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Drug Smuggling, Drug Dealing and Drug Abuse: Background and Overview of the Sanctions Under the Federal Controlled Substances Act and Related Statutes

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Summary

This is a brief sketch of the death penalty, terms of imprisonment, fines, sentencing guidelines, forfeitures, civil penalties and other sanctions associated with the proscriptions of the federal Controlled Substances Act and related statutes. The Controlled Substances Act (CSA) assigns various plants, drugs and chemicals to one of five schedules and authorizes the Attorney General to add or reassign substances to the schedules according to the risks they represented and medical benefits they provided. Those who wish to manufacture, distribute or dispense controlled substances must be registered with the Attorney General. The Attorney General is authorized to regulate registrants' business in controlled substances including establishing production quotas for schedule I and II controlled substances.

Within this basic scheme, the CSA and its offspring attack substance abuse and commerce in substance abuse at four levels: the unlawful possession, production, or distribution of drugs, and laundering of the proceeds the illicit traffic generates. A few CSA violations are capital offenses, but most carry heavy fines and long terms of imprisonment instead. Within the maximums and minimums established by Congress, the federal sentencing guidelines determine the sentences meted out as punishment for most federal crimes. The guidelines system is essentially a scorecard system. Forfeiture is a particularly prevalent feature of the federal anti-drug law enforcement efforts. Illicit controlled substances, the proceeds from drug trafficking, any property that can be traced to such proceeds, and any property used to facilitate drug trafficking can be confiscated under federal forfeiture laws. Civil penalties, the loss of federal benefits, injunctions and revocation of probation may also attend controlled substance offenses.

It includes a chart of the penalties for crimes involving: heroin; cocaine; crack, PCP; LSD, marijuana (marijuana); amphetamine; methamphetamine; listed (precursor) chemicals; paraphernalia; date rape drugs, rave drugs; designer drugs; ecstasy; drug kingpins; as well as the other substances including narcotics and opiates assigned to Schedule I, Schedule II, Schedule III, Schedule IV, and Schedule V of the Controlled Substances Act and the Controlled Substances Import and Export Act (Title II and Title III of the Comprehensive Drug Abuse and Control Act); drug trafficking; illicit drug import and export; recalcitrant drug smugglers; maritime drug law enforcement; environmental damage from illegal manufacturing; booby traps on federal lands; regulatory offenses; communications-related offenses; simple possession; attempt and conspiracy; drug dealing at truck stops; continuing criminal enterprises (CCE); investment of illicit drug profits; distribution to infants, minors, children, juveniles, and those under 18 years of age; distribution to pregnant women, trafficking in school zones; racketeering (RICO); Travel Act; armed career criminals; three strikes; money laundering; currency transaction reporting (smurfing); financial transactions with designated foreign narcotics traffickers; and sundry tax offenses.

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Introduction

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Background

Neither the consumption nor the regulation of potentially dangerous or addictive substances are particularly recent phenomena. Homer refers to their use, ODYSSEY 219-32. The Roman Empire banned certain sects in an attempt to curb drug abuse among them, or so it is thought, *Hallucinogens*, 68 COLUMBIA LAW REVIEW 521 (1968). In the American Southwest peyote was used in religious ceremonies perhaps as early as the time of the Spanish Conquest, *Employment Division v. Smith*, 485 U.S. 660, 667-9 n.11 (1988); and China's efforts to close its borders to the opium trade sparked the Opium War, ANSLINGER & TOMPKINS, THE TRAFFIC IN NARCOTICS, 3-8 (1953).

Within the United States, addiction was so common among wounded Civil War soldiers given morphine to ease their pain, that it became known as the "army disease," Lang, *The President's Crime Commission Task Force Report on Narcotics and Drug Abuse: A Critique of the Apologia*, 43 NOTRE DAME LAWYER 847, 849 (1968).

Through the late 60's federal authorities prosecuted illicit drug trafficking under the Harrison Narcotics Act and other tax and revenue based statutory schemes, 26 U.S.C. 4701-4775 (1964 ed.); 21 U.S.C. 199 (1964 ed). When the United States Supreme Court found that statutory form vulnerable to Fifth Amendment self-incrimination attacks, *Leary v. United States*, 395 U.S. 6 (1969),¹ Congress replaced

¹ Even when Fifth Amendment problems can be avoided, the use of a tax system to punish drug abuse may be constitutionally suspect for other reasons, see *Montana Dept. of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994)(holding that successive prosecution and tax proceedings for unlawful possession of controlled substances under Montana law would violate the Fifth Amendment's double jeopardy clause).

the tax provisions with the Controlled Substances Act,² a regulatory format based upon its powers under the Commerce Clause.³

The Controlled Substances Act (CSA) assigns various plants, drugs and chemicals to one of five schedules and authorizes the Attorney General to add or reassign substances to the schedules according to the risks they represented and medical benefits they provided.⁴ Schedule I contains heroin, lysergic acid diethylamide (LSD) and other substances that are highly susceptible to abuse, have no accepted medical use, and cannot safely be made available under prescription.⁵ Schedule II houses cocaine and other substances found to be highly susceptible to

² The Controlled Substances Act was enacted as Title II of the Comprehensive Drug Abuse and Control Act, Pub.L.No. 91-513, 84 Stat. 1236 (1970); Title III of the Comprehensive Act was the complementary Controlled Substances Import and Export Act.

³ “The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes,” U.S.Const. Art.I, §8, cl.3. Most of the states have enacted comparable statutory schemes, citations to which are appended.

Of course, the commerce clause is not an unlimited source of federal legislative authority. In *Lopez v. United States*, 514 U.S. 549 (1995), the Supreme Court held that the Gun Free School Zone provision purporting to proscribe possession of a firearm in a school zone exceeded Congress' power under the commerce clause, since the offense required no nexus to interstate commerce nor to any activity affecting interstate commerce. Subsequent cases have held, in contrast, that a similar prohibition of controlled substances within a school zone and other controlled substances prohibitions do fall within Congress' power under the commerce clause, *United States v. Hawkins*, 104 F.3d 437, 439-40 (D.C.Cir. 1996)(drug free school zone); *United States v. Zorrilla*, 93 F.3d 7, 8-9 (1st Cir. 1996)(drug free school zone); *United States v. Genao*, 79 F.3d 1333, 1335-337 (2d Cir. 1996) (conspiracy to distribute controlled substance); *United States v. Orozco*, 98 F.3d 105, 107 (3d Cir. 1996)(drug free school zone); *United States v. Leshuk*, 65 F.3d 1105, 1111-112 (4th Cir. 1995)(cultivating marijuana); *United States v. Clark*, 67 F.3d 1154, 1165-166(5th Cir. 1995)(drug free school zone); *United States v. Tucker*, 90 F.3d 1135 1139-140 (6th Cir. 1996)(drug free school zone); *United States v. McKinney*, 98 F.3d 974, 977-80 (7th Cir. 1996)(drug free school zone); *United States v. Koons*, 300 F.3d 985, 992-93 (8th Cir. 2002)(drug free school zone); *United States v. Tisor*, 96 F.3d 370, 374-75 (9th Cir. 1996)(controlled substances act); *United States v. Wacker*, 72 F.3d 1453, 1474-475 (10th Cir. 1995)(distribution of controlled substances); *United States v. Jackson*, 111 F.3d 101, 101-102 (11th Cir. 1997).

⁴ “. . . the Attorney General shall consider the following factors with respect to each drug or other substance to be controlled or removed from the schedules: (1) Its actual or relative potential for abuse. (2) Scientific evidence of its pharmacological effect, if known. (3) The state of current scientific knowledge regarding the drug or other substance. (4) Its history and current pattern of abuse. (5) The scope, duration, and significance of abuse. (6) What, if any, risk there is to the public health. (7) Its psychic or physiological dependence liability [, and]. (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter,” 21 U.S.C. 811(c).

⁵ “Placement in schedules . . . Schedule I -- (A) The drug or other substance has a high potential for abuse. (B) The drug or other substance has no currently accepted medical use in treatment in the United States. (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision,” 21 U.S.C. 812(b)(1).

abuse and highly addictive, but for which there may be beneficial medical uses.⁶ The remaining schedules reflect progressively less dangerous and addictive -- and progressively more beneficial -- classifications of substances.⁷

Those who wish to manufacture, distribute or dispense controlled substances must be registered with the Attorney General.⁸ The Attorney General is authorized to regulate registrants' business in controlled substances including establishing production quotas for schedule I and II controlled substances.⁹

The CSA is a model for, and serves as a supplement to, state regulation, except in cases of unavoidable conflict in which case it is preemptive.¹⁰

⁶ “Schedule II -- (A) The drug or other substance has a high potential for abuse. (B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions. (C) Abuse of the drug or other substance may lead to severe psychological or physical dependence,” 21 U.S.C. 812(b)(2).

⁷ “Schedule III -- (A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II. (B) The drug or other substance has a currently accepted medical use in treatment in the United States. (C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

“Schedule IV -- (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III. (B) The drug or other substance has a currently accepted medical use in treatment in the United States. (C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

“Schedule V -- (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV. (B) The drug or other substance has a currently accepted medical use in treatment in the United States. (C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV,” 21 U.S.C. 812(b)(3),(4),(5).

⁸ 21 U.S.C. 822 (persons required to register). The difference between “distributing” and “dispensing” is essentially, the difference between a pharmaceutical company and a pharmacist or physician. “The term ‘dispense’ means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term ‘dispenser’ means a practitioner who so delivers a controlled substance to an ultimate user or research subject,” 21 U.S.C. 802(10); “[t]he term ‘distribute’ means to deliver (other than by administering or dispensing) a controlled substance or listed chemical. The term ‘distributor’ means a person who so delivers a controlled substance or listed chemical.” 21 U.S.C. 802(11).

⁹ 21 U.S.C. 823(registration requirements), 824(denial, revocation, or suspension of registration), 825(labeling and packaging), 826(production quotas for controlled substances), 827 (records and reports of registrants).

¹⁰ 21 U.S.C. 903 (“No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot

Prohibitions

Within this basic scheme, the CSA and its offspring attack substance abuse and commerce in substance abuse at four levels: unlawful possession, production, distribution, and laundering of the proceeds illicit traffic generates.

Production

Controlled substances are either grown, created, or diverted from legitimate sources.¹¹ The CSA prohibits cultivation of controlled substances, such as marijuana, by anyone who is not registered with the Department of Justice.¹² It also outlaws attempts or conspiracies to cultivate controlled substances.¹³ And separate prohibitions have been enacted to cover growing controlled substances near schools,¹⁴ or in National Forests or other federal land,¹⁵ for using boobytraps to deter

consistently stand together”); a list of the citations to the various state controlled substances statutes is appended.

¹¹ More precisely, they are grown unlawfully, created unlawfully, or grown or created lawfully and diverted to unlawful channels thereafter.

The CSA merges growing and creating as “manufacturing:”

“(15) The term ‘manufacture’ means the *production*, preparation, propagation, compounding, or processing of a drug or other substance . . . (22) the term ‘production’ includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance,” 21 U.S.C. 802(15),(22)(emphasis added); see also, *United States v. Klein*, 850 F.2d 404, 405 (8th Cir. 1988).

¹² “(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute or dispense or possess with intent to distribute or dispense, a controlled substance.” 21 U.S.C. 841(a).

¹³ “Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.” 21 U.S.C. 846.

¹⁴ “Any person who violates section 841(a)(1) [quoted in n.12] or section 856 [establishing a manufacturing operation, quoted in n.17 infra] of this title by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility is subject . . . [to] twice the maximum punishment otherwise authorized. . . .” 21 U.S.C. 860(a).

¹⁵ “Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection. . . .” 21 U.S.C. 841(b)(5).

detection,¹⁶ or establishing a cultivation program.¹⁷

Although the last of these would seem to apply only within the United States, the underlying proscriptions reach anywhere in the world where American planes or vessels are involved or where the crops are destined for the United States.¹⁸

The same laws apply to “manufacturing” controlled substances such as LSD or heroin that are compounded or refined rather than grown. The law, however, attacks these processes in other ways as well. For instance, it not only regulates the controlled substances that are the products of compounding or processing but also the precursor or “listed” chemicals that are used in their creation.¹⁹ Moreover, additional

¹⁶ “(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured . . . shall be sentenced to a permit of imprisonment for not more than 10 years . . .” 21 U.S.C. 841(e)(1).

¹⁷ “(a) Except as authorized by this title, it shall be unlawful to – (1) knowingly open or maintain any place for the purpose of manufacturing . . . any controlled substance; (2) manage or control any building, room, or enclosure, either as an owner, lessee, agents, employee, or mortgagee, and knowingly and intentionally rent, lease, make available for use, with or without compensation, the building, room, or enclosure for the purpose of unlawfully manufacturing. . . a controlled substance.” 21 U.S.C. 856(a)

¹⁸ “(a) It is unlawful for any person on board a vessel of the United States or on board a vessel subject to the jurisdiction of the United States, or who is a citizen of the United States or a resident alien of the United States on board any vessel to knowingly or intentionally manufacture . . . or possess with intent to manufacture . . . a controlled substance.” 46 U.S.C.App. 1903(a).

“It shall be unlawful for any person to manufacture . . . a controlled substance in schedule I or II or frunitrazepam or listed chemical into the United States – (1) intending that such substance will be unlawfully imported . . .; or (2) knowing that such substance will be unlawfully imported into the United States. . . .

“It shall be unlawful for any United States citizen on board any aircraft, or any person on board an aircraft owned by a United States citizen or registered in the United States, to (1) manufacture . . . a controlled substance. . . .

“This section is intended to reach acts of manufacture . . . committed outside the territorial jurisdiction of the United States. . . .” 21 U.S.C. 959.

¹⁹ “(c) Any person who knowingly or intentionally – (1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter; (2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or (3) with the intent of causing the evasion of the record-keeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under this section is not required; shall be fined in accordance with Title 18, or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both. . . .

“(f) . . . (1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under Title 18 or imprisoned not more than 5 years, or both.

penalties may be incurred if the manufacturing process is environmentally destructive²⁰ or dangerous to human life.²¹

The CSA relies upon two sets of proscriptions within the regulatory process to prevent the diversion of legitimately manufactured and sold controlled substances from being diverted to criminal trafficking.²² The theft or transportation of stolen

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both,” 21 U.S.C. 841(c), (f).

²⁰ “Any person who violates subsection (a), or attempts to do so, and knowingly and intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use -- (A) creates a serious hazards to humans, wildlife, or domestic animals, (B) degrades or harms the environment or natural resources, or (C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with Title 18, or imprisoned not more than five years, or both,” 21 U.S.C. 841(b)(6).

²¹ “Whoever, while manufacturing a controlled substance in violation of this subchapter, or attempting to do so, or transporting or causing to be transported materials, including chemicals to do so, creates a substantial risk of harm to human life shall be fined in accordance with Title 18, or imprisoned not more than 10 years, or both,” 21 U.S.C. 858.

²² “(a) It shall be unlawful for any person -- (1) who is subject to the requirements of part C to distribute or dispense a controlled substance in violation of section 829 of this title [relating to prescriptions]; (2) who is a registrant to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration; (3) who is a registrant to distribute a controlled substance in violation of section 825 of this title [relating to labeling and packaging]; (4) to remove, alter, or obliterate a symbol or label required by section 825 of this title; (5) to refuse or fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required under this subchapter or subchapter II [relating to import and export of controlled substances and listed chemicals] of this chapter; (6) to refuse any entry into any premises or inspection authorized by this subchapter or subchapter II of this chapter; (7) to remove, break, injure, or deface a seal placed upon controlled substances pursuant to section 824(f) or 881 of this title [both relating to government seizures] or to remove or dispose of substances so placed under seal; (8) to use to his own advantage, or to reveal, other than to duly authorized officers or employees of the United States, or to the courts when relevant in any judicial proceeding under this subchapter or subchapter II of this chapter, any information acquired in the course of an inspection authorized by this subchapter concerning any method or process which as a trade secret is entitled to protection, or to use to his own advantage or reveal (other than as authorized by section 310) any information that is confidential under such section; (9) who is a regulated person to engage in a regulated transaction without obtaining the identification required under section 830(a)(3) of this title; (10) to fail to keep a record under section 830 of this title; or (11) to distribute a laboratory supply to a person who uses, or attempts to use, that laboratory supply to manufacture a controlled substance or a listed chemical, in violation of this subchapter or subchapter II of this chapter, with reckless disregard for the illegal uses to which such a laboratory supply will be put.

