

**FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, AZ 85007**

**JON M. SANDS
Federal Public Defender**

**(602) 382-2700
1-800-758-7053
(FAX) 382-2800**

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Honorable Ricardo H. Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comments on Proposed Amendments Relating to Drug Offenses

Dear Judge Hinojosa:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders on the proposed amendments relating to drug offenses (including crack but not including 21 U.S.C. § 960a) that were published on January 30, 2007.

I. New Offenses Under the Combat Methamphetamine Epidemic Act of 2005

A. *Using a Facilitated Entry Program to Import Methamphetamine, §§ 2D1.1, 2D1.11*

The Commission has published for comment a proposal for sentencing defendants who use a facilitated entry program (e.g., FASTPASS) to import methamphetamine in violation of 21 U.S.C. § 865. The proposal would amend U.S.S.G. §§ 2D1.1 and 2D1.11 to add a two-level enhancement for a conviction under 21 U.S.C. § 865. It would also add an application note instructing courts how to impose the sentence so as to ensure that the portion of the sentence relating to the enhancement will be served consecutively. The proposal appears to implement Congress's intent and adequately reflects the seriousness of the offense.

In response to Issue for Comment 3(a), the increase should not be more than two levels and there should not be a minimum offense level. A defendant who imports methamphetamine and is not a minor or minimal participant is already subject to a two-level enhancement under § 2D1.1(b)(4). Proposed § 2D1.1(b)(5) would add another two-level increase for using a facilitated entry program in order to do so, thereby resulting in a four-level increase for any such defendant. Similarly, those in charge of any vessel that uses a facilitated entry program to commit a methamphetamine-related offense would

receive a four-level increase and a minimum offense level of 28 (in addition to the number of levels specified in the Drug Quantity Table) under the combined effect of §2D1.1(b)(2) and proposed § 2D1.1(b)(5).

Issue for Comment 3(b) asks whether the proposed enhancement should be expanded to reach defendants who are not convicted of methamphetamine-related offenses. It should not. 21 U.S.C. § 865 was enacted as part of the Combat Methamphetamine Epidemic Act of 2005. *See* Pub. L. 109-177, Title VII, section 731. The statute specifically applies only to defendants who use facilitated entry programs to commit offenses involving methamphetamine or the chemicals required to manufacture it. By requiring a conviction under § 865, the proposed enhancement is properly limited to methamphetamine-related cases, which is what Congress intended. *See* 151 Cong. Rec. H11279-01, H11309 (Dec. 8, 2005) (“This section of the conference report creates an added deterrent for anyone who misuses a facilitated entry program to smuggle methamphetamine or its precursor chemicals.”). Given Congress’ clear intent to target only defendants who use facilitated entry programs to import methamphetamine, there is no reason to expand the enhancement to reach offenses involving other drugs.

Issue for Comment 3(c) asks whether the Commission should amend § 3B1.3 to require a two-level increase for offenses that involve use of a facilitated entry program. Such an amendment would double count the offense conduct for convictions under 21 U.S.C. § 865, once under §§ 2D1.1 or 2D1.11 and again under § 3B1.3. One increase in Chapter Two is sufficient. Moreover, there is no justification for amending § 3B1.3 to reach any offense that involves use of a facilitated entry program. Congress has suggested no such broad concern, and such an amendment would stretch § 3B1.3 well beyond its meaning. Section 3B1.3 is intended to reach defendants who hold a position of public or private trust characterized by a special skill or by professional or managerial discretion. *See* 3B1.3, comment. (n. 1). People authorized to use a facilitated entry program do not have any special skill and do not exercise any discretion whatsoever. Nor are they subject to any less scrutiny than other travelers. Facilitated entry programs simply permit participants to reduce the amount of time they spend when entering the United States by providing much of the information required by U.S. Customs ahead of time. *See* United States Customs and Border Patrol, Secure Electronic Network for Travelers Rapid Inspection (SENTRI) available at http://www.cbp.gov/xp/cgov/travel/frequent_traveler/sentri/sentri.xml. In other words, the programs do not reduce border requirements for participants but merely provide an administratively easier method for meeting them. Program participants continue to be held to the same standards as all other travelers, including being subject to further inspection at border crossings. *See id.* There is no principled basis for concluding that use of a facilitated entry program is equivalent to holding a position of trust or having a special skill.

