

**AMENDMENTS TO THE FEDERAL SENTENCING
GUIDELINES THAT TOOK EFFECT NOVEMBER 1, 2002
AND COMMISSION REPORT ON COCAINE SENTENCES**

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Highlights of Key Points

Ten new amendments to the sentencing guidelines went into effect on November 1, 2002. They are designated as amendments 637 through 646. The amendments are fully incorporated in the 2002 Guidelines Manual.¹ Here is an outline of the changes made by the 2002 amendments and action taken by the Commission with respect to cocaine offenses.

I. Retroactivity

The Commission did not designate any of the amendments for retroactive application to previously sentenced, imprisoned defendants. Under its current Rules of Practice and Procedure, the Commission is required to make the retroactivity decision “at the same meeting at which it decides to promulgate [for submission to Congress] the amendment.” Rule 4.1. However, the Rules also authorize the Commission to suspend temporarily any of its rules and would thus make it possible for the Commission to vote at some later time to make any amendment retroactive. *See* Rule 1.2(b).²

Prior to 1997, when the Commission first adopted its Rules of Practice and Procedure, including Rule 4.1, the retroactivity designation rule, the Commission did not always make a decision on retroactivity until years after it had promulgated the amendment. For example, in 1991 the Commission promulgated amendment 371, which created two new guidelines, U.S.S.G. § 2D1.11 (listed chemicals) and 2D1.12 (flasks, equipment & other products). It was not until 1994, however, when it designated amendment 371 for retroactive application. *See* U.S.S.G. §, App C, Amendment 504. Similarly, in 1994, the Commission promulgated amendment 505, which reduced the top offense level in the drug quantity table but it was not until the following year that the

¹ A reader-friendly version of the text of the amendments may be found on the United States Sentencing Commission website at: <http://www.ussc.gov/2002guid/2002amendments.pdf>.

² Rule 1.2(b) provides:

(b) The Commission temporarily may suspend any rule contained herein and/or adopt a supplemental or superseding rule by affirmative vote in a public meeting of a majority of the voting members then serving.

Commission designated this amendment for retroactive application. See U.S.S.G. §, App C, Amendment 536, effective Nov. 1, 1995.

Since the Rules of Practice and Procedure went into effect, however, there has not been an occasion when the Commission has actually made a retroactivity designation after the fact. The possibility that an amendment may be made retroactive at some later time by temporarily suspending the rules has been noted at public meetings of the Commission. No Commissioner has publicly countered that interpretation.

II. Current Application

For persons coming up for sentencing, the court must apply the guidelines that are in effect on the date the defendant is sentenced. See 18 U.S.C. § 3553(a)(4)(A); U.S.S.G. § 1B1.11. If the court determines that to do so would violate the *ex post facto* clause in Article 1, § 9 of the United States Constitution because the current amendment “makes more burdensome the punishment for a crime, after its commission,” then the court must apply the guideline in effect at the time the offense was committed. *Collins v. Youngblood*, 497 U.S. 37, 42 (1990); U.S.S.G. § 1B1.11(b)(1). For *ex post facto* purposes, the controlling date is the “last date of the offense, as alleged in the indictment.” *United States v. Broderson*, 67 F.3d 452, 456 (2d Cir.1995).

III. Drugs

U.S.S.G. § § 2D1.1 & 2D1.8 (Amendment 640)

A. U.S.S.G. § 2D1.1(a)(3) -- Cap on Sentences for Mitigating Role Defendants.³

The Commission amended *U.S.S.G. § 2D1.1(a)(3)* to include a provision that establishes a maximum base offense level of 30 from the Drug Quantity Table, if the defendant receives a mitigating role adjustment under U.S.S.G. § 3B1.2. Specific offense characteristics, adjustments from Chapter 3, and departures are to be added or deducted from the base offense level of 30.

The amendment also adds an application note to the mitigating role guideline directing that if the cap applies, courts “also shall apply the appropriate [mitigating role] adjustment. . . .” *U.S.S.G. § 3B1.2, (comment. n. 6)*.

The cap does not override any applicable statutory mandatory minimum sentence. Hence, if a defendant who receives a mitigating role adjustment is subject to a statutory mandatory minimum sentence because of the quantity of drugs for which the defendant is responsible, the court must impose the statutory minimum sentence unless the court is otherwise authorized to disregard the

³ Guidelines that were amended effective November 1, 2002 are highlighted.

statutory minimum either (1) because the government files a motion pursuant to 18 U.S.C. § 3553(e) asserting that the defendant has provided “substantial assistance in the investigation or prosecution of another person” or, (2) because the defendant meets the Safety Valve criteria set out in 18 U.S.C. § 3553(f).

