

An hourglass-shaped graphic with a globe of the Earth inside. The top bulb is dark blue, and the bottom bulb is light blue. The hourglass is centered on the page.

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*How the Federal Sentencing Guidelines Work: Two Examples*

Charles Doyle, American Law Division

April 4, 2005

**Abstract.** Until recently, the federal Sentencing Guidelines determine the sentences imposed as punishment for most federal crimes. They are now only advisory, but remain a major sentencing consideration. The guidelines system is essentially a scorecard system. This is a discussion of how the system works using two relatively simple examples , one involving a terrorism-related crime and the other involving drug trafficking.

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## How the Federal Sentencing Guidelines Work: Two Examples

**April 4, 2005**

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# How the Federal Sentencing Guidelines Work: Two Examples

## Summary

Until recently, the federal Sentencing Guidelines determine the sentences imposed as punishment for most federal crimes. They are now only advisory, but remain a major sentencing consideration. The guidelines system is essentially a scorecard system. This is a discussion of how the system works using two relatively simple examples – one involving a terrorism-related crime and the other involving drug trafficking – and following this roadmap:

- I. Identify 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. Adjust (levels added and subtracted) for:
  - A. Victim-related
  - B. Role in the offense
  - C. Obstruction
  - D. Multiple counts
  - E. Acceptance of responsibility.
- III. Find the criminal history category (assign points for criminal record).
- IV. Consider career offender alternative (required in some cases).
- V. Consider whether departures are appropriate.
- VI. Convert using sentencing table (final offense level points/criminal history points = sentencing range).
  - A. Imprisonment
  - B. Probation
  - C. Supervised release
  - D. Restitution
  - E. Fine
  - F. Forfeiture
  - G. Special assessments.

Abridged versions of portions of this report – without its footnotes, appendices, or most of its quotations and citations to authority – are available as CRS Report RS22104, *Sentencing Under the Federal Sentencing Guidelines: An Abridged Controlled Substance Example*, and CRS Report RS22105, *Sentencing Under the Federal Sentencing Guidelines: An Abridged Terrorism Related Example*.

## Contents

Introduction .....	1
Terrorism .....	4
Controlled Substance Case .....	14
Other Matters .....	33
Appendices .....	34
Drug Quantity Table .....	34
Drug Equivalency Tables .....	40
Selected Bibliography .....	42

# How the Federal Sentencing Guidelines Work: Two Examples

## Introduction

Until recently, the federal Sentencing Guidelines determined the sentences meted out as punishment for most federal crimes. Then the Supreme Court declared that as a matter of constitutional necessity the Guidelines must be viewed as advisory rather than mandatory, *United States v. Booker*, 125 S.Ct. 738 (2005).<sup>1</sup> The Guidelines remain a major consideration nevertheless. The Guidelines system is essentially a scorecard system. The purpose of this report is to give a bare bones description of the score-keeping process with simple examples of how it works.

Congress created the United States Sentencing Commission and authorized it to promulgate sentencing guidelines, 28 U.S.C. 991-998, in order to eliminate and prevent “unwarranted sentencing disparity.”<sup>2</sup> The statutes that define federal crimes still identify the maximum penalties – and in some cases the minimum sentences – that may be assessed. The Guidelines, however, provide the standards that most often speak to how federal criminals will be punished within those boundaries.<sup>3</sup> The

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<sup>1</sup> Mandatory application of the Guidelines raised constitutional concerns under the Sixth Amendment’s jury trial clause and the Fifth Amendment due process clause, neither of which undermine the basic constitutional validity of the Guidelines as a Congressional delegation of authority, 125 S.Ct. at 754-55; *Mistretta v. United States*, 488 U.S. 361 (1989); see generally, *United States Sentencing Guidelines and the Supreme Court: Booker, Fanfan, Blakely, Appendi, and Mistretta*, CRS Rep. RL32573 (2005).

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

<sup>3</sup> Although the Guidelines must ordinarily yield to a statutory mandatory minimum, Congress has established a safety valve for certain first time, low level drug offenders under which they escape the statutory mandatory minimum sanctions for sentencing under the Guidelines: “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;

Commission's mandate includes the power to amend the Guidelines or promulgate new ones, 28 U.S.C. 994(p), (r). 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 federal courts must impose a sentence after consideration of the factors identified in 18 U.S.C. 3553(a) including the sentence called for by operation of the Guidelines.<sup>4</sup> The Guidelines themselves call for deviation (departure) where the government moves for departure based upon the

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

<sup>4</sup> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider – (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed – (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) *the kinds of sentence and the sentencing range established for – (A) the applicable category of offense committed by the applicable category of defendant as set forth in the Guidelines – (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such Guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (ii) that except as provide in section 3742(g)[relating to sentencing on remand], are in effect on the date the defendant is sentenced; or (B) in the case of a violation of probation or supervised release, the applicable Guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such Guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); (5) any pertinent policy statement – issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendment made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense," 18 U.S.C. 3553(a)(emphasis added).*

defendant's cooperation with law enforcement authorities,<sup>5</sup> or 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.<sup>6</sup>

The Guidelines assign most federal crimes to one of forty-three "offense levels" based on the severity of the offense. 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 assessed under the Guidelines.

This is a walk through the Guidelines using as vehicles two reported cases,<sup>7</sup> with the sentences calculated according to the Guidelines' score-keeping procedure:

- I. Find 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. Adjust (levels added and subtracted) for:
  - A. Victim related
  - B. Role in the offense
  - C. Obstruction
  - D. Multiple counts
  - E. Acceptance of responsibility.
- III. Find criminal history category (assign points for criminal record).
- IV. Consider career offender alternative (required in some cases).
- V. Consider whether departures are appropriate

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<sup>5</sup> "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); U.S.S.G. §5K1.1. (The Guidelines are issued independently by the Sentencing Commission and appear in the various editions of the Commission's United States Sentencing Commission Guidelines Manual (*Guidelines Manual*) and an appendix in the United States Code Annotated (18 U.S.C.A. App.) and the United States Code Service (18 U.S.C.S. App.) but they are not carried in the United States Code (U.S.C.).

<sup>6</sup> 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; and permitting a corresponding "downward departure" based upon the court's view that the Guidelines overrepresent the seriousness of the defendant's past conduct; U.S.S.G. ch.5K (departures).

<sup>7</sup> *United States v. Biheiri*, 299 F.Supp.2d 590 (S.D.N.Y. 2003); and *United States v. Korakis*, 325 F.Supp.2d 628 (E.D.Va. 2004).

VI. Convert using sentencing table (final offense level points/criminal history points = sentencing range).

- A. Imprisonment
- B. Probation
- C. Supervised release
- D. Restitution
- E. Fine
- F. Forfeiture
- G. Special assessments.<sup>8</sup>

## Terrorism

Biheiri was convicted of various immigration-related false statements in violation of 18 U.S.C. 1015(a)<sup>9</sup> and 18 U.S.C. 1425(a)<sup>10</sup> which the government

<sup>8</sup> The Guidelines themselves have a more specific, if somewhat more cryptic, outline at U.S.S.G. §1B1.1: “Except as specifically directed, the provisions of this manual are to be applied in the following order: (a) Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See § 1B1.2.

“(b) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

“(c) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

“(d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

“(e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

“(f) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.

“(g) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

“(h) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

“(i) Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the Guidelines that might warrant consideration in imposing sentence.”

<sup>9</sup> “Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens . . . shall be fined under this title or imprisoned not more than five years, or both. . . .” 18 U.S.C. 1015(a).

<sup>10</sup> “(a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship . . . Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title), 10 years (in the case of a first or second such offense, if the offense was not committed to facilitate such an act of international terrorism

unsuccessfully asserted had facilitated the support of overseas terrorist activity, 299 F.Supp. 2d 590 (E.D.Va. 2004). He was sentenced to 12 months imprisonment, a fine of \$15,000, a \$100 special assessment, and 3 years of supervised release, 299 F.Supp.2d at 611-12.<sup>11</sup>

I. *Base offense level.* The Statutory Index, U.S.S.G. App.A, identifies U.S.S.G. §§2L2.1 and 2L2.2<sup>12</sup> as possibly applicable base offense level Guidelines for violations of subsection 1425(a) (depending upon whether the offense related to the status of the offender or of someone else); the Index identifies four possible Guidelines applicable for violations of subsections 1015(a)-(e), U.S.S.G. §§2B1.1, 2J1.3, 2L2.1, 2L2.2.<sup>13</sup> The court after a comparison of the language of the indictment with the language of the perjury Guideline (2J1.3) and the immigration false statement Guideline (2L2.2), concluded that Guideline section 2L2.2 applied to both the 18 U.S.C. 1015(a) and the 18 U.S.C. 1425(a) violations. Section 2L2.2 carries a base offense level of 8 with the possibility of increases for aggravating factors apparently not implicated in Biheiri’s case.<sup>14</sup> The base offense level for each violation (18 U.S.C. 1425 and 18 U.S.C. 1015) was: 8

## II. *Adjustments.*

A. *Victim-Related.* The Guidelines allow for four so-called victim-related offense level adjustments, one for hate crimes or vulnerable victims, U.S.S.G. §3A1.1; another for official victims, U.S.S.G. §3A1.2; third for restrained victims, U.S.S.G. §3A1.3; and a fourth for terrorism, U.S.S.G. §3A1.4. Although the

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or a drug trafficking crime), or 15 years (in the case of any other offense), or both,” 18 U.S.C. 1425.

