

On Friday, October 15, 2010, the USSC promulgated temporary emergency amendments, effective Nov, 1, 2010 which implement the directives in the Fair Sentencing Act of 2010 (FSA).

### **NEW BASE OFFENSE LEVELS (BOLs) FOR CRACK**

At the new mandatory minimum levels, 28g and 280g of crack, the new BOLs are 26 and 32. The marijuana equivalency for crack is 1 gram to 3571 grams of marijuana.

The FSA increases the threshold quantity of crack necessary to trigger a mandatory minimum from 5g to 28g (five year mandatory minimum) and 50g to 280g (ten year mandatory minimum)

The new amendment keys the new mandatory minimums for crack to offense levels 26 and 32 rather than the pre-amendment levels of 24 and 30. This means that certain crack clients will see NO change in BOLs under the FSA, i.e., clients with quantities from 28 to 35grams, 280g to 499g, 840g to 1.49kg.

The Commission adopted the level 26 option over a vigorous dissent from Judge Castillo. The majority of Commissioners seemed to believe that Congress expected a crack-powder ratio of 18 to 1 and setting the mandatory minimum thresholds at 26 and 32 was necessary to maintain that ratio. Nothing in the Fair Sentencing Act, however, mentions the ratio or directs the Commission to maintain an 18 to 1 ratio. Key congressional leaders, including Senator Durbin, urged the Commission to adopt a level 24. Senator Durbin's letter is posted on the USSC website.

Several Commissioners emphasized that this is an emergency temporary amendment that will be revisited during the regular amendment cycle.

### **ELIMINATION OF MANDATORY MINIMUM FOR SIMPLE POSSESSION OF CRACK**

#### **ADJUSTMENTS FOR ALL DRUG TYPES**

"If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by 2 levels."

The Commission did not define violence. The comments of the Federal Public and Community Defenders, found on this site, contain an analysis on why it should mean "physical force that is intended to cause and capable of causing serious bodily injury to another person."

The application note explains when the violence enhancement cumulates with other enhancements. It does not apply if your client is sentenced under USSG 2K2.4.

This enhancement, like several new ones discussed below, is limited to the defendant's conduct

(or that which he or she "aided, abetted, counseled, commanded, induced, or wilfully caused." It should not cover conduct that was in furtherance of jointly undertaken criminal activity and reasonably foreseeable under 1B1.3(a)(1)(B). Use of the term "defendant" rather than "the offense involved" should limit the scope of the relevant conduct provision.

"If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by 2 levels."

See new application note on when it does not double count with obstruction under USSG 3C1.

"If the defendant maintained a premise for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels."

Look carefully at the application note on this one The reach of this provision is narrower than 21 U.S.C. 856.

### **Super-aggravating role**

"If the defendant received an adjustment under 3B1.1 (Aggravating Role) and the offense involved 1 or more [super-aggravating] factors, increase by 2 levels.

This SOC targets leader, organizers, managers, supervisors, who used "fear, impulse, friendship, affection" to involve another person who "received little or no compensation and had minimal knowledge of the scope and structure of the enterprise"; involved or distributed to certain protected individuals (less than 18, 65 or older, pregnant, "unusually vulnerable due to physical or mental condition." or "otherwise particularly susceptible to the criminal conduct"); were "directly involved in the importation of a controlled substance"; engaged in witness tampering or other obstructionist acts; or "committed the offense as part of a pattern of criminal conduct engaged in as a livelihood."

Be sure to look carefully at the guideline and new application notes for double-counting issues and definitions.

### **Minimal Role Cap of 32**

If the defendant gets a minimal role adjustment, the BOL is capped at 32.

### **Minimal Participants Who Received No Money and Were Motivated by Their Relationship with Leader or Threats or Fear**

Provides for a 2 level reduction for defendants who receive minimal role and meet other criteria (minimum knowledge of scope and structure of enterprise, no monetary compensation, motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise

unlikely to commit the offense).