

Honorable Patti B. Saris
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington DC 20002-8002

Re: Public Comment on Proposed Priorities for 2017

Dear Chief Judge Saris and Members of the Commission,

I write to comment on a possible priority policy issue. The Commission has identified as a tentative priority “possible approaches to (A) simplify the operation of the guidelines, promote proportionality, and reduce sentencing disparities; and (B) appropriately account for the defendant’s role, culpability, and relevant conduct.” One way to move towards all of these goals would be to alter Guideline §2D1.1 so as to use an individual’s personal financial gain taken from narcotics activity as the primary driver in the determination of an offense level, rather than the amount of narcotics a conspiracy or individual is shown to have manufactured, distributed, or possessed with the intent to distribute.

Below, I will lay out the problems addressed, the benefits of reform, the challenges that may be created by such a change, and three possible models for incorporating personal profit as a key metric in narcotics sentencing.

I. Problems Addressed

Currently, because of the structure and importance of the Drug Quantity Table at Guideline §2D1.1(c), the primary input of sentence computation in narcotics cases is the weight of the drugs at issue, either by an individual or conspiracy. However, weight of narcotics is not a good proxy for culpability because it unfairly punishes the actions of too many low-level traffickers. If a true kingpin imports 150 kilograms of cocaine into the country and pays a trucker \$1,000 to haul it, both of them fall under Guideline §2D1.1(c)(2), which provides for a base offense level of 36. While guideline sections §3B1.1 & 1.2 (distinguishing roles in the offense)

provide some level of differentiation, that differentiation will likely be at most a swing of six offense levels.

We all know that the one-off trucker is not nearly as culpable as the kingpin, but the guidelines don't reflect that because weight-driven sentences are mandated by Guideline §2D1.1(c). Sentencing judges have chafed at the resulting failure of proportionality ever since the beginning of the guideline era.

The false proxy of narcotics weight creates problems with proportionality and disparities because it too often obscures actual role and culpability. Moreover, it imposes a complexity to the guidelines that is unnecessary.

The proportionality problem is ubiquitous, particularly for conspiracies. When we tag all members of a conspiracy with the same base offense level based on the weight of narcotics distributed, manufactured, or possessed with intent to distribute, we obliterate any sense of proportionality: The trucker and the kingpin have the same base offense level, despite the fact that one gets rich while the other does not and one is indispensable to the organization while the other is easily replaced. That proportionality problem has real consequences. When we treat a loader or trucker like a kingpin, we do nothing to solve the problems of narcotics trafficking, since those actors are easily replaced.

Disparity is created as well, driven by this false proxy. Some judges and prosecutors see the injustice in this embedded disproportionality, and adjust for it. Others do not. When the guidelines produce a perceived unfairness through false proportionality, we see an unusual number of disparities between “proportion-seeking” and “rule-following” judges and prosecutors. The former tend to depart or vary downward from the guidelines and the latter do not. Historically, this dynamic was most acute in crack sentences.

The current system is also too complex. The weight-driven metric currently built into Guideline 2D1.1(c) requires two complicated mechanisms. One is the Drug Quantity Table itself, which has to approximate dosage amounts and the relative harm of various narcotics—a framework built on estimates and incapable of variation for regional difference and shifts over time. The second is the complex formula for

combining different sorts of narcotics into a single offense group, by equating them to an “equivalent” amount of marijuana.

II. Benefits of a profit-based metric

In the world of markets generally, it is easy to identify those who create, lead, and sustain a successful business—that is, those who are most crucial to its success. That’s because markets reward those more valuable, less replaceable people with the largest share of personal financial gain. The CEO or CFO of Wal-Mart is paid much more than a greeter or cashier, because that person has specialized skills that are rare and particularly valued. A market naturally creates a culpability ranking: The amount of money each person takes from the enterprise.

Illegal narcotics function as a market. We should differentiate offense levels within that market based on the personal financial gain each player receives rather than the weight of the narcotics handled by the enterprise as a whole. We don’t need to create a false metric when a natural one already has been created by market forces.

If weight is replaced by personal financial gain as a chief metric in drug sentencing, a truer sense of proportionality is achieved compared to current practice. Those who benefited the most and who had the most valuable skills will be most severely punished. Those who benefited less and had more easily replaceable skills will be relatively less severely punished. Even in non-conspiracy cases, personal profit will provide a clear picture of how successful—and thus, how dangerous—a particular offender was. This device also allows relevant conduct to be used in a way consistent with the rest of the Guidelines, albeit in a more effective form.

Moreover, solving the proportionality problem embedded in the current Guideline §2D1.1 will help eliminate disparities. Fewer low-level defendants will qualify for severe advisory sentences, leading to fewer departures and thus fewer disparities.

Simplicity is also served by this change. With this reform, the entirety of Guideline §2D1.1(c), the Drug Quantity Table, is excised. The need to identify and differentiate usage amounts of dozens of drugs is thus eliminated. The formula to “combine” drugs and equate them to an amount of marijuana will also become a thing of the past—the metric of personal

profit will cover all drugs in the same way, using market forces rather than USSC estimates as a determinant. Importantly, a personal profit-based system will inherently reflect regional variations and changes over time in a way that the present system cannot.

III. Challenges

A. The interaction between statute and guideline

If a personal profit-based guideline is used for narcotics, it will provide a different metric than is found in 21 U.S.C. §841(b), which is structured by weight thresholds for various narcotics. However, conflict between the two is clearly resolved in favor of the statute. Further, the Commission has (with “drugs minus two”) already unhitched the guideline from the statute, as the bottom of the guideline range is now below the “cliff” created by the statute.

