Testimony of

JEFFREY B. STEINBACK

on behalf of the

Practitioner's Advisory Group

before the

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for the hearing on

Proposed Amendments

Pertaining to Drug Offenses

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Written Testimony on Proposed Amendments to the Sentencing Guidelines Pertaining to Drug Offenses

I. Introduction

I am pleased to have the chance to testify for the second time on behalf of the Sentencing Commission's Practitioner's Advisory Group. As a member of one of the Commission's three-standing advisory groups, we at the PAG appreciate the opportunity to provide the perspective of those in the private sector who represent individuals and organizations investigated and charged under the federal criminal laws.

In addition to the comments presented by William Brennan, Jr. on the firearms proposals, I would like to offer the PAG's input on the proposed amendments and request for comment pertaining to drug offenses.

II. Analysis of the 2011 Proposed Amendments Relating to Drugs: An Overview

In October 2010, the Commission promulgated an emergency, temporary series of amendments to implement Congress's directive under §8 of the Fair Sentencing Act of 2010. Among these emergency, temporary amendments were a number of substantive changes to §2D1.1, relating to various drug offenses. Included in these amendments were a number of new provisions to account for certain aggravating factors.

One of the questions posed by the Commission is what, if any, changes should be made to the Guidelines applicable to drug trafficking. The PAG strongly urges the Commission to reconsider and modify, to the extent permissible under the Congressional directive in §8, a number of these new aggravating factor enhancements.

III. §2D1.1(b)(12) and (14)

Subsection (b)(12) contains an enhancement for a defendant who "maintained a premises for the purpose of manufacturing or distributing a controlled substance."

Subsection (b)(14) has five separate sections concerning various conduct by a defendant who has received an adjustment under §3B1.1 for an aggravating role. The conduct in these subsections cuts an enormously wide path, ranging from the defendant's use of friendship, to the age of the defendant's cohorts or customers, to being directly involved in the importation of a controlled substance, to all manner of conduct sounding in obstruction, to committing the drug offense "as part of a pattern of criminal conduct engaged in as a livelihood." The existence of any one of these numerous factors now prompts an additional two-level increase over and above that required by the aggravating role enhancement, evidently cumulative to the application of aggravating enhancements found elsewhere in the Guidelines.

In a series of public hearings last May, the Commission heard extensive testimony from a wide range of jurists, legal scholars and practitioners concerning the harsh and unjust impact of

mandatory minimum sentences, particularly those associated with drug offenses. The Commission well knows the staggering statistics that show a massive increase in the Federal prison population, with most of that increase attributable to drug prosecutions.[1] Drug offenders account for an ever-increasing percentage of the overall prison population in large part because the average length of sentences imposed in such cases has increased on an exponential basis over the last two decades.[2] The concerns that we raised in our written submissions and testimony about mandatory minimums nearly a year ago have only grown. We are well aware that this Commission itself has long been sensitive to the plainly unjust severity and inflexibility of mandatory minimums for far too many drug defendants. These continuing concerns about the impact of mandatory minimums in drug cases serve as a backdrop to our comments on the proposed drug amendments. We strongly believe that the practical application of a number of the new enhancements relating to the aggravated factors will actually be so harsh as to rival or exceed our concerns about mandatory minimums. We also believe that the proposed new enhancements exceed Congress' mandate to the Commission..

In order to reify these concerns, it is helpful to consider the Supreme Court decision in *Gall v. U.S.*[3] and the well-known facts associated with Mr. Gall's offense conduct. With certain variations in those facts we hope to make more concrete our concerns about the proposals.

(A) The Facts in *Gall*

In February of 2000, Brian Gall was a sophomore at the University of Iowa. Gall had a drug problem. He used a variety of controlled substances, including ecstasy, cocaine, and marijuana. At the university Gall met Luke Rinderkanepht, who dealt in the unlawful sale of ecstasy. Knowing of Gall's drug use and his need for money, Luke invited Gall to join an ongoing conspiracy to distribute ecstasy. Gall accepted this invitation, and, for about seven months, delivered a large quantity of ecstasy pills which Gall had received from Luke, to other coconspirators, who, in turn, sold them to a number of consumers on the college campus. For his efforts, Gall made approximately $30,000 in that seven-month period.

To Gall's credit, he stopped using drugs and voluntarily withdrew from the conspiracy.

