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February 22, 2008

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: Recent decisions

Dear Judge Hinojosa:

Attached are two cases in which the district courts have identified problems with the new drug equivalency table in Application Note 10(D) to U.S.S.G. § 2D1.1 and declined to follow it.

Sincerely,

JON M. SANDS
Federal Public Defender
District of Arizona

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Richard Murphy
Judith W. Sheon, Staff Director
Ken Cohen, General Counsel
Alan Dorhoffer, Senior Staff Attorney

U.S. v. Watkins
E.D.Tenn.,2008.
Only the Westlaw citation is currently available.
United States District Court, E.D. Tennessee.
UNITED STATES of America, Plaintiff,
v.
Ferdale WATKINS, Defendant.
**No. 1:07-CR-67.**

Jan. 14, 2008.

**Background:** Defendant who was convicted of conspiracy to distribute 50 grams or more of cocaine base moved for a sentencing variance or downward departure.

**Holding:** The District Court, Curtis L. Collier, Chief Judge, held that downward departure was warranted to reduce sentencing guidelines offense level from 32 to 30.

Motion granted in part and denied in part.

**Sentencing and Punishment 350H ⚿807**

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)1 In General
350Hk803 Grounds for Departure
350Hk807 k. Factor Not Adequately Taken Into Account. Most Cited Cases
In defendant's sentencing for conspiracy to distribute cocaine base, downward departure was warranted to reduce sentencing guidelines offense level from 32 to 30; because defendant possessed both crack and powder cocaine, his base offense level was calculated by converting the drugs to equivalent amounts of marijuana, and converting the 96.36 grams of crack defendant possessed to equivalent amount of marijuana resulted in offense level of 32, while offense level for 96.36 grams of crack itself was 30, and since conversion rate for defendant's level 30 offense was 14 kilograms of marijuana per gram of crack, and conversion rate for more than 150 grams of crack was 6.7 kilograms of marijuana per gram of crack, more marijuana was attributed to defendant than to someone who had more crack. U.S.S.G. §§ 2D1.1, 5K2.0, 18 U.S.C.A.

Steven S. Neff, U.S. Department of Justice, Chattanooga, TN, for Plaintiff.
Rita C. Lalumia, Federal Defender Services of Eastern Tennessee, Inc., Chattanooga, TN, for Defendant.

***MEMORANDUM***

CURTIS L. COLLIER, Chief Judge.

***1** At defendant Ferdale Watkins' ("Defendant") sentencing hearing held on December 20, 2007, the Court heard his Motion for Variance (Court File No. 96). This motion was amended at the sentencing hearing to alternatively request a downward departure within the United States Sentencing Guidelines, as promulgated by the United States Sentencing Commission (Nov.2007) ("USSG" or "Guidelines"). *See* USSG § 5K2.0(a)(2)(B). At the hearing, the Court granted Defendant's motion for a downward departure, because application of the Guidelines as written produced an irrational result. This memorandum elaborates on that decision, explaining in more detail the nature of the departure within the Guidelines in conformity with the underlying principles and purposes of the Guidelines.

**I. ISSUE**

The abnormality presented in this case is that Defendant's offense level under the Guidelines is increased solely by converting the quantity of the crack cocaine involved into its marijuana equivalent. In simple terms, this means the Guidelines produce a different and higher offense level if crack cocaine is converted into its marijuana equivalent than if the same quantity of crack cocaine is simply calculated as crack cocaine. Because Defendant was found in possession of both crack cocaine and powder cocaine, the Guidelines instruct the Court to convert both drugs into their marijuana equivalents. *See* USSG § 2D1.1 comment. (n. 10(D)). The powder cocaine was of such a small quantity that it had no effect upon the resulting offense level. Regardless, due to the crack cocaine conversion, Defendant is

subject to a higher offense level. *See*USSG § 2D1.1 comment. (n. 10(D)(i)(II)).