The Commission promulgated the amendment because it is concerned that “base offense levels derived from the Drug Quantity Table in § 2D1.1 overstate the culpability of certain drug offenders who meet the criteria for a mitigating role adjustment.” U.S.S.G. App. C, Amend. 640. The amendment limits the impact of drug quantity “for offenders who perform relatively low level trafficking functions, have little authority in the drug trafficking organization, and have a lower degree of individual culpability (e.g., ‘mules’ or ‘couriers’ whose most serious trafficking function is transporting drugs and who qualify for a mitigating role adjustment).” *Id.*

1. Mitigating Role Adjustment – U.S.S.G. § 3B1.1

Generally, the mitigating role adjustment is intended for a defendant who “plays a part in committing the offense that makes him substantially less culpable than the average participant.” U.S.S.G. § 3B1.1, comment. (n.3(A)). The determination is “heavily dependent upon the facts of the particular case” and is to be made by the sentencing court after “weighing the totality of the circumstances.” U.S.S.G. § 3B1.1, comment. (n.3(C)). There is little uniformity in how the adjustment is applied, in part because courts use varying tests.

Indeed, just last year, the Commission amended the mitigating role guideline to resolve a circuit conflict regarding its application to less culpable defendants, such as couriers. The November 2001 amendment added language stating that the district court is not precluded from considering a mitigating role adjustment for a defendant simply because the defendant was accountable under relevant conduct *only* for the quantity of drugs or other conduct with which the defendant was personally involved. For example, where a defendant, who is a courier, is held liable solely for the drugs the defendant personally transported or stored and not accountable under relevant conduct for conduct of others, he or she may be eligible for a mitigating role adjustment. U.S.S.G. § 3B1.2, comment. (n. 3); U.S.S.G. §, App C, Amendment 635. Generally, this would happen because the defendant in fact is not accountable for any additional drugs under a proper application of the relevant conduct rules as when the scope of the defendant’s agreement simply was to transport the single shipment of drugs. *See* U.S.S.G. § 1B1.3, comment. (n. 2(c)(1), (3)-(8)).

In determining whether to grant a mitigating role adjustment, some courts apply a two-part test, which requires comparison to a hypothetical “average participant.”

The district court is required to gauge the defendant’s culpability relative to the elements of the offense of conviction as well as in relation to the co-conspirators. *United States v. Neils*, 156 F.3d 382, 383 (2d Cir. 1998). The defendant’s role must be considered not only in relation to those of co-conspirators, but also in relation to those of

“the average participant in such a drug crime.” *United States v. Ajmal*, 67 F.3d 12, 18 (2d Cir. 1995).

See also *United States v. Burns*, 298 F.3d 523, 546 (6th Cir. 2002) (reversing 4-level minimal role for defendants whose year-long activities in selling, carrying and delivering crack cocaine were “so much greater in scope and duration than the one-time functionary duties posited” in the guidelines commentary but leaving open possibility that district court could find defendants eligible for 3- or 2-level downward adjustments).

Other courts also apply a two-part test but in the second part compare the defendant to other co-conspirators rather than an “average” participant.

First, the district court must assess whether a defendant’s particular role was minor in relation to the relevant conduct attributed to him in calculating his base offense level. “Only if the defendant can establish that she played a relatively minor role in the conduct for which she has already been held accountable— not a minor role in any larger criminal conspiracy—” may a downward adjustment be applied. The second prong of the analysis, if reached, requires the district court to assess a defendant’s relative culpability vis-a-vis that of any other participants.

United States v. Ryan, 289 F.3d 1339, 1347-1349 (11th Cir. 2002) (internal citations omitted); see also *United States v. Johnson*, 297 F.3d 845, 874-75 (9th Cir. 2002) (defendant’s culpability is to be “measured against his co-participants, not a hypothetical “average participant”); *United States v. White*, 241 F.3d 1015, 1024 (8th Cir. 2001) (same).

The Ninth Circuit refines the test even further, clarifying that the sentencing court must “look beyond the individuals brought before it to the overall criminal scheme when determining whether a particular defendant is a minor participant in the criminal scheme.” *United States v. Rojas-Millan*, 234 F.3d 464, 473-74 (9th Cir. 2000) (vacating sentence and remanding for reconsideration of denial of mitigating role adjustment). In *Rojas-Millan*, the court explained that the district court should consider whether the defendant was relatively less culpable than “other likely actors,” including those not charged in the indictment. *Id.* In particular, the district court is required to consider the involvement of others such as “the alleged . . . supplier and the . . . distributor,” who although not identified by name nor charged in the indictment should be considered if the court finds “sufficient evidence of their existence and participation in the overall scheme.” *Id.*

Because the mitigating role adjustment is so fact-bound, subject to differing tests and the findings of fact are reviewable for clear error, there is a wide variation in its application among the circuits and even at times among districts within a circuit, particularly in reported cases.