<sup>11</sup> In a later proceeding, Biheiri pleaded guilty to additional immigration-related offenses for which he was sentenced to 13 months and 1 day with credit for time served and a waiver of the otherwise applicable fine in light of his financial circumstances, a special assessment of \$200, and instructed to cooperate with immigration officials to ensure his prompt removal from this country upon his release from prison, *United States v. Biheiri*, 356 F.Supp.2d 589, 603 (E.D.Va. 2005).

<sup>12</sup> Guideline section 2L2.1 is captioned “trafficking in a document to naturalization, citizenship, or legal resident status, or a United States passport; false statement in respect to the citizenship or immigration status of another; fraudulent marriage to assist alien to evade immigration law.” Guideline section 2L2.2 is captioned “fraudulently acquiring documents relating to naturalization, citizenship, or legal resident status for own use; false personation or fraudulent marriage by alien to evade immigration law; fraudulently acquiring or improperly using a U.S. passport.”

<sup>13</sup> Section 2B1.1 is captioned “larceny, embezzlement, and other forms of theft; offenses involving stolen property; property damage or destruction; fraud and deceit; forgery; offenses involving altered or counterfeit instruments other than counterfeit bearer obligations of the United States;” section 2J1.3 is captioned, “perjury or subordination of perjury; bribery of witness.”

<sup>14</sup> The section calls for an increase of 2 offense levels if the defendant has previously been deported or convicted of an immigration felony or if the offense involves misuse of a U.S. passport and an increase of 4 offense levels if the offender has two or more prior immigration felony convictions.

government sought an adjustment only under the terrorism Guideline in *Biheiri*, it has sought additional victim-related adjustment in other terrorism cases.<sup>15</sup>

The terrorism adjustment Guideline assigns an additional 12 offense levels “if the offense [or any related crime that constitutes relevant conduct] is a felony that involved, or was intended to promote, a federal crime of terrorism,” establishes a minimum offense level of 32 in such cases, and tops out the defendant’s criminal history score at VI regardless of his or her prior criminal record, U.S.S.G. §3A1.4. The section has obvious application when the offender has been convicted of a federal crime of terrorism,<sup>16</sup> but it may also apply when a crime of terrorism has the necessary relationship to the crime of conviction to qualify under the Guideline and constitute “relevant conduct” for purposes of the Guideline. The government asserted that Biheiri had engaged in financial transactions with a designated terrorist, who had connections to HAMAS, in violation of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1705. The statute of limitations barred prosecution of the IEEPA allegations directly, but the government asserted that IEEPA violations might be used as the basis for an adjustment under section 3A1.4.

It failed first because it could not prove that the IEEPA violations were committed in preparation for or in any other way “relevant” to the immigration violations that constituted the crimes of conviction and second because it failed to prove that the IEEPA violations constituted a “federal crime of terrorism,” 299 F.Supp.2d at 605-608. When a crime is related to the obstruction of a terrorism investigation or proceeding it may also warrant application of section 3A1.4, but the enhancement was unavailable in *Biheiri* because the government could not show that the false statements obstructed its investigation, *id.* at 606. Offense level adjustment 0 .

Adjusted offense level for each violation: 8 .

**B. Role in the Offense.** There are five role-in-the-offense adjustments: one for leadership (increase 4 levels for organizer or leader of a crime with 5 or more participants or that is otherwise extensive; increase 3 levels for a manager or supervisor of such an extensive crime; increase of 2 levels for an organizer, leader, manager or supervisor of any other criminal activity, U.S.S.G. §3B1.1); a second for minor players (decrease by 4 levels for minimal participants; decrease by 2 levels for minor participants, U.S.S.G. §3B1.2); a third for a crime involving an abuse of trust or use of a special skill (increase 2 levels, U.S.S.G. §3B1.3); a fourth a Fagan enhancement (increase 2 levels for the use of a minor to commit the offense, U.S.S.G. §3B1.4); and a fifth to discourage the use of body armor (increase 4 levels for the use of body armor during the preparation, commission, or flight from a drug trafficking crime or a crime of violence; increase 2 levels for a drug trafficking or violent crime involving the use of body armor, U.S.S.G. §3B1.5). The *Biheiri* court refused to assess a 4 level role in the offense increase under the theory that Biheiri’s activity involved the federal agencies and employees to whom the false statements were made (thereby qualifying as the supervisor in a crime involving 5 or more

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<sup>15</sup> *E.g.*, *United States v. Salim*, 287 F.Supp.2d 250, 355 (S.D.N.Y. 2003)(assessment of a 3 level official victim and 2 level restraint adjustment in the case of maiming a corrections officer where the government unsuccessfully sought a terrorist adjustment as well).

<sup>16</sup> *E.g.*, *United States v. Hammoud*, 381 F.3d 316, 355-56 (4<sup>th</sup> Cir. 2004); *United States v. Meskini*, 319 F.3d 88, 90 (2d Cir. 2003).

participants), but did conclude that a 2 level adjustment was appropriate in view of Biheiri's supervision of two other participants in his scheme, 299 F.Supp.2d at 608-610.<sup>17</sup> Offense level adjustment: +2

Adjusted offense level for each violation: 10

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. No question of either obstruction of justice adjustment arose in *Biheiri*.<sup>18</sup> Offense level adjustment 0.

Adjusted offense level for each violation: 10.

D. *Multiple Counts.* Nestled among the provisions that speak to how to account for the particular aggravating and mitigating factors that attend the crime for which the defendant has been convicted, are a series of adjustments that deal with cases in which the defendant has been convicted of more than one crime, either the defendant's commission of the same crime on more than occasion, or his commission of a series of crimes at the same time, or a series of crimes that have little other than the defendant in common, U.S.S.G. §§3D1.1 to 3D1.

The Guidelines in this part reflect a compromise between concurrent and consecutive punishment for crimes by the same defendant. They generally call for more severe punishment than pure concurrent sentencing and more lenient than pure consecutive sentencing. As long there are no statutory provisions that require consecutive sentencing, *e.g.*, 18 U.S.C. 924(c)(1)(D)(ii), 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.

Once the multiple crimes for which the defendant has been convicted have been collected in closely related groups, the offense level applicable to each group must be determined using the highest offense level attributable to the most serious crime within the group (*i.e.*, the crime with the highest offense level) – with one exception, U.S.S.G. §3D1.3. For the crimes whose offense levels depend upon the amount of money stolen, or the extent of damage caused, or the amount drugs manufactured or dealt – the amounts are cumulated, *id.* The offense level for each group having been

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<sup>17</sup> In other terrorism cases, the courts have held that recruiting and directing another in the underlying criminal activity is sufficient to justify a 2 level increase under U.S.S.G. §3A1.1, *United States v. Mandhai*, 375 F.3d 1243, 1248 (11<sup>th</sup> Cir. 2004); *United States v. Salim*, 287 F.Supp.2d 250, 310-11 (S.D.N.Y. 2003).

<sup>18</sup> The government raised the obstruction issue following Biheiri's second conviction but was unable to carry its burden, *United States v. Biheiri*, 356 F.Supp.2d at 600. The adjustment has been assessed when a terrorist denies misconduct at trial in the face of government evidence to the contrary, *United States v. Hammoud*, 381 F.3d 316, 357 (4<sup>th</sup> Cir. 2004).

determined, the group with the highest offense level is assigned a “unit” as is any group whose offense level is within 4 levels of the lead group (any group within 5 to 8 offense levels of that of the lead group is assigned a half unit; other groups are disregarded), U.S.S.G. §3D1.4. The offense level for the lead group is then increased by the total number of units (add 1 level for 1.5 units; 2 levels for 2 units; 3 levels for 2.5 or 3 units; 4 levels for 3.5 to 5 units; and 5 levels for more than 5 units), *id.* The resulting total offense level of the lead group is the basis for the defendant’s final sentencing, U.S.S.G. §3D1.5. Biheiri’s offenses were grouped together. No adjustment for multiple groups was necessary and the offense levels for the two violations were counted as one within the single group, 299 F.Supp.2d at 605. Had the offense level for the violation of either 18 U.S.C. 1015 or 1425 been higher, it would have been used. Since they were the same, that exercise was unnecessary.

Offense level adjustment 0 .

Adjusted offense level: 10 .

E. *Accept Responsibility.* The Guidelines permit an adjustment in cases where the defendant accepts responsibility; a decrease of 2 levels as a general rule and a decrease of 1 level in cases otherwise carrying an offense level of 16 or more where the defendant signals his intent to plead guilty before the government has had to invest major time and effort preparing for trial, U.S.S.G. §3E1.1. The adjustment was not applicable in *Biheiri*.<sup>19</sup> Offense level adjustment 0 .

Adjusted offense level: 10 .

### III. *Criminal History Category.*

A. *Generally.* As a general rule an offender’s criminal record determines his or her criminal history category (for each offense level there are six permissible sentencing subcategories arranged according to the seriousness of the defendant’s criminal history). Points are assessed for past convictions,<sup>20</sup> for misconduct committed while under judicial supervision such as bail or parole, and for crimes of violence.<sup>21</sup> Juvenile as well as general and special court martial convictions are counted; convictions by a tribal court, the court of a foreign country, or a summary court martial are not, U.S.S.G. §4A1.2. By operation of U.S.S.G. §3B1.4 a terrorism adjustment results in the assignment to criminal history category VI, regardless of the

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<sup>19</sup> In other terrorism cases, the courts have held that the adjustment is not available simply because the defendant pleads guilty on the eve of trial, *United States v. Biheiri*, 356 F.Supp.2d at 601-602; but is available to the defendant who consistently admits his guilty and pleads guilty even if he offers shifting explanations as to his motive, *United States v. Salim*, 287 F.Supp.2d 250, 315-16 (S.D.N.Y. 2003)

<sup>20</sup> 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).