## II. FACTS AND APPLICATION

Defendant pleaded guilty to conspiracy to distribute fifty grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. His base offense level is calculated with the following drug quantities: 96.36 grams of crack cocaine and 27.95 grams of powder cocaine. Because Defendant possessed more than one type of drug, the Guidelines require the Court to reach a base offense level, and corresponding sentencing range, which considers the aggregate amount of drugs. *See*USSG § 2D1.1 comment. (n. 10(D)). To do so, the Guidelines provide equivalency rates to convert the crack cocaine and powder cocaine to their equivalent amounts of marijuana for sentencing. *See*USSG § 2D1.1 comment. (n. 10(D)(i)(II), (E)).

The calculations for the crack cocaine conversion are as follows: to convert crack cocaine to its marijuana equivalent, the Guidelines provide conversion rates which vary according to the base offense level of the crack cocaine.USSG § 2D1.1 comment. (n. 10(D)(i)(II)). Here, Defendant's offenses involved 96.39 grams of crack cocaine, resulting in an offense level of 30 (which includes offenses involving at least 50 but less than 150 grams of crack cocaine). At offense level 30, the marijuana equivalency is 14 kilograms of marijuana per 1 gram of crack cocaine. *Id.* Therefore, Defendant's 96.39 grams of crack cocaine convert to 1349.46 kilograms of marijuana. Although 96.39 grams of crack cocaine fall within the middle of the range for a level 30 crack cocaine offense, the converted marijuana amount of 1349.46 kilograms results in an offense level of 32 (which includes offenses involving at least 1,000 but less than 3,000 kilograms of marijuana). This increase in offense level occurs prior to adding the marijuana-equivalent amount of the powder cocaine.[FN1]

***2** The Guidelines provide a fixed conversion ratio for powder cocaine of 200 grams of marijuana for every gram of powder cocaine. USSG § 2D1.1 comment. (n. 10(E)). As a result, Defendant's 27.95 grams of powder cocaine result in 5.59 kilograms of marijuana-equivalent. *See id.*This amount is less than half of one percent of the 1349.46 kilograms of the marijuana-equivalent converted from the crack cocaine, and does not affect Defendant's offense level.

## III. ANALYSIS

### A. Departure Within the Guidelines

The Guidelines provide sentencing ranges for particular offenses, circumstances, and characteristics of the defendant, but provide for departures in unusual cases where the Guidelines did not fully incorporate the circumstances of that case. USSG § 1A1.1, Pt.A, comment. (n. 4(b)), policy statement; *accord*USSG § 5K2.0, policy statement. The Sentencing Commission "does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure," and recognizes its case analysis in forming the Guidelines is neither perfect nor complete. *Id.* These policy statements coincide with the corresponding statutory language, which recognizes it is impossible for the Guidelines to account for all circumstances. *See*18 U.S.C. § 3553(b)(1). District judges are specifically authorized and encouraged to depart from an otherwise applicable guideline when it encounters an "atypical case." USSG § 1A1.1, Pt. A, comment. (n. 4(b)). However, even when application of a specific guideline does not account for a unique circumstance, sentencing courts must still consider, no less vigorously, the fundamental principles and body of experience found within the Guidelines. *See*18 U.S.C. § 3553(b)(1); USSG § 5K2.0(a)(1)(A), policy statement.

Pursuant to 18 U.S.C. § 3553(b)(1), the Court is authorized to sentence a defendant independently of the Guidelines, as Defendant requests in moving for a variance. However, under current sentencing jurisprudence, the Court must properly calculate the applicable guideline range and must consider both the Guidelines and that properly calculated guideline range. *See Gall v. United States*, --- U.S. ----, ---- - ---, 128 S.Ct. 586, 596-98, ---L.Ed.2d ----, ---- - ---- (2007); *United States v. McElheney*, 524 F.Supp.2d 983, 988 (E.D.Tenn.2007); *United States v. Phelps*, 366 F.Supp.2d 580, 584-85 (E.D.Tenn.2005). Only after having correctly calculated the applicable guideline range does the sentencing judge consider all of the factors set out in 18 U.S.C. § 3553(a). If the

district court determines that a sentence within the properly calculated guidelines is sufficient to fulfill the § 3553(a) factors, then the judge should impose such a sentence.