The following cases may be a useful reference in seeking a mitigating role adjustment.

a. Cases Granting Mitigating Role Adjustment

- ▶ *United States v. Marte*, ___ F.3d ___, 2002 WL 31628274 (2d Cir. Nov. 21, 2002). Noting without discussion that defendant was granted two-level minor role reduction after jury trial in a conspiracy case for his participation in the “attempted delivery of approximately 242 kilograms of cocaine to defendant’s place of business, where it was to be off-loaded and transported for distribution.”
- ▶ *United States v. Montano-Guidino*, 309 F.3d 501, 503 (8th Cir. 2002). District court granted three-level role reduction for defendant, who had been sent by his co-conspirators to empty a padlocked, commercial storage unit contained twenty-pounds of methamphetamine, and who brought with him a copy of the rental agreement, a key to open the lock, and had significant relationships with other co-conspirators, including the person who rented the storage unit; other incriminating evidence, including a “drug note” was seized as a result of consensual searches of defendant’s vehicle, residence and person. Eighth Circuit affirms the adjustment, but rejects defendant’s claim (not preserved below) that he was entitled to four-level rather than three-level role reduction.
- ▶ *United States v. Boksan*, 293 F.3d 1056, 1058 (8th Cir. 2002). Appellate court finds no clear error in district court’s grant of two-level minor role rather than 4-level minimal role adjustment sought by defendants who “played the central role of connecting the more culpable supplier with the less culpable delivery person,” who was awarded a four-level role reduction, and who also supervised the minimal participant, “provided him with money, a map and instructions on an ongoing basis.”
- ▶ *United States v. Vega*, 285 F.3d 256, 260 (3d Cir. 2002). After conviction in jury trial, district court grants 2-level role reduction to Safety Valve defendant arrested in a sting operation after he picked up two pounds of heroin from a courier who had been arrested at the airport bringing the drugs into the country and who, after she was arrested and began cooperating, was told by the supplier to call defendant to arrange delivery of drug to defendant.
- ▶ *United States v. Franklin*, 902 F.2d 501, 510 (7th Cir.), *cert. denied*, 498 U.S. 906 (1990). Affirming award of minor role reduction to defendant who assisted her brother in laundering drug proceeds by allowing him to title in her name two vehicles that he had purchased with money she knew were from drug proceeds, by purchasing cashier’s checks with drug proceeds and converting them back to cash to try to disguise the source of payments on a Mercedes and by putting her name on safe deposit boxes which were used to store large amounts of her brother's drug proceeds.

b. Cases Involving Couriers

Cases involving couriers are a particular class of cases where the lack of uniformity is prevalent. In some districts, couriers are granted four-level downward adjustments almost as a matter of course.

► *Rosier v. United States Parole Commission*, 109 F.3d 212 (5th Cir. 1997). Affirming the decision of the Parole Commission to award a two-level minor role reduction rather than four-level minimal role to a defendant, an American citizen who was to be serve out his term of incarceration in a federal prison pursuant to a transfer treaty after having been tried and sentenced in Mexico for possession of 146 kilograms of marijuana found in a parked vehicle occupied by him near the border with the United States.

► *United States v. United States v. Rivera*, 994 F.2d 942, 952 (1st Cir. 1993). In this opinion, written by then-Chief Judge Breyer and whose reasoning on departures was adopted by the Supreme Court in *Koon v. United States*, 116 S. Ct. 2035 (1996), the First Circuit notes without discussion that the defendant, a woman who transported about one pound of cocaine from New York to Providence was granted a four-level minimal role adjustment.

► *United States v. Fernandez*, 877 F.2d 1138, 1140-41 (2d Cir. 1989). Courier arrested as he arrived at Kennedy Airport from overseas with two suitcases containing approximately 25 kilograms of cocaine was awarded two-level minor role adjustment.

► *United States v. Martinez*, ___ F. Supp. 2d ___, 2002 WL 1041318 (S.D. N.Y. 2002). In granting a two-level downward adjustment to a courier who had transported substantial amounts of heroin to Detroit on five separate trips within a four-month period, the district court set out a helpful list of what it termed the “indicia of minor participation” present during each trip, including that defendant:

(1) ...did not own the drugs; (2) ... did not finance any part of the offense; (3) ...had no decision-making authority in the operation; (4) ... did not sell the drugs; and (5) ... had a distinct lack of knowledge or understanding of the scope and structure of the enterprise. In essence, [defendant’s] participation in the offense was that of a courier. Although [defendant] acknowledges that on one occasion he helped package the drugs for shipment, that instance was limited to securing the heroin in a suitcase with masking tape and, for approximately thirty minutes, securing the drug pellets in the suitcase while [the leader of the conspiracy] left to pick up more drugs. These facts are hardly indicative of a substantial role in the enterprise being conducted by [others]. Rather, they demonstrate that [defendant] was far less culpable than either his co-conspirators or the “average participant” in such an enterprise.

B. U.S.S.G. § 2D1.1, comment. (n. 11) – Typical Weight per Unit in Ecstasy Cases.

The amendment adds MDMA (3,4-Methylenediozymethamphetamine) to the list of substances for which a typical weight per unit is provided. It establishes the typical weight of an MDMA pill at 250 mg. Until this amendment went into effect on November 1, 2002, MDMA was not included on the list.

The amendment also increases the typical weight per unit for offenses involving MDA (3,4-Methylenediozyamphetamine) to 250 mg. Until November 1, 2002, the typical weight per unit listed for offenses involving MDA was 100 mg. For offenses involving MDA where the conduct occurred prior to November 1, 2002, the *ex post facto* clause of the United States Constitution requires use of the 100 mg typical weight per unit. See U.S.S.G. § 1B1.11(b)(1).