<sup>21</sup> Two 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).

offender's criminal record. Other than the inapplicability of the terrorism adjustment, there was no discussion of Biheiri's criminal history in *Biheiri*, but on the basis of statements of the court when sentencing him later for his second conviction he would appear to have had little if any criminal record of prior convictions at the time of his first conviction.<sup>22</sup>

Adjusted offense level: 10  
Criminal history category: I.

*B. 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, as in the case of career criminals, U.S.S.G. §4B1.1; professional criminals, U.S.S.G. §4B1.3; armed career criminals, U.S.S.G. §4B1.4; and recidivist sex offenders, U.S.S.G. §4B1.5.<sup>23</sup> None of these applied in *Biheiri*

Adjusted offense level: 10  
Criminal history category: I.

*V. Departures.* In the interest of uniformity, the Guidelines seek to limit the circumstances under which a sentence outside of the ranges otherwise called for by the Guidelines may be commended. The Guidelines countenance departure from the sentence otherwise called for (1) upon the request of the government in recognition of the defendant's cooperation with authorities, 18 U.S.C. 3553(e),(f); U.S.S.G. §§5C1.2, 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; (3) in cases where "there exists an aggravating [or, in cases other than those involving child crimes or sex offenses, a 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.

There are two statutory based grounds for assistance departures. One the so-called "safety valve" is only available to low level, first time drug offenders, 18 U.S.C. 3553(f), U.S.S.G. §5C1.2. The other is limited only by the requirement that the government petition for its application, 18 U.S.C. 3553(e), U.S.S.G. §5K1.1. Neither applied in *Biheiri* and are examined in greater detail below in the discussion of the drug case example.

*Biheiri* likewise did not involve a departure based on the inadequacy of criminal history Guidelines to accurately reflect the extent or seriousness of the defendant's past criminal activities. When it applies, the corrective Guideline may address either

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<sup>22</sup> "[T]he parties did not dispute that Biheiri should be in criminal history category II as a result of his twelve-month sentence for naturalization fraud," *United States v. Biheiri*, 356 F.Supp.2d at 602. Since criminal history category II tops out at 3 points and 2 points would have been assessed for Biheiri's 12 month sentence following his first conviction, Biheiri criminal history category at the time of his first conviction must have been category I (1 point or less).

<sup>23</sup> Recidivist enhancements are discussed more extensive later in this report since at least thus far they are more prevalent in drug cases than terrorism cases.

an inadequate assessment of the seriousness of defendant's criminal activity either to his benefit or to his detriment, U.S.S.G. §4A1.3.

Moving on to offense level inadequacies, the Guidelines note that the circumstances that may warrant departure from the Guidelines based on want of guideline consideration "will occur rarely and only in exceptional circumstances," U.S.S.G. §5K2.0, App.Notes 3(A)(ii), (B)(ii). The Guidelines, however, do contain 22 policy statements indicating specific conditions under which departure might be merited or are forbidden, U.S.S.G. §§5K2.1 to 5K2.23.<sup>24</sup>

The government sought an upward departure in *Biheiri*, but the court decided that "none of the circumstances or consequences of [Biheiri's] offenses of conviction appear to be atypical" so as to take the case out of the "heartland" of the applicable Guideline, 299 F.Supp.2d at 611.

Adjusted offense level: 10  
Criminal history category: I.

#### VI. Sentencing Table.

A. *Imprisonment.* The Guideline's Sentencing Table (below)<sup>25</sup> indicates that the permissible sentencing range for offense level 10, criminal history category I is not less than 6 nor more than 12 months imprisonment. Although the Guideline ranges must fall within the statutory maximum and any statutory minimum for the crime of conviction, 28 U.S.C. 994(b)(1), the range in *Biheiri* was well within the maximum for the statutes of conviction (18 U.S.C. 1015 carries a 5 year maximum; 18 U.S.C. 1425, a 10 year maximum). *Biheiri* was sentenced to 12 months imprisonment, 299 F.Supp.2d at 611-12.

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<sup>24</sup> Beyond the general policy statement for departures in section 5K2.0, there are individual policy statements relating to death (5K2.1), physical injury (5K2.2), extreme psychological injury (5K2.3), abduction or unlawful restraint (5K2.4), property damage or loss (5K2.5), weapons and dangerous instrumentalities (5K2.6), disruption of government function (5K2.7), extreme conduct (5K2.8), criminal purpose (5K2.9), victim's conduct (5K2.10), lesser harm (5K2.11), coercion and duress (5K2.12), diminished capacity (5K2.13), public welfare (5K2.14), voluntary disclosure of offense (5K2.16), high capacity, semiautomatic firearms (5K2.17), violent street gangs (5K2.18), post-sentencing rehabilitative efforts (5K2.19), aberrant behavior (5K2.20), dismissed and uncharged conduct (5K2.21), child crimes and sex offenses (5K2.22), and discharged terms of imprisonment (5K2.23).

<sup>25</sup> The Sentencing Table that follows has been replicated from the United States Sentencing Commission's *Guidelines Manual*, 376 (Nov. 2004). As will be seen the "Zones" mentioned in the Table determine a defendant's eligibility for probation and alternative forms of incarceration.

## SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A 5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B 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
Zone C 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
Zone D 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	188-235
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

*B. Probation.* Probation eligibility under the Guidelines is very limited. It extends only to defendants 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 to defendants whose maximum is no more than 1 year, if the court imposes some form of incarceration rather than imprisonment (i.e., weekend or nighttime imprisonment, home confinement, etc.) (Zone B on the Sentencing Table (no higher than offense level 10)), U.S.S.G. §5B1.1. The maximum permissible term of probation for a defendant with an offense level 6 or higher is 5 years; below offense level 6, the maximum term of probation is 3 years, U.S.S.G. §5B1.2. Defendants sentenced at offense level 19 or above (Zones C and D) are ineligible for probation. With an offense level of 10, Biheiri would have been eligible for probation coupled with some form of incarceration other than imprisonment, but court elected to sentence him to imprisonment at the top of the applicable range, 299 F.Supp.2d at 611-12.

*C. 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. Again with an offense level of 10, the court might have sentenced Biheiri to some form of substitute incarceration but elected not to, 299 F.Supp.2d at 611-12.

*D. Supervised Release.* Unless otherwise provided by statute, defendants sentenced to imprisonment for more than a year *must* also be sentenced to a term of supervised release to be served after they leave prison, U.S.S.G. §5D1.1(a). The court *may* impose a term of supervised release upon defendants sentenced to imprisonment for a year or less, U.S.S.G. §5D1.1(a). Maximum terms of supervised release range from 1 to 5 years depending on the seriousness of their offense.<sup>26</sup> Biheiri was sentenced to a 3 year term of supervised release, 299 F.Supp.2d at 611-12.

*E. Restitution.* The court may also order defendants to make restitution; or unless required by statute, the court may forego a restitution order if “(A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim’s losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process,” U.S.S.G. §5E1.1(b)(2). There was no evidence of a restitution order in *Biheiri*, 299 F.Supp.2d at 611-12.

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<sup>26</sup> “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. 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. A supervised release term of any term of years may be imposed in the case of the federal crimes of terrorism as listed in 18 U.S.C. 2332b(g)(5)(B) occurring under circumstances that result in or risk serious bodily injury, 18 U.S.C. 3583(j). Violations of 18 U.S.C. 1015 or 1425 are not among the federal crimes of terrorism.

F. *Fine.* The Guidelines establish a fine schedule according to offense level for the crime of conviction.<sup>27</sup> 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.<sup>28</sup> In Biheiri’s case, the Guidelines call for a fine of not less than \$2,000 nor more than \$20,000; the court imposed a fine of \$15,000, 299 F.Supp.2d at 611-12.

G. *Special assessment.* Federal courts must impose a special assessment of \$100 for felony violations of federal law and lesser amounts for misdemeanors, 18 U.S.C. 3013; U.S.S.G. §5E1.3. Biheiri was assessed a special assessment of \$100, 299 F.Supp.2d at 611-12.

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. There were no criminal forfeiture provisions implicated in *Biheiri*.

I. *Cost of Prosecution.* Several tax statutes and a few others 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 Biheiri was convicted are not among them.

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 set off the cost against any fine imposed, U.S.S.G. §5F1.4. The issue does not appear to have arisen in *Biheiri*.

http://wikileaks.org/wiki/CRS-RL32846

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<sup>27</sup> Fine Table

Offense Level	A Minimum	B Maximum
3 and below	\$100	\$5000
	* * *	
10-11	\$200	\$20,000
18-19	\$6,000	\$60,000
	* * *	
39 and above	\$25,000	\$250,000

U.S.S.C. §5E1.2(c)(3).

<sup>28</sup> “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).

## Controlled Substance Case

Korakis, a drug courier in an ecstasy<sup>29</sup> smuggling and marketing scheme, pleaded guilty to conspiracy to possess ecstasy and marijuana with the intent to distribute it in violation of 21 U.S.C. 841(a)(1), 846, *United States v. Korakis*, 325 F.Supp.2d 628, 631 (E.D.Va. 2004).<sup>30</sup>

### 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 the underlying 21 U.S.C. 841. There are several possible base offense levels under section 2D1.1 depending upon whether the offense has resulted in a death or serious injury and upon the type and amount of substances involved. The most severe of these applies to repeat offenders where the offense involves distribution of a substantial amount of various drugs and where the offense of conviction has resulted in a death or serious injury (base offense level 43; base offense level 38 for first time offenders), 21 U.S.C. §2D1.1(a)(1),(2). Otherwise, the Drug Quantity Table in subsection 2D1.1(c)(appended) sets the base offense level according to the type and amount of the controlled substance involved.