“(b) It shall be unlawful for any person who is a registrant to manufacture a controlled substance in schedule I or II which is (1) not expressly authorized by his registration and by a quota assigned to him pursuant to section 826 of this title; or (2) in excess of a quota assigned to him pursuant to section 826 of this title,” 21 U.S.C. 842(a),(b); see also 21

anhydrous ammonia (a methamphetamine precursor) for illicit manufacturing purposes, 21 U.S.C. 864, is punishable under the sanctions of the more serious of the two.²³

Traffic

The statutes that bar drug trafficking ordinarily speak of “distribution,” a term the CSA defines broadly to include virtually every transfer of possession.²⁴ Their breadth is further expanded by the fact that they frequently also bar “possession with

U.S.C. 843, below.

²³ 21 U.S.C. 843 (“(a) It shall be unlawful for any person knowingly or intentionally – (1) who is a registrant to distribute a controlled substance classified in schedule I or II, in the course of his legitimate business, except pursuant to an order or an order form as required by section 828 of this title; (2) to use in the course of the manufacture, distribution, or dispensing of a controlled substance, or to use for the purpose of acquiring or obtaining a controlled substance, a registration number which is fictitious, revoked, suspended, expired, or issued to another person; (3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge; (4)(A) to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this subchapter or subchapter II of this chapter, or (B) to present false or fraudulent identification where the person is receiving or purchasing a listed chemical and the person is required to present identification under section 830(a) of this title; (5) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit substance; (6) to possess any three-neck round-bottom flask, tableting machine, encapsulating machine, gelatin capsule, or equipment specially designed or modified to manufacture a controlled substance with the intent to manufacture a controlled substance except as authorized by this subchapter; (7) to manufacture, distribute or import any three-neck round-bottom flask, tableting machine, encapsulating machine, gelatin capsule, or equipment specially designed or modified to manufacture a controlled substance, knowing that it will be used to manufacture a controlled substance except as authorized by this subchapter; (8) to create a chemical mixture for the purpose of evading a requirement of section 830 of this title or to receive a chemical mixture created for that purpose; or (9) to distribute, import, or export a list I chemical without the registration required by this subchapter or subchapter II of this chapter”).

²⁴ “(11) The term ‘distribute’ means to deliver . . . a controlled substance. . . . or listed chemical” 21 U.S.C. 802(11).

“(8) The term ‘deliver’ . . . mean[s] the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship.” 21 U.S.C. 802(8).

intent to distribute”²⁵ and by the fact that the CSA outlaws simple possession regardless of intent.²⁶

Beyond the general prohibitions, there are individual provisions against associated misconduct. For example, there are explicit sanctions against using the mail, telephone,²⁷ firearms²⁸ or interstate travel to facilitate trafficking,²⁹ and against

²⁵ See for example, 21 U.S.C. 841(a)(general prohibition against knowingly or intentionally acting to “manufacture, distribute, or dispense, or possess with the intent to manufacture, distribute or dispense”); 21 U.S.C. 860 (“distributing, possessing with intent to distribute, or manufacturing a controlled substance” in or near schools); 21 U.S.C. 959 and 960 (manufacture, distribute or possess with the intent to distribute aboard vessels and aircraft subject to U.S. jurisdiction); 46 U.S.C.App. 1903 (same).

²⁶ “(a) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription, or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. . . .” 21 U.S.C. 844(a).

²⁷ “It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter For purposes of this subsection, the term ‘communication facility’ means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio and all other means of communication,” 21 U.S.C. 843(b).

²⁸ “(c)(1)(A) Except to the extent to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any . . . drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm shall, in addition to the punishment provided for such . . . drug trafficking crime -- (i) be sentenced to imprisonment for five years. . . . (2) For purposes of this subsection, the term ‘drug trafficking crime’ means any felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act,” 18 U.S.C. 924(c)(1),(2).

²⁹ “(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to -- (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraph (1), (2) or (3), shall be . . . imprisoned for not more than five years

“(b) As used in this section (i) ‘unlawful activity’ means (1) any business enterprise involving . . . narcotics or controlled substances” 18 U.S.C. 1952.

using minors,³⁰ distributing with the intent to commit a crime of violence against the recipient,³¹ distributing to minors³² or to pregnant women,³³ selling paraphernalia to

³⁰ “(a) It shall be unlawful for any person at least eighteen years of age to knowingly and intentionally -- (1) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen year[s] of age to violate any provision of this subchapter or subchapter II of this chapter; (2) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to assist in avoiding detection or apprehension for any offense under this subchapter or subchapter of this chapter by any Federal, State, or local law enforcement official; or (3) receive a controlled substance from a person under 18 years of age, other than an immediate family member, in violation of this subchapter or subchapter II of this chapter.

“(b) Any person who violates subsection (a) of this section is subject to twice the maximum punishment otherwise authorized. . . .

“(d) Any person who violates subsection (a)(1) or (2) of this section (1) by knowingly providing or distributing a controlled substance or controlled substance analogue to any person under eighteen years of age; or (2) if the person employed, hired, or used is fourteen years of age or younger, shall be subject to a term of imprisonment for not more than five years or a fine of not more than \$50,000, or both, in addition to any other punishment authorized by this section,” 21 U.S.C. 861(a),(b),(d).

Those who violate 21 U.S.C. 861(a)(1) would be presumably be prosecutable as principals in the crimes committed by their juvenile accomplices. See 18 U.S.C. 2 (“(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal”).

³¹ “(7)(A) Whoever with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

“(B) For purposes of this paragraph, the term ‘without that individual’s knowledge’ means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communication unwillingness to participate in conduct is administered to the individual,” 21 U.S.C. 841(b)(7).

³² “(a) Except as provided in section 860 of this title [relating to distribution near schools], any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age is (except as provided in subsection (b) of this section [relating to subsequent violations]) subject to (1) twice the maximum punishment authorized by section 841(b) of this title. . . .” 21 U.S.C. 859(a).

³³ “Except as authorized by this subchapter, it shall be unlawful for any person to knowingly or intentionally provide or distribute any controlled substance to a pregnant individual in violation of any provision of subsection (b), (c) and (e) of this section,” 21 U.S.C. 861(f).

assist production or consumption,³⁴ smuggling,³⁵ and trafficking so extensively as to constitute a continuing criminal enterprise³⁶ or racketeering.³⁷

³⁴ “(a) It is unlawful for any person – (1) to sell or offer for sale drug paraphernalia; (2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or (3) to import or export drug paraphernalia. . . .

“(d) The term ‘drug paraphernalia’ means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance. . . .” 21 U.S.C. 863(a),(d).

³⁵ “(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV or V of subchapter I of this chapter. . . .” 21 U.S.C. 952(a).

“(a) It is unlawful for the pilot of any aircraft to transport, or for any individual on board any aircraft to possess, merchandise knowing, or intending, that the merchandise will be introduced into the United States contrary to law

“(d) . . . [A]ny person who intentionally commits a violation of any provision of this section is, upon conviction . . . (2) liable for a fine of not more than \$250,000 or imprisonment for not more than 20 years, or both, if any of the merchandise involved was a controlled substance,” 19 U.S.C. 1590. See also 18 U.S.C. 545 (smuggling generally).

³⁶ “(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment. . . .

“(c) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if – (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter -- (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources,” 21 U.S.C. 848(a), (c)

³⁷ “It shall be unlawful for any person who has received any income derived . . . from a pattern of racketeering activity . . . to use . . . any part of such income . . . in . . . the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or any interest in . . . any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (c) It shall be unlawful for any person employed by or associated with any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate . . . in the conduct of such enterprise’s affairs through a pattern of racketeering activity. . . . (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section,” 18 U.S.C. 1962.

“As used in this chapter (1) ‘racketeering activity’ means . . . (D) any offense involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical . . . punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act. . . .” 18 U.S.C. 1961(1).

In addition, 18 U.S.C. 1959 prohibits the commission of violent crimes in aid of racketeering activity.

Money Laundering

Drug traffic generates enormous amounts of cash in relatively small denominations – difficult to explain or transport. Congress has enacted a number of money laundering statutes designed to identify, disrupt and prevent the domestic and international flow of the profits of the traffic in controlled substances.³⁸ These laws

³⁸ “(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity -- (A)(i) with the intent to promote the carrying on of specified unlawful activity; or (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986 [relating to tax evasion and tax fraud]; or (B) knowing that the transaction is designed in whole or in part – (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than \$500,000 . . . or imprisonment for not more than twenty years, or both.

“(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument, or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States – (A) with the intent to promote the carrying on of specified unlawful activity; or (B) knowing that the monetary instrument or funds involved in the transaction, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation is designed in whole or in part – (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than \$500,000 . . . or imprisonment for not more than twenty years, or both. . . .

“(3) Whoever, with the intent – (A) to promote the carrying on of specified unlawful activity; or (B) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (C) to avoid a transaction reporting requirement under State or Federal law, conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. . . .

“(c) As used in this section . . . (7) the term ‘specified unlawful activity’ means – (A) any act or activity constituting an offense listed in section 1961(1) of this title [relating to the offenses which may constitute racketeering activity for purposes of RICO and include narcotics and dangerous drug felonies]. . . (B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving – (i) the manufacture, importation, sale, or distribution of a controlled substance. . . (C) any act . . . constituting a continuing criminal enterprise” 18 U.S.C. 1956.

“(a) Whoever, . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than \$10,000 and is derived from specified unlawful activity shall be punished as provided in subsection (b). . . .

“(f) As used in this section . . . (2) the term ‘criminally derived property’ means any property constituting, or derived from, proceeds obtained from a criminal offense; and (3) the term ‘specified unlawful activity’ has the meaning given that term in section 1956 of this title.” 18 U.S.C. 1957.

“(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year in which such person has participated as a principal

have been augmented by a series of commercial transaction reporting requirements crafted to highlight money laundering.³⁹

Penalties and Other Consequences

Capital Punishment

Four CSA offenses are punishable by death or life imprisonment: (1) murder in furtherance of a large scale drug trafficking operation;⁴⁰ (2) murder of a law enforcement officer during the course of a controlled substances offense;⁴¹ (3) attempted murder by a drug “kingpin” in order to obstruct the investigation of a

within the meaning of section 2 of title 18 to use or invest directly or indirectly, any part of such income, or the proceeds of such income, in [the] acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce. . . .” 21 U.S.C. 854. See also, 21 U.S.C. 1901-1908 (relating to prohibited financial transactions with designated significant foreign narcotics traffickers).

³⁹ E.g., 31 U.S.C.5313 (cash transactions involving \$10,000 or more must be individually reported by banks, securities brokers, investment bankers, currency exchanges, those who issue money orders, cashiers’ checks or travelers’ checks, credit card companies, insurance agencies, jewelers, pawnbrokers, finance companies, travel agencies, those engaged in the business of sending money, telegraph companies, the Postal Service, car dealers, those who sell planes or boats, and real estate agents); 31 U.S.C.5316 (anyone who transports more than \$10,000 across a U.S. border must report); 26 U.S.C. 6050I (those engaged in any trade or business must report cash transactions involving more than \$10,000).

Of course, the fact that drug trafficking is illegal does not absolved dealers of income tax liability. Any failure to report the amount of income earned and – in the absence of a Fifth Amendment claim – the source of that income carries its own criminal and civil penalties. 26 U.S.C. 7201-7206.

⁴⁰ “(1) In addition to the other penalties set forth in this section – (A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death,” 21 U.S.C. 848(e)(1)(A).

⁴¹ “(1) In addition to the other penalties set forth in this section

* * *

“(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer’s official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

“(2) As used in paragraph (1)[(B)], the term ‘law enforcement officer’ means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions,” 21 U.S.C. 848(e)(1)(B).

continuing criminal enterprise;⁴² and (4) a drug “kingpin” in a continuing criminal enterprise involved in at least twice the amount of controlled substances or twice the gross receipts ordinarily required to trigger the enterprise provisions.⁴³

The death penalty may only be imposed in cases marked by statutorily designated aggravating factors that must be found to outweigh any statutorily identified mitigating factors, 18 U.S.C. 3593(e). There is a single set of mitigating factors:

- impaired capacity of the accused;
- the accused acted under duress;
- the accused was a principal but only a relatively minor participant;
- equally guilty codefendants will not be sentenced to death;
- the accused has no substantial criminal record;
- the accused committed the crime while severely disturbed, mentally or emotionally;
- the victim consented to the conduct that resulted in his or her death; and

⁴² “(b) A defendant who has been found guilty of
* * *

“(2) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under that section, where the defendant is a principal administrator, organizer, or leader of such an enterprise, and the defendant, in order to obstruct the investigation or prosecution of the enterprise or an offense involved in the enterprise, attempts to kill or knowingly directs, advises, authorizes, or assists another to attempt to kill any public officer, juror, witness, or members of the family or household of such a person, shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense,” 18 U.S.C. 3591(b)(2).

⁴³ “(b) A defendant who has been found guilty of – (1) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under the conditions described in subsection (b) of that section which involved not less than twice the quantity of controlled substance described in subsection (b)(2)(A) or twice the gross receipts described in subsection (b)(2)(B) . . . shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense,” 18 U.S.C. 3591(b)(1).

Twice the gross receipts of 21 U.S.C. 848(b)(2)(B) is twice \$10 million or \$20 million; twice the quantity of controlled substance described in 21 U.S.C. 848(b)(2)(A) is twice, 300 times the quantity of a substance described in 21 U.S.C. 841(b)(1)(B), that is: (1) 600 times 100 grams (60,000 grams (60 kilograms)) of a mixture containing heroin; (2) 600 times 500 grams (300,000 grams (300 kilograms)) of a mixture containing cocaine; (3) 600 times 5 grams (3,000 grams (3 kilograms)) of a mixture containing cocaine base (crack); (3) 600 times 10 grams (6,000 grams (6 kilograms)) of a mixture containing PCP; (4) 600 times 1 gram (600 grams) of a mixture containing LSD; (5) 600 times 100 kilograms (60,000 kilograms) of a mixture containing marijuana; or 600 times 5 grams (3,000 grams (3 kilograms)) of a mixture containing methamphetamine.

One gram = .035 ounce; 1000 grams = 1 kilogram = 2.2046 lbs; 1 oz.= 28.35 grams; 453.6 grams = 1 lb.

- any other factor considered mitigating including any other factor “in the defendant’s background, record, or character or any other circumstance of the offense that mitigate[s] against imposition of the death sentence.”⁴⁴

The aggravating circumstances are not the same for homicide cases as those used in cases of drug kingpin attempted homicide and double kingpin cases. The aggravating factors in kingpin attempted homicide or double kingpin cases include:

- prior conviction for a capital offense;
- two prior drug felony convictions;
- prior conviction of a 5 year drug felony;
- use of a firearm in the commission of the offense;
- distribution to or using a minor under 21 years of age or distributing in a school zone or similarly prohibited location; and
- trafficking in a drug known to contain a potentially lethal adulterant.⁴⁵

⁴⁴ “(a) Mitigating factors.— In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following:

“(1) Impaired capacity.—The defendant’s capacity to appreciate the wrongfulness of the defendant’s conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

“(2) Duress.—The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

“(3) Minor participation.—The defendant is punishable as a principal in the offense, which was committed by another, but the defendant’s participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

“(4) Equally culpable defendants.—Another defendant or defendants, equally culpable in the crime, will not be punished by death.

“(5) No prior criminal record.—The defendant did not have a significant prior history of other criminal conduct.

“(6) Disturbance.—The defendant committed the offense under severe mental or emotional disturbance.

“(7) Victim’s consent.—The victim consented to the criminal conduct that resulted in the victim’s death.

“(8) Other factors.— Other factors in the defendant’s background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence,” 18 U.S.C. 3592(a).

⁴⁵ “(d) Aggravating factors for drug offense death penalty.—In determining whether a sentence of death is justified for an offense described in section 3591(b), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

“(1) Previous conviction of offense for which a sentence of death or life imprisonment was authorized.—The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or death was authorized by statute.

“(2) Previous conviction of other serious offenses.—The defendant has previously been convicted of two or more Federal or State offenses, each punishable by a term of imprisonment of more than one year, committed on different occasions, involving the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) or the infliction of, or attempted

On the other hand, the death penalty is only available in homicide cases where the accused is shown to have the requisite capital intent⁴⁶ as well as one or more of a more extensive list of aggravating factors which includes various prior drug convictions.⁴⁷

infliction of, serious bodily injury or death upon another person.

“(3) Previous serious drug felony conviction.—The defendant has previously been convicted of another Federal or State offense involving the manufacture, distribution, importation, or possession of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) for which a sentence of five or more years of imprisonment was authorized by statute.

“(4) Use of firearm.—In committing the offense, or in furtherance of a continuing criminal enterprise of which the offense was a part, the defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person.

“(5) Distribution to persons under 21.—The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 418 of the Controlled Substances Act (21 U.S.C. 859) which was committed directly by the defendant.

“(6) Distribution near schools.—The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 419 of the Controlled Substances Act (21 U.S.C. 860) which was committed directly by the defendant.