Well after Gall walked away from this criminal activity, he was confronted by law enforcement officials. He openly admitted to his involvement, and eventually entered into a plea agreement with the Government. In that agreement, Gall stipulated that he was responsible for at least 2,500 grams of ecstasy. Gall had no significant criminal history, just some minor arrests

[1] For example, by mid-year 2008, the combined number of inmates in federal and state prisons and jails throughout the United States exceeded 2.3 million. As of 2008, this means that one out of every 130 Americans is incarcerated in prison or jail. Today, that ratio is closer to one out of every 100 Americans. The majority of the overall prison population, something in excess of 50%, comes from drug prosecutions.

[2] See, e.g., written testimony of Professor Stephen A. Saltzburg before this Commission on May 27, 2010. An individual charged with a federal drug offense sentenced today will likely serve a sentence in prison three times longer as did the same type of offender in 1984.

[3] *Gall v. United States*, 552 U.S. 38 (2007)

and convictions that were not serious enough to affect his criminal history category. Gall also was not deemed an organizer, leader, or manager. Finally, Gall's offense did not involve the use or possession of any weapons. The sentencing court ultimately determined his advisory sentencing range to be between 30 and 37 months of imprisonment.[4]

Based on a variety of mitigating factors relating to the nature and circumstances of Gall's offense conduct and his history and characteristics, the sentencing judge determined to vary downward from the advisory guideline range and sentence Gall to probation for a term of 36 months. After the 8th Circuit Court of Appeals reversed his sentence, the Supreme Court held that the sentencing judge did not abuse his discretion, thereby reversing the Court of Appeals and upholding the district judge's sentencing decision.[5]

One way to demonstrate the impact of the proposed drug amendments is to add certain hypothetical facts to *Gall*. For example, assume that one of the people with whom Brian Gall used ecstasy prior to his entrance into the conspiracy was his 17-year-old cousin, Bill. Bill is a senior at the local Iowa City high school from which Brian Gall had graduated. Bill's father lost his job, confronting Bill with a number of financial hardships. Gall, making decent money with Luke, approaches Luke, asking him if there are any opportunities for his cousin Bill.[6] Luke accommodates Gall's request.

Specifically, Luke had access to an old, rotting, uninhabited three-story flat, long since abandoned by its owner, where, on occasion, Luke stored his drugs for brief periods of time prior to distribution. Bill's job is to act as a lookout while these drugs are stored at this former apartment building, making sure that they remain safe until the drugs can be distributed. For this, Luke pays Bill $100 on each occasion. Bill was involved in this ecstasy conspiracy for approximately three months. When Gall got out, he successfully encouraged his cousin Bill to do the same. Assume, as was true in the actual case, that no weapons were involved, no violence employed, no attempts to bribe anyone in law enforcement, no obstructive behavior and no direct involvement by either Gall or Bill in the importation of the ecstasy pills.

(B) <u>Application of New Enhancements for Gall</u>

The question now becomes what impact these new enhancements under the proposed drug amendments would have had on Gall's advisory guideline range. As Gall stipulated that he was responsible for at least 2,500 grams of ecstasy, or the equivalent of at least 87.5 kilograms of marijuana, Gall's base offense level would be 24.[7] Because Gall recruited his cousin into the conspiracy, he now qualifies for a two-level increase for occupying an aggravating role.[8] As an

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[4] Total offense level 19; Criminal History Category I

[5] *Id.* at 552 U.S. 60

[6] See *Gall* at 552 U.S. 122, note 9. In this footnote, the district court discussed Gall, coming "from a working-class family with few financial resources" who decided to turn his back on what, for him, was a highly profitable venture," when he determined to withdraw from the conspiracy.

[7] See Drug Quantity Table at §2B1.1(c)(8).

[8] See §3B1.1(c).

individual having received an adjustment for an aggravating role, Gall gets an additional two-level increase under Subsection (b)(14)(B) for involving 17-year-old Bill in the offense. Gall would also be eligible for another two levels under Subsection (b)(12) because of the rotted-out apartment building he and the others occasionally used for brief storage of the ecstasy before it was distributed.

Consistent with the facts in *Gall*, we will continue to assume that Gall has no significant criminal history and pled guilty in a timely fashion. With an adjusted offense level of 30 and a three-level decrease for acceptance of responsibility[9] and a Criminal History Category of I, Gall's advisory guideline range now becomes 70-87 months. Gall himself was just a sophomore in college. His cousin, a long-time family friend, was just a few years younger. Yet with the simple addition of cousin Bill, the bottom of Gall's sentencing range more than doubles, increasing by 40 months. Gall's case is still mitigated, in every other respect; he still voluntarily withdrew from the conspiracy, taking cousin Bill out of it with him. Gall quit his personal use of drugs, even assisting his cousin in quitting. Gall goes on to finish college, earn his degree and build a small, successful business. People of the community still generate a "small flood" of testaments to his character, work ethic, and outstanding overall rehabilitation. By all accounts, Gall not only poses no danger to the community, he is a significant contributor to it. Now, what chance does anyone give young Mr. Gall, just 21 years of age when he was involved in this conspiracy, to receive the same sentence of probation? Would the 8th Circuit Court of Appeals deem that sentence reasonable? What is the likelihood that the Supreme Court would reverse the 8th Circuit if it finds a sentence of probation unreasonable? We believe it isn't hard to predict the answers to these questions. Under the new enhancements, Gall is going to prison, probably for at least five years. All that he worked for after voluntarily withdrawing from his brief stint in the conspiracy will have been destroyed. All of his post-conduct rehabilitation will have gone for naught. All of the people from the community who provided that flood of character support will view the process with the very derision the district judge sought to avoid with his sentence of probation. Many, perhaps most, in the community will once more view the law "as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing."[10]