The type and amount of controlled substances involved includes not only those that form the basis for the offense of conviction, but also the types and amounts of controlled substances in any related “relevant conduct.”<sup>31</sup> Korakis transported two packages of unmarked pills and delivered them to a second courier, who was later arrested with what the Probation Service’s presentencing report determined to be 960.8 grams of a mixture of containing MDMA and methamphetamine in pill form and 6,044 grams of hashish, 325 F.Supp.2d at 631. In order to provide a uniform sentencing standard in cases involving more than one type of controlled substance, section 2D1.1 includes Drug Equivalency Tables (appended) which allow conversion into a uniform marijuana equivalency standard. When as here pills contain more than one controlled substance, the higher equivalent is used, U.S.S.G. §2d1.1(c)(A).

Under the Drug Equivalency Tables, 1 gram of hashish is treated as the equivalent of 5 grams of marijuana; 1 gram of MDMA is treated as 500 grams of marijuana, but 1 gram of methamphetamine is treated as 2 kilograms (2000 grams) of marijuana. Thus, Korakis’ base offense level is the base offense level for 1,951.82 kilograms (1, 951,820 grams) of marijuana (30220 grams for the hashish (5 x 6044 grams) plus 1,921,600 grams for the methamphetamine mix (2000 x 960.8). Under 2D1.1(c) the base offense level for 1,951.82 kilograms of marijuana is 32 (at least 1,000 KG but less than 3,000 KG of marijuana).

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<sup>29</sup> MDMA or 3,4 Methylendioxyamphetamine.

<sup>30</sup> Under 21 U.S.C. 846 attempt or conspiracy to commit any controlled substance offense is subject to the same penalties as the underlying offense.

<sup>31</sup> “With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook,” U.S.S.G. §1B1.3, App.Note 2.

Base offense level: 32.

Section 2D1.1 modifies the base offense level to account for several aggravating and mitigating factors, some which are found in Korakis' case and some which are not. The factors inapplicable to Korakis include: a 2 level increase assessed for possession of a firearm or other dangerous weapon, U.S.S.G. §2D1.1(b)(1);<sup>32</sup> a 2 level increase (and a minimum base level of 26) for offenses involving smuggling aboard commercial aircraft or where the offender operates or helps operate the aircraft or other conveyance, U.S.S.G. §2D1.1(b)(2);<sup>33</sup> a 2 level increase for distribution in prison, U.S.S.G. §2D1.1(b)(3);<sup>34</sup> a 2 level increase for distribution involving Internet marketing, U.S.S.G. §2D1.1(b)(5);<sup>35</sup> and various manufacturing-related increases, U.S.S.G. §2D1.1(b)(6).<sup>36</sup> For these, Korakis' base offense level remained unchanged.

Adjusted offense level: 32.

The facts in *Korakis*, however, do implicate a few of the modifications mentioned in section 2D1.1. Korakis argued that as a simple "mule" he was entitled to the 2 level reduction which section 2D1.1(3) affords low level drug offenders with

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<sup>32</sup> Firearm possession enhancements are common in controlled trafficking cases; assessment of the Guideline requires proof of a likely nexus between possession of the firearm and the offense, *United States v. Santiago*, 384 F.3d 31, 33 (2d Cir. 2004); *United States v. Dillard*, 370 F.3d 800, 804 (8<sup>th</sup> Cir. 2004); it may be applied where the defendant should have reasonably anticipated qualifying firearm possession by a coconspirator, *United States v. Thornton*, 306 F.3d 1355, 1358 (3d Cir. 2002); or where "a law enforcement agent possesses a weapon at the time he uses his official position to facilitate a drug offense," *United States v. Partida*, 385 F.3d 546, 562 (5<sup>th</sup> Cir. 2004).

<sup>33</sup> E.g., *United States v. Rendon*, 354 F.3d 1320, 1329 (11<sup>th</sup> Cir. 2003)(captain of a "go-fast" smuggling boat); *United States v. Ray*, 250 F.3d 596, 602 (8<sup>th</sup> Cir. 2001)(aiding and abetting the use of a chartered aircraft in a smuggling conspiracy).

<sup>34</sup> E.g., *United States v. Lopez*, 299 F.3d 84, 86-8 (1<sup>st</sup> Cir. 2002); *United States v. Gallaway*, 199 F.Supp.2d 605, 607 (E.D.Tex. 2002).

<sup>35</sup> "(Apply the greater): If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3(Relevant Conduct), distribute a controlled substance through mass-marketing by means of an interactive computer service, increase by 2 levels," U.S.S.G. §2D1.1(b)(5).

<sup>36</sup> "(Apply the greater): (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels; (B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27. (C) If the offense (i) involved the manufacture or amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30," U.S.S.G. §2D1.1(b)(6); e.g., *United States v. Florence*, 333 F.3d 1290, 1292 (11<sup>th</sup> Cir. 2003)(fire resulting from a methamphetamine "cook" in a hotel room which required evacuation of the hotel's other guests including children); *United States v. Shamblin*, 323 F.Supp.2d 757, 761-62 (S.D.W.Va. 2004)(operating a meth lab in a house while a child was present).

a base offense level of 32.<sup>37</sup> The reduction is predicated upon the defendant's eligibility for an adjustment under U.S.S.G. §3B1.2 relating to minimal or minor participation in a large scale criminal enterprise. The court rejected Korakis' argument on the basis of wiretap evidence which indicated more substantial participation than that of a simple courier, 325 F.Supp.2d at 632. His offense level remained the same.

Adjusted offense level: 32.

The failure to qualify for the mitigation adjustment to which low level offenders are entitled also cost Korakis a 2 level increase because his offense involved methamphetamine smuggling.<sup>38</sup>

Adjusted offense level: 34.

On the other hand, Korakis was given the 2 level reduction which section 2D1.1(c)(7) makes available for those low level, first time, cooperative offenders who qualify for the "safety valve" under U.S.S.G. §5C1.2(a)<sup>39</sup>

Adjusted offense level: 32.

## II. *Adjustments.*

A. *Victim Related.* Controlled substance cases are less likely than terrorism cases to implicate victim related adjustments, *i.e.*, adjustments for hate crimes or

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<sup>37</sup> "(a) Base Offense Level . . . (3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels," U.S.S.G. 2D1.1(a)(3).

<sup>38</sup> "If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by 2 levels," U.S.S.G. §2D1.1(b)(4).

<sup>39</sup> "Except as provided in subsection (b) [which establishes a minimum offense level at 17], in the case of an offense under 21 U.S.C. 841, 844, 846, 960 or 963 [all relating to controlled substance offenses with mandatory minimum sentences], the court shall impose a sentence in accordance with the applicable Guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. 3553(f)(1)-(5) set forth below: (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing Guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); (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 play, 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," U.S.S.G. §5C1.2(a).

vulnerable victims (U.S.S.G. §3A1.1), for official victims (U.S.S.G. §3A1.2), for restraint of a victim (U.S.S.G. §3A1.3), or for terrorism, (U.S.S.G. §3A1.4).<sup>40</sup> They certainly did not arise in *Korakis*.

Adjusted offense level: 32 .

B. *Role in the Offense*. On the other hand, role in the offenses adjustments are a common feature of controlled substance cases as the discussion of section 2D1.1 above makes clear. There are five role-in-the-offense adjustments:

- leadership (increase 4 levels for organizer or leader of a crime with 5 or more participants or that is otherwise extensive; increase 3 levels for a manager or supervisor of such an extensive crime; increase of 2 levels for an organizer, leader, manager or supervisor of any other criminal activity, U.S.S.G. §3B1.1);<sup>41</sup>
- minor roles (decrease by 4 levels for minimal participants; decrease by 2 levels for minor participants, U.S.S.G. §3B1.2);<sup>42</sup>
- a crime involving an abuse of trust or use of a special skill (increase 2 levels, U.S.S.G. §3B1.3);<sup>43</sup>

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<sup>40</sup> *But see, United States v. Graham*, 327 F.3d 460, 461-62 (6<sup>th</sup> Cir. 2003)(U.S.S.G. §3A1.4 terrorism adjustment applied to a marijuana farmer who used the proceeds to fund paramilitary activities); *United States v. Bennett*, 368 F.3d 1343, 1358 (11<sup>th</sup> Cir. 2004) (U.S.S.G. §3A1.2 official victim adjustment applied to a drug trafficker who shot at federal officers investigating his activities); *United States v. Amedeo*, 370 F.3d 1305, 1317-318 (11<sup>th</sup> Cir. 2004) (U.S.S.G. §3A1.1 vulnerable victim adjustment applied to a drug trafficker who supplied cocaine to an 18 year old student addict).

<sup>41</sup> *E.g., United States v. Mesner*, 377 F.3d 849, 851-52 (8<sup>th</sup> Cir. 2004)(supervisor); *United States v. Trujillo*, 376 F.3d 593, 614-15 (6<sup>th</sup> Cir. 2004)(leader and organizer); *United States v. Dillard*, 370 F.3d 800, 806 (8<sup>th</sup> Cir. 2004)(leader); *United States v. Gutierrez*, 367 F.3d 733, 737 (8<sup>th</sup> Cir. 2004)(leader and organizer); *but see, United States v. Swanberg*, 370 F.3d 622, 629 (6<sup>th</sup> Cir. 2004)(enhancement is not appropriate merely because the defendant directs a one person operation with many customers).