Here, the Court concludes that after determining the correct guideline range, including appropriate departures, the resulting range provides for a sentence that is sufficient, but no greater than necessary to comply with the purposes of § 3553(a). Accordingly, there is no need for the Court to impose a non-guideline sentence in this case, or in the words of Defendant, a variance. When the initial calculation of the sentencing range under the Guidelines produces an anomalous result, for purposes of "administration and to secure nationwide consistency,"*Gall*, 128 S.Ct. at 596, the Court is best served by making a departure to the appropriate range within the Guidelines, guided by the fundamental purpose and principles of the Guidelines. *See*USSG § 5K2.0, policy statement.

**B. Proportionality**

***3** In considering whether a result is an anomaly, the Court looks to the structure and underlying theory or philosophy of the Guidelines. One of the underlying theories that runs throughout the Guidelines is that those more culpable should face greater sentences. For crimes where amounts or quantities are involved, the Guidelines generally instruct that these amounts and quantities should be taken into account and the larger amount or quantity should result in a greater sentence. This is the principle of proportionality. In formulating the Guidelines, "Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity."USSG § 1A1.1 comment. (ed.n. 3), background. Pursuant to 18 U.S.C. § 3553(a)(6), "the court, in determining the particular sentence to be imposed, shall consider ... the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

This proportionality is evident throughout the Guidelines. The severity of single-drug offenses are clearly delineated by the amount of the illegal substance and the dangers that substance creates. *See*USSG § 2D1.1(c). This same practice is seen with respect to many other sections of the Guidelines where a greater amount or quantity results in a greater Guideline offense level. *E.g.*USSG §§ 2B1.1(b)(1), (2) (embezzlement); 2B3.1(b)(3), (7) (robbery); 2L1.1(b)(2), (7) (transporting and harboring illegal aliens).

In drug cases proportionality requires offenses involving greater amounts of the same drug to be punished more severely than lesser amounts of that drug. *See*USSG § 2D1.1(c). When the Guidelines are applied as written, Defendant is subject to a more serious offense level than defendants charged with greater amounts of crack cocaine. *See*USSG § 2D1.1 comment. (n. 10(D)(i)(II)). This occurs because the crack-cocaine-to-marijuana conversion rate for a level 30 offense (involving at least 50 grams and not more than 150 grams of crack cocaine) is 14 kilograms of marijuana per gram of crack cocaine (14:1), while the conversion rate for a level 32 offense (involving at least 150 grams and not more than 500 grams) is only 6.7 kilograms of marijuana per gram of crack cocaine (6.7:1)-less than half the rate of a level 30 offense. *See* USSG § 2D 1. 1(c)(4), (5); comment. (n. 10(D)(i)(II)).

When applied in Defendant's case, his 96.39 grams of crack cocaine (level 30) are converted to 1349.46 kilograms of marijuana-equivalent (14:1), while a defendant with 150 grams of crack cocaine (53.61 grams more than Defendant) would only be attributed with 1005 kilograms of marijuana-equivalent (6.7:1).*See*USSG § 2D1.1 comment. (n. 10(D)(i)(II)). Thus, a defendant possessing over 50 additional grams of crack cocaine would be attributed with 305 fewer kilograms of marijuana-equivalent. *See id.*

As a further comparison, a defendant with 201 grams of crack cocaine (a level 32 offense, converting at 6.7:1), over twice that of Defendant, would be attributed with approximately the same amount of marijuana-equivalent (1346.70 kilograms) as Defendant, who possessed 96.39 grams of crack cocaine (1349.46 kilograms of marijuana-equivalent).*See*USSG § 2D1.1 comment. (n. 10(D)(i)(II)). Thus, a strict application of the Guidelines as written would punish Defendant more severely than defendants with substantially more crack cocaine. This is not a result the Court thinks the Sentencing Commission contemplated. For this

reason the Sentencing Commission would approve a departure.