At a time when the Commission has worked diligently to modify the Guidelines to align with purposes of punishment, the new proposed drug enhancements are simply incompatible with those efforts.

IV. §2D1.1(b)(12): Maintenance of Premises

The proposed amendment under Section 2D1.1(b)(12) would provide for a two-level increase where a defendant "maintained a premises for the purpose of manufacturing or distributing a controlled substance." The PAG has a number of concerns about the potential application of this proposed enhancement.

[9] See Guideline §3E1.1(a) and (b).
[10] *Gall*, 552 U.S. at 126.

Specifically, we share the Commission's apparent concern about the potential application of this increase in cases where a defendant has, on occasion, briefly stored his drugs, his money, or both at the home in which he and his family live, or where he has taken minimal actions within the home that could be construed as part of the distribution (such as placing a telephone call or sending a text message while in the house or on the property). In such a case, the purpose for maintaining the premises is to provide a home, not to facilitate distribution of controlled substances.

Application Note 28 addresses some of the PAG's concerns. In particular, the PAG notes with approval the language from this Application Note which states: "manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises." Consistent with this application note, and in order to avoid an unduly broad application of this proposed enhancement, the PAG respectfully recommends that the language of this provision be modified to reflect that the enhancement is limited to those instances where the premises are maintained "primarily" for the purposes of distributing the controlled substance.

Even with this modification, there are some outstanding concerns. For example, how do you determine whether the defendant "maintained" the premises? As to this term, the application note identifies two basic factors: first, "whether the defendant held a possessory interest in the premises," such as owning or renting the premises, and second, "the extent to which the defendant controlled access to or activities at the premises." While the sentencing court is directed to consider these factors, among others, in determining whether the defendant "maintained" the premises, it still leaves much open to varied interpretation. What about the son or daughter (still living at home) who is responsible enough to pay "rent" for his room after becoming an adult? Does such a person also control access to the premises if there is a separate entrance (or a secondary entrance) to a remodeled basement?

We return to the hypothetical fact pattern based on *Gall* to illustrate additional concerns regarding the abandoned flat, which was occasionally used by the coconspirators for the short-term storage of pills and money. Under these facts, it is clear that none of the co-conspirators held a possessory interest in the sense of either owning or renting these abandoned premises. At the same time, the prosecution could contend that one or more of the co-conspirators, by dint of their occasional use, "controlled access to, or activities at the premises." This would very likely invite extensive litigation over precisely just how much "control" a given defendant has. For example, would the prosecution simply have to show periodic access the defendant had to the building? Would the burden shift, as a matter of practice, to the defendant to prove that his access was not controlled or exclusive? Would it become incumbent upon the defendant to prove that others used the abandoned building for the same purposes as the defendant? If so, as a practical matter, this would be very difficult for the defendant to do. Absent such proof, would a defendant have to show that there were other "activities at" the premises, as for example, homeless people who occasionally took shelter in the abandoned building, or college kids who occasionally used the abandoned building as a place in which to party? Practically speaking, it would be extremely difficult for a defendant to produce in court witnesses to such activity. The PAG thus urges additional qualifying language in the application note, placing far greater

emphasis on the need for a defendant to actually hold a possessory interest in the premises before it can be said that he or she maintained them. As a final observation in this regard, the PAG urges the Commission to emphasize, in the context of this application note, that the burden of proving the application of this enhancement always remains with the government.

V. §2D1.1(b)(14)(A): (i) and (ii): Use of fear, impulse, friendship, affection on an individual who received little or no compensation

Subsection (b)(14)(A) is extraordinarily broad, using terms like "fear," "friendship," "impulse," "affection," and phrases such as "little or no compensation."