This typical-weight-per-unit coefficient applicable for offenses involving the substances listed in note 11 is a deviation from the method used to determine the weight of controlled substances. Ordinarily the weight of the entire mixture or substance containing the controlled substance is used to determine drug quantity. See *Chapman v. United States*, 111 S. Ct. 1919 (1991) (holding that the term “mixture or substance” in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). The typical-weight-per-unit table is based on estimates provided to the Commission by the Drug Enforcement Administration. U.S.S.G. § 2D1.1, comment. (n. 11).

C. Safety Valve – U.S.S.G. § 2D1.1(b)(6), comment. (n.21).

This amendment addresses two issues that have divided the courts in applying the Safety Valve. First, the amendment “clarifies” that the two-level reduction under § 2D1.1(b)(6) applies even where the defendant is convicted under a statute that does not carry a mandatory minimum term of imprisonment. U.S.S.G. App. C, amendment 640. For example, the two-level reduction in § 2D1.1(b)(6) applies even where the offense of conviction is a telephone count under 21 U.S.C. § 843(b), which carries a maximum sentence of four years without a mandatory minimum. It also applies in those cases where the quantity of drugs for which a defendant is held accountable does not trigger a mandatory minimum sentence in a case involving a conviction under 21 U.S.C. § 841.

The amendment also “clarifies” that the two-level reduction in § 2D1.1(b)(6) applies without regard to the limitation found in U.S.S.G. § 5C1.2(b), which sets a minimum offense level of seventeen for defendants for whom a five-year mandatory minimum sentence applies. U.S.S.G. § 2D1.1(b)(6), comment. (n.21). The Commission established a minimum offense level of seventeen in § 5C1.2(b) because Congress explicitly directed the Commission, when it enacted the Safety Valve, not to reduce the sentence below twenty-four months for a defendant who would otherwise be subject to a five-year mandatory minimum sentence. *Pub. L. 103-322, §80001*. To satisfy this congressional mandate for a defendant in Criminal History Category I, the type of person who would be eligible for treatment under the Safety Valve, the offense level cannot be set below seventeen, which produces a range of 24-30 months.

Although the Commission used the Safety Valve criteria as the basis for applying the two-level downward adjustment under § 2D1.1(b)(6), it is an adjustment wholly separate and apart from the Safety Valve. It was promulgated by the Commission under its general guideline authority rather than in response to any statutory directive found in the Safety Valve. See U.S.S.G. App. C, Amend. 515. Consequently, when applied to cases that are not subject to the five-year mandatory minimum, there is no reason for establishing a minimum offense level of seventeen. For example, in a case where the offense level from the drug quantity table is eighteen because the defendant is liable under relevant conduct for less than 200 grams of cocaine powder or less than 40 kilograms of marijuana, two levels may be deducted under § 2D1.1(b)(6), if applicable, to reduce the offense level to sixteen without regard to the limitation in U.S.S.G. § 5C1.2(b).

D. U.S.S.G. § 2D1.8. -- Increased Base Offense Level for Maintaining a “Crack House” or Other Drug Premises.

The maximum base offense level under subsection (a)(2) of U.S.S.G. § 2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy) is increased from offense level sixteen to offense level twenty-six. This is the provision that applies to a defendant who “had no participation in the underlying controlled substance offense other than allowing use of the premises....” *U.S.S.G. § 2D1.8(a)(2)*.

The Amendment results from the Commission’s concern that the previous offense level did not adequately reflect the culpability of certain defendants who allow use of their premises for distribution of quantities that involve much greater offense levels, and at least indirectly, “participate and profit” from the trafficking even though they may not participate directly in the underlying drug offense. U.S.S.G. App. C, Amend. 640. The amendment may also result from the Commission’s attention to Congress’ increased focus on ecstasy offenses, including its directive to the Commission last year that it increase penalties for cases involving ecstasy. For in its statement of reasons for promulgating the amendment, the Commission notes that offenses calculated under this guideline, which are based on violations of 21 U.S.C. § 856, originally targeted so-called “crack houses” but “more recently has been applied to defendants who facilitate drug use at commercial dance clubs, frequently called ‘raves’.” *Id.*

E. Report to the Congress: Cocaine and Federal Sentencing Policy

Although the Commission ultimately did not promulgate an amendment reducing the penalties for the crack form of cocaine, it did publish a “Report to the Congress: Cocaine and Federal Sentencing Policy” in May 2002. The Report was based on testimony presented to the Commission at hearings on February 25, February 26, and March 19, 2002 and a review of sentences in cocaine cases during the year 2000. The Report also updates and supplements much of the research and empirical data contained in the Cocaine Report that the Commission published in 1995.

The Report recommends that powder cocaine sentences remain at their current level.

As in 1995, the Department of Justice opposed any reduction in sentences for crack cocaine offenses.