***4** Second, proportionality requires involvement with more serious drugs to be punished more severely. Here, Defendant would receive a substantially harsher sentence from the powder cocaine than from the crack cocaine, despite crack cocaine being considered by Congress and the Sentencing Commission a more dangerous drug.[FN2]To result in a level 32 offense for crack cocaine, a defendant must be charged with at least 150 grams but less than 500 grams.USSG § 2D1.1(c). Defendant possessed 96.39 grams of crack cocaine (a level 30 offense). To be subject to a level 32 offense based *solely* on crack cocaine, Defendant would need to have possessed 53.61 additional grams of crack cocaine. *See id.*Since Defendant is subject here to a level 32 offense due to possessing multiple drugs, proportionality requires the second drug to have the severity of 53.61 grams of crack cocaine to warrant an increase in offense level from 30 to 32. The additional drug involved is 27.95 grams of powder cocaine.

It is anomalous to allow 27.95 grams of powder cocaine, a drug constituting a less serious offense,[FN3] to result in the same punishment as 53.61 grams of crack cocaine. Yet, if the Court were to blindly follow the Guidelines here, the Court would sentence Defendant at a base offense level of 32. This is not a result this Court nor the Sentencing Commission would countenance.[FN4]

As the above analysis demonstrates, the operation of the crack cocaine conversion rate in this case results in an anomalous and disproportionate sentence. The Court must determine the appropriate Guideline for Defendant, taking into account the text, structure and underlying philosophy of the Guidelines. *See*18 U.S.C. § 3553(a)(6).

### C. Determining the Appropriate Base Offense Level within the Guidelines

As discussed above, increasing Defendant's offense level based solely on the conversion of the crack cocaine results in an anomalous result. The Court must therefore determine the appropriate base offense level for Defendant's sentence to avoid these anomalies. *See*18 U.S.C. § 3553(a)(6). Defendant's base offense level for the unconverted crack cocaine is 30. *See*USSG § 2D1.1(c)(5). The Court determines this as the appropriate base offense level in this case for both the crack and powder cocaine, as follows:

Crack cocaine is punished more severely than powder cocaine. *See, e.g.*,21 U.S.C. §§ 841(b)(1)(A)(ii), (iii). Yet even if the Court viewed the 27.95 grams of powder cocaine as 27.95 grams of crack cocaine, Defendant's total amount of crack cocaine, 124.34 grams, would still fall within the level 30 base offense range. Thus, that offense level is sufficient to account for, without overstating, the amount of powder cocaine in Defendant's possession.

Furthermore, the powder cocaine involved results in a marijuana-equivalent of 5.59 kilograms. *See*USSG § 2D1.1 comment. (n. 10(E)) (converting 1 gram of powder cocaine to 200 grams of marijuana). The Court notes the amount of marijuana-equivalent for the powder cocaine is less than one percent of the marijuana required for a base offense level of 30 (i.e. at least 700 kilograms and not more than 1,000 kilograms), and less than one-half of one percent of the marijuana-equivalent from the crack cocaine (i.e. 1349.46 kilograms).*See*USSG § 2D1.1(c)(5); USSG § 2D1.1 comment. (n. 10(D)(i)(II)). Thus, the powder cocaine is comparatively minor, and does not warrant an increase of two offense levels.

### D. Non-Guideline Sentence

***5** As explained above, the Court denied Defendant's motion for a non-guideline sentence, what Defendant referred to as a variance. The Court does not see a necessity to consider a non-guideline sentence because it has determined it could reach the appropriate sentence within the Guidelines by properly departing downward within the Guidelines.

However, had the Court not been able to calculate the proper guideline range for some reason, it would have used its authority under 18 U.S.C. § 3553(a) to impose the same sentence it determined after deciding a departure was appropriate. Under § 3553(a), the Court is required to impose a sentence that avoids unwarranted sentencing disparities, and assures the principle of proportionality is maintained. *See*18 U.S.C. § 3553(a)(6); *Kimbrough v. U.S.*, --- U.S. ----, 128 S.Ct. 558, 573-74, --- L.Ed.2d ---- (2007).

## IV. CONCLUSION

The Guidelines are based in part upon the principle of proportionality, and this Court is charged with sentencing more serious crimes more severely. *See*18 U.S.C. § 3553(a)(6); USSG § 1A1. 1 comment. (n. 3), background. As discussed above, sentencing Defendant at a base offense level of 30 provides a sufficient punishment, while avoiding disproportionate disparities with other defendants guilty of more serious drug offenses. For these reasons, the Court **GRANTED IN PART** Defendant's motion for a departure within the Guidelines, determining the appropriate base offense level as 30, pursuant to USSG § 5K2.0(a)(2)(B) (Court File No. 96). The Court **DENIED IN PART** Defendant's Motion for Variance for a non-guideline sentence (Court File No. 96).