The PAG certainly appreciates the relevance of the aggravating factor of "use of fear" to induce participation in an offense. That term, assuming it is confined to fear of assault of other physical injury rather than, for example, fear of continuation in a life of impoverishment, is relatively familiar and more readily susceptible to proof. A defendant should be able to appreciate when he is instilling fear of those sorts in a person to get them to do something they would not otherwise do. We do think that the term could benefit from a clarifying definition that limits fear to concerns that the defendant or someone acting in concert with the defendant will cause physical harm to the individual or someone associated with that individual. We would welcome the opportunity to work with the staff on refining such language.

As for the word "friendship," our concerns are more significant. The PAG has not been able to locate any definition of "friendship" anywhere in the Guidelines. That word, to our knowledge, does not even appear in the Manual. There would be no guidance to the litigants or the court on how to interpret such an expansive term. Moreover, neither "friendship" nor "affection" is defined in any federal criminal statutes. Finally, none of the legal dictionaries or criminal case law provides a definition for "friendship" or, for that matter, "affection."

Turning to more conventional definitions[11] provided by English dictionaries, the term friend is defined as someone "who has a close personal relationship of mutual affection and trust with another." We also find the term friend described as an acquaintance, "somebody who has a casual relationship with another," using the example of a business acquaintance as in, "I've got a friend at the office who might be able to help out." Friend is also defined as an "ally," somebody "who is not an enemy" as in, "You can say what you like about the government, you're among friends here." The vagueness and overbreadth concerns are far from trivial. Indeed, we would anticipate an inordinate amount of litigation over whether there really was a "friendship" type of relationship and whether that friendship was somehow "used" (a word that itself is susceptible to multiple and potentially broad meanings depending on context) to "involve" another in an offense.

The PAG also has concerns that these broad-ranging provisions may well encourage undercover law enforcement officers to invite a defendant to involve a friend or someone for whom the defendant's "affection" might be an inducement. If so, persons who otherwise would steer clear of criminal activity could find themselves the victim of something akin to entrapment,

[11] See e.g. Encarta, World English Dictionary, published by Bloomsbury.

but without the ability to use entrapment as a defense. At the very least, individuals on the fringe of this misconduct will now be drawn into the litigation while defense lawyers and prosecutors dispute the closeness of their relationship to the defendant and the role it may have played. The downside of such broad-ranging terminology militates strongly in favor of the addition of very narrow definitions in the application notes in order to avoid these pitfalls.

Similarly, the definition of the phrase "little or no compensation" will now take on new significance in the application of this enhancement. Unfortunately, what counts for "little" compensation in one place may not cut it elsewhere. For example, $5,000 may qualify as "little" compensation in a very large drug-smuggling operation in San Antonio, Texas, where thousands of kilos of cocaine are involved. By contrast, in Peoria, Illinois, $500 may be considered significant compensation in the prosecution of offenders distributing a quarter kilo of cocaine.

Given the need to avoid unwarranted disparities, it is important to avoid a situation where a defendant's sentence is subject to the differing interpretations by judges across the country of a term ("little" compensation) that is not amenable to clear and consistent meaning through application over time. We urge the Commission to provide meaningful guidance by carefully circumscribing application of the term.

VI. Subsection (b)(14)(B): Concerning the knowing involvement of individuals less than 18 years of age

Title 21 U.S.C. 861(a) forbids the employment or use of persons under 18 years of age in drug operations. Subsection (a) of this statute makes it unlawful to knowingly and intentionally employ, hire, use, persuade, induce, entice or coerce a person under 18 years of age to engage in drug operations. The penalty for a first offense of this provision "shall not be less than one year."[12]

A corresponding guideline provision mandates that where the offense involves a person less than 18 years of age, the base offense level is 26[13]. In light of these provisions, the PAG questions the necessity for the separate enhancement proposed in Guideline §2D1.1(b)(14)(B), which would add two offense levels for knowingly involving a person under the age of 18 in the offense. The prosecution already has in its arsenal more than enough firepower to deal with this specific kind of misconduct. Accordingly, the PAG respectfully recommends that the Commission consider an application note which clarifies that if the defendant is also convicted of an offense covered by Guideline §2D1.2(a)(3), then this enhancement is not to be applied to the offense level for any other offense.

[12] 21 U.S.C. §861(b)
[13] §2D1.2(a)(3)

VII. §2D1.1(b)(14)(B): Knowing Involvement of Specific Individuals

Under this proposed amendment, a two-level enhancement will be applied where a defendant knowingly involves any number of different categories of individuals in his drug offense. Apart from our earlier comments about how this provision would apply where the defendant knowingly involves someone under 18 years of age,[14] the PAG also has a number of practical concerns.