“(7) Using minors in trafficking.—The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 420 of the Controlled Substances Act (21 U.S.C. 861) which was committed directly by the defendant.

“(8) Lethal adulterant.—The offense involved the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), mixed with a potentially lethal adulterant, and the defendant was aware of the presence of the adulterant.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists,” 18 U.S.C. 3592(d).

There may be an additional required aggravating circumstances because as noted *infra* in *Constitutional Considerations*, although nowhere specifically mentioned in the statutes, Supreme Court precedents suggest that the death penalty may only be imposed in cases involving the taking of a human life. *Coker v. Georgia*, 433 U.S. 584 (1977), *Enmund v. Florida*, 458 U.S. 782 (1982).

⁴⁶ “(a) A defendant who has been found guilty of . . . (2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593 – (A) intentionally killed the victim; (B) intentionally inflicted serious bodily injury that resulted in the death of the victim; (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act, shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense,” 18 U.S.C. 3591(a).

⁴⁷ “(c) Aggravating factors for homicide.—In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the

Thereafter the procedure is the same. The prosecution must give notice of an intent to seek the death penalty before trial or before a guilty plea is accepted, 18 U.S.C. 3593(a). If the accused is found or pleads guilty, the factors are weighed following a separate hearing at which a jury – or a judge without a jury if the parties agree – hears evidence and arguments as to the existence of aggravating and mitigating circumstances, 18 U.S.C. 3596(b). The court may refuse to provide the accused with the names of the members of the jury pool or of the witnesses to be called against him or her, 18 U.S.C. 3432, but the accused in a capital case is entitled to the appointment of two attorneys to assist in his defense, at least one of whom is expert in matters relating to the law of capital punishment, 18 U.S.C. 3005.

Before making a sentencing determination, the judge instructs the jury that its determination may not involve consideration of the race, color, religious beliefs, national origin, or sex of either the defendant or the victim, 18 U.S.C. 3593(f). The jury must be unanimous on the existence of any of the aggravating factors and on the determination that aggravating factors outweigh mitigating factors so as to justify capital punishment, 18 U.S.C. 3593(e). Individual jurors are free to consider and weigh virtually any circumstance they consider mitigating, 18 U.S.C. 3593(c).

A defendant sentenced to death may appeal as a matter of right and the court of appeals will reverse and remand for resentencing upon a finding that the sentence was the product of prejudice or passion, that the evidence does not support the finding of the existence of an aggravating factor, or that legal error requiring reversal exists, 18 U.S.C. 3595.

Appeals having been exhausted, the death penalty may not be carried out against a pregnant woman or mentally retarded defendant, 18 U.S.C. 3596. Otherwise, execution is to be conducted according to the laws of the state in which the sentence is imposed or of a state designated by the court if required. State facilities may be used for execution, but neither federal nor state employees may be required to participate in a capital prosecution or execution, 18 U.S.C. 3597.

court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

* * *

“(10) Conviction for two felony drug offenses.–The defendant has previously been convicted of 2 or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance. . . .

(12) Conviction for serious Federal drug offenses.–The defendant had previously been convicted of violating title II or III of the Controlled Substances Act for which a sentence of 5 or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(13) Continuing criminal enterprise involving drug sales to minors.–The defendant committed the offense in the course of engaging in a continuing criminal enterprise in violation of section 408(c) of the Controlled Substances Act (21 U.S.C. 848(c)), and that violation involved the distribution of drugs to persons under the age of 21 in violation of section 418 of that Act (21 U.S.C. 859)” 18 U.S.C. 3592(c).

Constitutional Considerations

The language of the kingpin statute notwithstanding there is a real question whether the Constitution limits imposition of the death penalty to cases in which a human life has been taken.

In 1972, the United States Supreme Court held that the Eighth Amendment's cruel and unusual punishments clause precluded imposing the death penalty at the unguided discretion of the trier of fact under the procedures then used by the federal government and most of the states in capital cases, *Furman v. Georgia*, 408 U.S. 238.

The Court subsequently held that the defect detected in *Furman* could not be cured by establishing a mandatory, rather than discretionary, death penalty statute for all murders, *Woodson v. North Carolina*, 428 U.S. 280 (1976), but that the Constitution would permit capital punishment under a procedure which guided the exercise of the judge and jury's discretion so that the death penalty would be reserved for only the most egregious cases, *Gregg v. Georgia*, 428 U.S. 153 (1976).

Having concluded in effect in *Woodson* that not all murders could be made subject to the death penalty, the Supreme Court, in *Coker v. Georgia*, 433 U.S. 584 (1977), held that imposition of the death penalty for commission of a crime other than murder, rape in that case, violated the cruel and unusual punishment clause:

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such, does not take human life.⁴⁸

Later cases seem to confirm the basic implication of *Woodson* and *Coker* – a crime that does not involve the taking of a life cannot be punished by death. For instance, the Court resisted the invitation to apply its individualized capital

⁴⁸ 433 U.S. at 598 (Opinion of White, J.). At the time of the rape for which he was sentenced to death, Coker was an escaped prisoner who had been sentenced to 3 consecutive terms of life imprisonment for earlier crimes. If not subject to the death penalty, Coker was not likely to be subject to any real penalty at all.

Four members of the Court based their conclusion on the fact they found the punishment disproportionate to the crime of rape, 433 U.S. at 593-600 (White, J., with Stewart, Blackmun and Stevens, JJ. concurring). A fifth, Justice Powell, considered the death penalty disproportionate to the crime of rape committed without excess brutality and where the victim suffered neither serious nor lasting injuries, 433 U.S. at 601 (Powell, J. concurring in part and dissenting in part), and two others considered all capital punishment unconstitutional, 433 U.S. at 600 (Brennan, J. and Marshall, J. concurring in the judgment).

punishment doctrine to a case challenging the imposition of life imprisonment without parole, because “death is different.”⁴⁹

And the Court made a life taking intent its focal point when determining the circumstances under which felony murders might be declared capital offenses. Under the felony murder doctrine, when a murder occurs during the course of a robbery or some other felony, the murderer as well as each of the other robbers or felons is considered equally guilty of murder. The Court used the defendants’ “culpable mental state” with respect to the murder (not the underlying felony) as a test to determine when the capital punishment might constitutionally be imposed under the felony murder doctrine.

Thus it concluded that the Eighth Amendment would not permit imposition of the death penalty to punish the getaway driver in a robbery at which he may not have been present and during which he did “not himself kill, attempt to kill, or intend that a killing take place or that lethal force . . . be employed,” even though his confederates murdered the victims of the robbery, *Enmund v. Florida*, 458 U.S. 782, 797 (1982).⁵⁰ The language of the Court so closely tracks that used in the plurality opinion in *Coker* as to make suspect capital punishment for any crime that “as such, does not take human life.”⁵¹

⁴⁹ *Harmelin v. Michigan*, 501 U.S. 957, 994-95 (1991) (“Our cases creating and clarifying the ‘individualized capital sentencing doctrine’ have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties”).

Harmelin had been convicted of possession of 672 grams of cocaine and sentenced to life imprisonment without the possibility of parole.

⁵⁰ In *Enmund*, two of robbers were in the process of holding up one of the victims when the victim’s wife appeared and shot one of the robbers. Both victims were then shot and killed. The state courts held that irrespective of whether he participated in planning the robbery or was present when the victims were killed, Enmund’s “driving the escape car was enough to warrant conviction and the death penalty whether or not [he] intended that life be taken or anticipated that lethal force would be used,” 458 U.S. at 787 n.2.

⁵¹ “[R]obbery is a serious crime deserving serious punishment. It is not, however, a crime so grievous an affront to humanity that the only adequate response may be the penalty of death. It does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, robbery by definition does not include the death of or even the serious injury of another person. The murderer kills; the robber, if no more than that, does not. Life is over for the victim of the murderer; for the robbery victim, life is not over and normally is not beyond repair. As was said of the crime of rape in *Coker*, we have the abiding conviction that the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the robber who, as such, does not take human life,” *Enmund v. Florida*, 458 U.S. at 797.

The death penalty may be constitutionally imposed, however, upon a major participant in a felony who acts with “reckless indifference to human life” and whose confederates murder the victims of their common felony, *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (the Tison brothers engineered the prison escape of two previously convicted murders by smuggling a freezer chest full of firearms into the prison. When the car in which they were making their escape blew a tire, they commandeered another car and kidnapped its occupants whom the prisoners later murdered, 481 U.S. at 139-40). *Tison*, with its focus on the defendants’ involvement in life-threatening misconduct that ended in murder, leaves

Some would argue that the death penalty is nevertheless constitutionally permissible under some extreme circumstances that do not involve the taking of human life. There are some crimes – the attempted assassination of a President, nation-threatening espionage, sabotage or treason, operating large drug trafficking enterprises, and similar crimes that produce or threaten wide-spread, catastrophic damage – for which the death penalty might not be considered disproportionately severe, even if it were considered a disproportionate sanction for rape and some murders.⁵²

Some proponents of this view also point out that the composition of the Court has changed since *Coker* and *Enmund*, leading them to conclude that *Coker* and *Enmund* should be limited to their facts and might be decided differently today.⁵³

Finally, the Eighth Amendment standards of *Coker* and *Enmund* both “rest on . . . an examination of contemporary values” evidenced, inter alia, by current legislative pronouncements, *McClesky v. Kemp*, 481 U.S. 279, 300 (1987); *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1987). The extent of the revival of the death penalty after *Furman* by state and federal legislative bodies, legislative imposition of progressively more severe penalties for drug trafficking, and Congressional establishment of not one but four and possibly as many as eight federal capital offenses that do not involve murder,⁵⁴ might all be cited for the proposition that

unchanged the implication in *Enmund* that the death penalty must be reserved as a punishment for those whose intentional misconduct or reckless indifference contributes to the death of another.

⁵² Cf., *The Death Penalty: A Solution to the Problem of Intentional AIDS Transmission Through Rape*, 26 JOHN MARSHALL LAW REVIEW 941 (1993) (suggesting that the death penalty should not be considered a disproportionately cruel and unusual punishment for rape committed by one who knows he has AIDS symptoms or that he is a carrier of AIDS or the HIV virus).

⁵³ *Death Penalty: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 470-71 (1989)(statement of Paul D. Kamemar, Executive Legal Director of the Washington Legal Foundation).

⁵⁴ The eight are treason (18 U.S.C. 2381); espionage (18 U.S.C. 794, 18 U.S.C. 3591(a)); operating a major continuing criminal enterprise (21 U.S.C. 848, 18 U.S.C. 3591(b)(1)); attempted murder by a drug kingpin to frustrate investigation or prosecution, (21 U.S.C. 848, 18 U.S.C. 3591(b)(2)); civil rights conspiracies during which a kidnapping, rape, attempted kidnapping, attempted rape or attempted murder occur (18 U.S.C. 241); deprivation of civil rights under color of law during which a kidnapping, rape, attempted kidnapping, attempted rape or attempted murder occur (18 U.S.C. 242); deprivation of federal protected civil rights during which a kidnapping, rape, attempted kidnapping, attempted rape, or attempted murder occur (18 U.S.C. 245); and obstruction of the exercise of religious beliefs during which a kidnapping, rape, attempted kidnapping, attempted rape, or attempted murder occur (18 U.S.C. 247).

The wording of the four civil rights statutes suggests that Congress intended to make them capital offenses even if no victim's life were taken, see e.g., 18 U.S.C. 241, “. . .if death results from the acts committed in violations of this section *or* if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death”

imposition of the death penalty in serious drug trafficking cases is not inconsistent with the “evolving standards of decency that mark the progress of a maturing society,” *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958), and is thus compatible with the demands of the Eighth Amendment.

Fines and Imprisonment

The Constitution as it is now understood, however, seems to leave little if any legislative discretion to establish capital offenses that do not involve the taking of a human life. On the other hand, legislative bodies enjoy considerable discretion to set other forms of punishment as long as imprisonment is not cruel and unusual and as long as the fines and forfeitures are not excessive. The constitutional test for imprisonment, fines and forfeitures is the same: a sanction is neither cruel and unusual nor excess unless “it is grossly disproportionate to the gravity of the defendant’s offense,” *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

The Supreme Court’s decision in *Harmelin v. Michigan*, 501 U.S. 957 (1991), indicates the breadth of discretion this test affords. There, the Court found no constitutional infringement in the imposition of a mandatory minimum term of life imprisonment without the possibility of parole upon conviction of a first time offender for possession of 672 grams of cocaine.

The following charts the myriad maximum and minimum terms of imprisonment and fines that may be imposed for a controlled substance or related offense:

(emphasis added). But the wording of the capital punishment provisions suggests a different reading. Section 3591 of title 18 activates the procedures required to overcome the Eighth Amendment problems identified in *Furman*, and its progeny. It identifies the circumstances under which it supplies the gateway for imposition of the death penalty: the two kingpin situations (18 U.S.C. 3591(b)(1),(2)), the nation-threatening situations, treason and espionage, (18 U.S.C. 3591(a)(1)(“a defendant who has been found guilty of – (1) an offense described in 794 [espionage] or section 2381 [treason] . . . shall be sentenced to death if. . .”) and finally 18 U.S.C. 3591(a)(2), the only category under the civil rights offenses may be accommodated, “A defendant who has been found guilty of . . . any other offense for which a sentence of death is provided, if the defendant . . . (A) intentionally killed the victim; (B) intentionally inflicted serious bodily injury that resulted in the death or the victim; (C) intentionally participated in an act, contemplating that the life of a person would be taken . . . and the victim died as a direct result of the act; or (D) intentionally and specifically engaged in an act of violence . . . and the victim died as a direct result of the act, shall be sentenced to death if. . .”).

Unlawful distribution, possession with intent to distribute, manufacture, importation and exportation, etc. (21 U.S.C. 841, 960, 962, and 46 U.S.C.App. 1903)⁵⁵

1st offense	<u>Substance</u>	<u>Amount</u>	<u>Fine</u>	<u>Imprisonment</u>
	Heroin	One kilogram or more	\$4/10 million	10 years to life
		100 grams to one kilogram	\$2/5 million	5 to 40 years
		Less than 100 grams	\$1/5 million	Up to 20 years
	Coca leaf and derivatives	5 kilograms or more	\$4/10 million	10 years to life
		500 grams to 5 kilograms	\$2/5 million	5 to 40 years
		Less than 500 grams	\$1/5 million	Up to 20 years
	Ecgonine (a cocaine precursor)	5 kilograms or more	\$4/10 million	10 years to life
		100 grams to 5 kilograms	\$2/5 million	5 to 40 years
		Less than 100 grams	\$1/5 million	Up to 20 years
	Coca leaves, cocaine, or ecgonine containing cocaine base ("Crack," etc.)	50 grams or more	\$4/10 million	10 years to life
		5 to 50 grams	\$2/5 million	5 to 40 years
		Less than 5 grams	\$1/5 million	Up to 20 years
	PCP (phencyclidine)	100 grams or more	\$4/10 million	10 years to life
		10 to 100 grams	\$2/5 million	5 to 40 years
		Less than 10 grams	\$1/5 million	Up to 20 years
	Mixture or substance containing detectable amount of PCP	1 kilogram or more	\$4/10 million	10 years to life
		100 grams to 1 kilogram	\$2/5 million	5 to 40 years
		Less than 100 grams	\$1/5 million	Up to 20 years
	LSD (lysergic acid diethylamide)	10 grams or more	\$4/10 million	10 years to life
		1 to 10 grams	\$2/5 million	5 to 40 years
		Less than 10 grams	\$1/5 million	Up to 20 years
	N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide (Fentanyl, i.e., "synthetic heroin")	400 grams or more (or 100 grams or more of a mixture or substance containing a detectable amount of it or any analogue of it)	\$4/10 million	10 years to life
		40 to 400 grams (or 10 grams of a mixture containing detectable amount)	\$2/5 million	5 to 40 years
		Less than 40 grams	\$1/5 million	Up to 20 years
	Marihuana	1000 kilograms or more or 1000 or more plants	\$4/10 million	10 years to life
		100 to 1000 kilograms or 100 to 1000 plants	\$2/5 million	5 to 40 years
		50 to 100 kilograms or 100 plants	\$1/5 million	Up to 20 years
		Under 50 kilograms ⁵⁶ , 10 kilograms of hashish, or one kilogram of hashish oil	\$250,000/\$1 million	Up to 5 years

⁵⁵ All trafficking offenses are subject to the same imprisonment penalty -- 20 years to life -- if death or serious bodily injury results from the use of the substance involved. Unless otherwise indicated weights apply to any mixture containing a detectable amount of the substance regardless of the weight of the substance in the mixture.

A reference to a fine of "\$4/10 million" means a fine of not less than \$4 million or more than 10 million and a reference to "10 years to life" means a term of imprisonment of not less than 10 years nor more than life.