In the Executive Summary of this new report, the Commission once again concludes that crack sentences should be lowered. For offenses involving the crack form of cocaine, the Report proposes that 25 grams (up from 5 grams) be set as the 5-year mandatory minimum threshold; and 250 grams (up from 50 grams) be set as the threshold for 10-year mandatory minimum sentences. This proposal is set out in a “model” guideline, which also includes certain new enhancements not currently in the drug guideline that would apply to all drug offenses. These include (1) a graduated enhancement for the use of a firearm similar to the one found in the robbery guideline, and (2) a two-level enhancement in the offense level for a defendant with a prior felony drug offense, which would be applied in addition to the criminal history points assessed for the prior conviction.

The Executive Summary also contains the following findings, which are supported by the data and analysis contained in the Report:

[C]urrent penalties exaggerate the relative harmfulness of crack cocaine;

Current penalties sweep too broadly and apply most often to lower level offenders;

Current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality; and

Current penalties’ severity mostly impacts minorities.

The 2002 Cocaine Report is posted on the Commission website at: http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm.

**IV. Promoting A Commercial Sex Act
or Prohibited Sexual Conduct**

**U.S.S.G. § 2G1.1
(Amendment 641)**

This amendment makes three substantive changes to § 2G1.1. It broadens the conduct covered by the guideline to include commercial sex acts where it previously had only included “prostitution.” § 2G1.1(b)(1); (b)(4); (b)(5); (c)(3); and (d)(1). The amendment also expands § 2G1.1(b)(1)(B) to cover offenses involving fraud under the subsection that previously covered offenses involving “physical force” or “coercion.” Lastly, the amendment deletes the provision in the commentary, *U.S.S.G. § 2G1.1, comment. (n.12(A))*, which encouraged an upward departure based on the age of the minor because that factor “already is taken into account by that guideline.” U.S.S.G. App. C, Amendment 641 at 268.

V. Offenses Involving Cultural Heritage Resources

**(Amendment 638)
U.S.S.G. § 2B1.5**

This amendment creates a new guideline for offenses involving cultural heritage resources. The guideline defines “cultural heritage resources” by reference to a number of federal statutes to include national memorials, landmarks, parks, archaeological and other historic and cultural items. It covers offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources.

The new guideline has a base offense level of eight, which is two levels higher than the base offense level for general economic and property destruction crimes. Although referencing the loss table in U.S.S.G. § 2B1.1, the new guideline relies on the concept of “value,” which is defined by reference to commercial value, archaeological value and the cost of restoration and repair. See *U.S.S.G. § 2B1.5(b)(1) and comment. (n. 2)*. The Commission opted to use the concept of “value” because “cultural heritage offenses do not involve the same fungible and compensatory values embodied in the concept of “loss” used for other economic offenses.

In addition to “value,” the new guideline provides five additional enhancements for offenses that involve (a) one of eight locations designated by Congress for special protection, including the national park system, national memorials, national marine sanctuaries and museums; (b) any number of specified resources, including human remains, funerary objects, and designated archaeological or ethnological material; (c) pecuniary gain or other commercial purpose; (d) a “pattern of misconduct involving cultural heritage resources”; and (e) the use or brandishing of a dangerous weapon. *U.S.S.G. § 2B1.5(b)(2)-(6)*. A “pattern of misconduct” is defined to include prior conduct that did not result in a conviction; if it involves a prior conviction, that conviction may be doubly counted as criminal history. U.S.S.G. § 2B1.5, comment. (n. 6). If a dangerous weapon was used or brandished, the minimum offense level is fourteen. *U.S.S.G. § 2B1.5(b)(6)*.

The guideline also provides a cross-reference to the arson guideline where the offense involved arson or the use of explosives. *U.S.S.G. § 2B1.5(c)*.

The commentary includes special grouping rules and invites an upward departure where the offense level “substantially understates the seriousness of the offense.” *U.S.S.G. § 2B1.5, comment. (n. 8-9)*. Although the commentary does not include comparable language inviting downward departures in cases where the offense level substantially overstates the seriousness of the offense, a downward departure on that basis would be available as an “unmentioned factor” pursuant to 18 U.S.C. § 3553(b) and U.S.S.G. § 5K2.0. See *Koon v. United States*, 116 S. Ct. 2035 (1996).

VI. Official Victim

U.S.S.G. §3A1.2

(Amendment 643)

The amendment expands the category of persons who are considered “official victims” under U.S.S.G. § 3A1.2 to include not merely law enforcement and corrections officers as in the past but any prison employee, independent contractor or volunteer who is “authorized to act on behalf of a prison or correctional facility.” *U.S.S.G. §3A1.2, comment. (n.4)*. The amendment addresses the holding in *United States v. Walker*, 202 F.3d 181 (3d Cir. 2000) that a prison cook supervisor, who was assaulted by an inmate while in the prison performing his duties was not an “official victim” for purposes of § 3A1.2.