Of course, no one wants to see a young, innocent individual, naive to the ways of the drug world, dragged into a drug conspiracy. But, without intending to sound too glib, there are 18-year-olds and then there are 18-year-olds. To appreciate the point, one need only listen to the experience of DEA agents who have spent any significant time investigating drug activity in large urban areas such as the south and west sides of Chicago. These agents will readily advise that there are literally tens of thousands of youngsters, teenagers between the ages of 13 and 17, already actively engaged in significant aspects of the drug trade; whether they be lookouts, couriers, or even small-level dealers themselves, the sad reality is that there are a staggering number of young people deeply involved in the drug trade. Indeed, in virtually every gang-related drug conspiracy, there will be any number of people under the age of 18 actively involved. Tragically, many of them will already have had multiple juvenile adjudications and many will even have adult convictions.

The PAG recognizes the limitations in proposed new Application Note 29(A), which states that where the defendant "distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(14)(B), the individual is not a 'vulnerable victim' for purposes of §3A1.1(b)." But this does not address the PAG's concern with the application of the proposed enhancement to those defendants who, with knowledge, distributed drugs to an individual under 18 years of age or who involve such a person in a drug offense. The PAG respectfully urges the Commission to add language in its application note to limit the "involvement" aspect to defendants who involve a person who is under 18 years of age knowing that the person was not already involved, or otherwise predisposed to engage, in drug activity.

The same concerns also apply to the enhancement for involving individuals over the age of 65. Experience has repeatedly demonstrated the steady downward spiral of those involved in the drug trade. So many young individuals grow up in environments where hopelessness, despair, and lack of opportunity are commonplace. Far too many of these individuals cannot conceptualize making it to the age of 30, much less 65. Drug dealing is perceived as a common way out. Many individuals start out relatively young, get caught with relatively small amounts of drugs, and receive a relatively small sentence. Having served that sentence, with no greater opportunities in life than the defendant had prior to engaging in his first offense, the defendant reengages. By this time, he or she has typically become more experienced and only gets more deeply involved. Another charge is followed by a more serious penalty, taking the individual out of commission for a longer period of time. Upon this individual's return to society, virtually all realistic opportunity for meaningful, legitimate gainful employment is lost, leading to even greater drug involvement, more serious charges and greater prison time.

[14] See page 8 *supra*.

Eventually, an individual serves out a 15, 20, or 25-year sentence, only to be released from custody into a far more hopeless circumstance. Some of these individuals reach the age of 65. Now outside of prison, they no longer wish to continue to engage in the dangerous risk-taking involved in a large-scale drug conspiracy—they just can't do that kind of time anymore. However, they are more than game for a few hundred dollars in cash here and there for their small role in some newcomer's large-scale drug operation.

In our experience, there is nothing special about the involvement of a person who has reached the age of 65. Very few have newly been dragged, kicking and screaming, into an unfamiliar world of crime. Rather, many are savvy veterans. To suggest that a two-level enhancement is appropriate where such an individual is involved goes too far. The PAG certainly wishes to ensure that unsuspecting senior citizens are protected from being drawn into a drug conspiracy. But again, there are 65-year –olds and there are 65-year-olds. The PAG recommends inclusion in the application notes of limiting language that prevents the enhancement from being triggered if the person over the age of 65 had a prior criminal record or if there is other evidence of propensity to engage in criminal conduct.

VIII. §2D1.1(b)(14)(E): Pattern of Criminal Conduct as Livelihood

Under this part of the proposed drug amendments, a defendant who receives an aggravating role adjustment would receive an additional two-level enhancement for committing his or her drug offense "as part of a pattern of criminal conduct engaged in as a livelihood."[15] How far can this language concerning "a pattern of criminal conduct engaged in as a livelihood" extend? The facts in *Gall* are illuminating. Gall participated in the conspiracy to distribute ecstasy for approximately seven months. And, for his efforts, Gall received a total of approximately $30,000. Then Gall voluntarily walked away from the conspiracy.

It is unclear from the facts precisely how many times Gall, at Luke's direction, acted as a middleman, taking the pills from Luke and delivering them to the sellers. If Gall only did this once, it could hardly be said to have constituted a pattern. But what if he did it 10 times? How about 20 times? And what if Gall was also working part-time at a local pizzeria, delivering pizzas? Would Gall's work for Luke in the drug conspiracy be deemed to be his "livelihood"? The Guidelines themselves are silent on these issues. However, the proposed application note for Subsection (b)(14) does make specific reference to Guideline §4B1.3 concerning criminal livelihood.[16] Specifically, Subsection (C) of this application note states: "For purposes of subsection (b)(14)(E), 'pattern of criminal conduct' and 'engaged in as a livelihood' have the meaning given such terms in §4B1.3." The commentary to §4B1.3 states that a "pattern of criminal conduct" refers to "planned criminal acts occurring over a substantial period of time."[17] According to the commentary, "such acts may involve a single course of conduct or independent offenses."