B. Manufacturing, Distributing or Possessing Methamphetamine on Premises Where a Minor Is Present or Resides, § 2D1.1

In addition to 21 U.S.C. § 865, section 734 of the Combat Methamphetamine Epidemic Act of 2005 created 21 U.S.C. § 860a, which provides an additional penalty for

manufacturing, distributing, or possessing with intent to manufacture or distribute methamphetamine on premises in which an individual who is under the age of 18 years is present or resides.

The Commission has proposed two alternatives for sentencing defendants convicted under § 860a. Option One would maintain the six-level enhancement with a floor of 30 under § 2D1.1(b)(8)(C) for any defendant who manufactured methamphetamine under circumstances that created a substantial risk of harm to the life of a minor, and would add a two-level enhancement for any defendant convicted under § 860a where the offense conduct did not create such a risk. Option Two would add an enhancement of six levels or to level 29 (whichever is greater) for § 860a convictions involving manufacturing or possessing with intent to manufacture, and an enhancement of two or three levels or to level 15 (whichever is greater) for § 860a convictions involving distributing or possessing with intent to distribute. Under the second option, the actual risk of harm to the minor would be irrelevant.

Issues for Comment 2. Both proposals are appropriately based on the offense of conviction and not relevant conduct rules. Relevant conduct (contrary to its original purpose) permits prosecutors to control sentencing, creates unwarranted disparity, results in unfairness, and is the primary source of criticism of the Guidelines. The Commission only recently announced that it was going to reconsider the relevant conduct rules. It should not add new unconvicted offenses to the Guidelines.

The proposed enhancements are also properly limited to the methamphetamine offenses addressed by § 860a, rather than covering all drug offenses. The Commission should not create new sentence enhancements not directed or even suggested by Congress. As discussed in Part I(A), *supra*, the Combat Methamphetamine Epidemic Act of 2005 is specifically focused, according to both the statutory language and the legislative history, on offenses involving methamphetamine.

Sentence enhancements solely for methamphetamine-related offenses are nothing new. In section 102 of the Methamphetamine and Club Drug Anti-Proliferation Act of 2000, Congress specifically directed the Commission to add what is now § 2D1.1(b)(8)(C) only for crimes involving the manufacture of amphetamine and methamphetamine. *See* Methamphetamine and Club Drug Anti-Proliferation Act of 2000, Pub. L. 106-310 (Dec. 16, 2000). It did so because of the drugs' unique manufacturing process, which involves combining chemicals in a manner that is unstable, volatile, highly combustible, and leaves toxic residue behind. *See* H.R. Rep. 106-878 (Sept. 21, 2000). Nothing in any subsequent legislation, including the Combat Methamphetamine Epidemic Act of 2005, has suggested that Congress believes § 2D1.1(b)(8)(C) should be expanded to reach other drugs. Nor has there been any suggestion that sentences for drug offenses are generally too low; to the contrary, the Commission's own reports reflect that, if anything, the drug guidelines are too harsh. There is thus no need and no justification to expand either § 2D1.1(b)(8)(C) or the proposed § 860a-based enhancements to apply to offenses involving any drug other than methamphetamine.

With respect to the specific proposals, we believe that Option One, which focuses on the actual risk of harm to a minor resulting from the manufacturing process, is more consistent with congressional intent and better reflects appropriate distinctions in culpability. It would result in significant increases in cases where a minor is actually put at substantial risk by the manufacturing process, which is the specific harm that Congress intended § 860a's enhanced penalties to address. *See* H.R. Conf. Rep. No. 333, 109th Cong., 1st Sess. 2005, 2006 U.S.C.C.A.N. 184, 208. It would also permit variations depending on the risk of harm attendant to the crime. For § 860a convictions involving possession or distribution, or where the defendant manufactured methamphetamine in such a way as to not create a substantial risk of harm, Option One permits a two-level enhancement, which is consistent with § 860a.

We oppose Option Two because it does not permit courts to take into account the risk of harm to the minor when sentencing a defendant convicted under § 860a conviction. Option Two would require a floor of 29 for any defendant convicted under § 860a of manufacturing or possessing with intent to manufacture methamphetamine. Given that § 860a does not require either that the minor actually be present during the commission of the crime or that the defendant knew that a minor was present or resided on the premises, the 29-level floor would vastly overstate the potential seriousness of the offense in many cases and would create unwarranted uniformity. Suppose, for example, there are two defendants, each with a criminal history category of I, who are each convicted under § 860a of manufacturing between 2.5 and 5 grams of methamphetamine. The first defendant committed the crime in an acquaintance's house while the minor resident was on vacation. The second defendant committed the crime while the minor resident was in the room. Under Option Two, these defendants would be treated equally, despite the clear differences in their culpability and the risk to the respective minors.

