Memo

Re: New Amendments to the Crack Cocaine Guidelines

From: Jason Hawkins, Supervisor, Appellate Section
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The United States Sentencing Commission promulgated some new amendments to the guidelines and, in general, they are beneficial to our clients who are charged with crack cocaine because the base offense level for cocaine base ("crack"), as determined by the Drug Quantity Table, will be reduced by two levels.[1] As a result of these new amendments I began putting together a sentencing memorandum and was preparing to argue that my client's advisory range should be reduced these two levels. However, in performing the calculations, my client's sentence remained the same.

In looking a little closer at the language in the amendment it also appears there are scenarios where a client who was found in possession of crack and another controlled substance could receive a lesser sentence for selling *more crack*. The language at issue in the new amendment is below:

(D)   Determining Base Offense Level in Offenses Involving Cocaine Base and Other Controlled Substances.—

    (i)   In General.—If the offense involves cocaine base ("crack") and one or more other controlled substance, determine the base offense level as follows:

        (I)   Determine the combined base offense level for the other controlled substance or controlled substances as provided in subdivision (B) of this note.

        (II)   Use the combined base offense level determined under subdivision (B) of this note to obtain the appropriate marihuana equivalency for the cocaine base involved in the offense using the following table:

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[1] The "Reader Friendly" version to the amendments can be found on the United States Sentencing Commission's website at http://www.ussc.gov/2007guid/may2007rf.pdf .

Base Offense Level	Marihuana Equivalency
38	6.7 kg of marihuana
36	6.7 kg of marihuana
34	6 kg of marihuana
32	6.7 kg of marihuana
30	14 kg of marihuana
28	11.4 kg of marihuana
26	5 kg of marihuana
24	16 kg of marihuana
22	15 kg of marihuana
20	13.3 kg of marihuana
18	10 kg of marihuana
16	10 kg of marihuana
14	10 kg of marihuana
12	10 kg of marihuana.

(III)   Using the marihuana equivalency obtained from the table in subdivision (II), convert the quantity of cocaine base involved in the offense to its equivalent quantity of marihuana.

(IV)   Add the quantity of marihuana determined under subdivisions (I) and (III), and look up the total in the Drug Quantity Table to obtain the combined base offense level for all the controlled substances involved in the offense.

(ii)   Example.—The case involves 1.5 kg of cocaine, 10 kg of marihuana, and 20 g of cocaine base. Pursuant to subdivision (B), the equivalent quantity of marihuana for the cocaine and the marihuana is 310 kg. (The cocaine converts to an equivalent of 300 kg of marihuana (1.5 kg x 200 g = 300 kg), which when added to the quantity of marihuana involved in the offense, results in an equivalent quantity of 310 kg of marihuana.) This corresponds to a base offense level 26. Pursuant to the table in subdivision (II), the base offense level of 26 results in a marihuana equivalency of 5 kg for the cocaine base. Using this marihuana equivalency for the cocaine base results in a marihuana equivalency of 100 kg (20 g x 5 kg = 100 kg). Adding the quantities of marihuana of all three drug types results in a combined quantity of 410 kg of marihuana, which corresponds to a combined base offense level of 28 in the Drug Quantity Table.[2]

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[2] http://www.ussc.gov/2007guid/may2007rf.pdf pp. 73-75.

Frankly, I found the language itself very confusing and I thought the example provided would help me down the path to understanding, but that is when I realized the problem. Notice first how the marihuana equivalency multiplier from the table rises and falls like a roller coaster. Then you will also see that it cuts off at a base offense level 12.

I then concocted three hypotheticals and ran them through these new amendments:

Hypothetical One
Client A possessed 100 kilograms of marijuana and 100 grams of cocaine base.

It appears from the example that I take 100 kilograms of marijuana and find the offense level which is a level 26 pursuant to 2D1.1(c)(7). I then go to the table in Application Note 10D(i)(II) and the listed marijuana equivalency for a level 26 is 5 kilograms of marijuana. According to the example, I multiply 100 grams of cocaine base by 5 kilograms of marijuana and come out with 500 kilograms of marijuana. Next I add 500 kilograms of marijuana + 100 kilograms of marijuana and this gives 600 kilograms of marijuana **with a corresponding offense level of 28** pursuant to 2D1.1(c)(6).

Hypothetical Two
Client B possessed 80 kilograms of marijuana and 100 grams of cocaine base.

