

METHAMPHETAMINE – SAMPLE ARGUMENT

Mr. DEFENDANT's guideline range has increased by 368% from what it would have been under the initial guidelines. His guideline range would have been 51-63 months in 1987, 151-188 months in 1989, and is 188-235 months as of 2000 and today. This 368% increase was in no way implemented by the Commission in the exercise of its "characteristic institutional role" of basing its determinations on "empirical data and national experience." *Kimbrough v. United States*, 552 U.S. 85, 109-10 (2007).

With the 1986 Anti-Drug Abuse Act, Congress apparently intended the 5- and 10-year mandatory minimums to apply to "serious" and "major" drug traffickers, respectively. *See* USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 8 & n.26 (2007). As defined by the House Subcommittee on Crime, "serious" drug traffickers are "managers of the retail traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities." *See* H.R. Rep. No. 99-845, pt. 1, at 11-12 (1986). "Major" drug traffickers were defined as "manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities." *Id.*

The Sentencing Commission derived the initial Drug Quantity Table by corresponding these statutory quantity triggers for "serious" and "major" traffickers as set forth in the 1986 Anti-Drug Abuse Act to two "cornerstone" offense levels, 26 and 32. *See* USSC, *Methamphetamine: Final Report of the Working Group* 7 (1999) [*Methamphetamine Report*], http://www.ussc.gov/Research/Working_Group_Reports/Drugs/199911_Meth_Report.pdf. At Criminal History Category I, the bottom of the guideline ranges of 26 and 32 exceed the 5- and 10-year mandatory minimums by 3 months and 1 month, respectively, which the Commission has since acknowledged was done to induce cooperation and guilty pleas. *See* USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 148 (1995) (explaining "[t]he base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities"). From these inflated cornerstones, the Commission set offense levels across the Drug Quantity Table "through processes of proportionate interpolation and extrapolation." *Methamphetamine Report* at 7 n. 18. In short, the original Commission did not use an empirical approach based in past practice or the purposes of sentencing in developing guideline sentences for drug trafficking offenses. "Instead, it employed the 1986 Act's weight-driven scheme," *Kimbrough*, 552 U.S. at 96, and set guideline ranges for all drug offenses two levels higher than justified by that weight-driven scheme.

The initial Drug Quantity Table did not include methamphetamine offenses because the 1986 Anti-Drug Abuse Act did not include mandatory minimums for methamphetamine. Instead, the Commission assigned methamphetamine an equivalency equal to twice that of cocaine so that 1 gram of methamphetamine equaled 0.4 gram of heroin, 2 grams of cocaine, or 400 grams of marijuana. *Id.* at 7-8. The effect was to assign an offense involving 250 grams of methamphetamine a base offense level 26, and an offense involving 2.5 kilograms a base offense level 32. USSG § 2D1.1(c) (1987). It is unknown how the Commission derived these initial equivalencies and penalties; methamphetamine offenses were not included in the Commission's study of pre-Guideline sentencing practices. *See* USSC, *Supplementary Report on the Initial*

Sentencing Guidelines and Policy Statements (1987). Even so, if Mr. DEFENDANT were sentenced under the 1987 guidelines for the sale of 70 grams of methamphetamine, his base offense level would be 18, with a guideline range of 51-63 months in CHC V. USSG § 2D1.1 (1987). Based on quantity alone, he would not even be considered a “serious” trafficker.

In 1988, Congress established mandatory minimums for methamphetamine offenses. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(g). Congress set the quantity triggers for “serious” traffickers (subject to the 5-year mandatory minimum) and “major” traffickers (subject to the 10-year mandatory minimum) at 10 grams and 100 grams of pure methamphetamine, respectively, and at 100 grams and 1 kilogram of methamphetamine mixture.¹ With this 1-to-10 pure-to-mixture ratio, the weight of the pure substance “control[led] the statutory penalty whenever the purity of a methamphetamine mixture exceed[ed] ten percent.” *Methamphetamine Report* at 8.

