

NO. _____

**In the Supreme Court of the United States
October Term, 2020**

RAMIRO D. RAMIREZ, JR., PETITIONER

v.

UNITED STATES OF AMERICA

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

**JAVIER RIOJAS
ATTORNEY-AT-LAW
542 E. MAIN ST.
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Counsel of Record for Petitioner

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**PETITION FOR WRIT OF CERTIORARI
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**MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS**

Petitioner Ramiro D. Ramirez, Jr., by and through his undersigned counsel, and pursuant to Rule 39.1, Supreme Court Rules, and Title 18, United States Code, § 3006(A)(7), respectfully moves this Honorable Court for leave to proceed in forma pauperis, and for leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of fees. Petitioner was represented by the undersigned appointed counsel under the

Criminal Justice Act of 1964, as amended, in the district court and the court of appeals. Leave to proceed in forma pauperis was never sought in any other court.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Javier Rojas", is written over a horizontal line.

Javier Rojas
Attorney At Law
542 E. Main Street
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Counsel of Record for Petitioner

Dated: January 24, 2020.

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October Term, 2020**

RAMIRO D. RAMIREZ, JR., PETITIONER

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UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
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Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals inappropriately affirmed the district court's denial of a mitigating role adjustment which contravened the factors and the admonition in the commentary of USSG § 3B1.2 Application Note 3(C) that a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline?

NO. _____

**In the Supreme Court of the United States
October Term, 2020**

RAMIRO D. RAMIREZ, JR., PETITIONER

v.

UNITED STATES OF AMERICA

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

Petitioner asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on November 6, 2019.

PARTIES TO THE PROCEEDINGS

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

A copy of the opinion of the court of appeals and judgment entered as a mandate on November 6, 2019, in United States v. Ramiro D. Ramirez, Jr., No. 18-50503, unpub. Op. (5th Cir. Nov. 6, 2019), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on November 6, 2019. A timely Petition for Rehearing was denied on October 29, 2019. This petition is filed within 90 days from the date of denial of the petition for rehearing. See, Sup. Ct. R. 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254 (1).

FEDERAL STATUTES INVOLVED

The texts of 21 U.S.C. § 841 and 21 U.S.C. § 846 are reproduced in Appendix B.

FEDERAL GUIDELINES PROVISION INVOLVED

Guideline § 3B1.2 and comment. (n. 3(C)) are reproduced in Appendix C.

STATEMENT

Ramiro was one of 26 co-defendants named in nine-count indictment. He was named only in Count Four which charged conspiracy to possess with intent to distribute a detectable amount of cocaine in violation of 21 U.S.C. §§ 841 (a)(1) & (b)(1)(C) and 846. He pled guilty. The revised Presentence Report established a total offense level of 29, a criminal history category of II, which yielded a guideline imprisonment range of 97 to 121 months imprisonment. At sentencing Ramirez moved the district court for a downward adjustment due to his mitigating role. The district court denied the request, and sentenced Ramirez to 121 months of imprisonment, the high end of the guideline range.

All of Ramirez co-defendants were actively involved and integral to the success of the Genaro Balboa-Falcon Drug Trafficking Organization which oversaw the smuggling of multi-kilogram amounts of cocaine through the United States/Mexico border. Genaro Balboa-Falcon, a fugitive, was the Mexico based source of supply for Willibaldo Mora, Sr., and Jorge Rivera of Crystal City, Texas. Sonia Balboa, spouse of Genaro Balboa-Falcon, assisted in coordinating the importation of cocaine as well as coordinating the transportation of drug proceeds back to her husband in Mexico. Angel Lee Ramirez assisted by transporting the cocaine which was received from Mexico to Crystal City, Texas.

The distribution of the narcotics took place out of three crack houses in Crystal City, Texas, supplied by Willibaldo Mora, Sr., and Jorge Rivera. The crack houses were situated on West Zapata Street (operated by David Davalos, Sr.), East Webb Street (operated by Jacinto Davalos), and North Avenue A (operated by Bruce Davalos).