It appears from the example that I take 80 kilograms of marijuana and find the offense level which is a level 24 pursuant to 2D1.1(c)(8). I then go to the table in Application Note 10D(i)(II) and the listed marijuana equivalency for a level 24 is 16 kilograms of marijuana. According to the example, I multiply 100 grams of cocaine base by 16 kilograms of marijuana. This would in turn give you 1600 kilograms of marijuana. Next I add 1600 kilograms of marijuana + 80 kilograms of marijuana and this gives 1680 kilograms of marijuana **with a corresponding offense level of 32** pursuant to 2D1.1(c)(4).

Hypothetical Three
Client C possessed 80 kilograms of marijuana and 80 grams of cocaine base.

It appears from the example that I take 80 kilograms of marijuana and find the offense level which is a level 24 pursuant to 2D1.1(c)(8). I then go to the table in Application Note 10D(i)(II) and the listed marijuana equivalency for a level 24 is 16 kilograms of marijuana. According to the example, I multiply 80 grams of cocaine base by 16 kilograms of marijuana and come out with 1280 kilograms of marijuana. Next I add 1280 kilograms of marijuana + 80 kilograms of marijuana and this gives 1360 kilograms of marijuana **with a corresponding offense level of 32** pursuant to 2D1.1(c)(4).

That means you get a four level increase for selling less drugs. Needless to say, I thought I must have been reading this wrong and was guideline challenged.

I began calling some of the attorneys on the Practitioners Advisory Group at the United States Sentencing Commission to see if I was wrong. I ran through my hypotheticals with them and the two I spoke with remarked that this example just did not seem right.

I was then referred to the Principal Legal Training Advisor at the United States Sentencing Commission. He was extraordinarily helpful and gracious in taking my call. However, he confirmed that I am reading the language correctly and *in his opinion* this result would occur.

He pointed me to a couple of bullet points in the Impact Statement of the amendments:

In this estimate, 69.7 percent of crack cocaine offenders are estimated to be affected by the amendment. Not all cases are affected by this amendment primarily because of one of seven possible reasons:

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6)   the offense involved crack cocaine and another controlled substance or substances and the reduction in the marijuana equivalency for cocaine base for determining the base offense level in revised Application Note 10 is not of sufficient magnitude to result in a lower combined base offense level (11.2 percent of all crack cocaine cases);[3]

He described my hypothetical scenarios as an anomaly in the guidelines and that not everyone would be helped with these new amendments.

When I asked for an explanation about how the Commission arrived at the multiplier for a particular offense level he responded that the Commission took the new proposed offense levels and just divided the amount of marijuana by the amount of crack for that particular offense level. In other words:

Offense level 26
        At least 20 G but less than 35 G of Cocaine Base;
        At least 100 KG but less than 400 KG of Marihuana;

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[3] http://www.ussc.gov/r_congress/cocaine2007.pdf , pp. E19-20.

So the Commission divided 100KG of marijuana by 20G of crack and that is where you get your marijuana equivalency multiplier of 5 for offense level 26 in the marihuana equivalency table.

> Offense Level 24
>> At least 5 G but less than 20 G of Cocaine Base;
>> At least 80 KG but less than 100 KG of Marihuana;

So the Commission divided 80KG of marijuana by 5G of crack and that is where you get your marihuana equivalency multiplier of 16 for offense level 24 marijuana equivalency table. He was not able to provide me with any further data about why they chose this method.

Finally, I questioned him about why the Commission would use the other controlled substance as the controlling basis for the multiplier for crack. He wasn't able to provide me with an explanation for that question. He did tell me that the Commission was made aware of my hypotheticals and that there is a possibility for later change, but for now it is what it is.

I do not have any real solutions for this "anomaly", but I do not believe it will be an anomaly because those are just the three scenarios I came up with in a short period of time. Furthermore, there is nothing below an offense level 12 on the equivalency table. So anyone caught with less than 2.5KG of marijuana or any other drug in that offense level will apparently not be held accountable.

I do not know the solution, but you should be aware of it. Hopefully the Judges will recognize, in our favor, the ludicrous situation this creates. Otherwise I guess we can tell our clients to not be caught with less than 100 grams of crack or make sure they debrief to a higher amount so then can get a lesser sentence.

Update on May 18, 2007

Prior to my sentencing on Friday, May 18, 2007, I submitted a sentencing memorandum to the Court arguing that my client should receive the benefit of a two level reduction as a result of the amendments. The supervising probation officer for the Northern District of Texas and I engaged in a debate over the amendments and he agreed that while the amendments are not very clear, the example provided in Application Note 10D(ii) was very clear to him. So it appears the probation office for the Northern District of Texas will be following the example provided. And the hits just keep on coming.