Though it was not required to do so, the Commission responded “by incorporating these statutory penalties into the drug trafficking guideline” by linking the guideline range at levels 26 and 32 to the statutory quantity triggers and using the “proportional approach” it had used for other controlled substances subject to mandatory minimums. *Methamphetamine Report* at 8; *see also id.* at 18 (explaining that the Commission can, instead of corresponding guideline ranges to mandatory minimums across all offense levels, allow the mandatory minimums to “trump” guideline ranges only in cases in which they exceed the guideline). As its Reason for Amendment, the Commission said only that it “reflect[s] the statutory change with respect to methamphetamine.” USSG App. C, Amend. 125 (Nov. 1, 1989). Under the amended guideline, 1 gram of methamphetamine mixture was equivalent to 1 gram of heroin, 5 grams of cocaine, or 1 kilogram of marijuana. *Methamphetamine Report* at 8; *see* USSG App. C, Amend. 125 (Nov. 1, 1989). One gram of pure methamphetamine was equivalent to 10 grams of heroin, 50 grams of cocaine, and 10 kilograms of marijuana. USSG § 2D1.1(c) (1989).

As a result of the 1989 amendments, Mr. DEFENDANT’s base offense level for 70 grams of methamphetamine (actual) was increased by *twelve* levels from 18 to 30 and his guideline range increased from 51-63 months to 151-188 months. USSG § 2D1.1 (1989). This increase was not implemented by the Commission in its “characteristic institutional role” according to which it is to review and revise guidelines based on sentencing data, and is to design guidelines that “assure the meeting of the purposes of sentencing” under § 3553(a)(2), 28 U.S.C. §§ 991, 994(o), and reflect, to the extent practicable, “advancement in knowledge of human behavior as it relates to the criminal justice process,” 28 U.S.C. § 991(b)(1)(C), but to track the mandatory minimums set by Congress.

In 1996, the Department of Justice submitted a proposal to Congress for new, harsher mandatory minimums for methamphetamine trafficking. *See* Ronald Weich, Chief Counsel to

¹ Due to a typographical error, the Act mistakenly stated that 100 grams of methamphetamine mixture triggered the ten year mandatory minimum. This was corrected in 1990. *See* Pub. L. No. 101-647, § 1202 (1990).

Sen. Kennedy, *The Battle Against Mandatory Minimums: A Report from the Front Lines*, 9 Fed. Sent'g Rep. 94 (1996). In July of that year, a bill was introduced in the Senate that would cut in half the quantities triggering the mandatory minimums, making the penalties for methamphetamine (actual) equivalent to those for crack. See S. 1965, 104th Cong. (introduced July 17, 1996). A similar bill was introduced in the House, H.R. 3852. As ultimately enacted, however, the mandatory minimum provisions were deleted and replaced by directions to the Sentencing Commission to “review and amend its guidelines and its policy statements to provide for increased penalties” for methamphetamine offenses. Comprehensive Methamphetamine Control Act of 1996, § 301, Pub. L. No. 104-237. In response, the Commission cut in half the amounts of methamphetamine *mixture* corresponding to each offense level, but not those for methamphetamine (actual). USSG App. C, Amend. 555 (Nov. 1, 1997).

In its Reason for Amendment, the Commission said that it had “arrived at these particular changes after careful analysis of recent sentencing data, including its own intensive study of methamphetamine offenses, information provided by the Strategic Intelligence Section of the Drug Enforcement Administration concerning recent methamphetamine trafficking levels, dosage unit size, price and drug quantity, and a variety of other information.” *Id.* But the Commission did not explain how the increases for offenses involving methamphetamine mixture would better assure that the purposes of sentencing were met. And the Commission’s “intensive study” and other “variety of information” were not made available to the public for comment or examination. As a result, public comment and hearing testimony during the amendment cycle did not address any of this information. All public comment received by the Commission in response to its proposal to do exactly what Congress had considered (and *rejected*) opposed the amendment, urging the Commission to study the issue and resist congressional hysteria much like that driving sentences for crack.² In the end, the Commission cut quantities in half for methamphetamine mixture, but did not increase penalties for methamphetamine (actual). This had the effect of reducing the guideline ratio of actual-to-mixture from 1-to-10 to 1-to-5, so that the weight of actual methamphetamine in a mixture triggered the higher guideline range for actual methamphetamine only when the mixture’s purity exceeded 20 percent, rather than 10 percent as before. *Methamphetamine Report* at 11. The Commission explained that its approach was designed to increase punishment for the majority of methamphetamine trafficking offenders,