FN1. Upon further inquiry, the Court found this increase occurs when crack cocaine amounts in the following ranges are converted to their marijuana equivalents:

6.25-19.99 grams (a level 24 crack cocaine offense increases to a level 26 marijuana-equivalent offense);

71.43-149.99 grams (a level 30 crack cocaine offense increases to a level 32 marijuana-equivalent offense);

447.77-499.99 grams (a level 32 crack cocaine offense increases to a level 34 marijuana-equivalent offense); and,

4477.62-4499.99 grams (a level 36 crack cocaine offense increases to a level 38 marijuana-equivalent offense).

These offense-level increases are caused by the varying crack cocaine conversion rates under USSG § 2D1.1 comment (n. 10(D)(i)(II)).

FN2.*See*21 U.S.C. §§ 841(b)(1)(A)(ii, iii) (where 5 kilograms of powder cocaine is punished to the same degree as 50 grams of crack cocaine, thereby punishing crack cocaine 100 times more severe than powder cocaine); USSG § 2D 1.1 comment. n. 10(D)(i)(II), (E) (where 1 gram of powder cocaine is equivalent to 200 grams (.2 kilograms) of marijuana, while 1 gram of crack cocaine is equivalent to 5-16 kilograms of marijuana); *United States v. Williams*, 962 F.2d 1218, 1227 (6th Cir.1992) (recognizing Congress had good reason to punish crack cocaine more severely, because (1) crack cocaine is more potent, and thus more addictive; and, (2) crack cocaine is sold more cheaply and in smaller size, thus encouraging its use and transport); *United States v. Pickett*, 941 F.2d 411, 418 (6th Cir.1991)*(accord); United States v. Avant*, 907 F.2d 623, 627 (6th Cir.1990) (*accord* ).

FN3.*See, e.g.*,21 U.S.C. §§ 841(b)(1)(A)(ii, iii).

FN4. Here, converting the crack cocaine alone raised Defendant's offense level. Courts should be vigilant for proportionality problems which arise even when the second drug's marijuana-equivalent is required to raise the offense level. For example, consider a defendant with 71.36 grams of crack cocaine (a level 30 offense) and 1 kilogram of marijuana. When the crack cocaine is converted, it results in 999.04 kilograms of marijuana-equivalent, still a level 30 offense. However, when the 1 kilogram of marijuana is added, the aggregate drug amount involved is 1000.04 kilograms, resulting in a base offense level of 32.

Such a sentence, however, would be giving 1 kilogram of marijuana the sentencing weight of 78.64 grams of crack cocaine. Since the crack cocaine offense level range for level 30 is at least 50 grams but less than 150 grams, a second drug that increases the offense level to 32 is being given the same punishment weight as 78.64 grams of crack cocaine (the difference between 150 grams and the 71.36 grams of crack cocaine charged).

To further illustrate this point, this hypothetical defendant, with 71.36 gram of crack cocaine and 1 kilogram of marijuana, would receive the same base offense level as a defendant with 150 grams of crack cocaine and no other drug. Furthermore, both defendants, other factors equal, should warrant the same sentence under the Guidelines because both of their offenses are at the bottom of level 32; 150 grams of crack cocaine and 1000.04 kilograms of marijuana are at the low drug ranges for crack cocaine and marijuana for level 32.

A defendant would, paradoxically, be better off under the Guidelines to have 149.99 grams of crack cocaine (a level 30 offense) than 78.64 grams of crack cocaine and 1 kilogram of marijuana (a level 32 offense).

Due to the severity of the crack-cocaine-to-marijuana conversion rates for offense levels 24, 30, 32, and 36, Courts should be extremely cautious when sentencing multi-drug defendants with crack cocaine amounts at those offense levels. *Cf. supra* note 1.

