

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

JON M. SANDS
Federal Public Defender

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

March 17, 2008

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

Re: Solution to Crack-to-Marijuana Equivalency Table

Dear Judge Hinojosa:

I write on behalf of the Federal Public and Community Defenders, in response to Commissioner Howell's request, with a solution to the problem in the crack-to-marijuana equivalency table found in Note 10(D)(i)(II) to the amended crack guideline.¹ The problem is urgent, particularly where retroactive relief is at stake. I will be following up on a few other issues that arose at the March 13 hearing in a few days.

The Problem

Prior to Amendments 706 and 711, effective November 1, 2007, the conversion ratio for crack to marijuana was 1 to 20,000 (1 gram of crack cocaine = 20 kg of marijuana). See USSG § 2D1.1, comment. (n.10) (Nov. 1, 2006). This ratio was based on the quantities within the base offense levels in the Drug Quantity Table, USSG § 2D1.1(c), which in turn were based on the quantities at the two mandatory minimum levels in 21 U.S.C. § 841(b).

This kept the equivalency neat and uniform throughout the discrete base offense levels and throughout the entire Drug Quantity Table. No matter what quantity of crack was involved in the offense, the marijuana equivalency would always result in the same relative position within the marijuana range. Simply converting the amount of crack to marijuana never altered the defendant's base offense level. Quantities of other drugs

¹ The solution was designed by James Egan, a lawyer in the Defender Office in the Northern District of New York, as explained in his memorandum dated January 18, 2008. See http://www.fd.org/pdf_lib/Egan%20faulty%20math.pdf. Judge Gleeson's solution in *United States v. Molina*, slip op., 2008 WL 544703 *3 (E.D.N.Y. Feb. 28, 2008) is essentially the same. Ms. Baron-Evans also provided the solution to Mr. Cohen last week.

involved in the offense may have resulted in a higher base offense level, but simply converting the crack to marijuana always maintained the same base offense level.

With the November 1, 2007 amendments, the Drug Quantity Table, USSG §2D1.1(c), was altered by reducing the base offense level by two at each quantity range. As a consequence of lowering the base offense levels for crack and keeping the marijuana quantities the same at each base offense level, the ratio of crack to marijuana within each range is no longer 1 to 20,000. Instead, the ratios both between and within most base offense levels vary. The equivalency table in Note 10(D) fails to account for the spectrum of ratios *within* most base offense levels. Instead, it specifies a single ratio for converting crack to marijuana at each base offense level. As a result, converting crack to marijuana will, at times, move the defendant to the next highest base offense level, even before considering any other drug.

The following example illustrates the point:

The offense involved 75 grams of crack and 10 grams of powder. The first step is to determine the base offense level for the quantity of crack involved in the offense by consulting the Drug Quantity Table. *See* USSG § 2D1.1, comment. (n. 10(D)(i)(I)). The base offense level for 75 grams of crack is 30. *See* USSG § 2D1.1(c).

The second step is to multiply each gram of crack involved in the offense by the number of kilograms of marijuana specified in the table for the base offense level identified at the first step. *See* USSG § 2D1.1, comment. (n. 10(D)(i)(II)). For a base offense level of 30, each gram of crack is multiplied by 14 kilograms of marijuana. This converts the 75 grams of crack to 1,050 kilograms of marijuana.

The conversion itself of crack to marijuana in the second step raises the base offense level from 30 to 32, even before considering the 10 grams of powder. The current quantity ranges for crack and marijuana at base offense levels 30 and 32 are:

<u>Base Offense Level</u>	<u>Range of Crack</u>	<u>Range of Marijuana</u>
30	50-150 grams	700-1,000 kilograms
32	150-500 grams	1,000-3,000 kilograms

To illustrate some of the anomalies, if the offense involved crack alone, an additional 75 grams of crack would be necessary to move to level 32. A defendant whose offense involved 149.99 grams of crack alone receives a base offense level of 30, while a defendant whose offense involved 75 grams of crack and only 1 gram of powder receives a base offense level of 32 simply by converting the crack to marijuana. The following cases illustrate other anomalies. *See United States v. Watkins*, 531 F. Supp. 2d 943 (E.D. Tenn. 2008); *United States v. Horta*, ___ F. Supp. 2d ___, 2008 WL 445893 (D. Me. Feb. 19, 2008); *United States v. Molina*, slip. op., 2008 WL 544703 (E.D.N.Y. Feb. 28, 2008).