² See Statement of Thomas W. Hillier, II, on Behalf of Federal Public and Community Defenders, concerning the Proposed Guideline Amendments, Part II (Mar. 28, 1997) (urging the Commission to come up with a rational basis for revising the guideline, if necessary, in the exercise of its independent role to develop sound sentencing policy); Letter from Practitioners’ Advisory Group Re: Proposed Guideline Amendments & Issues for Comment, 1997 Cycle – Part II (Mar. 24, 1997) (taking the position that “it would be wrong to propose increased penalties for this drug without ‘fixing’ the drug guidelines and statutes dealing with crack cocaine,” but if the Commission *must* do so, it should take steps far more modest than what Congress had considered); National Assoc. of Criminal Defense Lawyers, Comments on the 1997 Amendments – Part II (Mar. 28, 1997) (noting that there “is no indication that since [the law was enacted in October 1996] the Commission has conducted any studies, held any hearings or otherwise deliberately considered whether the current methamphetamine guidelines” were sufficient, and pointing out that the proposed new guidelines for methamphetamine are “not tied to any principled rational” and that the Commission had not appeared to make any determinations based on empirical data regarding dosage, profit, harm or addictiveness). The Commission’s public comment file for 2007 is not available on its website. It is available at <http://www.src-project.org/resources/ussc-materials/public-comment/>. The Department of Justice did not address the amendment in any *public* comment.

whose guideline ranges were determined based on the weight of the mixture. *Id.*; USSG App. C, Amend. 555 (Nov. 1, 1997) As a result of the amendment, 1 gram of methamphetamine mixture is now equivalent to 2 grams of heroin, 10 grams of cocaine, or 2 kilograms of marijuana. In guideline terms, offenses involving 50 grams of methamphetamine mixture are assigned a base offense level 26, and offenses involving 500 grams of methamphetamine mixture are assigned a base offense level 32. USSG § 2D1.1(c). Offenses involving 10 and 100 grams of methamphetamine (actual) remained at base offense levels 26 and 32, respectively. USSG § 2D1.1(c) (1997).

The Commission's decision not to increase penalties for methamphetamine (actual) did not survive long. In 1998, Congress did what it had considered doing in 1996, as urged by the Department of Justice, and cut in half the quantities triggering the mandatory minimums for offenses involving both methamphetamine mixture and methamphetamine (actual). *See* Methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998); *see* H.R. Rep. No. 105-711, pt. 1, at 8 (1998) (setting forth the Department's position in support of H.R. 3898, a bill similar to the one passed, and its view that penalties for methamphetamine should be the same as crack). As a result, 5 grams of methamphetamine (actual) now triggers the 5-year mandatory minimum, and 50 grams of methamphetamine (actual) triggers the ten-year mandatory minimum.