⁵⁶ Except in the case of 50 or more marihuana plants regardless of weight, and except that under section 841(b)(4) distribution of a small amount of marihuana for no remuneration is treated as a simple possession offense and punished under section 844, infra.

Methamphetamine ⁵⁷			
	50 grams or more		
	or 500 grams or more of a mixture	\$4/10 million	10 years to life
	5 to 50 grams		
	or 50 to 500 grams of a mixture	\$2/5 million	5 to 40 years
	Less than 5 grams		
	or less than 50 grams of a mixture	\$1/5 million	Up to 20 years
Gamma hydroxybutyric acid			
	any weight	\$1/5 million	Up to 20 years
Flunitrazepam			
	1 gram	\$1/5 million	Up to 20 years
	30 milligrams	\$250,000/\$1 million	Up to 5 years
Any other Schedule I or II substance ⁵⁸			
	any weight	\$1/5 million	Up to 20 years
Any Schedule III substance			
	any weight	\$250,000/\$1 million	Up to 5 years
Any Schedule IV substance			
	any weight	\$250,000/\$1 million	Up to 3 years
Any Schedule V substance			
	any weight	\$100,000/\$250,000	Up to 1 year
2nd offense⁵⁹			
Heroin			
	One kilogram or more	\$8/20 million	20 years to life
	100 grams to one kilogram	\$4/10 million	10 years to life
	Less than 100 grams	\$2/10 million	Up to 30 years
Coca leaf and derivatives			
	5 kilograms or more	\$8/20 million	20 years to life
	500 grams to 5 kilograms	\$4/10 million	10 years to life
	Less than 500 grams	\$2/10 million	Up to 30 years
Ecgonine (a cocaine precursor)			
	5 kilograms or more	\$8/20 million	20 years to life
	100 grams to 5 kilograms	\$4/10 million	10 years to life
	Less than 100 grams	\$2/10 million	Up to 30 years
Coca leaves, cocaine, or ecgonine containing cocaine base ("Crack," etc.)			
	50 grams or more	\$8/20 million	20 years to life
	5 to 50 grams	\$4/10 million	10 years to life
	Less than 5 grams	\$2/10 million	Up to 30 years
PCP (phencyclidine)			
	100 grams or more	\$8/20 million	20 years to life
	10 to 100 grams	\$4/10 million	10 years to life
	Less than 10 grams	\$2/10 million	Up to 30 years
Mixture or substance containing detectable amount of PCP			
	1 kilogram or more	\$8/20 million	20 years to life
	100 grams to 1 kilogram	\$4/10 million	10 years to life
	Less than 100 grams	\$2/10 million	Up to 30 years
LSD(lysergic acid diethylamide)			
	10 grams or more	\$8/20 million	20 years to life
	1 to 10 grams	\$4/10 million	10 years to life
	Less than 10 grams	\$2/10 million	Up to 30 years
N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide (Fentanyl, i.e., "synthetic heroin")			
	400 grams or more (or 100 grams or more of a		

⁵⁷ The penalties do not apply to importation or exportation, which are subject to imprisonment for not more than 20 years and a fine of not more than \$1 million for individuals and not more than \$5 million for organizations, regardless of the amount of the controlled substance involved.

⁵⁸ The penalties do not apply to importation or exportation, which are subject to imprisonment for not more than 20 years and a fine of not more than \$2/5 million where the substance involved is under schedule I or II and imprisonment for not more than 5 years and a fine of not more than \$250,000/1 million where it is under III, IV or V.

⁵⁹ A second offense is one committed after a prior conviction for any felony drug offense, under any Federal, State, or foreign law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances.

	mixture or substance containing a detectable amount of it or any analogue of it)	\$8/20 million	20 years to life
	40 to 400 grams (or 10 grams of a mixture containing detectable amount)	\$4/10 million	10 years to life
	Less than 40 grams	\$2/10 million	Up to 30 years
Marihuana			
	1000 kilograms or more or 1000 or more plants)	\$8/20 million	20 years to life
	100 to 1000 kilograms or 100 to 1000 plants)	\$4/10 million	10 yrs. to life
	50 to 100 kilograms or 100 plants	\$2/10 million	Up to 30 years
	Less than 50 kilograms ⁶⁰ , 10 kilograms of hashish, or one kilogram of hashish oil	\$500,000/\$2 million	Up to 10 years
Methamphetamine ⁶¹			
	100 grams or more	\$8/20 million	20 years to life
	10 to 100 grams	\$4/10 million	10 years to life
	Less than 10 grams	\$2/10 million	Up to 30 years
Gamma hydroxybutyric acid			
	any weight	\$2/10 million	Up to 30 years
Flunitrazepam			
	1 gram	\$2/10 million	Up to 30 years
	30 milligrams	\$500,000/\$2 million	Up to 10 years
Any other Schedule I or II substance ⁶²			
	any weight	\$2/10 million	Up to 30 years
Any Schedule III substance			
	any weight	\$500,000/\$2 million	Up to 10 years
Any Schedule IV substance			
	any weight	\$500,000/\$2 million	Up to 6 years
Any Schedule V substance			
	any weight	\$200,000/\$500,000	Up to 2 year
3rd offense	A Schedule I or II substance singled out for special penalty treatment (as indicated above) in amounts constituting a top level offense	Same as 2d offense	Life, no release

Cultivation on Federal property (21 U.S.C. 841(b)(5))

Any offense			
All substances/all weights	Greater of \$500,000/ \$1 million or the maximum fine for distribution of the substance involved		Maximum term for distribution of the substance involved

Environmental damage on Federal property resulting from controlled substance manufacturing or distribution (21 U.S.C. 841(b)(6))

Any offense ⁶³		
All substances	Up to \$250,000	Up to 5 years

⁶⁰ Except in the case of 50 or more marihuana plants regardless of weight and except that distribution of a small amount of marihuana is punishable as simple possession under section 844, infra.

⁶¹ The penalties do not apply to importation or exportation, which are subject to imprisonment for not more than 30 years and a fine of not more than \$2 million for individuals and not more than \$10 million for organizations, regardless of the amount of the controlled substance involved.

⁶² The penalties do not apply to importation or exportation, which are subject to imprisonment for not more than 30 years and fines of not more than \$2/10 million where the substance involved is under schedule I or II and imprisonment for not more than 10 years and fines of not more than \$500,000/2 million where it is under III, IV or V.

⁶³ Creating a serious hazard to human or animal life, or harming the environment, or causing water pollution as a result of using poisons, chemicals or other hazardous substances on Federal property while in the course of unlawfully manufacturing or otherwise distributing a controlled substance.

Use of a controlled substance to commit a crime of violence (21 U.S.C. 841(b)(7))

Any offense⁶⁴
 All substancesUp to \$250,000 Up to 20 years

Offenses involving precursor and essential (listed) chemicals, generally (21 U.S.C. 841(d))

Any offense⁶⁵
 List I chemicals [under 21 U.S.C. 802(34)] Up to \$250,000 Up to 20 years
 List II chemicals [under 21 U.S.C. 802(35)] Up to \$250,000 Up to 10 years

Boobytraps on Federal property (21 U.S.C. 841(e))⁶⁶

1st offense Up to \$10,000 Up to 10 years
 2nd offense Up to \$20,000 Up to 20 years

Wrongful distribution or possession of precursor and essential (listed) chemicals (21 U.S.C. 841(g))

Knowing unlawful distribution
 Listed chemicals [under 21 U.S.C. 802 (34)] Up to \$250,000 Up to 5 years
 Knowing possession of unreported listed chemicals
 Listed chemicals [under 21 U.S.C. 802 (34)] Up to \$100,000 Up to 1 year

Regulatory offenses & use of communications to facilitate distribution (21 U.S.C. 842, 843)

1st offense
 Generally⁶⁷ Up to \$100,000 Up to 1 year
 Deception offenses, etc.⁶⁸ Up to \$250,000 Up to 4 years
 Methamphetamine equipment offenses Up to \$30,000 Up to 10 years
 2nd offense
 Generally Up to \$250,000 Up to 2 years
 Deception offenses, etc. Up to \$250,000 Up to 8 years
 Methamphetamine equipment offenses Up to \$60,000 Up to 20 years

⁶⁴ Distributing a controlled substance to another with the intent to commit a crime of violence upon the victim.

⁶⁵ Possession with intent to use for unauthorized manufacture of a controlled substance; possession or distribution knowing that the chemical will be used for unauthorized manufacture of a controlled substance; or, with intent of causing evasion of the record-keeping or reporting requirements of 21 U.S.C. 830 (or regulations pursuant thereto), receipt or distribution of a reportable amount in units small enough so that the making of records or filing of reports is not required.

⁶⁶ Assembly, maintenance, or placement -- in connection with the manufacture, distribution, or dispensing of a controlled substance.

⁶⁷ Knowingly distributing a controlled substance to an unauthorized person by a registrant, removing required labels, unlawful use of information acquired during a controlled substance inspection, failing to keep required records, etc.

⁶⁸ To knowingly: use fictitious, revoked, suspended or expired registration number; obtain a controlled substance by fraud, forgery, or other form of deceit; provide false information; use labels and other markings to render a drug a counterfeit substance; unlawfully possess certain controlled substance manufacturing equipment; being a registrant, unlawfully distribute a controlled substance in the course of legitimate business; create or receive a mixture containing listed chemicals to evade regulatory requirements.

Simple possession (21 U.S.C. 844)⁶⁹

1st offense		
Cocaine base, over 5 grams	Up to \$250,000	5 to 20 years
All other	Not less than \$1,000	Up to 1 year
2nd offense ⁷⁰		
Cocaine base, over 3 grams	Up to \$250,000	5 to 20 years
All other	Not less than \$2,500	15 days to 2 years
3rd offense		
Cocaine base, over 1 gram	Up to \$250,000	5 to 20 years
All other	Not less than \$5,000	90 days to 3 years
Any offense		
Flunitrazepam	Up to \$250,000	Up to 3 years

Attempt and conspiracy (21 U.S.C. 846, 963)

Any offense
 All substances Same as penalties for the underlying offense

Manufacturing or Distributing Controlled Substances Within 1000 Feet of a Truck Stop or Highway Rest Area (21 U.S.C. 849)

1st offense
 All substances Up to twice the penalties otherwise authorized

2nd offense
 All substances Up to three times the penalties otherwise authorized

Continuing Criminal Enterprise (CCE) ("kingpin") (21 U.S.C. 848)⁷¹

1st offense
 All substances Up to \$2 million 20 years to life

2nd offense
 All substances Up to \$4 million 30 years to life

Any offense, if the offender is a major participant, involving an enterprise that grosses \$10 million a year or more or involving 300 times the amount of controlled substances required to trigger the most severe distribution penalties of 21 U.S.C. 841
 All substances Up to \$4 million life

Establishing manufacturing operations (21 U.S.C. 856)

Opening, maintaining, financing or making available a place for unlawful manufacture, distribution or use of controlled substances
 All substances Up to \$500,000 Up to 20 years

⁶⁹ If convicted of a simple possession offense, the defendant is required, if able, to pay the "reasonable costs" of the investigation and prosecution of the offense. Penalties for simple possession are also applicable to distribution of a "small amount" of marijuana for no remuneration.

⁷⁰ For purposes of the section under which the possession penalties are imposed, a prior conviction includes conviction of any offense under the Controlled Substances Act or the Controlled Substances Import and Export Act and any drug or narcotic offense chargeable under State law.

⁷¹ Under the statute, a person is considered to be engaged in a continuing criminal enterprise if (1) he commits any felony violation of the Controlled Substances Act or the Controlled Substances Import and Export Act, (2) the violation is a part of a continuing series of violations of those statutes (A) which are undertaken by the person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources.

Note that some violations carry the death penalty as discussed supra.

Endangering human life while illegally manufacturing a controlled substance (21 U.S.C. 858)

Any offense
All substances Up to \$250,000 Up to 10 years

Distribution to persons under age 21 by those age 18 or older (21 U.S.C. 859)

1st offense
All substances Up to twice the penalties otherwise authorized⁷²

2nd offense
All substances Up to three times the penalties otherwise authorized

Employment of persons under 18 years of age (for violation of the CSA) or unauthorized distribution to a pregnant individual (21 U.S.C. 861)

1st offense
Generally Up to twice the penalties otherwise authorized for the underlying offense but at least 1 year in prison⁷³

2nd offense
Generally Up to three times the penalties otherwise authorized for the underlying offense but at least 1 year in prison⁷⁴

Any offense
Use of person under 14 or distribution to a person under 18 Up to \$50,000 Up to 5 years

Distribution or manufacturing in or near schools, colleges, or certain youth-centered recreational facilities (21 U.S.C. 860)⁷⁵

1st offense
All substances Up to twice the penalties otherwise authorized for distribution and manufacture but at least 1 year in prison⁷⁶

2nd offense
All substances Up to three times the penalties otherwise authorized for distribution but at least 3 years in prison

Trafficking in drug paraphernalia (21 U.S.C. 863)

Interstate or foreign sale and transportation of, or use of the mails to sell, drug paraphernalia Up to \$250,000 Up to 3 years

Violation of regulations proscribing financial transactions with significant foreign narcotics traffickers (21 U.S.C.1906)

Any offense (individual) Up to \$250,000 Up to 10 years

⁷² Except that violation carries a mandatory minimum of no less than one year unless the offense involves marihuana in an amount of 5 grams or less.

⁷³ Also, at least twice any term of supervised release otherwise authorized for a first offense. Any higher mandatory penalty otherwise authorized for the offense would prevail.

⁷⁴ Also, at least three times any term of supervised release otherwise authorized for a first offense. Penalties for third and subsequent offenses are governed by 21 U.S.C. 841(b)(1)(A).

⁷⁵ The offense includes distribution or manufacturing in or on, or within 1,000 feet of the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or within 100 feet of a playground, public or private youth center, public swimming pool, or video arcade facility.

⁷⁶ Also, at least twice any term of supervised released otherwise authorized for a first offense. An exception to the mandatory 1-year minimum is provided with respect to an offense involving 5 grams or less of marihuana. Where the statute provides for a different mandatory penalty, the higher prevails.

Any offense (organization) Up to \$10,000,000
 Any offense (organization officer or agent) Up to \$5,000,000 Up to 30 years

Commission of a pattern of racketeering activity including one or more narcotic or dangerous drug felony to invest in, acquire, operate or participate in the affairs of an interstate enterprise ((RICO)(18 U.S.C. 1962)

Any offense
 Narcotic and dangerous drugs Up to \$250,000 Up to 20 years or life if the maximum for the predicate is life

Compensated crime of violence in aid of RICO (18 U.S.C. 1959)

Any offense
 All substances Up to \$250,000 Death or life in prison (murder or kidnapping)
 All substances Up to \$250,000 Up to 30 years (maiming)
 All substances Up to \$250,000 Up to 20 years (serious injury)
 All substances Up to \$250,000 Up to 5 years (threats injury)
 All substances Up to \$250,000 Up to 10 years (attempt or conspiracy to murder or kidnap)
 All substances Up to \$250,000 Up to 3 years (attempt or conspiracy to maim or commit a serious assault)

Aviation smuggling (19 U.S.C. 1590)

Any offense
 All substances Up to \$250,000 Up to 20 years

General smuggling (18 U.S.C. 545)

Any offense
 All substances Up to \$250,000 Up to 5 years

Travel Act: use of interstate facilities in aid of controlled substance violations (18 U.S.C. 1952)

Any Offense
 All substances Up to \$250,000 Up to 20 years, or any term of years or life if death results

Armed career criminal: possession of a firearm by a convicted felon or other disqualified person with 3 or more prior serious controlled substance convictions (drug crimes punishable by imprisonment for 10 years or more) or prior violent crime convictions (18 U.S.C. 924(e))

Any Offense
 All substances Up to \$250,000 Not less than 15 years

Three strikes: commission of a serious violent felony by an individual with a prior serious controlled substance conviction (drug kingpin or most seriously punished trafficking offense) and a prior serious violent felony conviction or 2 or more prior serious violent felony convictions (18 U.S.C. 3559(c))

Any Offense
 All substances Up to \$250,000 life

Laundering money from controlled substance violations

(18 U.S.C. 1956, 1957; 31 U.S.C. 5322)

Laundering (18 U.S.C. 1956)

Any offense
All substances Up to greater of Up to 20 years
\$500,000 or 2X
the amount of \$
laundered

Monetary traffic in property derived from unlawful activity (18 U.S.C. 1957)

Any offense
All substances Up to greater of Up to 10 years
\$250,000 or 2X
the amount of \$
laundered

Currency transaction and transportation reporting (31 U.S.C. 5322)

1st offense
All substances Up to \$250,000 Up to 5 years
2d offense
All substances Up to \$500,000 Up to 10 years

Investment of illicit drug profits (21 U.S.C. 854, 855)

Any offense
All substances Up to the greater of 2X profit/proceeds or \$50,000 Up to 10 years

Prohibited financial transactions in violation of the International Narcotics Trafficking Act (21 U.S.C. 1906)

Any Offense
All substances Up to \$250,000 Up to 10 years
Any Offense by officials of an entity
All substances Up to \$5 million Up to 30 years

Tax Offenses (26 U.S.C. 7201, 7203, 7206)

Attempted evasion [concerning income from controlled substance violations] (26 U.S.C. 7201)

Any offense
All substances Up to \$250,000 Up to 5 years

Willful failure to file return [concerning income for such violations] (26 U.S.C. 7203)

Any offense
All substances Up to \$250,000 Up to 5 years

Fraud and false statements [concerning income from such violations] (26 U.S.C. 7206)

Any offense
All substances Up to \$250,000 Up to 3 years

Drugs and the Federal Sentencing Guidelines

The federal sentencing guidelines determine the sentences meted out as punishment for most federal crimes. The guidelines system is essentially a scorecard system. Congress created the United States Sentencing Commission and authorized it to promulgate sentencing guidelines⁷⁷ in order to eliminate and prevent “unwarranted sentencing disparity.”⁷⁸ The Commission's mandate includes the power to amend the guidelines or promulgate new ones. Commission amendments become effective unless affirmatively modified or rejected by Act of Congress, 28 U.S.C. 944(p).