Each crack house had workers who sold narcotics. The workers included Joseph Garza, Robert Telles, Ronald Davalos, Arturo Hernandez, Arnoldo Almeida, Simon Contreras, Rogelio Davila, Jr., Maricela Alvarado Davalos, Rogelio Davila, Sr., Genaro Figueroa, and Abelardo Rodriguez.

The drug trafficking organization also had lookouts who notified co-conspirators of law enforcement presence and/or vehicles which did not belong in the area. The lookouts also sold narcotics. The lookouts included Maricela Alvarado Davalos (spouse of David Davalos, Sr.), David Davalos, Jr., and Willibaldo Mora, Jr.

After the cocaine was sold the drug proceeds were transported back to Mexico by Sonia Balboa, Sucel Balboa, Baldemar Balboa, Pura Garza Esquivel, and Teresa Santa Lopez. Over the course of the conspiracy, the distribution of cocaine resulted in approximately \$5.98 million in drug proceeds.

Petitioner Ramirez was a self-employed mechanic. He unlike the other workers who stayed at the crack house locations to sale smaller-sized quantities of cocaine to customers who went to the crack houses, would go to the West Zapata Street location to change oil, refuel and turn on the generator which supplied electricity to the location. He was provided gas money and paid \$10 for accomplishing the task. After completing the task he would leave the location to resume his work as a mechanic.

On appeal, Ramirez argued the district court clearly erred when denying him a mitigating role adjustment. The court of appeals affirmed holding that the district court's determination was consistent with factors and commentary in USSG § 3B1.2 Application Note 3 (C).

REASON FOR GRANTING THE WRIT

The Decision of the Fifth Circuit Renders Ineffectual USSG § 3B1.2 Application Note 3 (C), Unholds the District Court's Inappropriate Denial of A Mitigating Role Adjustment, And Requires The Application of This Court's Supervisory Powers.

The argument for review is simple and we submit, substantial. In large measure it relies heavily, on Application Note 3(C) of U.S.S.G. § 3B1.2. In pertinent part the Application Note, provides that in determining whether to provide a four-level minimal participant offense level adjustment, a two-level minor participant

adjustment or a three-level intermediate adjustment the lower courts should consider the following non-exhaustive list of factors:

- (i) The degree to which the defendant understood the scope and structure of the criminal activity;
- (ii) The degree to which the defendant participated in planning or organizing the criminal activity;
- (iii) The degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
- (iv) The nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
- (v) the degree to which the defendant stood to benefit from the criminal activity.

For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline. The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.

U.S.S.G. § 3B1.2 Application Note 3(C).

The factual discussion in the Statement of the case, demonstrates that all 25 of Ramirez' Co-Defendants were actively involved and integral to the success of the Genaro Balboa-Falcon Drug Trafficking Organization. The workers who stayed at the three crack house locations in Crystal City, Texas, and sold cocaine to individual users were the average participants. United States v.

Miranda, 248 F. 3d 434, 447 (5th Cir. 2001) (defendants actively involved in the conspiracy who sold drugs to individual users are average participants).

Ramirez unlike the other workers who stayed at the three crack houses to sale smaller-sized quantities of cocaine to customers who went to the crack houses, would go to the West Zapata Street location to change oil, refuel and turn on the generator which supplied electricity to the location. He was provided the gas money and paid \$10 for accomplishing the task. After completing the task, he would leave the location to resume his work as a mechanic. He was not actively involved in the sale of the cocaine to customers that frequented the crack house, or integral to the cocaine distribution. Recognizing Ramirez' limited role the Probation Office revised paragraph 44 of the Presentence Report to reflect that the "crack house included workers to assist with keeping the houses operational and/or selling narcotics."