Congress's intent was to make the penalties the same for methamphetamine (actual) as for crack. *See, e.g., ibid.*; *see also* 144 Cong. Rec. S4035 (May 1, 1998) (Sen. Ashcroft); 144 Cong. Rec. S12834 (Oct. 21, 1998) (Sen. Feinstein). According to Commission staff, "there were statements" by the bill's proponents "that the bill was necessary, in part, because the Commission's response [to the 1996 directive] had been inadequate." *Methamphetamine Report* at 18 n.50. Notably, a number of members of the House Judiciary Committee dissented from the Committee's favorable report on the 1998 legislation, pointing out that "the need for this legislation has not been established" as a matter of sentencing policy, and that the Committee had not held "a single hearing." H.R. Rep. No. 105-711, pt. 1 at 10. They observed that the legislation "ignores the role of the [Commission] in setting federal sentencing policy," and that the majority had been led by "political considerations which the Commission was designed to defuse." They stated that "modeling any sentencing policy after the crack cocaine sentencing policy is unwise" in part "because mandatory minimum sentences have failed to significantly reduce trafficking in crack cocaine." *Id.* at 11. These concerns obviously went unheeded. Thus, even when the Commission attempted to act in its characteristic institutional role by deciding *not* to increase sentences for some offenses in response to a directive, Congress enacted mandatory minimums which the Commission then incorporated into the guidelines.

As a result of the Commission's previous action in response to the 1996 directive, the new mandatory minimum thresholds for methamphetamine *mixture* were "[c]oincidentally . . . already aligned" to the Drug Quantity Table offense levels. *Methamphetamine Report* at 18. As Commission staff considered what the Commission should do in response to the new mandatory minimums for methamphetamine (actual), it recognized that "[t]he Commission is not required by the legislation to amend the guidelines" for methamphetamine (actual), and it could simply allow the mandatory minimums to "trump" guideline ranges. In a revealing comment, however, it said that "un-linking the Drug Quantity Table from the mandatory minimum quantities

established by Congress in a manner that reduces sentences would vary from past practice of the Commission and may prove *politically unwise*.” *Id.* at 18 (emphasis added).³

In this politically charged climate, and without giving any reason tied to the purposes of sentencing, the Commission amended the guideline for methamphetamine (actual) to cut in half the quantities at each offense level of the Drug Quantity Table, so that the guidelines would correspond to the quantities triggering the mandatory minimums. USSG App. C, Amend. 594 (Nov. 1, 2000). Offenses involving 5 grams of methamphetamine (actual) are now assigned a base offense level 26, and offenses involving 50 grams of methamphetamine (actual) are assigned a base offense level 32. USSG §2D1.1(c). As its reason, the Commission stated only that it “follows the approach set forth in the original guidelines for the other principal controlled substances for which mandatory minimum penalties have been established by Congress.” *Id.* As a result, guideline ranges (and the mandatory minimums) are the same as they were for crack before 2007. Mr. DEFENDANT’s base offense level for the sale of 70 grams of methamphetamine (actual) increased another two levels to level 32, with a guideline range of 188-235 months.

In short, as a result of political pressure, a congressional directive, a mandatory minimum enacted to override the Commission’s policy-making, and the Commission’s continuing decision, unmoored from the purposes of sentencing, to link guideline ranges to mandatory minimums and extrapolate these mathematically abstract numbers across offense levels, Mr. DEFENDANT’s sentencing range, based on 70 grams of methamphetamine (actual), has skyrocketed from 51-63 months to 188-235 months. *Compare* USSG § 2D1.1 (1987) *with* USSG § 2D1.1 (2011).

But now that Congress has partially rectified the grave mistake it made with respect to crack offenses and the Commission has amended the guidelines in response (a history well known to this Court and will not be recounted here), even the conceivable rationale for implementing Congress’s intent to punish offenses involving methamphetamine (actual) the same as crack offenses is gone. Base offense levels for methamphetamine offenses are now significantly higher than those for crack offenses for no apparent reason.

In fact, the severe penalties for methamphetamine are not justified by any purpose of sentencing. As to the seriousness of the offense, 18 U.S.C. § 3553(a)(2)(A), methamphetamine and all stimulants combined are less physically dangerous or addictive than heroin or cocaine, yet methamphetamine is punished more severely than any other drug.

³ Though the staff report did not mention it, the Department of Justice had also submitted a proposal to Congress in 1997 that would have “force[d] the Commission to tie its Sentencing Guidelines to the mandatory minimum statutes that will be passed and have been passed by Congress.” Testimony of Julie Stewart, Families Against Mandatory Minimums, Before the U.S. Sentencing Comm’n, at 36-37 (Mar. 17, 1997), http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/19970318/Public_Hearing_Transcript.PDF.