The guidelines apply to sentences imposed by the federal courts for crimes committed after November 1, 1987. The statutes that define federal crimes still identify the maximum penalties – and in some cases the minimum sentences – that may be assessed.⁷⁹ The guidelines, however, provide the standards that most often

⁷⁷ 28 U.S.C. 991-998; *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding the constitutionality of the Commission and the guidelines).

⁷⁸ H.R.Rep.No. 1017, 98th Cong., 2d Sess. 34 (1984); S.Rep.No. 225, 98th Cong., 1st Sess. 41 (1983).

⁷⁹ Sentencing courts may ignore statutory mandatory minimums upon petition of the government and in some first offender controlled substance cases:

“(e) **Limited authority to impose a sentence below a statutory minimum.**—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

“(f) **Limitation on applicability of statutory minimums in certain cases.**—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 961, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that – (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.” 18 U.S.C. 3553.

dictate how federal criminals will be punished within the boundaries Congress has established.

The federal courts must impose a sentence within the range the guidelines call for unless (1) the government moves for departure based upon the defendant's cooperation with law enforcement authorities,⁸⁰ (2) the guidelines expressly authorize departure,⁸¹ or (3) the court feels that the Commission failed to adequately consider the kind of factors raised by a particular case when it developed the otherwise applicable guidelines.⁸²

The guidelines assign most federal crimes to one of forty-three "offense levels" based on the severity of the offense.⁸³ Every offender is assigned to one of six "criminal history categories" based upon the extent of his or her past misconduct. The combination of offense levels and criminal history categories governs the severity of the penalties imposed.

This is an example of the operation of the federal sentencing guidelines applied in a drug case,⁸⁴ with the sentence calculated according to the guidelines' score-keeping procedure using the following outline:

- I. The applicable guideline which sets the base offense level for the crime(s) of conviction (i.e., the level assigned based on the nature of the offense).
 - A. Add levels to account for the presence of any aggravating factors indicated in the guideline
 - B. Subtract levels to account for any mitigating factors designated in the guideline.

- II. Adjustments (levels added and subtracted) for:
 - A. Victim related

⁸⁰ "The [sentencing] court shall impose a sentence of the kind, and within the range, referred to in [the sentencing guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. . . ." 18 U.S.C. 3553(b).

"Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines," U.S.S.G. §5K1.1.

⁸¹ E.g., U.S.S.G. §4A1.3 authorizing a sentence more severe than the guidelines would otherwise permit (a so-called "upward departure") if, in the sentencing court's view, the guideline's procedure for calibrating the weight to be given a defendant's criminal record does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes; a corresponding "downward departure" based upon the court's view that the defendant's past conduct is more commendable than guideline procedure acknowledges is *not* authorized.

⁸² 18 U.S.C. 3553(b).

⁸³ "If the offense is a felony or Class A misdemeanor for which no guideline expressly has been promulgated, . . . the most analogous offense guideline [applies]," U.S.S.G. §2X5.1.

⁸⁴ *United States v. Hill*, 79 F.3d 1477 (6th Cir. 1996).

- B. Role in the offense
- C. Obstruction
- D. Multiple counts
- E. Acceptance of responsibility.

III. Criminal history category (assign points for criminal record).

IV. Career offender alternative (required in some cases).

V. Sentencing table (final offense level points/criminal history points = sentencing range).

VI. Sentence (sentencing range used to determine punishment)

- A. Probation
- B. Imprisonment
- C. Supervised release
- D. Restitution
- E. Fine
- F. Forfeiture
- G. Special assessments.

VII. Departures

Application

“A grand jury indicted Hill for drug-related offenses committed on or about May 18, 1993. Counts one and two charged Hill with possession with intent to distribute approximately 20.8 grams of cocaine base (commonly known as “crack”) and 52.9 grams of cocaine powder respectively, in violation of 21 U.S.C. §841(a)(1).⁸⁵ Count

⁸⁵ “(a) . . . it shall be unlawful for any person knowingly or intentionally – (1) to . . . possess with intent to . . . distribute . . . a controlled substance. . . .

“(b) . . . any person who violates subsection (a) of this section shall be sentenced as follows: (1)(A) In the case of a violation of subsection (a) of this section involving . . . (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of . . . (II) cocaine. . . (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$4,000,000 . . . or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment . . . a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$8,000,000 . . . or both. If any person commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or

three charged Hill with possession of a firearm in violation of 18 U.S.C. 922(g).⁸⁶ Pursuant to a written plea agreement, Hill pleaded guilty to counts one and three, and the government agreed to dismiss count two of the indictment. The government also agreed to dismiss its appeal of the district court's grant of Hill's motion to suppress in a 1991 case in which Hill had been indicted for possession with intent to distribute approximately 75.4 grams of cocaine base," *United States v. Hill*, 79 F.3d 1477, 1480 (6th Cir. 1996). The firearms charge was based on the discovery of a handgun in the master bedroom of an apartment Hill shared with his girlfriend whom he claimed kept the gun for protection. At the time of his arrest, Hill had prior convictions for 6 misdemeanors and a felony for crimes ranging from possession of drug paraphernalia to assault and battery and had been paroled most recently on July 1, 1990.

I. *Base offense level.* The Statutory Index, U.S.S.G. App.A, identifies U.S.S.G. §2D1.1 as the guideline section applicable to violations of 21 U.S.C. 841 and U.S.S.G. §2K2.1 as the guideline section applicable to violations of 18 U.S.C.

suspend the sentence of any person sentenced under this subparagraph. . . .

“(B) In the case of a violation of subsection (a) of this section involving . . . (ii) 500 grams or more of a mixture or substance containing a detectable amount of . . . (II) cocaine . . . (iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base. . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$2,000,000 . . . or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment . . . a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$4,000,000 . . . or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. . . .

“(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years . . . a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$1,000,000 . . . or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years . . . a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$2,000,000 . . . or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. . . .” 21 U.S.C. 841(a),(b).

⁸⁶ “It shall be unlawful for any person – (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce,” 18 U.S.C. 922(g).

“Whoever knowingly violates subsection . . . (g) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years or both,” 18 U.S.C. 924(a)(2).

922(g). Under section 2D1.1, the base offense level is determined by the section's Drug Quantity Table unless the offense resulted in the death or serious bodily injury of another (in which case the base offense level is 38 for first time offenders and 43 for those with prior controlled substance convictions), U.S.S.G. §2D1.1(a). The Drug Table (appended) establishes the base offense level according the weight and type of controlled substance involved.

In *Hill*, the 20.8 grams of crack would carry a base offense level of 28, U.S.S.G. §2D1.1(c)(6), but the district court found that the 75.4 grams of crack involved in the 1991 dismissed indictment constituted "relevant conduct"⁸⁷ and thus should be counted for sentencing guideline purposes so that the appropriate base offense level for the combined weight of the crack ($75.4 + 20.8 = 96.2$) would be 32, U.S.S.G. §2D1.1(c)(4). The court of appeals found that the two single violations were too remote in time to be considered part of the common pattern necessary to consider the earlier possession "relevant conduct" for sentencing purposes. Thus, the base offense level for possession of between 20 and 35 grams of crack possession offense is:

28

In cases such as *Hill* that involve more than one type of controlled substance, the guidelines provide a conversion device to permit them to be merged into a single offense level. The device involves assigning various controlled substances equivalence weights, using marihuana as a standard, in a Drug Equivalency Table provided in section 2D1.1 (appended *infra* at 27). Thus, for example, 1 gram of heroin has been assigned a drug equivalency of 1 kilogram of marihuana. In the case of crack and powder cocaine, 1 gram of powder cocaine is considered the equivalent of 200 grams of marihuana and 1 gram of crack the equivalent of 20 kilograms (2,000 grams) of marihuana.

In *Hill*, this means 52.9 grams of cocaine yield a marihuana equivalent weight of 10.58 kilograms ($52.9 \times 200 = 10580$ grams) of marihuana and 20.8 grams of crack yield a marihuana equivalent weight of 416 kilograms ($20.8 \times 20 = 416$ kilograms) of marihuana. Together they have a marihuana equivalent weight of 426.58 kilograms which translates to a base offense level of: 28

Section 2D1.1 modifies the base offense level for four factors. It *adds* 2 levels if a dangerous weapon is possessed, U.S.S.G. §2D1.1(b)(1); it *adds* 2 levels (to a required minimum total offense level of 26) for drug smuggling involving a private or chartered airplane or involving the defendant as the pilot, captain, navigator or other operator of "any craft or vessel," U.S.S.G. §2D1.1(b)(2); it *adds* 2 levels for

⁸⁷ "Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level . . . shall be determined on the basis of the following: (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. . . (2) sole with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of the conviction. . . ." U.S.S.G. §1B1.3(a).

distribution in prison or in a correctional or detention facility, U.S.S.G. §2D1.1(b)(3); and if the offense level is 26 or greater, it *subtracts* 2 offense levels if the defendant is a first time offender, did not use violence or possess a dangerous weapon, was not a prime mover in a continuing criminal enterprise, provided authorities with all the information he had concerning the offense and related offenses, and if no one died or was seriously injured as a result of the offense, U.S.S.G. §§2D1.1(b)(4), 5C1.2.

Because Hill pled guilty to possession of a firearm, over which he might have been found to have constructive possession and which the lower court could have found was possessed in connection with the offense, Hill's offense level for the crack possession offense was increased by +2 (bring the offense level to 30).

With respect to the firearms charge in count three of Hill's indictment, there are eight possible base offense levels for a firearms offense: 26, if the defendant has 2 or more prior felony convictions involving drugs or violence and the firearm is a sawed-off shotgun, sawed-off rifle, machinegun, destructive device (bomb), semiautomatic assault weapon, or has a silencer, U.S.S.G. §2K2.1(a)(1); 24, if the defendant simply has 2 or more prior felony convictions involving drugs or violence, U.S.S.G. §2K2.1(a)(2); 22, if the defendant has a prior felony conviction involving drugs or violence and the firearm is a sawed-off shotgun, sawed-off rifle, machinegun, destructive device (bomb), semiautomatic assault weapon, or has a silencer, U.S.S.G. §2K2.1(a)(3); 20, if the defendant has a prior felony conviction involving drugs or violence or the defendant is a "prohibited person" (person with a previous felony conviction, a fugitive, an illegal alien, drug addict, or mental defective) and the firearm is a sawed-off shotgun, sawed-off rifle, machinegun, destructive device (bomb), semiautomatic assault weapon, or has a silencer, U.S.S.G. §2K2.1(a)(4); 18, if the firearm is a sawed-off shotgun, sawed-off rifle, machinegun, destructive device (bomb), semiautomatic assault weapon, or has a silencer, U.S.S.G. §2K2.1(a)(5); 14 if the defendant is a prohibited person; 6, for the less severely punishable violations of 18 U.S.C. 922 (e.g., dealer violations of the Brady Act waiting requirements), U.S.S.G. §2K2.1(a)(8); and 12, for all other violations, U.S.S.G. §2K2.1(a)(7).

The firearm in *Hill* was a handgun, but Hill had a prior felony conviction involving drugs or violence, so the base offense level under U.S.S.G. §2K2.1 (a)(4) is: 20

Section 2K2.1 requires offense level modification under six circumstances: when several firearms are involved, *add 2 to 10* offense levels based on the number of firearms involved (e.g., 3-7 firearms add 2; 200 or more add 10), U.S.S.G. §2K2.1(b)(1); *reduce to* offense level 6 an offense with a offense level of 12 or 14 if possession is solely for lawful sporting or collection purposes and is not unlawfully used, U.S.S.G. §2K2.1(b)(2); *add 2* offense levels when a destructive device is involved, U.S.S.G. §2K2.1(b)(3); *add 2* offense levels when the firearm is stolen or serial numbers have been tampered with (up to offense level 29), U.S.S.G. §2K2.1(b)(4); *add 4* offense levels and *increase* at least to offense level 18 when the firearm possession occurs in connection with another felony, U.S.S.G. §2K2.1(b)(5); and when the offense involves a record-keeping violation to conceal an underlying offense, use the offense level of the underlying offense, U.S.S.G. §2K2.1(b)(6).

Hill involved possession in connection with another felony resulting in the addition of 4 offense levels: +4 (bringing the offense level to 24)

II. Adjustments.

A. *Victim-Related.* None of the victim-related sentence level adjustments, U.S.S.G. §§3A1.1 to 3A1.4, apply since the case at hand involves neither international terrorism, a hate crime, a vulnerable victim, a government official as a victim, nor a victim under physical restraint: 0 (the offense levels remain at 30 (crack/cocaine) and 24 (firearm possession))

B. *Role in the Offense.* Adjustments may be made to reflect the defendant's level of participation in group criminal activities (increase 2 to 4 levels for group leadership, U.S.S.G. §3B1.1; reduce 2 or 4 levels for minor or minimal participation, U.S.S.G. §3B1.2), for the use of a minor to commit an offense (increase 2 levels, U.S.S.G. §3B1.4), or to account for an offender's abuse of a position of trust or use of a special skill (increase of 2 levels, U.S.S.G. §3B1.3). None are involved in *Hill*: 0 (the offense levels remain 30/24)

C. *Obstruction.* Obstruction of justice makes an increase of 2 levels appropriate, U.S.S.G. §3C1.1, as does reckless endangerment during flight, U.S.S.G. §3C1.2. In *Hill*, the defendant was found to have missed a court appearance and was subsequently arrested under circumstances that suggested he was in hiding. The court accordingly assessed points for obstruction of justice: +2 (the offense levels become 32 (crack/cocaine) and 26 (firearms)).

D. *Multiple Counts.* The multiple count sections of the guidelines merge these two base offense levels into one. The first step in the process is to group similar offenses, U.S.S.G. §3D1.1. Offenses are grouped together which (a) have the same victim and the act or transaction, (b) have the same victim and two or more acts or transactions involving the same scheme or objective, (c) "when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts," or (d) when offense level is calculated on the base of harm, loss or quantity of substance involved, U.S.S.G. §3D1.2.

In *Hill*, the drug and firearms offenses would be grouped together because possession of a firearm is a 2-level adjustment to the base offense level of the drug offense, U.S.S.G. §3D1.2(c). Offenses grouped together carry the offense level of the highest rated offense within the group; in the case of *Hill*, the drug offense (32 (drugs) v. 26 (firearms)), U.S.S.G. §3D1.3(a). A formula in U.S.S.G. §3D1.4 produces the offense level when there is more than one group. (The offense level is 32).

E. *Accept Responsibility.* The court found that Hill, in spite of his guilty plea, had not accepted responsibility for his misconduct, a conclusion supported by the obstruction of justice enhancement, and thus had not earned a 3-level reduction provided in U.S.S.G. §3E1.1: 0 (the offense level remains 32).

Final Offense Level. As a result, the final offense in *Hill* is: 32

III. *Criminal History Category.* An offender's criminal record determines his or her criminal history category (within the permissible sentence range for each offense level there are six permissible sentencing ranges arranged according to the seriousness of the defendant's criminal history). Points are assessed for past convictions,⁸⁸ for misconduct committed while under judicial supervision such as bail or parole, and for crimes of violence.⁸⁹

Hill's criminal record apparently involved 1 conviction carrying a sentence of more than 1 year and 1 month (3 points), and 6 carrying sentences from between 6 months to 1 year and 1 month (2 points each; $6 \times 2 = 12$ points), for a total of 15 points.