Given Ramirez' limited role in the conspiracy the factors set forth in the commentary to Application Note 3(C) of U.S.S.G. § 3B1.2 favor awarding him a mitigating role. For Ramirez (i) did not understand the scope and structure of the criminal activity; (ii) did not

participate in planning or organizing the criminal activity; (iii) did not exercise decision-making authority or influence the exercise of decision-making authority; (iv) did not actively participate in the day-to-day drug distribution at the West Zapata Street crack house location, rather his role was limited to maintaining the generator that supplied electricity to the location; (v) all he stood to benefit from his involvement in the criminal activity was the \$10 he was paid each time he performed the task of doing maintenance on the generator.

Hence, Ramirez had no proprietary interest in the criminal activity. He was paid by the task each time he changed oil, refueled, and turned on the generator that supplied electricity to the West Zapata Street crack house location. He should have received a mitigating role adjustment. In this connection, the commentary in Application Note 3(C) of U.S.S.G. § 3B1.2 goes on to provide that “a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain task should be considered for an adjustment under this guideline.” (emphasis ours). Circuit Judge Graves in his dissenting opinion in United States v. Castro, 843 F.3d 608, 614 (5th Cir. 2016) recognized that the commentary to § 3B1.2 was amended effective November 1, 2015, to

address “case law that may be discouraging courts from applying the adjustment in otherwise appropriate circumstances.” This case presents such a circumstance.

Assuming *arguendo*, that the act of maintaining the generator that provided electricity to the West Zapata Street crack house location is viewed as an essential or indispensable role in the cocaine distribution conspiracy, the commentary in U.S.S.G. § 3B1.2 Application Note 3 (C) again provides counsel. It provides that “[t]he fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.” Here the factual discussion demonstrates that Ramirez is substantially less culpable than the average participant workers who stayed at the three crack house locations to sale smaller-sized quantities of cocaine to customers who frequented the crack house locations, and peripheral to the advancement of the illicit drug distribution activity itself. See, United States v. Miranda, 248 F.3d 434, 446-447 (5th Cir. 2001); United States v. Villanueva, 408 F.3d 193, 204 (5th Cir. 2005); and United States v. Anchundia-Espinoza, 897 F.3d 629, 634 (5th Cir.

2018). Ramirez, therefore, should have received a mitigating role adjustment.

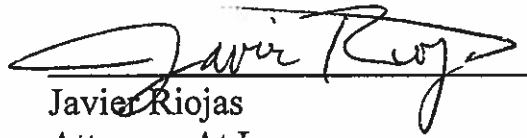
Given the foregoing discussion, the opinion of the Fifth Circuit erodes and renders toothless Application Note 3(C) of U.S.S.G. § 3B1.2. Its pronouncement that the determination was consistent with the list of factors set forth in the commentary to § 3B1.2 also rings hollow. See § 3B1.2 comment. (n.3(C)). Appendix A. This Court, therefore, should resolve the United States Sentencing Guideline issue now before the Court, in order to restore the teeth to the commentary in Application Note 3(C) to U.S.S.G. § 3B1.2, and provide direction to the lower courts who are denying mitigating role adjustments in appropriate circumstances, thereby necessitating that this Court exercise its supervisory powers in a recurring question that arises in the Federal Criminal Justice System. For courts like the district court herein readily depart upward to assess aggravating role enhancements, but are reluctant to depart downwardly when mitigating role adjustments are appropriate.¹

¹/ In the instant case the district court when addressing the mitigating role argument of co-defendant, Simon Contreras, acknowledged the workers were average participants and exemplifies this trend among the lower courts. The district court in its colloquy stated in this case, “you have the---the four level aggravating role, you’ve got some three levels, and you’ve got some

CONCLUSION

For the foregoing reasons, Ramirez respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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Fax (830) 773-5806

Counsel of Record for Petitioner

two levels, and then you have average participants. And it appears to be is that...the average participants are the ones that were actually being used by the aggravating big guys to basically sit there and distribute so they wouldn't have to do it themselves...And so[i]f the workers that are selling are average participants, you've got to show me that your client is substantially less culpable." Here Ramirez established he was substantially less culpable than the other workers.

**APPENDIX A
UNITED STATES**

V.

RAMIRO D. RAMIREZ, JR.