The problem at base offense level 30 is also present at base offense levels 24, 32 and 36. Defendants who possess 6.25 grams or more at level 24, 71.43 grams or more at level 30, 447.76 grams or more at level 32, and 4.48 kilograms or more at level 36 are propelled to the next highest base offense level prior to accounting for the remaining drugs.

The Solution

The table below shows the formulas that would keep the conversion of crack to marijuana consistent within each level. In the formula at each base offense level, x equals the amount of crack in grams involved in the offense.

Base Offense Level	Conversion Formula
38	$x(6.7)$
36	$20,000/3(x-1,500) + 10,000$
34	$7(x-500) + 3,000$
32	$40/7(x-150) + 1,000$
30	$3(x-50) + 700$
28	$20(x-35) + 400$
26	$20(x-20) + 100$
24	$4/3(x-5) + 80$
22	$20(x-4) + 60$
20	$20(x-3) + 40$
18	$20(x-2) + 20$
16	$x(10)$
14	$x(10)$

These formulas were derived by accounting for the spectrum of ratios of crack to marijuana within each base offense level as follows. First, determine the base offense level for the quantity of crack cocaine. Second, identify the ranges of quantities of crack and marijuana for that base offense level. At level 30, the range of crack is 50 to 150 grams, and the range of marijuana is 700 to 1,000 kilograms. Third, subtract the lowest quantity of marijuana from the highest quantity of marijuana for that base offense level: $1,000-700 = 300$. Fourth, do the same subtraction for the low and high quantities of crack: $150-50 = 100$. Fifth, divide the difference in the high and low quantities of marijuana by the difference in the high and low quantities of crack: $300/100 = 3$. Sixth, subtract the low quantity of crack for the base offense level from the quantity of crack involved in the offense: $x-50$. Seventh, multiply this difference by the quotient derived in

step five: $3(x-50)$. Finally, add this product to the low quantity of marijuana for the base offense level: $3(x-50) + 700$. Applying this method keeps the crack and its marijuana equivalency at the same relative position within each respective range at level 30.

Here is how the proposed table would apply in the example above involving 75 grams of crack and 10 grams of powder. Since the base offense level for 75 grams of crack is 30, apply the formula for base offense level 30 to find the marijuana equivalency of 75 grams of crack:

1. $3(x-50) + 700 =$ kilograms of marijuana
2. $3(75-50) + 700 =$
3. $3(25) + 700 =$
4. $75 + 700 =$
5. 775 kilograms of marijuana

Once the marijuana equivalency for the crack has been calculated, the marijuana equivalency for the remaining drugs is determined under Notes 10(D)(i)(III) & 10(E). In the above example, 10 grams of powder cocaine equals 2 kilograms of marijuana. Then, as directed by Note 10(D)(i)(IV), the marijuana equivalency for the crack is added to the marijuana equivalency for the remaining drugs, in this case 775 kilograms for the crack and 2 kilograms for the powder. This yields a total marijuana equivalency of 777 kilograms for all drugs, with a base offense level of 30.

This solution ensures that every crack quantity will convert to a quantity of marijuana that will maintain the same relative position within each range. No defendant will be propelled to the next highest base offense level simply by converting the crack to marijuana. A smaller amount of crack will have a lower marijuana equivalency than a larger amount of crack. It eliminates the anomalies and gives each defendant the intended benefit of the amendment.

Thank you for the opportunity to provide this information, and we look forward to working with you on it.

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 Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Richard Murphy
Ken Cohen, General Counsel
Judith Sheon, Staff Director