of average yield taking into account (1) studies reporting the actual yield of marihuana plants (37.5—412 grams depending on growing conditions), (2) that for guideline purposes all plants regardless of size are to be counted while, in reality, not all plants will actually produce useable marihuana (e.g., some plants may die of disease before maturity; when plants are grown outdoors, some plants may be eaten by animals); and (3) that male plants, which are counted for guideline purposes, are frequently culled because they do not produce the same quality of marihuana as do female plants. The one plant to one kilogram ratio used in the statute has been criticized by

commentators as unrealistic. Courts have upheld this statutory ratio as a legitimate exercise of legislative authority (although not on the grounds that a marihuana plant actually produces anywhere close to one kilogram of marihuana). This amendment would detach the equivalency used in the guidelines from the one plant-one kilogram ratio used in the statute and substitute the 100 grams per marihuana plant ratio (currently used in the guidelines for cases involving fewer than 50 plants) for all cases.

Proposed Amendment: Section 2D1.1(c) is amended in the fifth note immediately following the drug quantity table by deleting “if the offense involved (A) 50 or more marihuana plants, treat each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marihuana plants,”.

The Commentary to § 2D1.1 captioned “Background” is amended in the first sentence of the fourth paragraph by deleting “In cases involving fifty or more marihuana plants, an equivalency of one plant to one kilogram of marihuana is derived from the statutory penalty provisions of 21 U.S.C. § 841(b)(1) (A), (B), and (D). In cases involving fewer than fifty plants, the statute is silent as to the equivalency. For cases involving fewer than fifty” and inserting in lieu thereof “For marihuana”, and in the last sentence of the fourth paragraph by deleting “, in the case of fewer than fifty marihuana plants,”.

38. Issue for Comment: The 100 to 1 ratio between crack cocaine base and cocaine used in the guidelines reflects the ratio found in 21 U.S.C. § 841(b) with respect to the amounts that require a five- or ten-year mandatory minimum sentence. This 100 to 1 ratio has been criticized by a number of commentators as unwarranted. Congress has directed the Commission to conduct a study with respect to this issue. The Commission’s report to Congress is forthcoming. The Commission requests comment as to whether the guidelines should be amended with respect to the 100 to 1 ratio, and if so, whether a 1 to 1, 2 to 1, 5 to 1, 10 to 1, 20 to 1 ratio, or some other ratio, should be substituted.

39. Synopsis of Proposed Amendment: This proposed amendment would revise § 2D1.1 so that the scale of the offense is based upon the quantity of the controlled substances with which the defendant was involved in a given time period. A number of commentators have suggested that the use of such a “snapshot” would provide a more accurate method of distinguishing the scale of the offense than the current

procedure of aggregating all the controlled substances regardless of the time period of the offense. See, e.g., proposed amendments submitted by the Practitioners’ Advisory Committee and Federal Defenders in the 1993–1994 amendment cycle; see also Judge Martin’s opinion in *United States v. Genao*, 831 F. Supp. 246 (S.D. N.Y. 1993). Use of a given time frame would reduce the sentencing impact of law enforcement decisions as to the number of “buys” to be made before arresting the defendant. Currently, for example, whether the defendant is arrested after two sales or ten sales may have a substantial impact on the guideline range. The legislative history of the mandatory minimum sentencing provisions in the Anti-Drug Abuse Act of 1986 (from which the offense levels in § 2D1.1 were derived) seems consistent with the use of a snapshot approach. The amounts at the ten-year mandatory minimum were chosen to be indicative of “major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs” and the amounts at the five-year level were chosen to be indicative of “the managers of the retail level traffic.” (Narcotics Penalties and Enforcement Act of 1986, H.R. Rep. No. 845, Part I, 99th Cong., 2nd Sess. 11–12 (1986)). In explaining the weights chosen for major traffickers, the House report states:

* * * after consulting with a number of DEA agents and prosecutors about the distributions patterns for these various drugs, the Committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. * * * The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing and distribution chain. (Id.).

The above language suggests that the Congress was focusing on the amount of controlled substances possessed at one time (or within a limited time frame) rather than a cumulative amount of controlled substances possessed over an unlimited time period. Furthermore, it is noted that the Drug Enforcement Administration’s investigation/prosecution priority classification scheme in effect at the time this mandatory minimum legislation was being considered graded cases by the amount of controlled substances distributed within a time period of 30 days; e.g., a Class I (major violator) was one who could be expected to distribute four kilograms of cocaine in a 30-day period; a Class II violator (mid-level violator) was one who could be