VII. Career Offender Triggered by § 924(c) Conviction

U.S.S.G. §§ 2K2.4; 4B1.1-4B1.2

(Amendment 642)

The career offender guidelines, U.S.S.G. §§ 4B1.1-4B1.2, were amended to provide that a conviction for a firearm offense prosecuted under 18 U.S.C. § 924(c) or § 929(a) will require a sentence as a career offender “at or near the [statutory] maximum” of life imprisonment in any case where the defendant has two qualifying prior convictions for violent or drug trafficking felonies. 28 U.S.C. § 994(h); *U.S.S.G. § 4B1.1(c)(1)*. In such a situation, if the sole count of conviction is one under 18 U.S.C. § 924(c) or § 929(a), the career offender guideline enhances the defendant’s sentence to an offense level of thirty-seven (decreased by any adjustment for acceptance of responsibility) and criminal history VI. *U.S.S.G. § 4B1.1(c)(3)*.

Section **4B1.1(c)(3)** provides the following career offender table where the sole count of conviction is a § 924(c) or § 929(a) offense:

Acceptance of Responsibility	Career Offender Range – Instant Offense under § 924(c) or § 929(a):
none	360 to life
2-level reduction	292 to 365 months
3-level reduction	262 to 327 months

The amendment also provides a special rule for determining the offense level where there are multiple counts of conviction. *U.S.S.G. § 4B1.1(c)(2) & comment. (n. 3)*. In such a case, a guideline range for the other counts is first determined under normal guideline application principles. The mandatory consecutive penalty required for the un-enhanced § 924(c) or § 929(a) (e.g., 7-years if a revolver is brandished during and in relation to a drug trafficking offense) is added to the maximum and minimum range determined for the other counts. If this range is greater than the range in the table set out in § 4B1.1(c)(3), the greater range applies. If not, the range set out in the table in § 4B1.1(c)(3) applies.

Section **2K2.4**, the guideline for § 924(c) or § 929(a) offenses, was also amended to include a provision that precludes application of other Chapter 3 and Chapter 4 adjustments where a defendant “as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender.” *U.S.S.G. § 2K2.4(c)*. The only exception is the acceptance of responsibility adjustment in U.S.S.G. § 3E1.1. *Id.*

Note that all other rules applicable to the career offender guideline remain in place, including the definitions in U.S.S.G. § 4B1.2; the provisions of U.S.S.G. § 4A1.2, concerning “related cases” and stale priors, *see* U.S.S.G. § 4B1.2, comment (n. 3); and the rule that precludes application of a guideline weapon enhancement in a case where the defendant is convicted of a § 924(c) or 929(a) offense.

For example, unless the defendant committed the instant §924(c) offense “subsequent to sustaining” convictions for the two predicate offenses, *see* U.S.S.G. § 4B1.2(c), the career offender guideline does not apply. Similarly, the sentences for the two predicates must receive criminal history points under the provisions of U.S.S.G. § 4A1.1(a), (b) or (c) in order to satisfy the requirements of the career offender guideline. Hence, stale priors, *see* U.S.S.G. § 4A1.2(e), and priors resulting from “related cases,” *see* U.S.S.G. § 4A1.2(a)(2), do not count as predicates.

Downward departures, where the career offender designation is not warranted because it overrepresents the seriousness of defendant's criminal history or the likelihood that defendant will commit future crimes, have been available in career offender cases. See *United States v. Lindia*, 82 F.3d 1154, 1165 (1st Cir. 1996); *United States v. Mishoe*, 241 F.3d 214, 218-19 (2d Cir. 2001); *United States v. Shoupe*, 35 F.3d 835, 838-39 (3d Cir. 1994); *United States v. Adkins*, 937 F.3d 947, 952 (4th Cir. 1991); *United States v. Fletcher*, 15 F.3d 553, 556-57 (6th Cir. 1994); *United States v. Jones*, 55 F.3d 289, 292 (7th Cir.), cert. denied, 116 S.Ct. 161 (1995); *United States v. Senior*, 935 F.2d 149, 151 (8th Cir. 1991); *United States v. Lawrence*, 916 F.2d 553 (9th Cir. 1990); *United States v. Bowser*, 941 F.2d 1019, 1024-25 (10th Cir. 1991); *United States v. Webb*, 1390, 1395 (11th Cir. 1998); *United States v. Beckham*, 968 F.2d 47, 54-55 (D.C. Cir. 1992). There is nothing in the current amendments that precludes downward departures in this new class of career offender cases.

VIII. Discharged Term of Imprisonment

U.S.S.G. § 5G1.3

(Amendment 645)

The amendment adds commentary to *U.S.S.G. § 5G1.3* to provide that courts may consider a downward departure in cases in which U.S.S.G. § 5G1.3(b) would have applied but for the fact that the term of imprisonment has been fully served and discharged before sentencing in the federal case. ***U.S.S.G. § 5G1.3, comment. (n. 7)***. Cases falling under U.S.S.G. § 5G1.3(b) are those where the undischarged term of imprisonment “resulted from offense(s) that [were] fully taken into account in the determination of the offense level” for the offense to be sentenced. U.S.S.G. § 5G1.3(b). In such cases, the guidelines require that the sentence be imposed to run concurrently with the undischarged term of imprisonment. The amendment resolves a circuit conflict rejecting the Fourth Circuit view that a downward departure under such circumstances was an abuse of discretion. Compare *United States v. O’Hagan*, 139 F.3d 641, 657 (8th Cir. 1998) (holding that district court could depart down to adjust for time served on a discharged state sentence); *United States v. Blackwell*, 49 F.3d 1232, 1241-42 (7th Cir. 1995) (same) with *United State v. McHan*, 101 F.3d 1027, 1040 (4th Cir. 1996) (holding that a downward departure to account for a discharged term of imprisonment was an error of law amounting to an abuse of discretion).