Since Hill had been paroled in 1990, a 2 point increase for commission of the offense within 2 years of release from imprisonment for a prior offense would have been appropriate had the conduct covered by the dismissed 1991 indictment been "relevant conduct." Since it was not and since the conduct to which the defendant pled occurred in 1993, no such enhancement was made. Thus Hill's criminal record the criminal history category point total is: 15 points

IV. *Recidivist Enhancements.* There are past criminal activities which not only determine a defendant's criminal history category point total, but also provide the basis for increasing a defendant's offense level,

⁸⁸ 3 points for each past sentence of more than 1 year and 1 month; 2 points for each sentence of imprisonment for 6 months but less than 1 year and 1 month; and 1 point for any other past sentence (up to a total of 4 points), U.S.S.G. §4A1.1(a),(b),(c).

⁸⁹ 2 points when the crime for which sentence is being calculated occurred while the defendant was "under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status;" 2 points when the offense under sentence was committed less than 2 years after release from imprisonment for a term of 6 months or more, was committed while in prison, or was committed while the defendant was an escaped prisoner; 1 point for each past conviction for a crime of violence not otherwise related or counted (up to 3 points), U.S.S.G. §4A1.1(d),(e),(f).

as in the case of career criminals,⁹⁰ armed career criminals,⁹¹ or professional criminals.⁹²

The career criminal provisions did not apply in *Hill* because he had only 1 prior felony conviction; the criminal livelihood enhancement (requiring a minimum offense level of 13) was not proven, and would in any event not have enlarged Hill's offense level. With no grounds for recidivist enhancements, Hill remains at an offense level of 32 with 15 criminal history category points.

V. *Sentencing Table*. The guideline's Sentencing Table (next page) indicates that the permissible sentencing range for offense level 32, criminal history category VI (13 or more 12 criminal history points) is not less than 210 nor more than 262 months.

⁹⁰ "A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum	Offense Level*
(A) Life	37
	* * *

(G) More than 1 year, but less than 5 years. 12

*If an adjustment from §3E1.1(Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment," U.S.S.G. §4B1.1.

⁹¹ "(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. §924(e) is an armed career criminal.

"(b) the offense level for an armed career criminal is the greatest of: (1) the offense level applicable from Chapters Two and Three; (2) the offense level from §41B.1 (Career Offender) if applicable; or (3)(A) 34, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in §4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. §5845(a)*; or (B) 33, otherwise.* *If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

"(c) The criminal history category for an armed career criminal is the greatest of: (1) the criminal history category from Chapter Four, Part A (Criminal History), or §4B1.1 (Career Offender) if applicable; or (2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or committed substantive offense, as defined in §4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. §5845(a); or (3) Category IV," U.S.S.G. §4B1.4.

⁹² "If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, his offense level shall be not less than 13, unless §3E1.1 (Acceptance of Responsibility) applies, in which event his offense level shall be not less than 11," U.S.S.G. §4B1.3 (Criminal Livelihood).

SENTENCING TABLE⁹³

Offense Level	Criminal History Category					
	I (0 or 1 pts.)	II (2 or 3 pts.)	III (4, 5, 6 pts.)	IV (7, 8, 9 pts.)	V (10, 11, 12 pts.)	VI (13+ pts.)
1	<i>0-6</i>	<i>0-6</i>	<i>0-6</i>	<i>0-6</i>	<i>0-6</i>	<i>0-6</i>
2	<i>0-6</i>	<i>0-6</i>	<i>0-6</i>	<i>0-6</i>	<i>0-6</i>	[1-7]
3	<i>0-6</i>	<i>0-6</i>	<i>0-6</i>	<i>0-6</i>	[2-8]	[3-9]
4	<i>0-6</i>	<i>0-6</i>	<i>0-6</i>	[2-8]	[4-10]	[6-12]
5	<i>0-6</i>	<i>0-6</i>	[1-7]	[4-10]	[6-12]	9-15
6	<i>0-6</i>	[1-7]	[2-8]	[6-12]	9-15	12-18
7	<i>0-6</i>	[2-8]	[4-10]	8-14	12-18	12-21
8	<i>0-6</i>	[4-10]	[6-12]	10-16	15-21	18-24
9	[4-10]	[6-12]	8-14	12-18	18-24	21-27
10	[6-12]	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-265
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

⁹³ Zone A (probation permitted) appears in italics; Zone B (probation permitted only when accompanied by some form of confinement such night-time confinement, week-end confinement, or home detention) appears in brackets; Zone C (no probation but sentence may be split to include other forms of confinement in addition to imprisonment) appears in bold; Zone D (no probation, a term of imprisonment within the sentencing range is required) appears without highlight.

VI. A. *Probation.* Probation eligibility under the guidelines is very limited. It is limited to those for whom the maximum permissible sentence of imprisonment under the guidelines is no more than 6 months (Zone A on the Sentencing Table (no higher than offense level 8)) or if the court imposes some form of incarceration rather than imprisonment (i.e., weekend or nighttime imprisonment, home confinement, etc.), no more than 1 year (Zone B on the Sentencing Table (no higher than offense level 10)), U.S.S.G. §5B1.1. The probationary period for offense level 6 or higher is not less than 1 nor more than 5 years; below offense level 6, the maximum term of probation is three years, U.S.S.G. §5B1.2. Defendants sentenced at offense level 32, category VI are ineligible for probation.

B. *Substitute Incarceration.* In cases where the offense level carries a maximum term of imprisonment of not more than 16 months (Zone B or C (no higher than offense level 12)), the sentencing court may impose a term of substitute incarceration (intermittent confinement, community confinement, or home detention), U.S.S.G. §5C1.1. Defendants sentenced at offense level 32, category VI are ineligible for substitute incarceration.

C. *Imprisonment.* A sentencing court has discretion to impose any term of imprisonment between 210 and 262 months in cases with an offense level of 32 and a criminal history category of VI. Hill was convicted of violating 18 U.S.C. 922(g) which is punishable by imprisonment for not more than 10 years, 18 U.S.C. 924(a)(2), and of violating 21 U.S.C. 841(a) which is punishable by imprisonment for not less than 5 nor more than 40 years, 21 U.S.C. 841(b)(1)(B)(iii). Any term of imprisonment between 210 and 262 months would come within the statutorily required minimum of 5 years (60 months) and the statutorily permissible maximum of 50 years (600 months) (10 years (§924) + 40 years (§841)).

Because Hill has a prior criminal record (more than 1 criminal history point), he is ineligible for the “safety valve” provisions that waive mandatory minimums for low level, cooperative, first time drug offenders, 18 U.S.C. 3553(f).⁹⁴ Because there

⁹⁴ “(f) Limitation on applicability of statutory minimums in certain cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that – (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the

is no indication of Hill's cooperation with authorities, he could not benefit from the general prosecution-triggered waiver of mandatory minimums of 18 U.S.C. 3553(e).⁹⁵

D. Supervised Release. After release from imprisonment, defendants are required to serve a term of supervised release of between 1 to 5 years depending on the seriousness of their offense.⁹⁶ Violation of 21 U.S.C. 841 is a class B felony and would ordinarily be subject to a term of supervised release of from 3 to 5 years imposed by the court at the time of sentencing. Violations of section 841, however, carry a series of mandatory minimum terms of supervised release ranging from 2 to 10 years depending upon the seriousness of the offense, 21 U.S.C. 841. In a case like Hill's involving more than 5 but less than 50 grams of crack cocaine, the term of supervised release must be not less than 4 years for first time offenders and not less than 8 years for recidivists, 21 U.S.C. 841(b)(1)(B).

E. Restitution. Congress has amended the federal restitution provisions in recognition of the difficulties associated with identifying victims and the precise extent of loss in drug cases.⁹⁷ The restitution in an amount based upon the amount of public harm caused by the offense, 18 U.S.C. 3663(c)(2)(A), may be ordered to be

information shall not preclude a determination by the court that the defendant has complied with this requirement," 18 U.S.C. 3553(f).

⁹⁵ "Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code," 18 U.S.C. 3553(e).

⁹⁶ "The court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed. . . ." U.S.S.G. §5D1.1. Unless otherwise provided for a particular offense, class A and B felonies (felonies with a maximum of life or 25 years or more) carry a supervised release term of not less than 3 nor more than 5 years; class C and D felonies (felonies with a maximum of 5 years or more) of not less than 2 nor more than 3; and class E felonies and A misdemeanors a term of 1 year (crimes with a maximum of more than 6 months), U.S.S.G. 5D1.2.

Failure to comply with the conditions of supervised release can result in the further imprisonment for a term of not more than 5 years for a class A felony, 3 years for a class B felony, 2 years for a class C or D felony, and 1 year for any other offense, 18 U.S.C. 3583(e)(3). Possession of a controlled substance while on supervised release is an automatic ground for revocation, 18 U.S.C. 3583(g).

⁹⁷ "(c)(1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii) [relating to the defendant's ability to pay and the discretion of the court to forego restitution if the process would result unduly complication of prolongation], when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861 or 863)l, in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection," 18 U.S.C. 3663(c)(1), added by §205(a)(3) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1230 (1996).

paid to state entities, 18 U.S.C. 3663(c)(3); may not exceed the maximum permissible fine, 18 U.S.C. 3663(c)(2)(B); stands in priority behind any forfeitures, fines or penalty assessments, 18 U.S.C. 3663(c)(4),(5). The court in its discretion may forego imposing a fine in order to enable a defendant to make restitution; conversely unless required by statute, the court may forego a discretionary restitution order if “the complication and prolongation of the sentencing process resulting from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims through the criminal process,” U.S.S.G. §5E1.1(b).

F. *Fine.* The guidelines establish a fine schedule according to offense level.⁹⁸ The sentencing guidelines call for a fine of between \$17,500 and \$175,000 for crimes at an offense level of 32, U.S.S.G. 5E1.2(c)(3). The court need not impose a fine where the defendant is unable and unlikely to become able to pay any fine imposed, U.S.S.G. 5E1.2(a). If the court does not impose or waives the fine imposed, it may impose alternative sanctions.⁹⁹

G. *Special assessment.* Federal courts must impose a special assessment at sentencing for each violation of federal law in an amount determined by the seriousness of the offense, 18 U.S.C. 3013; U.S.S.G. §5E1.3. The special assessment for the two felony counts in *Hill* would have been \$100 (2 x \$50).¹⁰⁰

H. *Forfeiture.* Criminal forfeitures which become operable upon conviction for certain offenses are announced as part of the sentencing process, 18 U.S.C. 3554; U.S.S.G. §5E1.4. The prospect of criminal forfeiture is not mentioned in *Hill*, but as

⁹⁸

Fine Table			
Offense Level	.....	<u>Minimum</u>	..... <u>Maximum</u>
3 and below	.....	\$100	..... \$5000
	* * *		
10-11	.....	\$2000	..... \$20,000
	* * *		
18-19	.....	\$6,000	..... \$60,000
	* * *		
32-34	.....	\$17,500	..... \$175,000
	* * *		
39 and above	.....	\$25,000	..... \$250,000

U.S.S.C. §5E1.2(c)(3).

⁹⁹ “If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine. In these circumstances, the court shall consider alternative sanctions in lieu of all or a portion of the fine, and must still impose a total combined sanction that is punitive. Although any additional sanction not proscribed by the guidelines is permissible, community service is the generally preferable alternative in such instances,” U.S.S.G. §5E1.2(e).

¹⁰⁰ The assessment would have been \$200 if the offense in *Hill* had been committed on or after April 24, 1996, the date of enactment of the Antiterrorism and Effective Death Penalty Act which increased the special assessments from \$50 to \$100, 18 U.S.C. 3013(a)(2), as amended by §210, Pub.L.No. 104-132, 110 Stat. 1240 (1996).

will be discussed in a moment any property derived from or used in a violation of the controlled substances provisions, including 21 U.S.C. 841, is subject to criminal forfeiture under 21 U.S.C. 853.

I. *Cost of Prosecution.* Several statutes authorize the court to assess the costs of prosecution against defendants convicted of violating their commands, U.S.S.G. §5E1.5. The statutes under which Hill was convicted are not among them, although the court may include the costs of imprisonment, probation or supervised release as an addition to any fine that it imposes, U.S.S.G. §5E1.2(i).

J. *Cost of Notification of Victims.* Section 3555 of title 18 authorizes sentencing courts to order a defendant to pay for the cost of victim notification up to a maximum of \$20,000; the guidelines permit the court to offset the cost against any fine imposed, U.S.S.G. §5F1.4. This provision seems inapplicable in *Hill*.

VII. *Departures.* The circumstances under which a court may impose a sentence outside of the ranges called for by the guidelines are limited. A court may depart from the sentence called for by the guidelines (1) upon the request of the government in recognition of the defendant's cooperation with authorities, 28 U.S.C. 994(n), U.S.S.G. §5K1.1; (2) where the criminal history provisions do not adequately reflect the seriousness of the defendant's past criminal record, U.S.S.G. §4A1.3; or (3) where "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines," 18 U.S.C. 3553(b); U.S.S.G. §5K2.0.

The guidelines note that the "[c]ircumstances that may warrant departure from the guidelines [based on want of guideline consideration] cannot, by their very nature, be comprehensively listed and analyzed in advance," U.S.S.G. §5K2.0. The guidelines, however, do contain 20 policy statements concerning factors that might be thought to fit this category, U.S.S.G. §§5K2.1 to 5K2.21. Moreover, the annual amendment cycle permits the Sentencing Commission to adjust the guidelines to account for previously unconsidered circumstances when they arise. The Commission notes that departure should be reserved for those rare cases marked by circumstances carrying them from the "heartland" of situations addressed by the applicable sentencing guideline.¹⁰¹

Other Consequences of Controlled Substance Violations

Forfeitures

Forfeiture is the loss of any right – ordinarily a property right – as a consequence of a breach of some legal obligation.¹⁰² Congress and state legislatures have

¹⁰¹ "An offender characteristic or other circumstance that is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range may be relevant . . . if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing," U.S.S.G. §5K2.0.

¹⁰² BLACK'S LAW DICTIONARY, 661 (7th ed. 1999).

authorized the use of forfeiture for over two hundred years. Recourse to both civil and criminal forfeiture provisions is a common feature of federal anti-drug abuse efforts. Illicit controlled substances, the proceeds from drug trafficking, any property that can be traced to such proceeds, and any property used to facilitate drug trafficking can be confiscated.¹⁰³

Forfeiture follows one of two procedural routes. Although crime triggers all forfeitures, they are classified as civil forfeitures or criminal forfeitures according to the nature of procedure which ends in confiscation.

Civil Forfeiture

Civil forfeiture is ordinarily the product of civil, in rem, proceedings in which the property is treated as the offender.¹⁰⁴ Within the confines of due process and the language of the applicable statutes, the guilt or innocence of the property owner is irrelevant; it is enough that the property was involved in a violation to which forfeiture attaches.¹⁰⁵ Criminal forfeiture proceedings, on the other hand, are in personam proceedings, and confiscation is only possible upon the conviction of the owner of the property and only to the extent of his interest.¹⁰⁶

Civil forfeiture begins with actual or constructive seizure of the property by the government.¹⁰⁷ In most instances, federal agencies can complete confiscation

¹⁰³ See e.g., 21 U.S.C. 881, 853; 18 U.S.C. 981 to 985, 1963.

¹⁰⁴ “This [civil] ‘forfeiture proceeding . . . is in rem. It is the property which is proceeded against, and by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient,’” *United States v. Ursery*, 518 U.S. 267, 275 (1996), quoting *Various Items of Personal Property v. United States*, 282 U.S. 577, 284 (1931).

¹⁰⁵ *Bennis v. Michigan*, 516 U.S. 442, 453 (1996). Innocent owners have the benefit of a statutory defense in civil forfeiture cases conducted under the controlled substance and money laundering statutes, but not those conducted under the customs laws, 18 U.S.C. 983(d),(i).

¹⁰⁶ E.g., 21 U.S.C. 853(a); 18 U.S.C. 982, 1963(a).

¹⁰⁷ *United States v. Ursery* 518 U.S. at 289 (“In contrast to the in personam nature of criminal actions, [forfeiture] actions in rem have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object”) (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974); *Dobbin's Distillery v. United States*, 96 U.S. 395, 396 (1877)).