<sup>42</sup> Section 3B1.2 benefits are not easily claimed in controlled substance cases, *see e.g., United States v. Awad*, 371 F.3d 583, 591(9<sup>th</sup> Cir. 2004)(“the role adjustment for minimal participation is a tool which should be used infrequently . . . and . . . any downward role adjustment should be restricted to those cases presenting exceptional circumstances”); *United States v. Bertling*, 370 F.3d 818, 821 (8<sup>th</sup> Cir. 2004)(defendant must be “substantially less culpable than the average participant”); *United States v. McKee*, 389 F.3d 697, 700 (7<sup>th</sup> Cir. 2004)(same).

<sup>43</sup> *E.g., United States v. Partida*, 385 F.3d 546, 567 (5<sup>th</sup> Cir. 2004)(wayward police officer); *United States v. Flecha-Maldonado*, 373 F.3d 170, 179-80 (1<sup>st</sup> Cir. 2004)(same); *United States v. Montero-Montero*, 370 F.3d 121, 122-24 (1<sup>st</sup> Cir. 2004)(smugglers’ power boat driver); *United States v. Nelson-Rodriguez*, 319 F.3d 12, (1<sup>st</sup> Cir. 2003)(boat captain and radio operator); *but see, United States v. Nuzzo*, 385 F.3d 109, (2d Cir. 2004)(enhancement for abuse of trust requires a nexus between the position of trust, its abuse, and the commission, facilitation, or concealment of the offense).

- a Fagan enhancement (increase 2 levels for the use of a minor to commit the offense, U.S.S.G. §3B1.4),<sup>44</sup> and

- the use of body armor (increase 4 levels for the use of body armor during the preparation, commission, or flight from a drug trafficking crime or a crime of violence; increase 2 levels for a drug trafficking or violent crime involving the use of body armor, U.S.S.G. §3B1.5).

As noted earlier, had Korakis been able to claim the benefits of section 3B1.2 for reduced participation he would have been entitled to offense level reductions both under that section and under 2D1.1 in the calculation of his initial sentencing level. But he was not and the other role in the offense adjustments did not apply either.

Adjusted offense level: 32.

C. *Obstruction*. Although obstruction of justice adjustments<sup>45</sup> are fairly common in controlled substance cases,<sup>46</sup> the issue did not arise in *Korakis* under either the general obstruction Guideline, U.S.S.G. §3C1.1, or the enhancement Guideline for dangerous flight, U.S.S.G. §3C1.2.

Adjusted offense level: 32.

D. *Multiple Counts*. Nestled among the provisions that speak to how to account for the particular aggravating and mitigating factors that attend the crime for which the defendant has been convicted, are a series of adjustments that deal with cases in which the defendant has been convicted of more than one crime, either the defendant's commission of the same crime on more than occasion, or his commission of a series of crimes at the same time, or a series of crimes that have little other than the defendant in common, U.S.S.G. §§3D1.1 to 3D1.

The Guidelines in this part reflect a compromise between concurrent and consecutive punishment for crimes by the same defendant. They generally call for more severe punishment than pure concurrent sentencing and more lenient than pure consecutive sentencing. As long there are no statutory provisions that require consecutive sentencing, 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

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<sup>44</sup> E.g., *United States v. Gaskins*, 364 F.3d 438, 464-65 (2d Cir. 2004)(applies even if the minor did not commit an offense or did not realize he was assisting the offender in the commission of a crime); *United States v. Nava-Sotelo*, 354 F.3d 1202, 1206 (10<sup>th</sup> Cir. 2003) (applies even if the offender did not know the individual used was a minor); *United States v. Blalock*, 321 F.3d 686, 690 (7<sup>th</sup> Cir. 2003)(applies even if the offender himself was a minor); *United States v. Ceballos*, 302 F.3d 679, 697 (7<sup>th</sup> Cir. 2002)(applies even if the offender did not use the minor in order to shield himself from prosecution).

<sup>45</sup> U.S.S.G. §§3C1.1(obstructing or impeding the administration of justice); 3C1.2 (reckless endangerment during flight).

<sup>46</sup> E.g., *United States v. Peterson*, 385 F.3d 127, 139-43 (2d Cir. 2004)(obstruction); *United States v. Williams*, 374 F.3d 941, 947-48 (10<sup>th</sup> Cir. 2004)(same); *United States v. Amedeo*, 370 F.3d 1305, 1318-319 (11<sup>th</sup> Cir. 2004)(same); *United States v. Cook*, 356 F.3d 913, 917 (8<sup>th</sup> Cir. 2004)(reckless flight); *United States v. Chong*, 285 F.3d 343, 344-46 (4<sup>th</sup> Cir. 2002)(same); *United States v. Moore*, 242 F.3d 1080, 1082 (8<sup>th</sup> Cir. 2001)(same).

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.

Once the multiple crimes for which the defendant has been convicted have been collected in closely related groups the offense level applicable to each group must be determined using the highest offense level attributable to the most serious crime within the group (*i.e.*, the crime with the highest offense level) – with one exception, U.S.S.G. §3D1.3. For the crimes whose offense levels depend upon the amount of money stolen, or the extent of damage caused, or the amount drugs – the amounts are cumulated, *id.* The offense level for each group having been determined, the group with the highest offense level is assigned a “unit” as is any group whose offense level is within 4 levels of the lead group (any group within 5 to 8 offense levels of that of the lead group is assigned a half unit; other groups are disregarded), U.S.S.G. §3D1.4. The offense level for the lead group is then increased by the total number of units (add 1 level for 1.5 units; 2 levels for 2 units; 3 levels for 2.5 or 3 units; 4 levels for 3.5 to 5 units; and 5 levels for more than 5 units), *id.* The resulting total offense level of the lead group is the basis for the defendant’s final sentencing, U.S.S.G. §3D1.5.

Korakis pleaded guilty to a one count indictment and thus his case did not trigger the adjustments for cases involving multiple counts.

Adjusted offense level: 32.

E. *Acceptance of Responsibility.* The Guideline for the acceptance of responsibility awards a general 2 level reduction, U.S.S.G. §3E1.1(a), and an additional 1 level reduction upon the motion of the government for trial preparation time saved by a guilty plea in case where the offense level is 16 or more.<sup>47</sup> Korakis qualified for both, 325 F.Supp.2d at 631.

Adjusted offense level: 29.

### III. *Criminal History Category.*

A. *Generally.* As noted earlier, generally an offender’s criminal record determines his or her criminal history category (for each offense level there are six permissible sentencing subcategories arranged according to the seriousness of the defendant’s criminal history). Points are assessed for past convictions,<sup>48</sup> for

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<sup>47</sup> “If the defendant qualifies for a decrease under subsection a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level,” U.S.S.G. §3E1.1(b).

<sup>48</sup> 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

misconduct committed while under judicial supervision such as bail or parole, and for crimes of violence.<sup>49</sup> Juvenile as well as general and special court martial convictions are counted; convictions by a tribal court, the court of a foreign country, or a summary court martial are not, U.S.S.G. §4A1.2. Korakis apparently had no prior criminal record for he was found to have a criminal history category of I.

Adjusted offense level: 29

Criminal history category: I.

B. *Career Offender*. The career offender Guidelines, U.S.S.G. §§4B1.1, 4B1.2, have special relevance for defendants convicted of controlled substance offenses. They are essentially three strikes provisions although they do not call for an automatic sentence of life imprisonment, but instead supply an alternative enhanced penalty structure for the crime that constitutes the third strike. They cover any adult offender<sup>50</sup> convicted of a controlled substance crime<sup>51</sup> or crime of violence<sup>52</sup> following two prior convictions for similar offenses, U.S.S.G. §4B1.1(a). Offenders who qualify are assigned a criminal history category of VI and the higher of (1) the offense level that applies based on their present conviction or (2) U.S.S.G. §4B1.1 which except in the case of certain firearms offenses range from an offense level of 37 down to one of 12 based on the maximum penalty for the offense of their present conviction.<sup>53</sup> The firearms equation is a bit more complicated to account for the

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other past sentence (up to a total of 4 points), U.S.S.G. §4A1.1(a),(b),(c).

<sup>49</sup> Two 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).

<sup>50</sup> “[T]he defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction,” U.S.S.G. §4B1.1(a)(1).

<sup>51</sup> “The term ‘controlled substance offense’ means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense,” U.S.S.G. §4B1.2(b).

<sup>52</sup> “The term ‘crime of violence’ means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that – (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another,” U.S.S.G. §4B1.2(a).

<sup>53</sup> U.S.S.G. §4B1.1(b) provides for these offense enhancements:

<u>“Offense Statutory Maximum</u>	<u>Offense Level*</u>
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24

serious nature of the triggering offense.<sup>54</sup> Korakis apparently had no prior criminal record and consequently the career offender Guideline did not apply.

Adjusted offense level: 29  
 Criminal history category: I.

*C. Criminal by Profession.* Unlike the other enhancements in this chapter, a first time offender is eligible for the criminal livelihood enhancement. It simply applies to defendants who are criminal by profession: “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. Perhaps because of the relative high offense levels ordinarily found in controlled substances cases, section 4B1.3 does not appear to be very widely used in drug cases.<sup>55</sup> In any event, Korakis did not seem to qualify and so his offense level and criminal history category remained unchanged.

Adjusted offense level: 29  
 Criminal history category: I.

*D. Armed Career Criminal.* Section 4B1.4 is a four strike provision which like the three strike career criminal provision of section 4B1.1 is predicated upon prior violent crime or controlled substance convictions. The provision can only be triggered by firearms possession offense;<sup>56</sup> it limits its controlled substance predicates

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(F) 5 years or more, but less than 10 years	17
(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.”

