

MEMORANDUM

To: All Defenders, CJA Panelists
From: Sentencing Resource Counsel
Date: November 1, 2007
Re: Applying the Crack Amendments 101

As of November 1, 2007, new rules apply for determining the base offense level in crack cases under § 2D1.1 of the advisory guidelines. This memorandum describes the amendments, explains how they work, and alerts you to the anomalies that lurk within them.

I. Determining Base Offense Level in Offenses Involving Crack Only

The Commission amended the Drug Quantity Table in § 2D1.1 so that crack quantities triggering the five- and ten-year mandatory minimums are assigned base offense levels two levels lower than before. The base offense levels for these quantities now correspond to guideline ranges that *include* (rather than exceed) the mandatory minimum. The Commission similarly adjusted the drug threshold quantities above, between, and below the mandatory minimum thresholds, with the net result being that for crack offenses, base offense levels across the board are two levels lower than they would have been before the amendment. *See* 72 Fed. Reg. 28,558, 28,571-73; U.S.S.G. App. C, Supp. Amend. 706; U.S.S.G. § 2D1.1 (2007).

For example, under the old guideline, at least 5 grams but less than 20 grams of crack was assigned a base offense level of 26 and a minimum guideline range of 63 to 78 months, which *exceeded* the mandatory minimum of five years by at least three months. Now, the same quantity of crack is assigned to base offense level 24, which corresponds to a minimum advisory guideline range (51 to 63 months) that *includes* the mandatory minimum. Likewise, the base offense level assigned to at least 50 grams but less than 150 grams of crack has been adjusted downward to offense level 30, which corresponds to a minimum advisory guideline range of 97 to 121 months. The remaining quantities above, between, and below these quantities have been similarly adjusted downward.

Here is a reader-friendly comparison of the old and new base offense levels:

Quantity	BOL under Former § 2D1.1	BOL under Amended § 2D1.1
4.5 KG or more	38	38
1.5 KG to < 4.5 KG	38	36
500 G to < 1.5 KG	36	34
150 G to < 500 G	34	32
50 G to < 150 G	32	30
35 G to < 50 G	30	28

Quantity	BOL under Former § 2D1.1	BOL under Amended § 2D1.1
20 G to < 35 G	28	26
5 G to < 20 G	26	24
4 G to < 5 G	24	22
3 G to < 4 G	22	20
2G to < 3 G	20	18
1G to < 2	18	16
500 MG to < 1 G	16	14
250 MG < 500 MG	14	12
< 250 MG	12	12

For offenses involving crack only, applying the amendment is easy: simply determine the base offense level in the new Drug Quantity Table in § 2D1.1 that corresponds to the quantity of crack your client has been proven responsible for. For quantities between 4.5 KG and 500 MG, the result will be two levels lower than under the old guideline. For quantities outside that range, there is no change in the base offense level.

ALERT: By recalibrating the crack cocaine quantity thresholds in this manner, the Commission has created a system in which the ratio of crack to powder cocaine varies wildly from one offense level to the next. Even worse, the ratio is often more severe for low-level players than it is for bigger dealers. Below are the new ratios:

LEVEL	RATIO
38	33:1
36	33:1
34	30:1
32	33:1
30	70:1
28	57:1
26	25:1
24	80:1
22	75:1
20	67:1
lower	50:1

As the guidelines are only advisory, if you find yourself looking at one of the higher ratios, argue that the court should not assign a ratio any higher than the lowest ratio of the bunch, which is 25 to 1. Ask the judge to make the independent assessment – under 18 U.S.C. § 3553(a) and pursuant to the district court’s duty under *Booker* and *Rita* – that an advisory guideline range based on a higher ratio reflects “unsound judgment” on the part of the Commission and should not be followed.¹

¹ See *Rita v. United States*, 127 S. Ct. 2465, 2468 (2007) (district court may conclude that the guideline sentence fails to reflect § 3553(a) considerations, reflects an unsound judgment, does not treat defendant characteristics in the proper way, or that a different sentence is appropriate “regardless.”); *id.* at 2463 (The

II. Determining Base Offense Level in Offenses Involving Crack and Other Controlled Substances

The Commission also modified the mechanism for determining the base offense level in offenses involving crack and other controlled substances. The mechanism is set forth in new subdivision (D) of Application Note 10. *See* U.S.S.G. § 2D1.1 cmt. n.10(D) (2007). Although this determination is a bit more complicated than for offenses involving crack only, it is really not very different from the old method of determining the base offense level for combined substances, except that there is now a special marijuana equivalency table for the quantity of crack involved, which is derived from the new ratios between crack and marijuana quantities at each offense level. Here's how it works:

First, determine the base offense level for the quantity of crack involved in the case. Find the assigned marijuana equivalency for the crack offense level in the *special* table in that subdivision. *See id.* cmt. n.10(D)(i)(II). Convert the crack quantity to its marijuana equivalency under the special table, which is reproduced here:

<u>Base Offense Level</u>	<u>Marihuana Equivalency</u>
38	6.7 kg of marihuana per g of cocaine base
36	6.7 kg of marihuana per g of cocaine base
34	6 kg of marihuana per g of cocaine base
32	6.7 kg of marihuana per g of cocaine base
30	14 kg of marihuana per g of cocaine base
28	11.4 kg of marihuana per g of cocaine base
26	5 kg of marihuana per g of cocaine base
24	16 kg of marihuana per g of cocaine base
22	15 kg of marihuana per g of cocaine base
20	13.3 kg of marihuana per g of cocaine base
18	10 kg of marihuana per g of cocaine base
16	10 kg of marihuana per g of cocaine base
14	10 kg of marihuana per g of cocaine base
12	10 kg of marihuana per g of cocaine base

For example, 200 G of crack now corresponds to base offense level 32 in the Drug Quantity Table. Under the special marijuana equivalency table above, each gram of

presumption is not binding, does not place any burden of persuasion or proof on either party, and does not reflect greater deference to the Commission's factfinding than to that of the district court, but merely "reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, both the sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the particular case," which is a "double determination").

For a more thorough discussion of how *Rita* can be used to support this argument, see Amy Baron-Evans & Dan Kaplan, *What is Lovely (and Not so Lovely) about Rita: Implications for Gall, Kimbrough, and Future Cases* (September 12, 2007), available at http://www.fd.org/pdf_lib/Rita_Memo_9.12.07.pdf.

crack at level 32 is equivalent to 6.7 KG of marijuana. Thus, 200 G of crack at level 32 is equivalent to 1340 KG of marijuana.

Second, determine the combined marijuana equivalency for the other controlled substances involved in the offense by using the regular Drug Equivalency Table (now located in subdivision (E) of Application Note 10) and by following the instructions in subdivision (B) of note 10. Basically, for each substance, convert each drug to its marijuana equivalent under the Drug Equivalency Table, add the quantities, and find the corresponding offense level for the total quantity in the Drug Quantity Table. *See* U.S.S.G. § 2D1.1 cmt. n.10(B).²

For example, say that the case involving 200 G of crack referred to above also involved 300 G of powder cocaine and 750 G of methamphetamine. Under the regular Drug Equivalency Table, the cocaine converts to 60 KG of marijuana, and the methamphetamine converts to 1500 KG of marijuana.

Third, add the marijuana equivalencies for all three drugs together and find the quantity in the Drug Quantity Table to obtain the combined base offense level.

As calculated above, the crack converts to 1340 KG of marijuana under the special equivalency table in subdivision (D) of Application Note 10; the cocaine converts to 600 KG of marijuana under the regular table in subdivision (E); and the methamphetamine converts to 1500 KG of marijuana under the regular table in subdivision (E). Adding these marijuana equivalencies results in a combined quantity of 3440 KG of marijuana (1340 KG + 60 KG + 1500 KG = 2900 KG), which corresponds to a combined base offense level of **32** for all three controlled substances involved in the offense.

ALERT: When this new mechanism was first promulgated May 2007, we quickly realized that the method for arriving at the appropriate offense level to which varying marijuana equivalencies were applied created the anomaly that an offense involving crack and other drugs could be assigned a higher base offense level than another offense involving significantly more crack and other drugs. In September 2007, the Commission amended subdivision (D) so that the special table applies only to determine the marijuana equivalency for crack, with the other equivalencies being determined under the regular table in subdivision (E), as described above.³ This amended method is simpler to apply (and less confusing), and also seems to produce fewer anomalies. However, it appears that the mechanism will still produce unfair results in some cases, again due to the varying marijuana equivalencies at each crack offense level.

For example, an offense involving a quantity of crack and a quantity of another controlled substance could be assigned a base offense level higher than an offense involving the same total quantity of crack alone. Following the procedures outlined in

² Note that for certain types of controlled substances, the marijuana equivalencies are “capped” and may require special counting. *See* U.S.S.G. § 2D1.1 cmt. n.10(B).

³ *See* 72 Fed. Reg. 51,882-83 (Sept. 11, 2007).

subdivision (D), an offense involving 12 grams of crack and 6 grams of powder is assigned a combined base offense level of **26**. Here's how:

- (1) 12 G crack = BOL 24 in the DQT. Multiply by 16 KG mj per g of crack under subdivision (D) = 192 KG mj
- (2) 6 G powder cocaine. Multiply by 200 G mj per g of powder under subdivision (B) = 1.2 KG mj
- (3) Add 192 KG + 1.2 KG = 193.2 KG mj, which is assigned a BOL 26 in the DQT.

In contrast, had the offense involved 18 grams of crack only, the assigned base offense level would only be **24** under the Drug Quantity Table.

If you come across such a situation or something similar, you may want to point out to the judge that these amendments are intended as only “interim” and incomplete fixes to the problems associated with the 100-to-1 ratio, and as such, are not perfect.⁴ Again, ask the judge to make the independent assessment – under 18 U.S.C. § 3553(a) and pursuant to the district court’s duty under *Booker* and *Rita* – that it need not follow an advisory guideline range that is higher for a combination of crack and another, less severely punished drug than it would be for crack alone.⁵

⁴ U.S.S.G App. C, Supp., Amend. 706 (Reason for Amend.).

⁵ See *Rita*, 127 S. Ct. at 2463, 2465, 2468; see also *supra* note 1.