Type of Drug ⁴	Emergency Room Mentions per 100,000 Users	Treatment Sought per 100,000 Users
Heroin	28,387	50,535
Cocaine (crack and powder combined)	3,806	2,799
All Stimulants	1,801	4,105
Marijuana	515	1,143

And Mr. DEFENDANT is not a “major” trafficker as Congress defined that term in 1986 and to which the 10-year mandatory minimum was intended to apply. He was not a manufacturer or head of any organization, creating and delivering large quantities. At most, he was a mid-level distributor.

There is no evidence that lengthy prison sentences deter others, 18 U.S.C. § 3553(a)(2)(B), or have any crime control effect. *See* Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Justice: A Review of Research* 28-29 (2006); Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 *J. of Pub. Econ.* 2043, 2043 (2004) (“it is unlikely that the dramatic increase in drug imprisonment was cost-effective”). Because drug offenses are driven by user demand, drug crime is not prevented by incarceration of low-skill drug traffickers, who are readily replaced in the drug market. *See* USSC, *Cocaine and Federal Sentencing Policy* 68 (1995) (DEA and FBI reported dealers were immediately replaced). Indeed, the supply and consumption of methamphetamine have steadily increased since 2000 despite the increased penalties. *See* What America’s Users Spend on Illegal Drugs, Office of National Drug Control Policy fig. FW.8 (2012).

Nor is the guideline sentence of 188-235 months necessary to protect the public from further crimes of MR. DEFENDANT, 18 U.S.C. § 3553(a)(2)(C). According to the Commission, drug offenders have lower than average rates of recidivism. *See* USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 13 (2004) (“Offenders sentenced in fiscal year 1992 under fraud, §2F1.1 (16.9%), larceny, §2B1.1 (19.1%), and drug trafficking, §2D1.1 (21.2%) are overall the least likely to recidivate.”). Moreover, research from the Bureau of Prisons shows that too-lengthy sentences for low-risk drug offenders can increase recidivism. *See* Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 *Fed. Sent. Rep.* 22 (1994). As to the need for rehabilitation in the most effective manner, 18 U.S.C. § 3553(a)(2)(D), MR. DEFENDANT is drug-free now and will receive residential drug treatment from the Bureau of Prisons within a short period of time.

Given all of the above, the starting point for Mr. DEFENDANT’s sentence should be the same as that for powder cocaine, or at *most* the same as that for crack under the 2010 amendments to the crack guideline. In either case, the base offense level is inflated by the two

⁴ Rates were calculated using the latest (2010) data from the National Survey on Drug Use and Health, the Drug Abuse Warning Network, and the Treatment Episode Dataset – Admissions. These datasets are available at <http://www.icpsr.umich.edu/icpsrweb/SAMHDA/sda>. Rates of ER mentions and treatment episodes for cocaine (all forms) may be understated because users of *both* crack and powder cocaine are not identified in the data for number of users.

levels incorporated in all drug guidelines for no purpose but to induce cooperation for those subject to mandatory minimums. If sentenced for 70 grams under the powder cocaine guideline, and without the unnecessary two levels to induce cooperation, Mr. DEFENDANT's base offense level would be 14 with a corresponding guideline range of 33-41 months; if sentenced under the current crack guideline, his base offense level would be 24, with a corresponding guideline range of 92-115 months. In these lights, the applicable 10-year statutory mandatory minimum is already greater than necessary to serve sentencing purposes, while the applicable guideline range piles on at least another five and a half years of unnecessary imprisonment.

Mr. DEFENDANT respectfully requests this Court to vary from the applicable guideline range and to consider these alternative guideline ranges as more appropriate possible "starting points" in determining what sentence is sufficient, but not greater than necessary, to achieve the purposes of sentencing under 18 U.S.C. § 3553(a)(2).