<sup>54</sup> U.S.S.G. §4B1.1(c) provides for these offense enhancements: “(c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows: (1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3). (2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of – (A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and (B) the guideline range determined using the table in subsection (c)(3). (3) Career Offender Table for 18 U.S.C. § 924(c) or § 929(a) Offenders [reductions for acceptance of responsibility]:

Sec. 3E1.1 Reduction	Guideline Range for the 18 U.S.C. Sec. 924(c) or Sec. 929(a)
No reduction	360-life
2-level reduction	292-365
3-level reduction	262-327.”

<sup>55</sup> In what appears to be the only reported case in this century to cite the section, the court merely mentions it as an aside, *United States v. Mayes*, 332 F.3d 34, 36 n.3 (1<sup>st</sup> Cir. 2003).

<sup>56</sup> “A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. 924(e) is an armed career criminal,” U.S.S.G. §4B1.4(a). Section 924(e) establishes a 15 year mandatory minimum term of imprisonment for anyone who violates 18 U.S.C. 922(g) had has three prior convictions for violent felonies and/or serious drug offenses. Section

to 10 year felonies, 18 U.S.C. 924(e)(2)(A); and in some cases it will recognize a criminal history category of IV.<sup>57</sup> The three strike provision in contrast can be triggered by any violent or drug felony; defines its drug predicates to include all controlled substance felonies; and carries an automatic escalation to criminal history category VI, U.S.S.G. §§4B1.1, 4B1.2. On the other hand, where the three strike criminal provision may yield an offense level as low as 12, the four strike armed career provision establishes a floor at the 33 offense level.<sup>58</sup> This section is not a sentencing option in the case of a controlled substance conviction unless accompanied by a firearms conviction. Korakis was not charged with a qualifying firearms violation and thus his offense level and criminal history category remained the same.

Adjusted offense level: 29  
Criminal history category: I.

*E. Repeat and Dangerous Child Sex Offenders.* This is a sex offender enhancement which has no necessary nexus to any controlled substance offense.<sup>59</sup>

922(g) prohibits firearm possession by convicted felons, fugitives, unlawful controlled substance users, illegal aliens, and the like.

<sup>57</sup> “(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 either a crime of violence, as defined in § 4B1.2(a), or a controlled substance offense, as defined in § 4B1.2(b), 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(c).

<sup>58</sup> “(b) The offense level for an armed career criminal is the greatest of: (1) the offense level applicable from Chapters Two and Three; or (2) the offense level from § 4B1.1 (Career Offender) if applicable; or (3) (A) 34, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in § 4B1.2(a), or a controlled substance offense, as defined in § 4B1.2(b), 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,” U.S.S.G. §4B1.4(b).

<sup>59</sup> “(a) In any case in which the defendant's instant offense of conviction is a covered sex crime, § 4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction: (1) The offense level shall be the greater of: (A) the offense level determined under Chapters Two and Three; or (B) the offense level from the table below decreased by the number of levels corresponding to any applicable adjustment from § 3E1.1 (Acceptance of Responsibility):

<u>Offense Statutory Maximum</u>	<u>Offense Level</u>
(i) Life	37
(ii) 25 years or more	34
(iii) 20 years or more, but less than 25 years	32
(iv) 15 years or more, but less than 20 years	29
(v) 10 years or more, but less than 15 years	24
(vi) 5 years or more, but less than 10 years	17
(vii) More than 1 year, but less than 5 years	12

(2) The criminal history category shall be the greater of: (A) the criminal history category determined under Chapter Four, Part A (Criminal History); or (B) criminal history Category V. (b) In any case in which the defendant's instant offense of conviction is a covered sex

It did not apply in *Korakis* and thus Korakis' offense level and criminal history category remained unchanged.

Adjusted offense level: 29  
Criminal history category: I.

V. *Departures*. In the interest of uniformity, the Guidelines seek to limit the circumstances under which a sentence outside of the ranges otherwise called for by the Guidelines may be commended. The Guidelines countenance departure from the sentence otherwise called for (1) upon the request of the government in recognition of the defendant's cooperation with authorities, 18 U.S.C. 3553(e),(f); U.S.S.G. §§5C1.2, 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; (3) in cases where "there exists an aggravating [or, in cases other than those involving child crimes or sex offenses, 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.

There are two statutory based grounds for assistance departures. One, the so-called "safety valve," is only available to certain low level, first time drug offenders, 18 U.S.C. 3553(f), U.S.S.G. §5C1.2. The other is limited only by the requirement that the government petition for its application, 18 U.S.C. 3553(e), U.S.S.G. §5K1.1. The safety valve is unavailable under the statute if the defendant was the leader or organizer of the drug offense, or if he used violence or the threat of violence in the commission of the offense or if the offense resulted in serious injury.<sup>60</sup> The

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crime, neither § 4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct: (1) The offense level shall be 5 plus the offense level determined under Chapters Two and Three. However, if the resulting offense level is less than level 22, the offense level shall be level 22, decreased by the number of levels corresponding to any applicable adjustment from § 3E1.1. (2) The criminal history category shall be the criminal history category determined under Chapter Four, Part A," U.S.S.G. §4B1.5.

<sup>60</sup> "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 information shall not preclude a determination by the court that the defendant has complied

Guideline mirrors the statutory factors and sets a minimum offense level of 17 if the offense of conviction carries a mandatory minimum term of imprisonment of at least 5 years.<sup>61</sup> Moreover, as noted earlier, the drug trafficking Guideline, 2D1.1(b)(7), awards defendants who qualify for the safety valve a 2 level decrease. Since the statute requires the application of the Guidelines (“shall impose a sentence pursuant to the guidelines”), the Guidelines’ application might be considered mandatory in safety valve cases *Booker* notwithstanding. Admittedly, *Booker* makes no mention of the safety valve provision. The difficulty is that the same logic under which *Booker* rendered 18 U.S.C. 3553(a) inoperable would seem to apply. Without the *Booker* “fix,” the mandatory Guidelines with their judicial fact-finding under a preponderance standard offend both the Sixth Amendment jury right clause and the Fifth Amendment due process clause as described by the Court in *Booker, Blakely v. Washington*, 124 S.Ct. 2531 (2004); and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

The same may be said of the government driven substantial assistance departure. Even though the statute there also declares that sentences that fall within its realm “shall be imposed in accordance with the guidelines,”<sup>62</sup> pulling the Guidelines back from the *Booker* command that they not be considered mandatory dooms them to the proscriptions recognized elsewhere in *Booker* as well as in *Blakely* and *Apprendi*. Of course the substantial assistance Guideline is still a feature of the advisory Guidelines. When applicable it directs the court to assess the reduction with an eye to the utility of the assistance supplied and the risk to the defendant in providing it.<sup>63</sup>

The government apparently did not petition for a departure under U.S.S.G. §5K1.1 for Korakis. He did qualify for the safety valve departure and although his

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with this requirement,” 18 U.S.C. 3553(f).

<sup>61</sup> “In the case of a defendant (1) who meets the criteria set forth in subsection (a) [the statutory standards]; and (2) for whom the statutorily required minimum sentence is at least 5 years, the offense level applicable from Chapter Two (Offense Conduct) and Three (Adjustments) shall be not less than 17,” U.S.S.G. §5C1.2(b).

<sup>62</sup> “Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a 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).

<sup>63</sup> “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.

“(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following: (1) the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant’s assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; (5) the timeliness of the defendant’s assistance,” U.S.S.G. §5K1.1.

offense of conviction does not come with a mandatory minimum he did receive a 2 level decrease in his offense level, credited when the calculation under U.S.S.G. §2D1.1(b)(7) was done.

Adjusted offense level: 29  
Criminal history category: I.

It would appear that nothing in Korakis' background spurred the government to petition for a criminal history category departure under U.S.S.G. §4A1.3 which allows for both limited upward and limited downward departures. The section concedes that a departure may be warranted if the Guidelines under-represent the seriousness of the defendant's past misconduct and suggests some of the factors that might support such a departure.<sup>64</sup> It also points out, however, that a prior arrest record itself may not be considered, U.S.S.G. §4A1.3(a)(3). On the other hand, inadequacies may warrant bumping the defendant with a category VI criminal history to a higher offense level, U.S.S.G. §4A1.3.

Section 4A1.3 is equally candid with its observation that the Guidelines' otherwise applicable criminal history category may over-represent the seriousness of the defendant's past criminal record and warrant a downward departure as a consequence, U.S.S.G. §4A1.3(b)(1). But here there are prohibitions and limitations. A defendant with a category I criminal history cannot be bumped down into a lower offense level, U.S.S.G. §4A1.3(b)(2)(A). A defendant ineligible for safety valve treatment because of his criminal history category cannot be made eligible by a downward departure in his criminal history category here, U.S.S.G. §4A1.3(b)(3)(B). Defendants who qualify for armed career criminal or repeat and dangerous sex offender sentencing under U.S.S.G. §§4B1.4 and 4B1.5 in ineligible for a downward departure, U.S.S.G. §4A1.3(b)(2)(B). Defendants who qualify for career offender sentencing under U.S.S.G. §4B1.1, are eligible for a downward departure of no more than 1 category, U.S.S.G. §4A1.3(b)(3)(A). Section 4A1.3 was not an issue in *Korakis* and consequently his offense level and criminal history category remained unchanged.

Adjusted offense level: 29  
Criminal history category: I.