NO. 18-50503, Upub. Op.

**(5th Cir. September 20, 2019), rehearing
denied**

(October 29, 2019)

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

November 06, 2019

Ms. Jeannette Clack
Western District of Texas, Del Rio
United States District Court
111 E. Broadway Street
Room L100
Del Rio, TX 78840-0000

FILED

NOV 06 2019

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY  DEPUTY

No. 18-50503 USA v. Ramiro Ramirez, Jr.
USDC No. 2:16-CR-1115-18

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Allison G. Lopez, Deputy Clerk
504-310-7702

cc: Mr. Joseph H. Gay Jr.
Mr. Javier F. Riojas Sr.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50503
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

September 20, 2019

Lyle W. Cayce
Clerk

D.C. Docket No. 2:16-CR-1115-18

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

RAMIRO D. RAMIREZ, JR., also known as Ram, also known as Ramiro
Ramirez,

Defendant - Appellant

Appeal from the United States District Court for the
Western District of Texas

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is
affirmed.



Certified as a true copy and issued
as the mandate on Nov 06, 2019

Attest: *Lyle W. Cayce*
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50503
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

September 20, 2019

UNITED STATES OF AMERICA,

Lyle W. Cayce
Clerk

Plaintiff-Appellee

v.

RAMIRO D. RAMIREZ, JR., also known as Ram, also known as Ramiro Ramirez,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:16-CR-1115-18

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Ramiro D. Ramirez, Jr., pleaded guilty to a single count of conspiracy to possess with intent to distribute a controlled substance containing a detectable amount of cocaine, in violation of 21 U.S.C. § 846 and 21 U.S.C. § 841(b)(1)(C), and was sentenced to 121 months in prison. Ramirez appeals his sentence.

Ramirez argues that the district court erred by not applying a mitigating-role adjustment pursuant to U.S.S.G. § 3B1.2. He contends that an

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 18-50503

adjustment should have been awarded because he was relatively insignificant to the conspiracy and was the least culpable of its participants. Ramirez asserts that he was not principally involved in the distribution of cocaine and that his role in the conspiracy was limited to ensuring that electricity was supplied to a single crack house and, on a few instances, distributing cocaine.

At sentencing, a defendant must demonstrate by a preponderance of the evidence that he is entitled to an adjustment under § 3B1.2. *See United States v. Miranda*, 248 F.3d 434, 446 (5th Cir. 2001). We review factual findings, including whether a § 3B1.2 reduction was merited, for clear error. *See United States v. Villanueva*, 408 F.3d 193, 203 (5th Cir. 2005).

Ramirez failed to establish the level of culpability of the average participant in the conspiracy or demonstrate that he was substantially less culpable than that participant. *See* § 3B1.2, comment. (n.3(A)); *United States v. Anchundia-Espinoza*, 897 F.3d 629, 634 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1291 (2019); *United States v. Castro*, 843 F.3d 608, 613 (5th Cir. 2016). Ramirez acknowledges that he went to a property used for cocaine distribution daily to turn on the generator, that he sometimes was paid for this work in cocaine, and that he was given quantities of cocaine and instructed to deliver them to buyers. Based on these facts, the district court's denial of a § 3B1.2 adjustment was plausible in light of the entire record and, thus, not clearly erroneous. *See Villanueva*, 408 F.3d at 203. The determination also was consistent with the list of factors set forth in the commentary to § 3B1.2. *See* § 3B1.2, comment. (n.3(C)); *United States v. Bello-Sanchez*, 872 F.3d 260, 264 (5th Cir. 2017) (holding that a district court need not weigh each § 3B1.2 factor on the record).

AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

October 29, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-50503 USA v. Ramiro Ramirez, Jr.
USDC No. 2:16-CR-1115-18

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa Mattingly

By: _____
Melissa V. Mattingly, Deputy Clerk
504-310-7719

Mr. Joseph H. Gay Jr.
Mr. Javier F. Riojas Sr.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50503

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

RAMIRO D. RAMIREZ, JR., also known as Ram, also known as Ramiro
Ramirez,

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

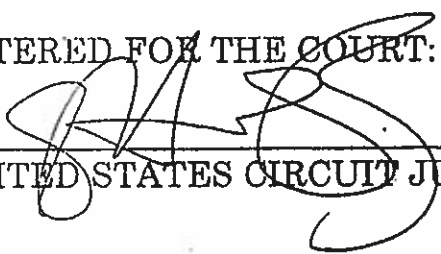
Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is

denied.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

APPENDIX B
21 U.S.C. §§ 841 and 846

CROSS REFERENCES

This section is referred to in 21 USCS §§ 802, 841.

OFFENSES AND PENALTIES

§ 841. Prohibited acts A

(a) **Unlawful acts.** Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
- (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) **Penalties.** Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861] after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any

quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$5,000,000 if the defendant is an individual or \$25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$8,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma

hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999 [21 USCS § 812 note]), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in ad-

dition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$500,000 if the defendant is an individual or \$2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$100,000 if the defendant is an individual or

\$250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$200,000 if the defendant is an individual or \$500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 404 [21 USCS § 844] and section 3607 of title 18, United States Code.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18, United States Code;

(C) \$500,000 if the defendant is an individual; or

(D) \$1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

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

(B) Definition. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals. Any person who knowingly or intentionally—

- (1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this title;
- (2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or
- (3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 310 [21 USCS § 830], or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with title 18, United States Code, or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined. (1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under title 18, United States Code, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under title 18, United States Code, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty. In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals. (1) Whoever knowingly distributes a listed chemical in violation of this title (other than in violation of a recordkeeping or reporting requirement of section 310 [21 USCS § 830]) shall, except to the extent that paragraph (12), (13), or (14) of section 402(a) [21 USCS § 842(a)] applies, be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 310 [21 USCS § 830] have not been adhered to, if, after such knowledge is acquired, such person does not

take immediate steps to remedy the violation shall be fined under title 18, United States Code, or imprisoned not more than one year, or both.

(g) **Internet sales of date rape drugs.** (1) Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that—

(A) the drug would be used in the commission of criminal sexual conduct; or

(B) the person is not an authorized purchaser;

shall be fined under this title or imprisoned not more than 20 years, or both.

(2) As used in this subsection:

(A) The term “date rape drug” means—

(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol;

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of title 5, United States Code [5 USCS § 553], to be used in committing rape or sexual assault.

The Attorney General is authorized to remove any substance from the list of date rape drugs pursuant to the same rulemaking authority.

(B) The term “authorized purchaser” means any of the following persons, provided such person has acquired the controlled substance in accordance with this Act:

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by the Attorney General. A “qualifying medical relationship” means a medical relationship that exists when the practitioner has conducted at least 1 medical evaluation with the authorized purchaser in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other health [health] professionals. The preceding sentence shall not be construed to imply that 1 medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(ii) Any practitioner or other registrant who is otherwise authorized by their registration to dispense, procure, purchase, manufacture, transfer, distribute, import, or export the substance under this Act.

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate purpose for using any “date rape drug” for which a prescription is not required.

(3) The Attorney General is authorized to promulgate regulations for record-

keeping and reporting by persons handling 1,4-butanediol in order to implement and enforce the provisions of this section. Any record or report required by such regulations shall be considered a record or report required under this Act.

(h) Offenses involving dispensing of controlled substances by means of the Internet. (1) In general. It shall be unlawful for any person to knowingly or intentionally—

(A) deliver, distribute, or dispense a controlled substance by means of the Internet, except as authorized by this title; or

(B) aid or abet (as such terms are used in section 2 of title 18, United States Code) any activity described in subparagraph (A) that is not authorized by this title.