In fact, until the Supreme Court's decision in *Republic National Bank v. United States*, 506 U.S. 80 (1992), confirmed that initial rather continued control was ordinarily sufficient to support jurisdiction, some believed that a court's continued jurisdiction depended upon its continued control over the res, and that its power to proceed disappeared if the property were released other than by accident, fraud or some other improper or inequitable means, *United States v. \$1,322,242.58*, 938 F.2d 433, 437 (3d Cir. 1991); *United States v. \$84,740.00 U.S. Currency*, 900 F.2d 1402, 1404 (9th Cir. 1990); *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1435-436 (11th Cir. 1991); *Appellate Jurisdiction for Civil Forfeiture: The Case for the Continuation of Jurisdiction Beyond the Release of*

administratively, if the property owner does not challenge the forfeiture.¹⁰⁸ Those who wish to contest must demonstrate that they have a legal interest in the property.¹⁰⁹

When administrative forfeiture is unavailable, when a claimant has successfully sought judicial proceedings, or when the government has elected not to proceed administratively, the government may seek to secure a declaration of forfeiture by filing either a complaint or a libel against the property.¹¹⁰ In controlled substance, money laundering and most civil forfeitures, the government bears the burden of establishing its right to confiscation by a preponderance of the evidence.¹¹¹

Where the property is declared forfeited, its disposal is a matter of statute, but the proceeds from most federal forfeitures go into one of two special funds for the Department of Justice and the Department of the Treasury where they are available for federal and state law enforcement purposes.¹¹²

Should the court determine that the property is not subject to forfeiture, it must be returned to its owner.¹¹³ Prevailing claimants may be entitled to compensation for damages to the property incurred while in federal custody,¹¹⁴ attorneys' fees, post-judgment interest, and in some instances pre-judgment interest.¹¹⁵

the Res, 65 FORDHAM LAW REVIEW 679 (1991).

Because realty cannot be seized until after the property owner has been given an opportunity for hearing, the procedure differs slightly in the case of real property, e.g., 18 U.S.C. 985.

¹⁰⁸ Under federal customs law, administrative forfeiture may be used if the property to be forfeited is cash; or if the property is worth less than \$500,000; or is a boat, plane or car used to carry or store drugs, 19 U.S.C. 1607. Many federal forfeiture statutes adopt customs procedures either directly or by cross reference, e.g., 21 U.S.C. 881(d).

¹⁰⁹ 18 U.S.C. 983(a); 19 U.S.C. 1608.

¹¹⁰ *Id.*

¹¹¹ 18 U.S.C. 983(c); *United States v. Real Property in Section 9 (Gahagan)*, 241 F.3d 796, 798 (6th Cir. 2001); *United States v. Wagoner County Real Estate*, 278 F.3d 1091, 1097 n.5 (10th Cir. 2002). Forfeitures under the Tariff Act of 1930, the Internal Revenue Code, and a few others are not governed by the procedures generally applicable to federal civil forfeitures, 18 U.S.C. 983(i).

¹¹² The Department of Justice Asset Forfeiture Fund, 28 U.S.C. 524(c), and the Department of the Treasury Forfeiture Fund, 31 U.S.C. 9703.

¹¹³ 28 U.S.C. 2465; *Republic National Bank v. United States*, 506 U.S. 80, 95 (1992); *United States v. Seifuddin*, 820 F.2d 1074, 1078-79 (9th Cir. 1987). The property owner, however, is not entitled to the return of property cannot be lawfully possessed, *Boggs v. Rubin*, 161 F.3d 37, 40 (D.C.Cir. 1998); *United States v. Felici*, 208 F.3d 667, 670 (8th Cir. 2000).

¹¹⁴ 28 U.S.C. 2680(c).

¹¹⁵ 28 U.S.C. 2465. The courts will award pre-judgment interest in forfeiture cases brought under the controlled substance and money laundering statutes where the government sought unsuccessfully to confiscate cash, negotiable instruments, or the proceeds from the sale (prior to the completion of forfeiture proceedings) of other contested property, 28 U.S.C.

Criminal Procedure

Although less numerous than civil confiscation statutes, criminal forfeiture statutes are widely used. Criminal forfeiture is a consequence of conviction.¹¹⁶ It is punishment, even though it may also serve remedial purposes very effectively.¹¹⁷ The indictment upon which the conviction is based must list the property which the government asserts is subject to confiscation.¹¹⁸ Since the court's jurisdiction does not depend upon initial control of the res, it need not be seized before forfeiture is declared. The court, however, in some instances may restrain the use or transfer of property the government contends is subject to confiscation.¹¹⁹ The defenses to criminal forfeiture differ somewhat from those available in cases of civil forfeiture. For example, since conviction is a prerequisite to confiscation, acquittal will bar forfeiture.

After conviction of the defendant, the court usually declares forfeited property described in the indictment and found subject to confiscation by the jury or the trier of fact.¹²⁰ Those with claims to the property, other than the defendant, are then entitled to notice and a judicial hearing on their claims.¹²¹ The disposal of property which remains after claims have been resolved is a matter of statute, but like most civil forfeitures the proceeds from most criminal forfeitures go to either the Department of Justice or the Department of the Treasury forfeiture funds.¹²²

Civil Penalties

Violations of the regulatory restrictions by registrants under the Controlled Substances Act are punishable by a civil penalty of up \$25,000, 21 U.S.C. 842(c).¹²³ And possession of small amounts of controlled substances are punishable by a civil penalty of not more than \$10,000, 21 U.S.C. 844a. The Foreign Narcotics Kingpin

2465(b)(1)(C).

¹¹⁶ E.g., 18 U.S.C. 1963 ("Whoever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States"); 21 U.S.C. 853; *United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660, 665 (4th Cir. 1996).

¹¹⁷ The federal Racketeer Influenced and Corrupt Organization (RICO) forfeiture statute, for example, is designed not only to sever the offender from the organization he or she has corrupted but to confiscate any property right which affords a source of influence over the enterprise, 18 U.S.C. 1963(a)(2)(D).

¹¹⁸ Fed.R.Crim.P. 7(c).

¹¹⁹ E.g., 21 U.S.C. 853(e)(1),(2). Substitute assets may become subject to forfeiture if the tainted property has become unavailable, 21 U.S.C. 853(p), but most courts have been reluctant to issue pre-trial restraint orders on substitute assets, *United States v. Gotti*, 155 F.3d 144, 147 (2d Cir. 1998); *United States v. Riley*, 78 F.3d 367, 371 (8th Cir. 1996).

¹²⁰ E.g., 18 U.S.C. 1963(e); 21 U.S.C. 853(g).

¹²¹ E.g., 18 U.S.C. 1963(l); 21 U.S.C. 853(n).

¹²² 28 U.S.C. 524(c)(4); 31 U.S.C. 9703(d).

¹²³ As noted earlier knowing violations are also punishable by criminal penalties.

Designation Act calls for civil penalties of up to \$1 million for engaging in prohibited financial transactions with presidentially designated foreign drug kingpins, 21 U.S.C. 1906.

Other Disabilities¹²⁴

Federal Benefits

Both state and federal courts may impose a sentence rendering defendant convicted of controlled substance possession or trafficking offenses ineligible for various federal benefits, 21 U.S.C. 862. The disqualification may run for up to a year for a first time possession offender and up to five years for a first time trafficker or for a possession offender with a prior possession conviction, *id.* Dealers with a single prior conviction may become ineligible for up to 10 years and those convicted more frequently may be declared permanently ineligible, *id.* Unless, the state has opted out, those with state or federal drug-related, felony convictions are ineligible for assistance under the food stamp program or the federally funded programs for aid to needy families with children, 21 U.S.C. 862a.

Injunctions

Anyone with a federal felony conviction for dealing in precursor chemicals ("listed chemicals") may also be enjoined from engaging in transactions involving such chemicals for up to ten years, 21 U.S.C. 841(f); 21 U.S.C. 843(e).

Mandatory Probation Revocation

Federal probation must include a condition that the probationer refrain from unlawful possession of controlled substances, 18 U.S.C. 3563(a)(3), and violation of the condition requires revocation of probation, 18 U.S.C. 3565(b)(1).

¹²⁴ This is a sampling of the disabilities under federal law that flow from conviction for a violation of the federal controlled substances provisions; disabilities triggered by wider range of offenses, e.g., any felony violation, and disabilities under state law, even if federally encouraged, are beyond the scope of our discussion.

APPENDIX**2D1.1(c)
Drug Quantity Table**

Controlled Substances and Quantity	Base Offense Level
<p>(1) 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); 150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); 1.5 KG or more of Cocaine Base; 30 KG or more of PCP, or 3 KG or more of PCP(actual); 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of Ice; 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual) 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); 12 KG or more of Fentanyl; 3 KG or more of Fentanyl Analogue; 30,000 KG or more of Marihuana; 6,000 KG or more of Hashish; 600 KG or more of Hashish Oil; 30,000,000 units or more of Schedule I or II Depressants; 1,875,000 units or more of Flunitrazepam.</p>	Level 38
<p>(2) At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 500 G but less than 1.5 KG of Cocaine Base; At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual); At least 5 KG but less than 15 KG of Methamphetamine, or At least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of Ice; At least 5 KG but less than 15 KG of Amphetamine, At least 500 G but less than 1.5 KG of Amphetamine (actual); At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 4 KG but less than 12 KG of Fentanyl; At least 1 KG but less than 3 KG of a Fentanyl Analogue; At least 10,000 KG but less than 30,000 KG of Marihuana; At least 2,000 KG but less than 6,000 KG of Hashish; At least 200 KG but less than 600 KG of Hashish Oil; At least 10,000,000 but less than 30,000,000 units or more of Schedule I or II Depressants; At least 625,000 but less than 1,875,000 units or more of Flunitrazepam.</p>	Level 36
<p>(3) At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 150 G but less than 500 G of Cocaine Base; At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual); At least 1.5 KG but less than 5 KG of Methamphetamine, or At least 150 G but less than 500 G of Methamphetamine (actual),</p>	Level 34

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or at least 150 G but less than 500 G of Ice;
At least 1.5 KG but less than 5KG of Amphetamine, or
At least 150 G but less than 500 G of Amphetamine (actual);
At least 30 G but less than 100 G of LSD
(or the equivalent amount of other Schedule I or II
Hallucinogens);
At least 1.2 KG but less than 4 KG of Fentanyl;
At least 300 G but less than 1 KG of a Fentanyl Analogue;
At least 3,000 KG but less than 10,000 KG of Marihuana;
At least 600 KG but less than 2,000 KG of Hashish;
At least 60 KG but less than 200 KG of Hashish Oil;
At least 3,000,000 but less than 10,000,000 units or more of
Schedule I or II Depressants;
At least 187,500 but less than 625,000 units or more
of Flunitrazepam.

- (4) At least 1 KG but less than 3 KG of Heroin Level 32
(or the equivalent amount of other Schedule I or II Opiates);
At least 5 KG but less than 15 KG of Cocaine
(or the equivalent amount of other Schedule I or II
Stimulants);
At least 50 G but less than 150 G Cocaine Base;
At least 1 KG but less than 3 KG of PCP, or at least 100 G but
less than 300 G of PCP (actual);
At least 500 G but less than 1.5 KG of Methamphetamine, or
At least 50 G but less than 150 G of Methamphetamine
(actual), or at least 50 but less than 150 G of Ice;
At least 500 G but less than 1.5 KG of Amphetamine, or
At least 50 G but less than 150 G of Amphetamine (actual);
At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II
Hallucinogens);
At least 400 G but less than 1.2 KG of Fentanyl;
At least 100 G but less than 300 G of a Fentanyl Analogue;
At least 1,000 KG but less than 3,000 KG of Marihuana;
At least 200 KG but less than 600 KG of Hashish;
At least 20 KG but less than 60 KG of Hashish Oil;
At least 1,000,000 but less than 3,000,000 units or more of
Schedule I or II Depressants;
At least 62,500 but less than 187,500 units or more
of Flunitrazepam.

- (5) At least 700 G but less than 1 KG of Heroin Level 30
(or the equivalent amount of other Schedule I or II Opiates);
At least 3.5 KG but less than 5 KG of Cocaine
(or the equivalent amount of other Schedule I or II
Stimulants);
At least 35 G but less than 50 G of Cocaine Base;
At least 700 G but less than 1 KG of PCP, or at least 70 G
but less than 100 G of PCP (actual);
At least 350 G but less than 500 G of Methamphetamine, or
At least 35 G but less than 50 G of Methamphetamine (actual),
or at least 35 G but less than 50 G of Ice;
At least 350 G but less than 500 G of Amphetamine, or
At 35 G but less than 50 G of Amphetamine (actual);
At least 7 G but less than 10 G of LSD
(or the equivalent amount of other Schedule I or II
Hallucinogens);
At least 280 G but less than 400 G of Fentanyl;
At least 70 G but less than 100 G of a Fentanyl Analogue;
At least 700 KG but less than 1,000 KG of Marihuana;
At least 140 KG but less than 200 KG of Hashish;
At least 14 KG but less than 20 KG of Hashish Oil;
At least 700,000 but less than 1,000,000 units or more of
Schedule I or II Depressants;

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At least 43,750 but less than 62,500 units or more of Flunitrazepam.

- (6) At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 20 G but less than 35 G of Cocaine Base; At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual); At least 200 G but less than 350 G of Methamphetamine, or At least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of Ice; At least 200 G but less than 350 G of Amphetamine, or At least 20 G but less than 35 G of Amphetamine (actual); At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 160 G but less than 280 G of Fentanyl; At least 40 G but less than 70 G of a Fentanyl Analogue; At least 400 KG but less than 700 KG of Marihuana; At least 80 KG but less than 140 KG of Hashish; At least 8 KG but less than 14 KG of Hashish Oil At least 400,000 but less than 700,000 units or more of Schedule I or II Depressants; At least 25,000 but less than 43,750 units or more of Flunitrazepam. Level 28
- (7) At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 5 but less than 20 G of Cocaine base; At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual); At least 50 G but less than 200 G of Methamphetamine, or At least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of Ice; At least 50 G but less than 200 G of Amphetamine, or At least 5 G but less than 20 G of Amphetamine (actual); At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 40 G but less than 160 G of Fentanyl; At least 10 G but less than 40 G of a Fentanyl Analogue; At least 100 KG but less than 400 KG of Marihuana; At least 20 KG but less than 80 KG of Hashish; At least 2 KG but less than 8 KG of Hashish Oil; At least 100,000 but less than 400,000 units or more of Schedule I or II Depressants; At least 6,250 but less than 25,000 units or more of Flunitrazepam. Level 26
- (8) At least 80 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 4 G but less than 5 G of Cocaine Base; At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual); At least 40 G but less than 50 G of Methamphetamine, or Level 24

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At least 4 G but less than 5 G of Methamphetamine (actual),
or at least 4 G but less than 5 G of Ice;
At least 40 G but less than 50 G of Amphetamine, or
At least 4 G but less than 5 G of Amphetamine (actual);
At least 800 MG but less than 1 G of LSD
(or the equivalent amount of other Schedule I or II
Hallucinogens);
At least 32 G but less than 40 G of Fentanyl;
At least 8 G but less than 10 G of a Fentanyl Analogue;
At least 80 KG but less than 100 KG of Marihuana;
At least 16 KG but less than 20 KG of Hashish;
At least 1.6 KG but less than 2 KG of Hashish Oil;
At least 80,000 but less than 100,000 units or more of
Schedule I or II Depressants;
At least 5,000 but less than 6,250 units or more
of Flunitrazepam.

- (9) At least 60 G but less than 80 G of Heroin Level 22
(or the equivalent amount of other Schedule I or II Opiates);
At least 300 G but less than 400 G of Cocaine
(or the equivalent amount of other Schedule I or II
Stimulants);
At least 3 G but less than 4 G of Cocaine Base;
At least 60 G but less than 80 G of PCP, or at least 6 G but
less than 8 G of PCP (actual);
At least 30 G but less than 40 G of Methamphetamine, or
At least 3 G but less than 4 G of Methamphetamine (actual), or
at least 3 G but less than 4 G of Ice;
At least 30 G but less than 40 G of Amphetamine, or
At least 3 G but less than 4 G of Amphetamine (actual);
At least 600 MG but less than 800 MG of LSD
(or the equivalent amount of other Schedule I or II
Hallucinogens);
At least 24 G but less than 32 G of Fentanyl;
At least 6 G but less than 8 G of a Fentanyl Analogue;
At least 60 KG but less than 80 KG of Marihuana;
At least 12 KG but less than 16 KG of Hashish;
At least 1.2 KG but less than 1.6 KG of Hashish Oil;
At least 60,000 but less than 80,000 units or more of
Schedule I or II Depressants;
At least 3,750 but less than 5,000 units or more
of Flunitrazepam.