IX. DNA Samples

U.S.S.G. § 5B1.3 & 5D1.3

(Amendment 644)

This amendment adds a new mandatory condition of probation and supervised release that requires a defendant to “submit to the collection of a DNA sample ... at the direction” of a probation officer if the collection of the sample is authorized pursuant to 42 U.S.C. § 14135a, the DNA Analysis Backlog Elimination Act of 2000. ***U.S.S.G. § 5B1.3(a)(10)*** (condition of probation); ***U.S.S.G. § 5D1.3(a)(8)*** (condition of supervised release). The DNA Analysis Backlog Elimination Act of 2000 requires that defendants convicted of certain offenses, (*e.g.*, murder, kidnapping), provide a DNA sample.

X. Terrorism Amendments (Amendment 637)

This is a multi-part amendment that responds to the provisions in the USA Patriot Act.

A. A new guideline, *U.S.S.G. § 2M5.3* was created for offenses under 18 U.S.C. § 2339B, which prohibits any person from providing material support or resources to a foreign terrorist organization. It establishes a base offense level of twenty-six and also includes a two-level enhancement for cases in which (1) the material support involved dangerous weapons, firearms, explosives, or (2) funds with reason to believe that the funds would be used to purchase dangerous weapons, firearms or explosives. It also contains cross-references to the murder, attempted murder and weapons of mass destruction guidelines.

B. A new specific offense characteristic was added to *U.S.S.G. § 2A5.2* for use of a weapon in an offense involving the interference with a flight crew or flight attendant. The provision establishes a minimum offense level of twenty-four and provides for graduated enhancements based on whether the weapon was discharged, otherwise used, brandished, or its use was threatened. *U.S.S.G. § 2A5.2(b)(1)*.

C. The existing guideline for unlawful production or trafficking in weapons of mass destruction, *U.S.S.G. § 2M6.1* was expanded to cover two new offenses (18 U.S.C. § 175(b) and § 175b) involving possession and transportation of biological agents, toxins and delivery systems. For violations of § 175(b), which prohibits the knowing possession of certain biological substances the existing base offense level of twenty (formerly used for cases involving the threatened use of weapons of mass destruction without any conduct evidencing the intent or ability to carry out the threat), applies. *U.S.S.G. § 2M6.1(a)(4)*. The existing enhancements for particularly dangerous biological agents for the most serious substances, resulting death or injury, and disruption of governmental functions or substantial expenditures in responding to the offense, are also available. *U.S.S.G. § 2M6.1(b)*. The existing cross-references to the murder and attempted murder guidelines also apply. *U.S.S.G. § 2M6.1(c)*.

D. For violations of § 175b, which forbids certain restricted persons to ship, transport, or possess selected biological agents (*e.g.*, ebola, anthrax) and toxins, a new base offense level of twenty-two is provided

E. The terrorism enhancement in Chapter Three, *U.S.S.G. § 3A1.4* has once again been amended this time to apply to cases that do not fit the statutory definition of “federal crimes of violence.” Section 3A1.4 was originally promulgated in 1995 in response to the Violent Crime Control and Law Enforcement Act of 1994, which directed the Commission to enhance any felony involving international terrorism. At the time, the Commission added this new section, which provided for an enhanced minimum offense level of thirty-two and a minimum criminal history of VI for any felony offense that involved, or was intended to promote “international terrorism” as that term was defined at 18 U.S.C. § 2331. *U.S.S.G. App. C, Amend. 526*.

In the wake of the April 1995 bombing of the federal building in Oklahoma City, Congress once again directed the Commission to address terrorism by broadening the scope of § 3A1.4. *See* The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, §730. The Commission responded by expanding § 3A1.4 to apply not merely to international terrorism but to any “Federal crime of terrorism” as that term is defined at 18 U.S.C. § 2332b(g)(5). *Id.*, Amend. 539 (emergency amendment) & Amend. 565 (permanent amendment).

The 2002 amendment expands the reach of § 3A1.4 to cases that are “calculated to influence or affect the conduct of government” or to “intimidate or coerce a civilian population” but that do not otherwise fall within the statutory definition of “federal crime of terrorism.” ***U.S.S.G. § 3A1.4, comment. (n. 4)***. In such cases, the commentary now provides for an encouraged upward departure, that is structured not to exceed the maximum sentence available were the § 3A1.4 enhancement (rather than the upward departure) to apply. *See U.S.S.G. § 3A1.4, comment. (n. 4)* (“the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied”). .