As with criminal history category departures, the Guidelines have a general section that confirms in guarded terms that offense level departures may be

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<sup>64</sup> "(1) Standard for Upward Departure. If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

"(2) Types of Information Forming the Basis for Upward Departure. The information described in subsection (a) may include information concerning the following: (A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses). (B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions. (C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order. (D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense. (E) Prior similar adult criminal conduct not resulting in a criminal conviction," U.S.S.G. §4A1.3(a)(1),(2).

warranted.<sup>65</sup> Here too, however, it emphasizes the circumstances that warrant departure based on want of guideline consideration “will occur rarely and only in exceptional circumstances,” U.S.S.G. §5K2.0, App.Note 3.(A)(ii), (B)(ii). With its general terms section 5K2.0 serves as something of a residual basis for departure, supplementing the individual departure policy statements that follow in chapter 5K. It also provides some general prohibitions,<sup>66</sup> and acknowledges that in addition to the grounds in chapter 5K, the factors described in chapter 5H, which deals with the generally irrelevant personal characteristics of the defendant such as age and education,<sup>67</sup> may serve as an additional avenue of departure under the appropriate circumstances.<sup>68</sup>

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<sup>65</sup> “(1) In General. – The sentencing court may depart from the applicable guideline range if – (A) in the case of offenses other than child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. 3553(b)(1), that there exists an aggravating or mitigating circumstance; or (B) in the case of child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. 3553(b)(2)(a)(1), that there exists an aggravating circumstance, of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objections set forth in 18 U.S.C. 3553(a)(2), should result in a sentence different from that described,” U.S.S.G. §5K2.0(a)(1).

<sup>66</sup> “Notwithstanding subsections (a) and (b) of this policy statement [acknowledging permissible departure for failure of adequate Guideline consideration], or any other provision in the guidelines, the court may not depart from the applicable guideline range based on any of the following circumstances: (1) Any circumstance specifically prohibited . . . in §§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth . . .), the third and last sentences of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence. . .), the last sentence of 5K2.12 (Coercion and Duress), and 5K2.19 (Post-Sentencing Rehabilitative Efforts). (2) . . . acceptance of responsibility. . . (3) . . . aggravating or mitigating role in the offense . . . (4) The defendant’s decision, it and of itself, to plead guilty to the offense or to enter a plea agreement . . . (5) . . . fulfillment of restitution obligations . . . (6) Any other circumstance specifically prohibited as a ground for departure in the guidelines,” U.S.S.G. §5K2.0(d).

<sup>67</sup> There are policy statements in 5H describing defendant characteristics that are generally not relevant sentencing considerations and that relate to age (5H1.1)(may be grounds to depart downward in cases of the elder or infirm); education and vocational skills (5H1.2); mental and emotional conditions (5H1.3), physical condition, including drug or alcohol dependence or abuse; gambling addiction (5H1.4)(extraordinary physical impairment may warrant downward departure; drug, alcohol or gambling addiction may not), employment record (5H1.5), family ties and responsibilities (5H1.6), role in the offense (5H1.7), criminal history (5H1.8), dependence upon criminal activity for a livelihood (5H1.9), race, sex, national origin, creed, religion, and socio-economic status (5H1.10), military, civic, charitable, or public service: employment-related contributions; record of prior good works (5H1.11), lack of guidance as a youth and similar circumstances (5H1.12).

<sup>68</sup> “An offender characteristic or other circumstance identified in Chapter 5, Part H (Offender Characteristics) . . . may be relevant to this determination [of departure] only if such offender characteristic or other circumstances is present to an exceptional degree,” U.S.S.G. §5K2.0(a)(4).

“The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only – (1) such offender characteristics or other circumstances, taken together, make the case an exceptional one; and (2) each offender

Korakis sought to no avail an exceptional circumstance downward departure under the general provisions of section 5K2.0, arguing that he had no knowledge that MDMA pills with which his coconspirator was arrested contained methamphetamine and that his immigration status would subject him to harsher treatment than would otherwise have been the case, 325 F.Supp.2d at 632. His argument rejected, his offense level remained unchanged.

Adjusted offense level: 29  
Criminal history category: I.

Beyond section 5K2.0, the Guidelines contain 22 policy statements which address specific factors which the Commission felt either might warrant departure and should not be used to justify departure, U.S.S.G. §§5K2.1 to 5K2.23.<sup>69</sup> Several of these are controlled substance related. For example, the lesser harm section notes that in the case of “a school teacher [who] possess controlled substances for display in a drug education program, a reduced sentence might be warranted,” U.S.S.G. §5K2.11. Another section explains that “the court may not depart below the applicable guideline range [for diminished capacity] if (1) the significant reduced mental capacity was caused by the voluntary use of drugs . . .” U.S.S.G. §5K2.13. A third declares that the aberrant behavior basis for departure may not be claimed when “[t]he instant offense of conviction is a serious drug trafficking offense,” U.S.S.G. §5K2.20(c)(4). Another insists that drug dependence or abuse may not be the basis for a downward departure in a case involving crimes against a child or sexual offenses, U.S.S.G. §5K2.22(3).

Specific references aside, the violence and prominence of firearms that frequently attend controlled substance offenses might support an upward departure in appropriate circumstances under other sections of chapter 5K. For instance, section 5K2.1, which suggests the possibility of upward departures when a murder is associated with the crime of conviction, has been relied upon in various controlled substance cases,<sup>70</sup> as have the physical injury, extreme psychological injury, and use

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characteristic or other circumstance is – (A) present to a substantial degree; and (B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstances is not ordinarily relevant to a determination of whether a departure is warranted,” U.S.S.G. §5K2.0(c).

<sup>69</sup> Beyond the general policy statement for departures in section 5K2.0, there are individual policy statements relating to death (5K2.1), physical injury (5K2.2), extreme psychological injury (5K2.3), abduction or unlawful restraint (5K2.4), property damage or loss (5K2.5), weapons and dangerous instrumentalities (5K2.6), disruption of government function (5K2.7), extreme conduct (5K2.8), criminal purpose (5K2.9), victim’s conduct (5K2.10), lesser harm (5K2.11), coercion and duress (5K2.12), diminished capacity (5K2.13), public welfare (5K2.14), voluntary disclosure of offense (5K2.16), high capacity, semiautomatic firearms (5K2.17), violent street gangs (5K2.18), post-sentencing rehabilitative efforts (5K2.19), aberrant behavior (5K2.20), dismissed and uncharged conduct (5K2.21), child crimes and sex offenses (5K2.22), and discharged terms of imprisonment (5K2.23).

<sup>70</sup> “If death resulted, the court may increase the sentence above the authorized guideline range. . .The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide. . . Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. . .” U.S.S.G. §5K2.1. *See e.g., United States v. Scheetz*, 293 F.3d 175, 189-91 (4<sup>th</sup> Cir. 2004); *United States v. Murgas*, 321

of firearms policy statements in U.S.S.G. §5K2.2,<sup>71</sup> U.S.S.G. §5K2.3,<sup>72</sup> and U.S.S.G. §5K2.6.<sup>73</sup> The section relating to violent street gangs is something of hybrid because it is predicated upon the federal street crime statute which itself predicated upon the concerted, continue commission of drug trafficking offenses or crimes of violence, 18 U.S.C. 521.<sup>74</sup> None of these departures appear to have been implicated in *Korakis* and thus his offense level and criminal history category remained the same.

Adjusted offense level: 29  
Criminal history category: I.

## VI. Sentencing Table.

A. *Imprisonment.* “[A] total offense level of 29 . . . with defendant criminal history category of I, resulted in a Guidelines range of 87 to 108 months imprisonment” under the Sentencing Table, 325 F.Supp.2d at 631. The Guidelines sentencing range may only be applied within the statutory maximum and any statutory minimum that applies to the crime of conviction, cf., 28 U.S.C. 994(b)(1). In *Korakis*’ case, however, the range was well below the maximum for the offense of conviction for which there was no mandatory minimum, 21 U.S.C. 841(b)(1)(C).

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F.Supp.2d 451, 458-60 (N.D.N.Y. 2004).

<sup>71</sup> “If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked . . . In general, the same considerations apply as in §5K2.1,” U.S.S.G. §5K2.2. *See e.g., United States v. Scheetz*, 293 F.3d 175, 189-91 (4<sup>th</sup> Cir. 2004).

<sup>72</sup> “If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. . . U.S.S.G. §5K2.3. *See e.g., United States v. Orchard*, 332 F.3d 1133, 1139-141(8<sup>th</sup> Cir. 2003)(also noting the appropriate application in certain date rape cases of section 5K2.9 relating to the commission of the crime of conviction in order to commit another offense).

<sup>73</sup> “If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase,” U.S.S.G. §5K2.6. *See e.g., United States v. Santiago*, 384 F.3d 31, 34-5 (2d Cir. 2004).

<sup>74</sup> “If the defendant is subject to an enhanced sentence under 18 U.S.C. 521 (pertaining to criminal street gangs), an upward departure may be warranted. . . U.S.S.G. §5K2.18.

**SENTENCING TABLE**

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A 5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B 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
Zone C 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
Zone D 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	188-235
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

*B. Probation.* Probation eligibility under the Guidelines 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 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, like Korakis, sentenced at offense level 29, criminal history category I 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, like Korakis, sentenced at offense level 29, criminal history category I are ineligible for substitute incarceration.

*C. Supervised Release.* Unless otherwise provided by statute, upon 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.<sup>75</sup> Individual statutory provisions under 21 U.S.C. 841 carry mandatory minimum terms of supervised release range from 2 to 10 years depending upon the defendant's criminal record and the type and amount of controlled substance involved. In Korakis' case section 841 requires a term of supervised release of at least 3 years, 21 U.S.C. 841(b)(1)(C) and the Guidelines call for a term of no more than 3 years, U.S.S.G. §5D1.2. He was sentenced to a 3 year term of supervised release, 325 F.Supp.2d at 632.