E.D.Tenn.,2008.
U.S. v. Watkins
--- F.Supp.2d ----, 2008 WL 152901 (E.D.Tenn.)

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U.S. v. Horta
D.Me.,2008.
Only the Westlaw citation is currently available.
United States District Court,D. Maine.
UNITED STATES of America,
v.
Manuel HORTA.
**No. CR-07-16-B-W.**

Feb. 19, 2008.

Joel B. Casey, Office of the U.S. Attorney, Bangor, ME, for United States of America.
Virginia G. Villa, Federal Defender's Office, Bangor, ME, for Manuel Horta.

**SENTENCING ORDER**

JOHN A. WOODCOCK, JR., District Judge.

***1** The Court concludes that for defendants convicted of possessing cocaine base and another illegal drug, the conversion table for marijuana equivalency in Application Note D to U.S.S.G. § 2D1.1 contains a computational anomaly that enhances the sentencing range for a limited set of defendants, based on the quantity of cocaine base alone. Unable to assign a rational policy basis for the resulting sentencing range distinctions among similarly situated defendants, the Court will impose a sentence outside the guidelines to avoid "unwarranted sentence disparities" under 18 U.S.C. § 3553(a)(6).

## I. A COMPUTATIONAL ANOMALY

Convicted of possessing powder and crack cocaine with the intent to distribute it in violation of 21 U.S.C. § 841(a)(1), Manuel Horta comes for sentencing. On November 1, 2007, the United States Sentencing Commission amended the guidelines for crack cocaine and as a result, taking crack cocaine alone, Mr. Horta's base offense level is 24. However, because Mr. Horta possessed powder cocaine as well as crack cocaine, under a quirk in the mathematical calculation of drug equivalency for the possession of multiple drugs, his base offense level for the possession of cocaine base alone increases from 24 to 26, the same level he would have been before the amendments. United States Sentencing Commission, *Guidelines Manual*, § 2D1.1, comment 10(D)(i)(II) (Nov.2007).

Standing alone, this increase is not surprising: a crack cocaine dealer, who deals in other illegal drugs, could deserve a higher sentence than one who deals in crack cocaine alone. What is perplexing is that this increase occurs solely by virtue of the computation translating the quantity of crack cocaine to its marijuana equivalency and not as a result of the addition of the other illegal drug. What is also puzzling is that the increase does not occur uniformly across the drug equivalency tables and therefore, the result appears to be a computational anomaly, not a deliberate policy choice. Essentially, because the tables for the calculation of drug equivalency contain a limited number of categories broader than the categories for the calculation of sentencing ranges and because the tables use different multipliers to calculate marijuana equivalency, the guidelines impose harsher sentences against a restricted cadre of defendants, solely based on the quantity of cocaine base, while most similarly situated defendants experience no increase. This Order explores this anomaly.

## II. THE GUIDELINE CALCULATIONS

On October 10, 2007, Manuel Horta pleaded guilty to possessing 14 .2 grams of cocaine powder and 13 grams of cocaine base in violation of 21 U.S.C. § 841(a)(1).*Prosecution Version* (Docket # 47). The Presentence Investigation Report correctly calculated the guideline sentencing range to fall under U.S.S.G. § 2D1.1(c)(7), establishing a base offense level of 26. *Presentence Report.*To arrive at this conclusion, the guidelines require a series of steps. First, a calculation is made based on the 13 grams of cocaine base; this turns out to be level 24. U.S.S.G. § 2D1.1(c)(8) ("At least 5 G but less than 20 G of Cocaine Base"). Next, because Mr. Horta is also responsible for a quantity of powder cocaine, it is necessary to turn to the drug equivalency tables to convert the quantity of cocaine base to its equivalent quantity of marijuana. *Id.* § 2D1 .1, comment

10(D)(i). Here, the result is counterintuitive. Thirteen grams of cocaine base equals 208 kilograms of marijuana: 13 grams x 16 kg of marijuana per gram of cocaine base = 208 kg of marijuana equivalent. *Id.*§ 2D1.1, comment 10(D)(i)(II). Then, the powder cocaine is translated into its marijuana equivalent: 14.2 grams 🔑 179.6 grams 🔑 120.9 grams = 314.7 grams x 200 = 62.94 kg of marijuana equivalent. *Id.*§ 2D1.1, comment 10(D)(i)(III). Combining the two numbers, the total marijuana equivalent is 270.94 kg, which fits within offense level 26. *Id.*§ 2D1.1(c)(7) ("At least 100 KG but less than 400 KG of Marijuana").