(2) Examples. Examples of activities that violate paragraph (1) include, but are not limited to, knowingly or intentionally—

(A) delivering, distributing, or dispensing a controlled substance by means of the Internet by an online pharmacy that is not validly registered with a modification authorizing such activity as required by section 303(f) [21 USCS § 823(f)] (unless exempt from such registration);

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or dispensation by means of the Internet in violation of section 309(e) [21 USCS § 829(e)];

(C) serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance in a manner not authorized by sections [section] 303(f) or 309(e) [21 USCS § 823(f) or 829(e)];

(D) offering to fill a prescription for a controlled substance based solely on a consumer's completion of an online medical questionnaire; and

(E) making a material false, fictitious, or fraudulent statement or representation in a notification or declaration under subsection (d) or (e), respectively, of section 311 [21 USCS § 831].

(3) Inapplicability. (A) This subsection does not apply to—

(i) the delivery, distribution, or dispensation of controlled substances by nonpractitioners to the extent authorized by their registration under this title;

(ii) the placement on the Internet of material that merely advocates the use of a controlled substance or includes pricing information without attempting to propose or facilitate an actual transaction involving a controlled substance; or

(iii) except as provided in subparagraph (B), any activity that is limited to—

(I) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of the Communications Act of 1934 [47 USCS § 231]); or

(II) the transmission, storage, retrieval, hosting, formatting, or trans-

lation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of the Communications Act of 1934 [47 USCS § 230(c)] shall not constitute such selection or alteration of the content of the communication.

(B) The exceptions under subclauses (I) and (II) of subparagraph (A)(iii) shall not apply to a person acting in concert with a person who violates paragraph (1).

(4) Knowing or intentional violation. Any person who knowingly or intentionally violates this subsection shall be sentenced in accordance with subsection (b).

(Oct. 27, 1970, P. L. 91-513, Title II, Part D, § 401, 84 Stat. 1260; Nov. 10, 1978, P. L. 95-633, Title II, § 201, 92 Stat. 3774; Sept. 26, 1980, P. L. 96-359, § 8(c), 94 Stat. 1194; Oct. 12, 1984, P. L. 98-473, Title II, Ch II, § 224(a)(2), Ch V, Subch, Part A, Subpart, §§ 502, 503(b)(1)(2), 98 Stat. 2030, 2068, 2070; Oct. 27, 1986, P. L. 99-570, Title I, Subtitle A, §§ 1002, 1003(a), 1004(a) Subtitle C, § 1103, Title XV, § 15005, 100 Stat. 3207-2, 3207-5, 3207-6, 3207-11, 3207-192; Nov. 18, 1988, P. L. 100-690, Title VI, Subtitle A, § 6055, Subtitle H, §§ 6254(h), 6265(h), Subtitle N, §§ 6452(a), 6470(g), (h), 6479, 102 Stat. 4318, 4366, 4367, 4371, 4378, 4379, 4381; Nov. 29, 1990, P. L. 101-647, Title X, § 1002(e), Title XII, § 1202, Title XXXV, § 3599K, 104 Stat. 4828, 4830, 4932; Sept. 13, 1994, P. L. 103-322, Title IX, Subtitle A, § 90105(a), (c), Title XVIII, Subtitle B, 180201(b)(2)(A), 108 Stat. 1987, 1988, 2047; Oct. 3, 1996, P. L. 104-237, Title II, § 206(a), Title III, § 302(a), 110 Stat. 3103, 3105; Oct. 13, 1996, P. L. 104-305, § 2(a), (b)(1), 110 Stat. 3807; Oct. 21, 1998, P. L. 105-277, Div E, § 2(a), 112 Stat. 2681-759; Feb. 18, 2000, P. L. 106-172, §§ 3(b)(1), 5(b), 9, 114 Stat. 9, 10, 13; Nov. 2, 2002, P. L. 107-273, Div B, Title III, § 3005(a), Title IV, § 4002(d)(2)(A), 116 Stat. 1805, 1809; March 9, 2006, P. L. 109-177, Title VII, Subtitle A, § 711(f)(1)(B), Subtitle C, § 732, 120 Stat. 262, 270; July 27, 2006, P. L. 109-248, Title II, § 201, 120 Stat. 611; Oct. 15, 2008, P. L. 110-425, § 3(e), (f), 122 Stat. 4828; Aug. 3, 2010, P. L. 111-220, §§ 2(a), 4(a), 124 Stat. 2372.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

Schedules I, II, III, IV, and V, referred to in this section, are contained in 21 USCS § 812(c).