*D. Restitution.* Congress amended the federal restitution provisions in recognition of the difficulties associated with identifying victims and the precise extent of loss in drug cases.<sup>76</sup> The restitution in 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 paid to the State, 18 U.S.C. 3663(c)(3); may not exceed the amount of the fine

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<sup>75</sup> "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. 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.

<sup>76</sup> "(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), 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).

imposed, 18 U.S.C. 3663(c)(2)(B);<sup>77</sup> and 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 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. There is no reference to restitution in *Korakis*.

E. *Fine*. The Guidelines establish a fine schedule according to offense level.<sup>78</sup> They call for a fine of between \$15,000 and \$150,000 for crimes at an offense level of 29, U.S.S.G. 5E1.2(c)(3). The court need not impose a fine where the defendant is unable and unlike 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.<sup>79</sup> *Korakis* does not mention a fine.

F. *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. *Korakis* would have received a \$100 special assessment.

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<sup>77</sup> *United States v. Mansoori*, 304 F.3d 635, 676(7th Cir. 2002)(vacating restitution order where the lower had failed to impose fine and noting that by statute the amount of restitution ordered may not exceed the amount of the fine imposed).

<sup>78</sup> Fine Table

Offense Level	A <u>Minimum</u>	B <u>Maximum</u>
3 and below	\$100	\$5000
10-11	\$2000	\$20,000
18-19	\$6,000	\$60,000
29-31	\$15,000	\$150,000
39 and above	\$25,000	\$250,000**

U.S.S.C. §5E1.2(c)(3). \*\*The \$250,000 maximum fine does not apply where the statute, like 21 U.S.C. 841, supplies a higher maximum for the crime of conviction, U.S.S.G. §5E1.2(c)(4); see e.g., *United States v. Lujan*, 324 F.3d 27, 34-5 (1<sup>st</sup> Cir. 2003)(upholding a fine of \$1,000,000).

<sup>79</sup> “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). The court may not impose an alternative sanction to be carried out if the fine is not paid, 18 U.S.C. 3572(e).

G. *Forfeiture*. As is the case with several other federal crimes, property derived from and used to facilitate a controlled substance violation is subject to confiscation, 21 U.S.C. 853, 881. There are two procedures under which the property may be confiscated. The government may elect to treat the property as the defendant and initiate civil forfeiture proceedings, 21 U.S.C. 881.<sup>80</sup> Or it may chose to accomplish the confiscation as part of the defendant's criminal trial, 21 U.S.C. 853.<sup>81</sup> These criminal forfeitures which become operable upon conviction are announced as part of the sentencing process, 18 U.S.C. 3554; U.S.S.G. §5E1.4. Although confiscation, accomplished either through criminal or civil forfeiture procedures, is a common consequence of a controlled substance violation,<sup>82</sup> *Korakis* does not mention the prospect of confiscation.

H. *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.<sup>83</sup> The statute under which was *Korakis* convicted is not among them, but the court might include the consideration of the costs of imprisonment, probation or supervised release when it determines the fine, if any, to be imposed, U.S.S.G. §5E1.2(d)(7).

I. *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 set off the cost against any fine imposed, U.S.S.G. §5F1.4. This provision does not appear to have been considered in *Korakis*.

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<sup>80</sup> E.g., *United States v. \$38,852 in U.S. Currency*, 328 F.Supp.2d 768 (N.D. Ohio 2004)(forfeiture of drug trafficking proceeds); *United States v. One Numbered Lot of the Lavaland Annex*, 256 F.3d 949, 952 (10<sup>th</sup> Cir. 2001)(forfeiture of a motel where illicit drug transactions and consumption occurred regularly).

<sup>81</sup> E.g., *United States v. Sdoulam*, 398 F.3d 981, 987 n.3 (8<sup>th</sup> Cir. 2005)(confiscation of a minivan used to facilitate methamphetamine manufacturing conspiracy); *United States v. Singh*, 390 F.3d 168, 189-91 (2d Cir. 2004)(confiscation of the medical license of a physician convicted of controlled substance violations).

<sup>82</sup> See e.g., in addition to the cases cited above, *United States v. Contents of Account Number 03001288*, 344 F.3d 399, 401 (3d Cir. 2003)(civil forfeiture of heroin trafficking proceeds); *United States v. Collado*, 348 F.3d 323, 325 (2d Cir. 2003)(civil forfeiture of a three story building used in which drug trafficking operation was based); *United States v. Bernitt*, 392 F.3d 873, 880-81 (7<sup>th</sup> Cir. 2004)(criminal forfeiture of a thirty acre farm on which marijuana was grown); *United States v. McHan*, 345 F.3d 262, 266 (4<sup>th</sup> Cir. 2003)(criminal forfeiture of \$395,670 as drug trafficking proceeds).

<sup>83</sup> U.S.S.G. §5E1.5 lists: 7 U.S.C. 13 (theft relating to commodity exchanges); 21 U.S.C. 844 (simple controlled substance possession); 26 U.S.C. 7201 (income tax evasion), 7202 (willful failure to pay tax), 7206 (false statements), 7210 (failure to obey a summons), 7213 (unauthorized disclosure of information), 7215 (tax collection offenses), 7216(disclosure by tax preparers), 7232 (false statements relating to gasoline tax); 42 U.S.C. 1302c-9 (improper FOIA disclosure); and 43 U.S.C. 942-6 (violations relating to Alaskan wagon road rights of way).

## Other Matters

The Guidelines address another area worthy of mention – the sentencing of organizations found in chapter 8 of the Guidelines. The approach taken generally traces that used for individuals and “reflects the following general principles:

First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended should not be viewed as punishment, but rather as a means of making victims whole for the harm caused. Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets. Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the highest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization’s actions after an offense has been committed. Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct. U.S.S.G. ch.8, Introductory Commentary.

## Appendices

### 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 3KG 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, or 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),            or at least 150 G but less than 500 G of Ice;            At least 1.5 KG but less than 5 KG of Amphetamine, or</p>	Level 34

CRS-35

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 187,000 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 187,000 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 70 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 least 35 G but less than 70 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;  
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 Level 28  
(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.

- (7) At least 100 G but less than 400 G of Heroin Level 26  
 (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 Methamphetamine (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.

- (8) At least 80 G but less than 100 G of Heroin Level 24  
 (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 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 Methamphetamine (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 Methamphetamine (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 or more of Schedule I or II Depressants;  
40,000 or more units of Schedule III substances;  
At least 2,500 but less than 3,750 units or more of Flunitrazepam.
- (11) At least 20 G but less than 40 G of Heroin Level 18  
(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 or more of Schedule I or II Depressants;  
At least 20,000 but less than 40,000 units of Schedule III substances;  
At least 1,250 but less than 2,500 units or more of Flunitrazepam.

(12) At least 10 G but less than 20 G of Heroin Level 16  
(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 or more of Schedule I or II Depressants;  
At least 10,000 but less than 20,000 units of Schedule III substances;  
At least 625 but less than 1,250 units or more of Flunitrazepam.

(13) At least 5 G but less than 10 G of Heroin Level 14  
(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),  
or at least 250 but less than 500 M G 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 or more of Schedule I or II Depressants;  
At least 5,000 but less than 10,000 units of Schedule III substances;  
At least 312 but less than 625 units or more of Flunitrazepam.

(14) Less than 5 G heroin (or the equivalent amount of other Level 12  
"Schedule I or II Opiates);

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 250 MG of Methamphetamine (actual), or less than 250 MG of Ice;  
 Less than 2.5 G of Amphetamine, or less than 250 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 or more of Schedule I or II Depressants;  
 At least 2,500 but less than 5,000 units of Schedule III substances;  
 At least 156 but less than 312 units or more of Flunitrazepam.  
 40,000 or more units of Schedule IV substances (except Flunitrazepam).

- (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 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;  
 At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);  
 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.

## Drug Equivalency Tables

### Schedule I or II Opiates<sup>84</sup>

- 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)<sup>85</sup>

- 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 (Actula) = 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

<sup>84</sup> "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.

<sup>85</sup> 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.

## CRS-41

1 gm of N-N-Dimethylamphetamine = 40 gm of marihuana

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)<sup>86</sup>

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-Methylenedioxy-methamphetamine/MDMA = 500 gm of marihuana

1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA = 500 gm of marihuana

1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC = 680 gm of marihuana

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

Flunitrazepam<sup>87</sup>

1 unit of a Flunitrazepam = 16 gm of marihuana

Schedule I or II (except gamma-hydroxybutyric acid)

1 unit of a Schedule I or II Depressant (except gamma-hydroxybutyric acid) = 1 gm of marihuana

Gamma-hydroxybutyric

1 unit of gamma-hydroxybutyric acid = 8.8 gm of marihuana

Schedule III Substances<sup>88</sup>

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

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<sup>86</sup> 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.

<sup>87</sup> Provided, That the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

<sup>88</sup> Provided, That the combined equivalent weight of all Schedule III substances, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

Schedule IV Substances (except flunitrazepam)<sup>89</sup>

1 unit of a Schedule IV Substance (except flunitrazepam) = 0.0625 gm of marihuana

Schedule V Substances<sup>90</sup>

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

List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)<sup>91</sup>

1 gm of Ephedrine = 10 kg of marihuana

1 gm of Phenylpropanolamine = 10 kg of marihuana

1 gm of Pseudoephedrine = 10 kg of marihuana

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<sup>89</sup> Provided, that the combined equivalent weight of all Schedule IV and V substances shall not exceed 4.99 kilograms of marihuana.

<sup>90</sup> Provided, that the combined equivalent weight of all Schedule V substances shall not exceed 999 grams of marihuana.

<sup>91</sup> Provided, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

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 Panel, *State and Federal Sentencing Guidelines: What's Working? What Isn't?*, 207

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