Option Two is explicitly premised on the assumption that manufacturing methamphetamine "poses an inherent danger to minors" in all cases. This assumption is not justified in all cases. As § 2D1.1, comment. (n. 20) recognizes, the danger posed by manufacturing methamphetamine can vary significantly depending upon numerous factors, including the quantity of chemicals or toxic substances, the manner in which such substances were stored and/or disposed, the duration of the offense, the extent of the operation, the location of the laboratory, and the number of people placed at substantial risk of harm. Unwarranted uniformity and other unintended consequences of lumping a variety of cases together should be avoided.

Additional Issues. Although not addressed in the Issues for Comment section, the Commission has also proposed to raise sentences for ketamine across the board by eliminating the 20-level cap in the Drug Quantity Table for ketamine, a Schedule III drug. This proposal appears to have been based on the mistaken assumption that ketamine distribution is covered under § 860a. *See* 72 Fed. Reg. 4372-01, 4390 (Jan. 30, 2007) (proposing to eliminate offense level cap for ketamine because "[i]f a defendant is convicted under 21 U.S.C. § 860a for distributing ketamine, however, the defendant is subject to a statutory maximum of 20 years"). As noted above, § 860a applies only to manufacturing and distributing offenses involving "methamphetamine, or its salts,

isomers, or salts of isomers.” See 21 U.S.C. § 860a. Ketamine does not fall within those categories and hence is not covered under § 860a. It may be that the Commission intended to refer to § 841(g), which does cover ketamine and which carries a twenty-year statutory maximum for convictions under that particular statute. The proposed amendments addressing § 841(g) are discussed in Part II, *infra*.

II. Using the Internet to Distribute Date Rape Drugs, § 2D1.1

Section 201 of the Adam Walsh Act created a new offense at 21 U.S.C. § 841(g), prohibiting knowing use of the Internet to distribute a date rape drug to any person knowing or with reasonable cause to believe either that the drug would be used in the commission of criminal sexual conduct or that the person is not an authorized purchaser as defined by the statute. The Commission has proposed three options for sentencing defendants convicted under § 841(g). Under Option One, the sentence would increase by either two or four levels for a § 841(g) conviction. Option Two would impose a four-level increase if the defendant was convicted of knowing or having reasonable cause to believe that the drug would be used in the commission of criminal sexual conduct. Option Three would impose a six-level increase and a floor of 29 if the defendant knew the drug would be used to commit criminal sexual conduct, a three-level increase and a floor of 26 if the defendant had reasonable cause to believe the drug would be so used, and a two-level increase for all other § 841(g) convictions. Issue for Comment 1 seeks input on these proposals or alternative methods.

Option One is unsatisfactory because it is overbroad and would create unwarranted disparity. This option would require an enhancement for a defendant convicted under § 841(g)(1)(B) of using the Internet to distribute a date rape drug to an unauthorized purchaser. However, distributing drugs to unauthorized purchasers is the basis of every distribution charge. Section 2D1.1 already results in substantial sentences for unauthorized sales of date rape drugs over the Internet,¹ including a two-level enhancement for distributing a controlled substance through mass marketing over the Internet. See 2D1.1(b)(5). Accordingly, sentences under § 841(g)(1)(B) should not be subject to additional enhancement, particularly in light of the Commission’s priority of simplifying the Guidelines.

Option Three is unsatisfactory because it too would require a two-level enhancement for distributing a date rape drug to an unauthorized purchaser under § 841(b)(1)(B). In addition, Option Three’s increases and minimum offense levels would result in excessive sentences and unwarranted uniformity. A defendant in Criminal History I convicted under § 841(g)(1)(A) of selling even one pill classified as a date rape drug or one unit of a drug analogue would be subject to a minimum offense level of 26 (63-78 months in CHC I) or 29 (87-108 months in CHC I). A minimum sentence of 5 ¼

¹ See, e.g., DEA Press Release, *Missouri Mother and Son Are Sentenced to Lengthy Prison Terms on Drug Conspiracy Charges* (Jan. 30, 2004) (reporting sentences of 168 months and 100 months for selling date rape drugs over the Internet), available at <http://www.dea.gov/pubs/states/newsrel/stlouis013004.html>.

to 9 years for distributing a single unit of a drug over the Internet would overstate the seriousness of the offense.