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[15] §2D1.1(b)(14)(E); *See* also §4B1.3 (Criminal Livelihood) .
[16] §2D1.1(b)(14)(E), *comment* (n. 29).
[17] §4B1.3, *comment* (n. 1).

Case law interpreting this commentary has found that a defendant need not have engaged in criminal conduct for a 12-month period in order to qualify for this enhancement.[18] Rather, a defendant need only make the criminal activity his primary occupation during the course of a 12-month period for this enhancement to apply.[19] Would Gall's seven-month stint in Luke's drug conspiracy be deemed to constitute a "substantial period of time" necessary to establish a pattern of criminal conduct? In *U.S. v. Reed*[20] the 6th Circuit found that a seven-month period was in fact sufficient. Indeed, the vast majority of cases have broadly construed a "substantial period of time" in applying this enhancement.[21] On the basis of this authority, Gall's seven-month participation in Luke's conspiracy would constitute a "substantial period of time."

Although admittedly a closer question, under the current interpretive case law, there is a likelihood that even Gall's cousin, Bill, with his three-month stint in Luke's conspiracy, would be deemed to have been involved for a "substantial period of time."

The phrase "engaged in as a livelihood" has likewise been given some contours in the commentary to §4B1.3.[22] Application Note 2 provides a two-fold definition: first, that the defendant "derived income from the pattern of criminal conduct that in any 12-month period exceeded 2,000 times the then-existing hourly minimum wage under federal law;" And second, that, "the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that 12-month period."

In light of this commentary, can it be said that Gall engaged in his criminal conduct "as a livelihood"? We know that Gall was engaged in the conspiracy for approximately seven months, during which time he earned approximately $30,000. Under the case law, it is likely that Gall would be deemed to have committed his offense as part of a "pattern of criminal conduct engaged in as a livelihood." He need not have engaged in this criminal conduct for a full twelve months to qualify for this enhancement.[23] The $30,000 would exceed 2,000 times the existing minimum hourly wage. But what if Gall, for example, also held a full-time job as a manager during the night shift at a local pizzeria, from which he earned $35,000 per year? Would he now be said to have engaged in his criminal conduct "as a livelihood"? According to the commentary to §4B1.3, the government must establish that Gall's "primary occupation" was criminal conduct. Case law in this area has generally undertaken a comparative analysis of a defendant's income from both his legitimate and illegitimate sources in determining whether this enhancement applies. So, for example in *Reed*, the 6th Circuit affirmed the sentencing court's finding that the defendant had "engaged in his criminal conduct as a livelihood" where Reed had made $17,000 from stealing merchandise but only $350 from working as a roofer. In our illustration, Gall has worked for the last two years, earning $35,000 each year managing a pizzeria, while receiving only $30,000 for a seven-month period from his participation in the drug conspiracy. It is unlikely that the government would be able to meet its burden that Gall's

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[18] *U.S. v. Cryer* ,925 F.2d 828 (5th Cir. 1991).
[19] *U.S. v. Morse*, 983 F.2d 851 (8th Cir. 1993).
[20] 951 F.2d 97 (6th Cir. 1991).
[21] See e.g. *U.S. v. Irvin*, 906 F.2d 1424 (10th Cir. 1990); U.*S. v. Hearrin*, 892 F.2d. 756 (8th Cir. 1990); *U.S. v. Salazar*, 909 F.2d. 1447 (10th Cir. 1990).
[22] §4B1.3, *comment*. (note. 2).
[23] *U.S. v. Kellams*, 26 F.3d 646 (6th Cir. 1994).

"primary occupation" was drug-dealing, particularly where he voluntarily withdrew from the conspiracy, but continued to work at the pizzeria.

Assume now that Gall was an otherwise unemployed student, but only distributed ecstasy pills for Luke on three or four occasions over the course of a two-year period, earning $100 for each occasion.

Would twice- a- year constitute "a pattern of criminal conduct"? Gall's criminal acts would, at most, be considered sporadic. Yet, the commentary states that such acts may involve a "single course of conduct or independent offenses." In theory, Gall's criminal conduct may qualify as a "pattern," but the amount of money he derived from his involvement is far less than that necessary to qualify "as a livelihood." Nonetheless, it is not difficult to project the extensive litigation which will arise over the application of this proposed two-level enhancement under Subsection (b)(14)(E). The PAG is concerned that the commentary to §4B1.3 lacks sufficient guidance to ensure a consistent application of this new enhancement.

