

Approach 2

43. Synopsis of Proposed

Amendment: When Congress enacted the Anti-Drug Abuse Act of 1986, it targeted the drug kingpins and mid-level managers for stiff penalties. To effect its objective, Congress used drug quantity as a proxy for seriousness of the offense and indicia of large drug organizations. Unintended consequences resulted from such an approach, principally low-level, non-violent drug offenders were snared by the quantity net. The attached proposal attempts to address these unintended consequences by offering an alternative to the present guideline for drug trafficking, § 2D1.1. Under this proposal, sentences for drug traffickers will not be determined on the basis of drug quantity. Instead sentences will be based on the type of drug in conjunction with other important sentencing factors identified by Congress as critical, such as the use and possession of weapons, related violence, and defendant culpability.

This proposed amendment shows two options. Option 1 abandons drug quantity as the measure of offense seriousness and relies instead on an array of factors to determine appropriate sanctions for drug traffickers. Specific offense characteristics for use of a weapon, weapon type, injury, and function and culpability in the offense provide additional sentence distinctions. By removing consideration of drug quantity, this proposed amendment simplifies the application of the drug guideline as there will be no need to determine the amount of drugs trafficked, or to calculate the amount of drugs attributed to each defendant in the drug conspiracy under the provisions of the relevant conduct guideline. Drug amount will no longer be a consideration, except that extremely large or small amounts may be a factor that could warrant departure. Instead, the court will simply determine the type of drug trafficked. Furthermore, this proposal provides greater increases in offense levels for defendants who use or possess firearms or who cause bodily injury. In addition, factors distinguishing defendant culpability on the basis of the function the defendant performed in the offense will become part of the drug guideline, rather than as role consideration in Chapter Three.

The seriousness of the drug trafficking offenses is currently determined primarily on the basis of the quantity of drugs involved. The current drug guideline structure presumes that the quantity of drugs involved in the offense is a reliable indicator of offense

seriousness in every case. Although quantity has the appearance of being non-subjective and easily determined, it can be significantly influenced by other factors such as the duration of the investigation, the fortuity of timing, and the plea negotiation process. For example, a distributor of cocaine could have an offense level as low as level 12 if the offense involved just one "buy-bust," or as high as level 38 if the investigation continued and involved repeated distributions. Practitioners report that determining the amount of drugs that each member of a large drug conspiracy is held accountable for at sentencing can be a daunting, speculative, and time-consuming task.

This proposed amendment has three base offense levels, while the current drug guideline has seventeen. The highest base offense level is for the most serious drugs: heroin, cocaine, and cocaine base. Imbedded in the current drug guideline and the mandatory minimum penalty structure is the premise that drugs of varying types pose varying degrees of harm. These three base offense levels reflect this distinction. Most would agree that heroin, cocaine, and cocaine base pose the greatest degree of harm, and that marijuana and hashish create lesser harms. Ranking of methamphetamine, LSD, and PCP is posited with marijuana and hashish. A third level is reserved for those drugs arguably less harmful, Schedules III, IV, and V controlled substances.

This proposed amendment also provides offense level increases based upon the type and use of weapons involved in the offense: 2, 3, 4, 5, 6, or 7 levels depending on the use and type of weapon. This increase only applies, however, if the defendant committed the act of weapon possession or use, or directed or induced another participant to do so. An additional increase of two levels is provided if the weapon involved was of the type listed in 26 U.S.C. § 5845(a) (e.g., machineguns, sawed-off shotguns, silencers, destructive devices).

The role considerations found in Chapter Three are moved into the drug guideline in this proposed amendment. The size of the drug organization becomes a proxy for drug quantity. The current drug guideline uses quantity as a proxy for role and culpability, and this results in many "false positives" when the quantity is great but the defendant's culpability is not. This proposal addresses role and culpability directly and adds a 10-level increase for leaders of drug organizations of 30 or more participants on the premise that this size organization was able to distribute,

import, or manufacture large quantities of drugs. This increase, unlike the quantity increases in the current guideline, only results for defendants who are kingpins and mid-level dealers in the offense, as Congress intended. The current aggravating role guideline contains two primary considerations, role and the number of participants in the offense. This proposal separates these factors into two specific offense characteristics for operational simplicity.

This proposed amendment provides a 2-level reduction for peripheral defendants. The term "peripheral" was used instead of minimal and minor because the case law interpreting these terms and the mitigating role guideline (§ 3B1.2) is not useful in the context of this guideline configuration. Without quantity to drive offense levels too high, the need to apply the mitigating role adjustment to reduce offense levels is greatly relieved. For example, the current quantity-based guideline frequently produced offense levels for couriers, mules, and street-level dealers well beyond five- and ten-year mandatory minimum sentences. Considerable pressure exists to view these defendants as having a mitigating role so their sentences could be reduced. The desired result seemed to be influencing the interpretation of who received the mitigating role reduction. Without quantity to drive offense levels up, the need to see those who actually import and distribute drugs as minor or minimal participants is eliminated.

Option 2 substitutes a limited quantity measure for the specific offense characteristic in Option 1 pertaining to the size of the organization. It does this by providing four quantity distinctions. The first distinction is built into the base offense level, and will provide for no increase unless the defendant is associated with the type and amount of drug specified in (c)(3) of the proposal's Drug Quantity Table. Two levels are added for drug amounts associated with offense levels 26 through 30 in the current Drug Quantity Table. Four levels are added for amounts associated with levels 32 and 34, and six levels for amounts associated with levels 36 and 38. Specific offense characteristic (b)(1) specifies that the increases for drug amount are based on the greatest amount of drugs that the defendant was associated with on any one occasion. By controlling the time factor, the guideline will screen more effectively for large-scale traffickers. For example, when drug amounts are aggregated over time (as with the current drug guideline) the same offense levels are added for the defendant who imports on one occasion