Defenders' Proposal. We propose that the Commission adopt a variant of Option Two, which would not add an enhancement for defendants convicted under § 841(g)(1)(B) for distributing a date rape drug to an unauthorized purchaser. For defendants who fall under the "criminal sexual conduct" aspect of § 841(g), we propose that the Commission use the following language:

If the defendant was convicted under § 841(g)(1)(A), increase by 2 levels.

A 2-level increase would sufficiently reflect the increased culpability of defendants convicted under § 841(g)(1)(A). *Accord* U.S.S.G. § 2D1.1(e)(1) (requiring 2-level increase under § 3A1.1(b)(1) where defendant committed or attempted to commit a sexual offense against another by distributing a controlled substance to that individual). Any defendant who distributed the drug by using the Internet to solicit a large number of purchasers would receive an additional 2-level increase under § 2D1.1(b)(6).

If, however, the Commission wishes to distinguish between the greater culpability of a defendant who acted with knowledge and the lesser culpability of a defendant who acted "with reasonable cause to believe," we propose the following language:

If the defendant was convicted under § 841(g)(1)(A) and (i) knew that the date rape drug was to be used to commit criminal sexual conduct, add 3 levels, or (ii) had reasonable cause to believe that the drug would be used to commit criminal sexual conduct, add 1 level.

Again, the additional enhancement under § 2D1.1(b)(6) would apply if the defendant distributed the drug by using the Internet to solicit a large number of purchasers.

The Commission should not provide a cross reference to the criminal sexual abuse guidelines for defendants convicted under 21 U.S.C. § 841(g)(1)(A) first, because a defendant convicted under 21 U.S.C. § 841(g)(1)(A) did not commit criminal sexual abuse, and second, because defendants should not be sentenced for crimes of which they were not convicted.

Additional Issues. Ketamine is listed along with gamma hydroxybutyric acid ("GHB") and flunitrazepam in § 841(g)'s definition of a "date rape drug." Accordingly, selling ketamine over the Internet in violation of § 841(g) is subject to a 20-year statutory maximum. Ketamine, however, is a Schedule III drug, which is different from both GHB (Schedule I) and flunitrazepam (Schedule IV²). As such, unlike GHB and flunitrazepam, the number of levels added in the Drug Quantity Table is capped at 20.

² Although flunitrazepam is a Schedule IV substance, it is treated the same as a Schedule I depressant under 21 U.S.C. § 841(b)(1)(C) and is subject to significantly higher offense levels under U.S.S.G. § 2D1.1.

The Commission should not remove this cap for ketamine. When Congress enacted § 841(g), it was fully aware that ketamine is a Schedule III drug and that guideline sentences for ketamine-related offenses are capped. Congress has been very clear when it intends to generally increase penalties for offenses involving date rape drugs. It did not do so here.

In 1996, Congress amended 21 U.S.C. § 841(b)(1)(C)³ to include flunitrazepam, which increased the statutory maximum to twenty years, or thirty years with a prior felony drug conviction. *See Drug-Induced Rape Prevention and Punishment Act of 1996*, Pub. L. 104-305, 110 Stat. 3807, 3807-08 (Oct. 13, 1996). At the same time, Congress directed the Commission to ensure “that the sentencing guidelines for offenses involving flunitrazepam reflect the serious nature of such offenses.” *See id.*

In 2000 and 2003, Congress took identical steps with respect to GHB. *See Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000*, Pub. L. 106-172, 114 Stat 7, 9 (Feb. 18, 2000). First, it amended § 841(b)(1)(C) to include GHB, thereby increasing the statutory maximum for GHB offenses to twenty years (or thirty with a prior), and directed the Attorney General to reclassify the drug. *See id.* at 8-9. Then it directed the Commission to “consider amending the Federal sentencing guidelines to provide for increased penalties such that those penalties reflect the seriousness of offenses involving GHB and the need to deter them.” *See Illicit Drug Anti-Proliferation Act of 2003*, Section 608(e)(2), Pub. L. 108-21, 117 Stat 650, 691-92 (April 30, 2003).

Here, when passing § 841(g), Congress did not indicate any dissatisfaction with ketamine sentences generally, nor did it amend § 841(b)(1) to provide for harsher treatment of ketamine. Ketamine stills falls under § 841(b)(1)(D), which carries a statutory maximum of five years’ imprisonment (ten with a prior). *See* 21 U.S.C. § 841(b)(1)(D). Congress did not direct that ketamine be reclassified as a Schedule I or Schedule II substance, which would have had the effect of both increasing the statutory maximum under § 841(b)(1) and removing the 20-level cap (which applies only to Schedule III drugs). And it did not issue any directive to the Commission to review or amend the ketamine guidelines.