There is, however, more specific guidance to be found in other federal criminal statutes. For example, 31 U.S.C. §5324(a)(3) makes it illegal for a person to structure financial transactions for the purpose of evading certain reporting requirements. Typically, this violation is charged when individuals cash checks in amounts just under $10,000 in order to bypass the bank's requirement to file a Currency Transaction Report.[24]

The applicable guideline for this violation is §2S1.3. The base offense level for a structuring offense is 6, plus the number of levels from the theft table at §2B1.1.[25] One of the specific offense characteristics under this guideline requires a two-level increase where the defendant "committed the offense as a pattern of unlawful activity involving more than $100,000 in a 12-month period."[26] The commentary to this guideline defines a "pattern of unlawful activity" to mean "at least two separate occasions of unlawful activity involving a total amount of more than $100,000 in a 12-month period…"[27] There is also a "safe harbor" provision which reduces the offense level to 6, provided, among other things, that the funds which were structured were the proceeds of lawful activity and were used for a lawful purpose.[28]

Clearly, in the context of drug offenses, a safe harbor provision has no application. Gall, for example, knew that every time he distributed drugs for Luke he was engaged in unlawful activity. Equally clear is the fact that Gall distributed drugs on more than two separate occasions. However, Gall was involved in the conspiracy for only seven months. The enhancement under Subsection (b)(2) requires criminal involvement in a 12-month period. It also requires unlawful activity involving more than $100,000. Gall received a total of $30,000. We recognize that the amount paid to Gall was likely only a fraction of the value of the drugs he

[24] See e.g. *U.S. v. Peterson*, 607 F.3d 975 (4th Cir. 2010).
[25] §2S1.3(a)(2).
[26] §2S1.3(b)(2).
[27] *Id.*
[28] §2S1.3(b)(3).

distributed.[29] At the same time, there is no way to determine with absolute precision the value of those particular drugs. Street values change. Arrests are made in connection with some sales. Other sales are executed at a discount. Although unlikely, it is not inconceivable that Luke was overpaying Gall for the value of his services such that the $30,000 Gall received was actually more than the value of the drugs he distributed.

And what of Gall's cousin Bill? Assume he acted as a lookout over a five-month period on ten different occasions, earning a total of $1,000. Lacking any legitimate, part-time employment, the commentary to §4B1.3 would likely lead to a finding that this two-level enhancement applies. Absent more specific guidance, it is not difficult to envision a wide range of inconsistent interpretations of this provision, contributing to disparate sentences for like offenders.

To avoid extensive litigation, the PAG strongly recommends an application note which would limit this two-level increase only to those situations in which the defendant earned more than $100,000 over the course of a 12-month period.

IX. §2D1.1(b)(15): A two-level decrease for defendants who qualify as "minimal participants" where the drug offense also involves three additional factors

After careful review of the proposed two-level decrease for certain minor participants, the PAG membership fears that the amendment, as written, will have very little practical application.

As a prerequisite for a two-level decrease under Subsection (b)(15), a defendant must first qualify as a "minimal participant" as that phrase is defined in Guideline §3B1.2(a).[30] Specifically, Application Note 4 to this guideline provision limits its application to cover only those defendants "who are plainly among the least culpable of those involved in the conduct of a group." This Application Note concludes by reflecting the Commission's intention "that the downward adjustment for a minimal participant will be used infrequently."

It has been the collective experience of those members of the PAG who are involved in the representation of individuals accused of federal drug offenses that, indeed, this downward adjustment is employed very infrequently. Given that it is a prerequisite for further consideration under Subsection (b)(15), by definition, it necessarily limits those defendants who may even be considered eligible for this reduction. Beyond this inherent limitation on eligibility, this provision is even further limited because the offense must involve all three enumerated factors.

The first factor in Subsection (b)(15)(A) requires that the defendant's motivation for involvement in the offense must emanate either from "an intimate or familial relationship or by

[29] In Gall's plea agreement, he stipulated that he was accountable for the distribution of 2,500 grams of ecstasy; although the agreement made clear that he did not personally distribute all of those pills.

[30] §3B1.2(a) provides: "If the defendant was a minimal participant in any criminal activity, decrease by 4 levels. "

threat or fear to commit the offense." Additionally, to qualify under this first factor, the defendant must be "otherwise unlikely to commit such an offense." Essentially, Subsection (b)(15)(A), beyond the requirement of an intimate or familial relationship or fear, also requires proof of a lack of predisposition. As such, an individual seeking to qualify for this additional two-level reduction would have to demonstrate that he or she was both coerced as well as "entrapped" by a family member. The PAG can conceptualize precious few individuals who may be able to satisfy the provisions of Subsection (b)(15)(A).