***2** This result changes the sentencing ranges for Mr. Horta. Because he possessed a firearm, he is subject to a two-level enhancement under U.S.S.G. § 2D1.1(b)(1). He accepted responsibility under U.S.S.G. § 3E1.1 and is entitled to a three-level reduction. Finally, he fits in criminal history category II. If he starts out at a base offense level of 26, the result is a sentencing range between 63 and 78 months. If he starts out at a base offense level of 24, the sentencing range is 51 to 63 months; however, because he is subject to a mandatory term of five years, the range is 60 to 63 months. 21 U.S.C. § 841(b)(1)(B).

## III. DISCUSSION

### A. A Counterintuitive Jump in Offense Level

It is odd that, solely by the application of the marijuana equivalency tables for his possession of other drugs, Mr. Horta's offense level jumped two levels from 24 to 26 for his possession of cocaine base alone. Under the amended cocaine base calculations, the possession of 13 grams of cocaine base results in a base offense level of 24. However, under the marijuana equivalency tables, 13 grams of cocaine base equals 208 kgs of marijuana equivalent and places Mr. Horta squarely in offense level 26 (100 to 400 kg of marijuana equivalent). Thus, even though the drug equivalency tables are designed to take into account a crack cocaine dealer?s possession of another controlled substance, the possession of 13 grams of cocaine base by itself causes a two-level increase. Ironically, in Mr. Horta's case, his possession of powder cocaine, though it triggers the use of the marijuana equivalency tables, has no mathematical impact on his offense level. Thus, a provision designed to enhance the offense level because the defendant possesses cocaine base and another illegal drug, actually enhances the offense level for his possession of cocaine base alone.

### B. Whether the Result is Intended

This may be an intended result. It is entirely logical that a defendant convicted of dealing crack cocaine and another controlled substance should face a higher sentence than one convicted of dealing crack cocaine alone. However, this two-level jump under the marijuana equivalency tables occurs in limited instances. The marijuana equivalency tables provide for calculations from base offense levels 12 to 38, a total of 14 levels. U.S.S.G. § 2D1.1, comment 10(D)(i)(II). But, under the tables, the offense level jumps only at four of these levels: 24, 30, 32, and 36. The policy behind enhancing the offense level for these four levels and not the others is obscure.

### C. Markedly Different Results

The drug equivalency table where Mr. Horta fits-offense level 24-is extremely broad. Offense level 24 captures between 5 and 20 grams of cocaine base. The table requires that for base offense level 24, the quantity of cocaine base must be multiplied by 16 to arrive at the marijuana equivalency. The result is between 80 (5 x 16 = 80) and 320 kgs (20 x 16 = 320) of marijuana equivalent. Turning back to the offense levels, offense level 24 includes between 80 kg and 100 kg of marijuana; offense level 26 includes between 100 kg and 400 kg of marijuana. Thus, 80 kgs comes within offense category 24 and the translation into marijuana equivalency would not change the base offense level, but 320 kgs comes within offense category 26 and the marijuana equivalency computation thus boosts the defendant into a higher category. The breakpoint between remaining i n offense level 24 and jumping to offense level 26 is 6.25 grams of cocaine base, which translates into 100 kgs of marijuana equivalent. From 6.25 grams to 20 grams, the defendant, who but for this computation would be in offense level 24, finds himself in offense level 26.

***3** At the next offense level of 26, the calculations under the guidelines become more counterintuitive. The offense level stays exactly the same throughout offense level 26. If the defendant

possessed from 20 to 35 grams of cocaine base, the equivalency table mandates a multiplier of 5 (not 16) to convert to the marijuana equivalent. Using 5 as a multiplier, a defendant can possess up to 35 grams of cocaine and still fit within offense level 26: 35 x 5 = 175, well within the 100 to 400 kgs of marijuana for offense level 26. The net effect is that a defendant can be responsible for from 6 .25 to 34.9 grams of cocaine combined with another illegal drug and be subject to the same base offense level of 26.