Cases that are subject to the new upward departure provision are those where:

(A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.

U.S.S.G. § 3A1.4, comment. (n. 4).

The amendment also adds commentary to U.S.S.G. § 3A1.4 to “clarify” that this enhancement may apply for conduct that occurs after the commission of a federal crime of terrorism. For example, where the offense of conviction involves “harboring or concealing a terrorist who committed a federal crime of terrorism” or “obstructing an investigation of a federal crime of terrorism.” ***U.S.S.G. § 3A1.4, comment. (n. 2)***; *see* USSG, Supp. App. C, Amendment 637 at 249 (2002) (referring to this provision as “clarifying” the application of U.S.S.G. § 3A1.4). Note that a number of circuits have held that when amended commentary requires a circuit “to overrule precedent . . . in order to interpret the guideline consistent with the amended commentary,” it cannot be said that the “amendment merely clarified the pre-existing guideline.” *United States v. Saucedo*, 950 F.2d 1508, 1512-17 (10th Cir. 1991) (amendment to mitigating role commentary to “clarify” that adjustment should be based on all relevant conduct would not be applied retroactively because it conflicted with circuit precedent and result in harsher sentence for defendant). In those

circumstances, the change is deemed a substantive change and if it implicates the *ex post facto* clause because it results in a harsher penalty, it cannot be applied retroactively. *Id.* See also *United States v. Capers*, 61 F.3d 1100, 1110-12 (4th Cir. 1995) (amendment that “ works a substantive change in the operation of the guideline in this circuit” is not clarifying and would not be applied retroactively); *United States v. Smallwood*, 35 F.3d 414, 417-18 n.8 (9th Cir. 1994) (“Respectfully disagreeing with the Sentencing Commission's conclusion that the amendment is only clarifying and not substantive, we find that retroactive application of the ... Amendment would violate the ex post facto clause.”); *United States v. Menon*, 24 F.3d 550, 567 (3d Cir. 1994) (court’s interpretation of the pre-amendment language rather than Commission’s description of an amendment as “clarifying” controls).

F. The amendment also incorporates new money laundering provisions created by the USA Patriot Act by expanding U.S.S.G. § 2S1.3. In particular, the amendment provides an alternative base offense level of 8 where the defendant is convicted under 31 U.S.C. § 5318 or § 5318A. ***U.S.S.G. § 2S1.3(a)(1)***. The Commission set this base offense level two levels greater than the existing alternative in recognition of the “heightened due diligence requirements placed on financial institutions with respect to payable-through accounts, correspondent accounts, and shell banks.” U.S.S.G. Supp. App. C, Amend. 637 at 249-50. The amendment also expands the enhancement for cases involving the promotion of unlawful activity to provide a two-level enhancement where the offense involved “bulk cash smuggling.” ***U.S.S.G. § 2S1.3(b)(1)(B)***. The amendment also provides an enhancement to reflect the enhanced penalties under 31 U.S.C. § 5322(b) if such offenses were committed “as part of a pattern of unlawful activity involving more than \$100,000 in a 12-month period.” ***U.S.S.G. § 2S1.3(b)(2)***.

The amendment also implements a number of miscellaneous changes required by the USA Patriot Act.

G. In particular, for purposes of the prior conviction enhancement in the unlawful entry guideline, U.S.S.G. § 2L1.2(b)(1)(5), the amendment adds a definition of “terrorism offense.” ***U.S.S.G. § 2L1.2, comment. (n. 1(B)(vi))*** (“‘Terrorism offense’ means any offense involving, or intending to promote, a ‘federal crime of terrorism,’ as that term is defined in 18 U.S.C. § 2332b(g)(5).”).

H. The amendment also adds commentary to the obstruction of justice guideline that explains that “failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p)” is an “example of the type of conduct to which” the obstruction of justice adjustment applies. ***U.S.S.G. § 3C1.1, comment. (n. 4(j))***.

J. The amendment also adds language to U.S.S.G. § 5D1.2 stating that for persons convicted of a federal crime of terrorism which “resulted in, or created a foreseeable risk of, death or serious bodily injury to another person” the term of supervised release may be up to life and not less than the maximum term authorized for the class of offense. ***U.S.S.G. § 5D1.2(a)***.

XI. Foreign & Corrupt Practices

U.S.S.G. § 2C1.1
(Amendment 639)

For violations of 15 U.S.C. §§ 78dd-1, 78dd-2 and 78dd-3, this amendment deletes U.S.S.G. § 2B4.1 (the guideline for commercial bribery cases) as the referenced guideline in the Statutory Index. Heretofore, these offenses are to be sentenced pursuant to the guideline for public corruption cases, U.S.S.G. § 2C1.1.

XII. Technical & Conforming Amendments

(Amendment 646)

This is a thirteen-part amendment that makes technical and conforming changes to various guidelines including such changes as updating statutory references to correspond to statutory redesignations and correcting grammatical errors and inadvertent omissions.