The federal drug laws have been repeatedly criticized as the primary cause of prison overcrowding. A large part of that criticism has been focused on the Guidelines, which often require lengthy sentences for nonviolent offenders, which are not connected to the risk of recidivism or dangerousness. As a matter of policy, the Commission should not raise drug sentences when there is no directive and no need to do so. That general principle is particularly applicable here, where Congress has explicitly increased sentences for other date rape drugs but has said nothing about raising ketamine sentences.

³ The offense levels set forth in § 2D1.1(c) are based on the statutory penalties for the drug as set forth in 21 U.S.C. § 841(b)(1). *See* U.S.S.G. § 2D1.1 application note 10 (“The Commission has used the sentences provided in, and equivalencies derived from, the statute (21 U.S.C. § 841(b)(1)) as the primary basis for the guideline sentences.”).

Even if removing the cap for convictions under § 841(g) involving ketamine were justified, which it is not, there is no basis for raising ketamine sentences across the board, as the proposed amendment would do. A simpler and more rational approach would be to withdraw the proposed amendments to the Drug Quantity and Drug Equivalency Tables, and instead add an application note to § 2D1.1 stating:

In any case in which a defendant is convicted of violating 21 U.S.C. § 841(g) by distributing ketamine, the Drug Quantity Table levels and quantities for Schedule III substances should not be used for purposes of determining the offense level. Instead, ketamine should be treated under the Drug Quantity Table as though it is a Schedule I or II Depressant for purposes of determining the offense level for the § 841(g) violation.

We emphasize, however, that even this step is unnecessary. We oppose any change to the ketamine guideline.

III. Crack/Powder Cocaine Disparity

The Commission has offered to receive additional comments on the proper approach to remedying the disparate treatment of crack and powder cocaine under the Guidelines. We continue to urge the Commission to amend the Guidelines to remove the unwarranted and unjustifiable 100:1 ratio for cocaine and crack sentences, and to replace it with a retroactive guideline establishing a 1:1 ratio that ensures equal penalties for equal amounts of crack and powder cocaine.⁴ In addition, we urge the Commission to follow Judge Sessions' suggestion and add a downward adjustment or a recommended downward departure for successful completion of a drug treatment program.

There is no justification for maintaining the disparity between crack and powder cocaine sentences. The disparity has had a detrimental effect on families and communities and increased exponentially the costs of our criminal justice and penal systems. As stated by Senators Kennedy, Hatch and Feinstein in a recent amicus brief to the Supreme Court, "the Commission's own statements on the fundamental unfairness of the 100:1 ratio in the weight of powder and crack cocaine - a ratio currently incorporated in the sentencing guidelines - demonstrate that the guidelines do not always reflect objective data or good policy." See Br. of Amici Curiae Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein, *Claiborne v. United States*, 2007 WL 197103, *21

⁴ We incorporate by reference all of the letters and testimony provided by us to the Commission in the past year in support of our position on this issue. See Letter from Jon M. Sands to Hon. Ricardo Hinojosa Re: Follow-Up on Commission Priorities (Nov. 27, 2006); Testimony of A.J. Kramer Before the United States Sentencing Commission Public Hearing on Cocaine and Sentencing Policy (Nov. 14, 2006); Letter from Jon M. Sands to Hon. Ricardo Hinojosa Re: Proposed Priorities for 2006-2007 (July 19, 2006); Letter from Jon M. Sands to Hon. Ricardo H. Hinojosa Re: Report on Federal Sentencing Since *United States v. Booker* (Jan. 10, 2006).

(Jan. 22, 2007). Noting that the crack-powder disparity would be a principled basis for a sentence below the guideline range, the Senators stated, "Attention to this problem . . . is long overdue." *Id.* at **27-28. It is time for the Commission to repair this injustice.

We hope that these comments are useful to the Commission. Please do not hesitate to contact us if you have any questions or concerns, or would like any additional information.

Very truly yours,



JON M. SANDS

Federal Public Defender

*Chair, Federal Defender Sentencing Guidelines
Committee*

AMY BARON-EVANS

ANNE BLANCHARD

SARA E. NOONAN

JENNIFER COFFIN

Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Louis Reedt, Acting Deputy Director for the Office of Research and Data
Judy Sheon, Staff Director
Ken Cohen, Staff Counsel