This contrasts with the other offense levels that jump the defendant's base offense level. Level 30 captures from 50 to 150 grams of cocaine base, but the offense level increases to 32 only at 71.5 grams, about half way through the range. Level 32 includes from 150 grams to 500 grams, but the offense level does not increase to level 34 until 447.8 grams, nearer the top of the range. Finally, level 36 attaches to 1,500 to 4,500 grams, but does not rise to level 38 until 4,477.7 grams, at the very top of the range. Application of the marijuana equivalency tables does not affect any other base offense level.

### D. The Crack Cocaine Amendments and *Kimbrough*

The Court is at a loss. There does not appear to be any rational basis for this differential treatment of similarly situated defendants. Imposing harsher sentences for those who sell other illegal drugs with crack cocaine is a legitimate goal, but sporadically including only a smattering of such defendants for harsher treatment is not. Enhancing the sentences for those at the lowest end of cocaine base possession-6.25 to 20 grams-and leaving unaffected others responsible for significantly more is equally confounding.

The proper sentencing ranges for crack cocaine offenses, particularly as opposed to powder cocaine, have been the source of controversy. *See United States v. Pho*, 433 F.3d 53 (1st Cir.2006). After extensive study, effective November 1, 2007, the United States Sentencing Commission amended the guidelines to alter the 100-to-1 drug quantity ratio between crack and powder cocaine. U.S.S.G.App. C, Amend. 706 (2007). The Commission explained that the amendment "modifie[d] the drug quantity thresholds in the Drug Quantity Tables so as to assign, for crack cocaine offenses, base offense levels corresponding to guideline ranges that *include* the statutory mandatory minimum penalties."*Id.* The Commission noted that "[c]rack cocaine offenses for quantities above and below the mandatory minimum threshold quantities similarly are adjusted downward by two levels."*Id.* In fact, on December 11, 2007, the Commission made these amendments retroactive to sentences imposed before November 1, 2007. U.S.S.C. § 1B1.10 *Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)* (effective March 3, 2008).

***4** The Commission went on to say that the amendment "also includes a mechanism to determine a combined base offense level in an offense involving crack cocaine and other controlled substances."[FN1]U.S.S.G.App. C, Amend. 706. However, there is no suggestion in the Commission documentation as to why this particular computational anomaly exists. Coordinating the math between the statutory mandatory minimums and the guidelines is easier in theory than in practice and it may be that in making the attempt, the Commission promulgated an unintended consequence.

> FN1. The Commission also made a technical change in the commentary to section 2D1.1, which is not relevant to the issues here.U.S.S.G.App. C, Amend. 711 (2007).

The United States Supreme Court recently reviewed the controversy surrounding the disparate impact the guidelines have had on crack as opposed to powder cocaine, *Kimbrough v. United States*, 128 S.Ct. 558 (2007).*Kimbrough* emphasized that, in imposing a sentence for crack cocaine, a district judge "may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses."*Id.* at 564. *Kimbrough* suggests that if the Court determined that there was a similar, unintentional disparity among similarly situated defendants under the new guidelines, a sentencing judge could determine that "a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing."*Id.*

## IV. CONCLUSION

Consistent with *Kimbrough*, the Court may sentence outside the guidelines and impose a statutory sentence in accordance with the factors in

18 U.S.C. § 3553(a). In addition to the parsimony provision, which requires that the sentence be "sufficient, but not greater than necessary, to comply with the [statutory] purposes,"18 U.S.C. § 3553(a), one further factor is "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct...."18 U.S.C. § 3553(a)(6). Here, although it takes the guidelines and the policies underlying the guidelines into account, the Court will impose a non-guideline sentence, based on its determination that to impose a sentence based on the guideline calculations would be contrary to the dictates of the statute.

SO ORDERED.

D.Me.,2008.
U.S. v. Horta
--- F.Supp.2d ----, 2008 WL 445893 (D.Me.)

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