- (10) At least 40 G but less than 60 G of Heroin Level 20
(or the equivalent amount of other Schedule I or II Opiates);
At least 200 G but less than 300 G of Cocaine
(or the equivalent amount of other Schedule I or II
Stimulants);
At least 2 G but less than 3 G of Cocaine Base;
At least 40 G but less than 60 G of PCP, or at least 4 G but
less than 6 G of PCP (actual);
At least 20 G but less than 30 G of Methamphetamine, or
At least 2 G but less than 3 G of Methamphetamine (actual), or
at least 2 G but less than 3 G of Ice;
At least 20 G but less than 30 G of Amphetamine, or
At least 2 G but less than 3 G of Amphetamine (actual);
At least 400 MG but less than 600 MG of LSD (or the equivalent
amount of other Schedule I or II Hallucinogens);
At least 16 G but less than 24 G of Fentanyl;
At least 4 G but less than 6 G of a Fentanyl Analogue;
At least 40 KG but less than 60 KG of Marihuana;
At least 8 KG but less than 12 KG of Hashish;
At least 800 G but less than 1.2 KG of Hashish Oil;
At least 40,000 but less than 60,000 units of

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Schedule I or II Depressants or
Schedule III substances;
At least 2,500 but less than 3,750 units of Flunitrazepam .

- (11) At least 20 G but less than 40 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 1 G but less than 2 G of Cocaine Base;
At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
At least 10 G but less than 20 G of Methamphetamine, or
At least 1 G but less than 2 G of Methamphetamine (actual), or
at least 1 G but less than 2 G of Ice;
At least 10 G but less than 20 G of Amphetamine, or
At least 1 G but less than 2 G of Amphetamine (actual);
At least 200 MG but less than 400 MG of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 8 G but less than 16 G of Fentanyl;
At least 2 G but less than 4 G of a Fentanyl Analogue;
At least 20 KG but less than 40 KG of Marihuana;
At least 5 KG but less than 8 KG of Hashish;
At least 500 G but less than 800 G of Hashish Oil;
At least 20,000 but less than 40,000 units of Schedule I or II Depressants or Schedule III substances
At least 1,250 but less than 2,500 units of Flunitrazepam. Level 18
- (12) At least 10 G but less than 20 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
At least 50 G but less than 100 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 500 ML but less than 1 G of Cocaine Base;
At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
At least 5 G but less than 10 G of Methamphetamine, or
At least 500 MG but less than 1 G of Methamphetamine (actual), or
at least 500 MG but less than 1 G of Ice;
At least 5 G but less than 10 G of Amphetamine, or
At least 500 MG but less than 1 G of Amphetamine (actual);
At least 100 MG but less than 200 MG of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 4 G but less than 8 G of Fentanyl;
At least 1 G but less than 2 G of a Fentanyl Analogue;
At least 10 KG but less than 20 KG of Marihuana;
At least 2 KG but less than 5 KG of Hashish;
At least 200 G but less than 500 G of Hashish Oil;
At least 10,000 but less than 20,000 units of Schedule I or II Depressants or Schedule III substances
At least 625 but less than 1,250 units of Flunitrazepam. Level 16
- (13) At least 5 G but less than 10 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);
At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 250 ML but less than 500 ML of Cocaine Base;
At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
At least 2.5 G but less than 5 G of Methamphetamine, or
At least 250 MG but less than 500 MG of Methamphetamine (actual), Level 14

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or at least 250 but less than 500 MG of Ice;
At least 2.5 G but less than 5 G of Amphetamine, or
At least 250 MG but less than 500 MG of Amphetamine (actual);
At least 50 MG but less than 100 MG of LSD
(or the equivalent amount of other Schedule I or II
Hallucinogens);
At least 2 G but less than 4 G of Fentanyl;
At least 500 MG but less than 1 G of a Fentanyl Analogue;
At least 5 KG but less than 10 KG of Marihuana;
At least 1 KG but less than 2 KG of Hashish;
At least 100 G but less than 200 G of Hashish Oil;
At least 5,000 but less than 10,000 units of Schedule I or II
Depressants or Schedule III substances;
At least 312 but less than 625 units of Flunitrazepam.

- (14) Less than 5 G heroin (or the equivalent amount of other "Schedule I or II Opiates); Level 12
Less than 25 G Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
Less than 250 ML of Cocaine Base;
Less than 5 G of PCP, or less than 500 MG of PCP (actual);
Less than 2.5 G of Methamphetamine, or less than 500 MG of Methamphetamine (actual), or less than 500 MG of Ice;
Less than 2.5 G of Amphetamine or less than 500 MG of Amphetamine (actual);
Less than 50 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
Less than 2 G of Fentanyl;
Less than 500 MG of a Fentanyl Analogue;
At least 2.5 KG but less than 5 KG of Marihuana;
At least 500 G but less than 1 KG of Hashish;
At least 50 G but less than 100 G of Hashish Oil;
At least 2,500 but less than 5,000 units of Schedule I or II Depressants or Schedule III substances;
At least 156 but less than 312 units of Flunitrazepam
40,000 or more units of Schedule IV substances.
- (15) At least 1 KG but less than 2.5 KG of Marihuana; Level 10
At least 200 G but less than 500 G of Hashish;
At least 20 G but less than 50 G of Hashish Oil;
At least 1,000 but less than 2,500 units of Schedule I or II Depressants or Schedule III substances;
At least 62 but less than 156 units of Flunitrazepam;
At least 16,000 but less than 40,000 or more units of Schedule IV substances (except Flunitrazepam).
- (16) At least 250 G but less than 1 KG of Marihuana; Level 8
At least 50 G but less than 200 G of Hashish;
At least 5 G but less than 20 G of Hashish Oil;
At least 250 but less than 1,000 units of Schedule I or II Depressants) or Schedule III substances;
Less than 62 units of Flunitrazepam;
At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
At least 40,000 or more units of Schedule V substances.
- (17) Less than 250 G of Marihuana; Level 6
Less than 50 G of Hashish;
Less than 5 G of Hashish Oil;
Less than 250 units of Schedule I or II Depressants or Schedule III substances;
Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
Less than 40,000 units of Schedule V substances.

* Notes to Drug Quantity Table:

“(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

“(B) The terms ‘PCP (actual)’, ‘Amphetamine (actual)’, and ‘Methamphetamine (actual)’ refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

“(C) ‘Ice,’ for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.

“(D) ‘Cocaine base,’ for the purposes of this guideline, means ‘crack.’ ‘Crack’ is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form..

“(E) In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marihuana. *Provided*, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

“(F) In the case of Schedule I or II Depressants, Schedule III substances (except anabolic steroids), Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance is in liquid form, one "unit" means 0.5 gms.

“(G) In the case of anabolic steroids, one "unit" means a 10 cc vial of an injectable steroid or fifty tablets. All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials (e.g., one 50 cc vial is to be counted as five 10 cc vials).

“(H) In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.

“(I) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

“(J) Hashish oil, for purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.”

Drug Equivalency Tables

Schedule I or II Opiates¹²⁵

1 gm of Heroin	= 1 kg of marihuana
1 gm of Alpha-Methylfentanyl	= 10 kg of marihuana
1 gm of Dextromoramide	= 670 gm of marihuana
1 gm of Dipipanone	= 250 gm of marihuana
1 gm of 3-Methylfentanyl	= 10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP	= 700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP	= 700 gm of marihuana
1 gm of Alphaprodine	= 100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide)	= 2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone	= 2.5 kg of marihuana
1 gm of Levorphanol	= 2.5 kg of marihuana
1 gm of Meperidine/Pethidine	= 50 gm of marihuana
1 gm of Methadone	= 500 gm of marihuana
1 gm of 6-Monoacetylmorphine	= 1 kg of marihuana
1 gm of Morphine	= 500 gm of marihuana
1 gm of Oxycodone	= 500 gm of marihuana
1 gm of Oxymorphone	= 5 kg of marihuana
1 gm of Racemorphan	= 800 gm of marihuana
1 gm of Codeine	= 80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk	= 50 gm of marihuana
1 gm of Ethylmorphine	= 165 gm of marihuana
1 gm of Hydrocodone/Dihydrocodeinone	= 500 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum	= 250 gm of marihuana
1 gm of Opium	= 50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM)	= 3 kg of marihuana

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)¹²⁶

¹²⁵ Provided, That the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

¹²⁶ Provided, That the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

1 gm of Cocaine = 200 gm of marihuana
 1 gm of N-Ethylamphetamine = 80 gm of marihuana
 1 gm of Fenethylamine = 40 gm of marihuana
 1 gm of Amphetamine = 2 kg of marihuana
 1 gm of Amphetamine (Acupal) = 20 kg of marihuana
 1 gm of Methamphetamine = 2 kg of marihuana
 1 gm of Methamphetamine (Actual) = 20 kg of marihuana
 1 gm of Ice = 20 kg of marihuana
 1 gm of Khat = .01 gm of marihuana
 1 gm of 4-Methylaminorex (Euphoria) = 100 gm of marihuana
 1 gm of Methylphenidate (Ritalin) = 100 gm of marihuana
 1 gm of Phenmetrazine = 80 gm of marihuana
 1 gm Phenylacetone/P sub2 P (when possessed for the purpose of
 manufacturing methamphetamine) = 416 gm of marihuana
 1 gm Phenylacetone/P sub2 P (in any other case) = 75 gm of marihuana
 1 gm of N-N-Dimethylamphetamine = 40 gm of marihuana
 1 gm of Cocaine Base ("Crack") = 20 kg of marihuana
 1 gm of Aminorex = 100 gm of marihuana
 1 gm of Methcathinone = 380 gm of marihuana

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)¹²⁷

1 gm of Bufotenine = 70 gm of marihuana
 1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD = 100 kg of
 marihuana
 1 gm of Diethyltryptamine/DET = 80 gm of marihuana
 1 gm of Dimethyltryptamine/DMT = 100 gm of marihuana
 1 gm of Mescaline = 10 gm of marihuana
 1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) = 1 gm of
 marihuana
 1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) = 0.1 gm of
 marihuana
 1 gm of Peyote (Dry) = 0.5 gm of marihuana
 1 gm of Peyote (Wet) = 0.05 gm of marihuana
 1 gm of Phencyclidine/PCP = 1 kg of marihuana
 1 gm of Phencyclidine (actual)/PCP (actual) = 10 kg of marihuana
 1 gm of Psilocin = 500 gm of marihuana
 1 gm of Psilocybin = 500 gm of marihuana
 1 gm of Pyrrolidine Analog of Phencyclidine/PHP = 1 kg of marihuana
 1 gm of Thiophene Analog of Phencyclidine/TCP = 1 kg of marihuana
 1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB = 2.5 kg of marihuana
 1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM = 1.67 kg of marihuana
 1 gm of 3,4-Methylenedioxyamphetamine/MDA = 500 gm of marihuana
 1 gm of 3,4-Methylenedioxymethamphetamine/MDMA = 500 gm of
 marihuana

¹²⁷ Provided, That the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

- 1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA = 500 gm of marihuana
- 1 gm of Paramethoxymethamphetamine/PMA = 500 gm of marihuana
- 1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC = 680 gm of marihuana
- 1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) = 1 kg of marihuana

Schedule I Marihuana

- 1 gm of Marihuana/Cannabis, granulated, powdered, etc. = 1 gm of marihuana

- 1 gm of Hashish Oil = 50 gm of marihuana
- 1 gm of Cannabis Resin or Hashish = 5 gm of marihuana
- 1 gm of Tetrahydrocannabinol, Organic = 167 gm of marihuana
- 1 gm of Tetrahydrocannabinol, Synthetic = 167 gm of marihuana

Flunitrazepam¹²⁸

- 1 unit of Flunitrazepam = 16 gm of marihuana

Schedule I or II Depressants¹²⁹

- 1 unit of a Schedule I or II Depressant = 1 gm of marihuana

Schedule III Substances¹³⁰

- 1 unit of a Schedule III Substance = 1 gm of marihuana

Schedule IV Substances¹³¹

- 1 unit of a Schedule IV Substance = 0.0625 gm of marihuana

Schedule V Substances¹³²

- 1 unit of a Schedule V Substance = 0.00625 gm of marihuana

¹²⁸ Provided, That the combined equivalent weight of flunitrazepam, all Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances shall not exceed 99.99 kilograms of marihuana.

The minimum offense level from the Drug Quantity Table for flunitrazepam individually or in combination with Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

¹²⁹ Provided, That the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

¹³⁰ Provided, that the combined equivalent weight of all Schedule III substances, Schedule I or II depressants, Schedule IV substances, and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

¹³¹ Provided, that the combined equivalent weight of all Schedule IV and V substances shall not exceed 4.99 kilograms of marihuana.

¹³² Provided, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.

State Controlled Substances Laws

Alabama: Ala Code §§20-2-1 to 20-2-190; §§13A-12-201 to 13A-12-294;

Alaska: Alaska Stat. §§11.71.010 to 11.73.099; §§17.30.010 to 17.37.080;

Arizona: Ariz. Rev. Stat. Ann. §§36-2501 to 36-2553; §§13-3401 to 13-3461;

Arkansas: Ark. Code §§5-64-101 to 5-64-1303;

California: Cal. Health & Safety Code §§11000 to 11712;

Colorado: Colo. Rev. Stat. §§12-22-301 to 12-22-324; §§18-18-101 to 18-19-103;

Connecticut: Conn. Gen. Stat. Ann. §§21a-240 to 21a-328;

Delaware: Del. Code tit. 16 §§4701 to 4804A

Florida: Fla. Stat. Ann. §§893.01 to 893.20;

Georgia: Ga. Code Ann. §§16-13-20 to 16-13-114;

Hawaii: Hawaii Rev. Stat. §§329-1 to 329-70;

Idaho: Idaho Code §§37-2701 to 37-2751;

Illinois: Ill. Comp. Stat. Ann. ch. 720 §§570/100 to 690/4.5;

Indiana: Ind. Code Ann. §§35-48-1-1 to 35-48-7-14;

Iowa: Iowa Code Ann. §§ 124.101 to 126.23;

Kansas: Kan. Stat. Ann. §§65-4101 to 65-4164;

Kentucky: Ky. Rev. Stat. §§218A.010 to 218A.994;

Louisiana: La. Rev. Stat. Ann. §§40:961 to 40:1036;

Maine: Me. Rev. Sta. Ann. ch. 17-A §§1101 to 1118; ch. 22 §§2383 to 2389;

Maryland: Md. Code art. 27 §§276 to 305;

Massachusetts: Mass. Gen. Laws Ann. ch. 94C §1-48;

Michigan: Mich. Comp. Laws Ann. §§333.7101 to 333.7545;

Minnesota: Minn. Stat. Ann. §§152.01 to 152.20;

Mississippi: Miss. Code §§41-29-101 to 41-29-313;

Missouri: Mo. Ann. Stat. §§195.010 to 195.515;

Montana: Mont. Code Ann. §§50-32-101 to 50-32-405;

Nebraska: Neb. Rev. Stat. §§28-401 to 28-456; §§28-1437 to 28-1439.05;

Nevada: Nev. Rev. Stat. §§453.011 to 454.710;

New Hampshire: N.H. Rev. Stat. Ann. §§318-B:1 to 318-B:30;

New Jersey: N.J. Stat. Ann. §2C:35-1 to 2C:36-9;

New Mexico: N.M. Stat. Ann. §§30-31-1 to 30-31B-18;

New York: N.Y. Pub. Health Law §§3300 to 3397.g; N.Y. Penal Law 220.00 to 221.55;

North Carolina: N.C. Gen. Stat. §§90-86 to 90-113.46;

North Dakota: N.D. Cent. Code §§19-03.1-01 to 19-03.4-06;

Ohio: Ohio Rev. Code §§3719.01 to 3719.99; 2925.01 to 2925.52;

Oklahoma: Okla. Stat. Ann. tit. 63 §§2-101 to 2-608;

Oregon: Ore. Rev. Stat. §§475.005 to 475A.160; §§167.203 to 167.262;

Pennsylvania: Pa. Stat. Ann. tit. 35 §§780-101 to 888;

Rhode Island: R.I. Gen. Laws §§21-28-1.01 to 21-28-6.02;

South Carolina: S.C. Code §§44-53-110 to 44-54-140;

South Dakota: S.D. Comp. Laws §§34-20B-1 to 34-20C-19; §§ 22-42-1 to 22-42A-4;

Tennessee: Tenn. Code Ann. §§39-17-401 to 39-17-451; 53-11-201 to 53-11-452;

Texas: Tex. Health & Safety Code. §§481.001 to 485.113;

Utah: Utah Code Ann. §§58-37-1 to 58-37e-14;

Vermont: Vt. Stat. Ann. tit. 18 §§4201 to 4248;

Virginia: Va. Code §§54.1-3400 to 54.1-3472; §§18.2-247 to 18.2-265.5;

Washington: Wash. Rev. Code Ann. §§69.50.101 to 69.55.030;

West Virginia: W. Va. Code §§60A-1-101 to 60A-7-707;

Wisconsin: Wis. Stat. Ann. §§961.001 to 961.62;

Wyoming: Wyo. Stat. 35-7-.... to 35-7-.....

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