Concerning Subsection (b)(15)(B), in addition to being a "minimal participant," and being motivated by either familial relationships, threats, or fear and having a lack of predisposition, the defendant must also receive zero monetary compensation for his or her involvement in the drug offense. This introduces complexity and uncertainty because when the defendant's motivation was familial, such as a woman willing to help her husband, the government may very well argue that the defendant received tangible monetary benefits that count as compensation if she has a joint bank account with her husband. If the Commission retains this requirement, it should be modified to read that "The defendant received no *direct* monetary compensation…"

We return to Gall's hypothetical 17-year-old cousin, Bill, for illustrative purposes. For a period of about three months, he sporadically acts as a lookout when directed by Luke, one of the leaders of the conspiracy. When Gall voluntarily withdraws, Bill also leaves the conspiracy, long before either was caught. Assume that Bill was asked to act as a lookout on three occasions. He is not told whether there are drugs or money in the old abandoned building. He knows nothing about quantities. He does not know where the pills come from or where they are going. On each of these three occasions, he receives $100 for his efforts. He is the conspirator who knew the least, was involved for the shortest period of time and is clearly the least culpable. Despite this, the $300 he received would make him ineligible for the two-level decrease under this provision.

With a very modest adjustment of this hypothetical, now assume Bill was never paid any money for his services as a lookout. He did, however, receive a few ecstasy pills from his cousin before he completely stopped using drugs. Although the pills have some value, they do not technically constitute "monetary compensation." Accordingly, Bill could conceivably qualify under this modified set of hypothetical factors for this decrease.

The final prerequisite to this two-level decrease is Subsection (b)(15)(C), requiring that, in addition to qualifying as a minimal participant, satisfying these particular motivational requirements and receiving no monetary compensation the defendant must also have "minimal knowledge of the scope and structure of the enterprise."

We have reviewed the provisions of Application Note 4 to Guideline §3B1.2(a) concerning the applicability of a "minimal participant" adjustment. According to Application Note 4, "…the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as a minimal participant." From this language, it is evident that the proposed requirement in Subsection (b)(15)(C) is subsumed by Application Note 4 to Guideline §3B1.2(a). Repeating it would give the mistaken impression

that the Commission is now requiring an heightened level of "ignorance" (if such a thing is possible) about the scope and structure of the enterprise. It also would prompt unnecessary litigation over the difference between "minimal knowledge" and "lack of knowledge." Such litigation would need to grapple with the fact that the added requirement ("minimal" knowledge) appears to be *less* restrictive than the existing requirement ("lack of" knowledge). These thorny issues would be avoided by omitting the requirement all together.

As a final observation, we also note the fundamental and difficult-to-understand incongruity between the provisions of Subsection (14)(A)-(E) and the provisions of Subsection (15)(A)-(C). An upward adjustment applies when only "one or more" of five listed factors is present, yet to qualify for a two-level decrease, the defendant must satisfy "all" three of the enumerated factors.

As previously noted, the PAG fears that the provisions of Subsection (b)(14) will cause a significant increase in sentences for drug offenders. By sharp contrast, the provisions of Subsection (b)(15) will have an extremely limited impact in lowering the sentences of drug offenders with marginal roles because of the infrequency with which a defendant even qualifies as a "minimal participant" and the necessity of having to satisfy all three factors rather than "one or more" of those factors. Expanding Subsection (b)(15) to defendants with a minor or minimal role reduction, striking Subsection (15)(C) as redundant and confusing, qualifying Subsection (15)(B) by adding the word "direct" to modify monetary compensation, and modifying the prefatory language of Subsection (b)(15) to read "involved in either Subsection (A) or Subsection (B)," would provide appropriate symmetry between the prerequisites for the aggravating enhancements and the mitigating enhancement, while improving the prospects that Subsection (b)(15) will make a meaningful contribution to drug sentencing.

X. Conclusion:

On behalf of the PAG, I have offered a number of suggestions primarily concerning the modification and limitation of certain proposed aggravating enhancements. I have also offered several recommendations with respect to additions to the application notes for the proposed drug amendments, principally aimed at limiting the potential for what the PAG feels would otherwise be an overly broad and inconsistent interpretation of the proposed drug amendments. As I noted at the outset, the PAG greatly appreciates the chance to offer our input on the 2011 proposals and issues for comment. We also look forward to the continued opportunity to work with the Commission on completing this amendment cycle with final language for the 2011 Manual. On behalf of my colleagues, I thank you for your time and consideration.

Jeffrey B. Steinback