"This Act", referred to in this section, is Title II of Act Oct. 27, 1970, P. L. 91-513, popularly known as the Controlled Substances Act, which appears generally as 21 USCS §§ 801 et seq. For full classification of such Act, consult USCS Tables volumes.

"This title", referred to in this section, is Title II of Act Oct. 27, 1970, P. L. 91-513, which appears generally as 21 USCS §§ 801 et seq. For full classification of such Title, consult USCS Tables volumes.

"Title III", referred to in this section, is Title III of Act Oct. 27, 1970, P. L. 91-513, which appears generally as 21 USCS §§ 951 et seq. For full classification of such Title, consult USCS Tables volumes.

HISTORY:

Act Oct. 27, 1970, P. L. 91-513, Title II, Part C, § 312, as added Oct. 24, 2018, P. L. 115-271,

Title III, Subtitle B, Ch. 9, § 3292(b), 132 Stat. 3956.

OFFENSES AND PENALTIES**§ 841. Prohibited acts A****(a) [Unchanged]**

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A)(i)-(viii) [Unchanged]

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861] after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B)(i)-(viii) [Unchanged]

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or \$5,000,000 if the defendant is an individual or \$25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or \$8,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) - (E) [Unchanged]**(2) - (7) [Unchanged]**

21 USCS § 844a

FOOD AND DRUGS

Amendments:

1990. Act Nov. 29, 1990, in subsec. (a), deleted "of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A))" following "section 401(b)(1)(A)" and "of that Act (21 U.S.C. 841(b)(1)(A))" following "section 404"; and in subsecs. (c) and (j)(4), deleted "as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)" following "to a controlled substance" each place it appears.

Redesignation:

This section, enacted as § 6486 of Act Nov. 18, 1986, P. L. 100-690, Title VI, Subtitle N, 102 Stat. 4384, was redesignated § 405 of Act Oct. 27, 1970, P. L. 91-513, Title II, Part D, by Act Nov. 29, 1990, P. L. 101-647, Title X, § 1002(g)(1), 104 Stat. 4828.

CODE OF FEDERAL REGULATIONS

Department of Justice—Rules of procedure for assessment of civil penalties for possession of certain controlled substances, 28 CFR 76.1 et seq.

RESEARCH GUIDE

Federal Procedure:

13 Fed Proc L Ed, Food, Drugs, and Cosmetics §§ 35:807, 808, 834-837.

Am Jur:

25 Am Jur 2d, Drugs and Controlled Substances § 206.

Criminal Law and Practice:

3 Criminal Defense Techniques (Matthew Bender), ch 57, Defense of a Drug Abuse Case § 57.03.

§§ 845, 845a, 845b. [Transferred]

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

These sections were redesignated and appear as 21 USCS §§ 859-861.

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (Oct. 27, 1970, P. L. 91-513, Title II, Part D, § 406, 84 Stat. 1265; Nov. 18, 1988, P. L. 100-690, Title VI, Subtitle N, § 6470(a), 102 Stat. 4377.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This title", referred to in this section, is Title II of Act Oct. 27, 1970, P. L. 91-513, which appears generally as 21 USCS §§ 801 et seq. For full classification of such Title, consult USCS Tables volumes.

Effective date of section:

This section took effect on the first day of the seventh calendar month that

APPENDIX C
U.S.S.G. § 3B1.2 and Application Note 3(C)

ADJUSTMENTS

18 USCS Appx § 3B1.2

that district court would have given defendant lesser sentence under advisory guidelines; fact that defendant was sentenced at lowest level available under guidelines did not alone show reasonable probability that lesser sentence would have been imposed had district court known that it could do so. *United States v Shallal* (2005, CA8 Iowa) 410 F3d 434.