B. Proving up profit amounts

As is currently true with drug weights, the prosecution would have to prove up profit amounts if an enhanced sentence based on personal financial gain will apply. In significant cases, this work is in large part already being done in service of money laundering counts and forfeitures. Moreover, the need to prove up personal financial gain will normally replace, not add to, the need to prove up drug weights.

Prosecutors, of course, won’t have to prove up personal financial gain in every case—only in those cases where they seek an enhanced sentence. This new mechanism may create an incentive for prosecutors to be more intentional and consistent in the way that they enhance cases, since resources might dictate that it isn’t possible to do so in every case. The resulting focus on the most culpable will increase proportionality while more efficiently disrupting narcotics markets by removing those actors who are most difficult to replace.

C. Retroactivity

Unlike some reforms, it would be difficult to make this change retroactive. While simple changes in the weight metric (such as drugs minus two) can be made retroactive with a simple recalculation, the same is not

true of the reform suggested here. This would likely be only a prospective amendment.

D. Altering conspiracy rules

Assessing the financial gain taken by an individual rather than the conspiracy as a whole would alter traditional ideas relating to conspiracy. However, those traditional rules (as applied to sentencing) have led to injustice and merit re-examination in this narrow context.

IV. Models of Execution

Below are three models of how a reformed Guideline §2D1.1 could accomplish these goals.

Model 1

In this model, the Drug Quantity Table at §2D1.1(c) is replaced by adding new base offense levels rooted in personal profit to §2D1.1(a):

§2D1.1 Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

[(1) –(4) unchanged]

(5) **12**, if the individual defendant profited from drug trafficking in an amount of \$10,000 or less over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.

(6) **14**, if the individual defendant profited from drug trafficking in an amount over \$10,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.

- (7) **16**, if the individual defendant profited from drug trafficking in an amount less than \$25,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.
- (8) **18**, if the individual defendant profited from drug trafficking in an amount over \$50,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.
- (9) **22**, if the individual defendant profited from drug trafficking in an amount more than \$100,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.
- (10) **26**, if the individual defendant profited from drug trafficking in an amount more than \$250,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.
- (11) **30**, if the individual defendant profited from drug trafficking in an amount more than \$500,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.
- (12) **34**, if the individual defendant profited from drug trafficking in an amount more than \$1,000,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture.
- (13) **38**, if the individual defendant profited from drug trafficking in an amount more than \$5,000,000 over a one-year period ending with the last known distribution, manufacture, or possession with intent to distribute

or manufacture.

Model 2

In this model, personal profit is considered on top of base offense levels structured consistently with 21 U.S.C. §841(b):

§2D1.1 Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

[(1)–(4) unchanged]

- (5) **6**, if the defendant is subject to 21 U.S.C. §841(b)(1)(C), 21 U.S.C. §841(b)(1)(D), 21 U.S.C. §841(b)(2), or 21 U.S.C. §841(b)(3); or
- (6) **12**, if the defendant is charged pursuant to 21 U.S.C. §841(b)(1)(B), in compliance with 21 U.S.C. §851.
- (7) **18**, if the defendant is charged pursuant to 21 U.S.C. §841(b)(1)(A), in compliance with 21 U.S.C. §851.
- (8) [current text of (5), absent the reference to the “Drug Quantity Table”]

(b) Specific Offense Characteristics

- (1) If an individual defendant profited from drug trafficking in an amount over \$10,000 over a one-year period (ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture), increase by **1** level.
- (2) If an individual defendant profited from drug trafficking in an amount over \$25,000 over a one-year period (ending with the last known distribution, manufacture, or

possession with intent to distribute or manufacture),
increase by **2** levels.

- (3) If an individual defendant profited from drug trafficking in an amount over \$50,000 over a one-year period (ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture), increase by **4** levels.
- (4) If an individual defendant profited from drug trafficking in an amount over \$100,000 over a one-year period (ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture), increase by **6** levels.
- (5) If an individual defendant profited from drug trafficking in an amount over \$250,000 over a one-year period (ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture), increase by **10** levels.
- (6) If an individual defendant profited from drug trafficking in an amount over \$500,000 over a one-year period (ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture), increase by **14** levels.
- (7) If an individual defendant profited from drug trafficking in an amount over \$1,000,000 over a one-year period (ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture), increase by **18** levels.
- (8) If an individual defendant profited from drug trafficking in an amount over \$5,000,000 over a one-year period (ending with the last known distribution, manufacture, or possession with intent to distribute or manufacture), increase by **24** levels.

(9-24): Current text of 1-16.

Model 3:

Finally, the most elegant solution might be to simply combine the narcotics guideline with the theft/fraud guideline, and have the amount of personal profit follow the metric of loss amount already built into Guideline §2B1.1(b).

The text of §2B1.1 would remain largely unchanged, with the simple addition of the term “personal profit in a narcotics case” to the term “loss” as used in §2B1.1(b)(1) and the addition of sentencing enhancements and safety valve provisions currently contained in §2D1.1 other than in §2D1.1(c).

Conclusion

The benefits created by a profit-centered drug guideline would outweigh the challenges. In terms of accomplishing the goals already identified by the Commission (including proportionality, simplicity, and reduction of disparities), a profit-centered approach to narcotics may be the best bet.

Thank you for your consideration of these and other public comments.

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