Defendant's motion for reduction of sentence under 18 USCS § 3582(c)(2) was properly denied because amendment adding application note to USSG § 3B1.1, which stated that upward adjustment was appropriate only if defendant managed one or more other participants, did not qualify defendant for reduction. Record was clear that defendant had managed one or more other participants in drug smuggling operation. *United States v Rodriguez-Pena* (2006, CA1 Puerto Rico) 470 F3d 431.

While defendant, who pled guilty to conspiracy to possess with intent to distribute and distribution of controlled substance, violation of 21 USCS §§ 841(b)(1)(A), 846, and carrying firearm during and in relation to drug trafficking crime, violation of 18 USCS § 924(c)(1)(A)(ii), was not in violation when he objected to presentence report, nor was Government when it advocated for enhancements under USSG §§ 3B1.1(a), 3C1.2, 3C1.1 because such arguments were contemplated by parties in plea agreement, plea agreement was breached because Government, against its promise, proffered sentence in excess of 30 years; it asked district court to protect society in all future events, clearly suggesting life sentence; such conduct violated both letter and spirit of agreement, and remand was required. *United States v Cudjoe* (2008, CA10 Okla) 534 F3d 1349.

In sentencing defendant, trial court did not err in applying preponderance of evidence standard, instead of clear and convincing standard, to its enhancement findings under USSG § 2B1.1(b)(1) and (2) and 3B1.1; enhancements based entirely on extent of conspiracy did not require heightened standard of proof; jury had found beyond reasonable doubt that defendant was leader or organizer of conspiracy; and two-level enhancement due to disputed amount of loss did not have extremely disproportionate effect on sentence. *United States v Armstead* (2008, CA9 Wash) 546 F3d 1097.

Trial counsel did not render ineffective legal assistance to 28 USCS § 2255 petitioner by failing to raise breach of plea agreement claim at petitioner's sentencing hearing because claim lacked merit where (1) Government had indicated in plea agreement that it believed petitioner should receive upward adjustment under USSG § 3B1.1 as organizer or leader of drug distribution conspiracy, but it did not take position on how large enhancement petitioner should receive; (2) Government did not violate plea agreement by failing to recommend two-level § 3B1.1 upward adjustment at sentencing hearing, nor did it actively advocate that larger adjustment should be imposed; and (3) petitioner was not harmed by Government's conduct because he had not been induced to plead guilty based upon any promises that were made with regard to his sentence, but had pleaded guilty in exchange for Government's promise to drop additional drug-related charge against him. *Soto-Lara v United States* (2005, DC Mass) 367 F Supp 2d 189.

§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
 - (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.
- In cases falling between (a) and (b), decrease by 3 levels.

Commentary

Application Notes:

1. Definition. For purposes of this guideline, "participant" has the meaning given that term in Application Note 1 of § 3B1.1 (Aggravating Role).

2. Requirement of Multiple Participants. This guideline is not applicable unless more than one participant was involved in the offense. see the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.

3. Applicability of Adjustment. (A) Substantially Less Culpable than Average Participant. This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.

A defendant who is accountable under § 1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in the criminal activity may receive an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose participation in that offense was limited to transporting or storing drugs and who is accountable under § 1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under this guideline.

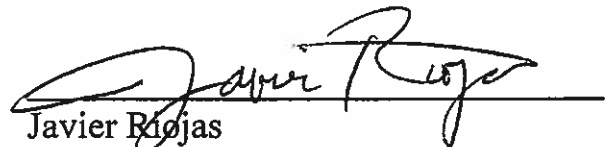
Likewise, a defendant who is accountable under § 1B1.3 for a loss amount under § 2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense or who had limited knowledge of the scope of the scheme may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, may receive an adjustment under this guideline.

(B) Conviction of Significantly Less Serious Offense. If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only

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And depositing same in a United States mail box at Eagle Pass, Texas, on 24th day
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A handwritten signature in black ink, appearing to read "Javier Riojas", is written over a horizontal line.

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