

CHAPTER TWO

The Sentencing Guidelines

Guideline Amendments

The legislation creating the Sentencing Commission provides that “[t]he Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.” 28 U.S.C.

§ 994(o). Given this congressional direction, the Commission has adopted an evolutionary approach to guideline development under which it periodically refines the guidelines in light of district court sentencing practices, appellate decisions, research, enactment of new statutes, and input from federal criminal justice practitioners. By statute, the Commission annually may transmit guideline amendments to the Congress on or after the first day of a regular session of Congress but not later than May 1. Such amendments become effective automatically upon expiration of a 180-day congressional review period unless the Congress, by law, provides otherwise. Occasionally, Congress also grants the Commission special authority to issue temporary, “emergency” amendments in connection with particular legislation.

Amendments Promulgated

In 2000, the Commission passed and submitted to Congress a number of amendments, several of which address issues of congressional interest or conflict among various federal circuit courts of appeal. Proposed amendments were published in the *Federal Register* on January 18, 2000, and February 11, 2000. The Commission received extensive written comment on the proposed amendments, and, on March 23, the Commission conducted a general public hearing on the proposed amendments.

An additional, temporary, emergency amendment was promulgated in response to a directive contained in the No Electronic Theft (NET) Act, Pub. L. 105-147. A proposed amendment and issues for comment regarding the Commission’s response to the directive were published in the *Federal Register* on December 23, 1999. On May 9, 2000, the Commission published in the *Federal Register* the temporary amendment that was adopted in response to the directive.

With the exception of the temporary, emergency NET Act amendment, which had an effective date of May 1, 2000, the Commission established an effective date of November 1, 2000, for the amendments. The temporary, emergency NET Act amendment became a permanent amendment effective November 1, 2000.

The amendments promulgated by the Commission in FY 2000 include (1) amendments responding to congressional directives and addressing congressional interest; (2) amendments resolving circuit conflicts; and (3) technical amendments. The following are the more significant changes to the sentencing guidelines, policy statements, and official commentary, set out by these three categories.

Table 2

PUBLIC HEARING WITNESS LIST

Proposed Amendments to the Sentencing Guidelines
Washington, D.C. — March 23, 2000

Julie Stewart
William Boman
Arthur Curry

Families Against Mandatory Minimums

Robert M. Kruger
Business Software Alliance

David C. Quam
International AntiCounterfeiting Coalition

Roseanna DeMaria
AT&T Wireless Services

Mary Riley
Edward Kitlas
U.S. Secret Service

Jon Sands
A.J. Kramer
Federal Public and Community Defenders

Charles R. Tetzlaff
U.S. Attorney, District of Vermont

The amendments responding to congressional directives and addressing congressional interest

- increased and conformed the penalties for methamphetamine (actual) to the new mandatory minimums established in the Methamphetamine Trafficking Penalty Enhancement Act of 1998;
- increased the penalties for offenses that involve the criminal infringement of copyright and trademark;
- made permanent, the temporary emergency amendment submitted to Congress on September 23, 1998, that increased the penalties for fraud offenses that involve sophisticated means and provided an additional increase in section 3A1.1 (Hate Crimes Motivation or Vulnerable Victim) for offenses that involve a large number of vulnerable victims, in response to directives contained in the Telemarketing Fraud Protection Act of 1998;
- increased the penalties for offenses that involve (1) the use or possession of equipment that is used to manufacture access devices; (2) the production of, and trafficking in, unauthorized and counterfeit access devices, such as stolen credit cards and wireless cloned telephones; and (3) the possession or production of documents to commit identity theft, in response to the Identity Theft and Assumption Deterrence Act of 1998 and the Wireless Telephone Protection Act of 1998;
- increased the penalties for (1) the use of a computer in sexual abuse, prostitution, and child pornography offenses, and (2) offenses that involve a violation of chapter 117 of title 18, United States Code, in response to the Protection of Children from Sexual Predators Act of 1998;
- expanded the definition of “distribution” in sections 2G3.1 (Importing, Mailing, or Transporting Obscene Matter) and 2G2.2 (Possession, Receipt, Transportation, Trafficking of Material Involving the Sexual Exploitation of a Minor) to cover all acts of distribution, including those for which the distributor received nothing of value in return, in response to the Protection of Children from Sexual Predators Act of 1998;
- clarified application of section 2K2.4 (Use of a Firearm, Armor-Piercing Ammunition, or Explosive during or in relation to Certain Crimes) for an offender convicted under 18 U.S.C. § 924(c) who might also qualify as a career offender under the rules and definitions provided in guidelines 4B1.1 (Career Offender) and 4B1.2 (Definition of Terms Used in section 4B1.1), in response to statutory changes made in the Act to Throttle the Criminal Use of Guns. The amendments also incorporated the new tiered mandatory minimums for “possession,” “brandishing,” and “use” of firearms under section 924(c).

Circuit Conflicts

The amendments resolving circuit conflicts

- added an enhancement in guideline 2F1.1 (Fraud and Deceit) for making a false statement in a bankruptcy proceeding and clarified that in cases other than

bankruptcy fraud, the enhancement for violation of a judicial order or process only applies if a defendant violates a prior specific order to take or not take a specified action;

- clarified that the sentencing court must apply the offense guideline referenced for the statute of conviction listed in Appendix A (Statutory Index) unless the case involves a stipulation to a more serious offense or additional offenses as set forth in section 1B1.2(a);
- provided a new departure policy statement at section 5K2.19 (Post-Sentencing Rehabilitation Efforts) that prohibits using post-sentencing rehabilitative efforts as a factor for departure when re-sentencing a defendant initially sentenced to a term of imprisonment;
- provided a new departure policy statement at section 5K2.20 (Aberrant Behavior) that permits a downward departure for aberrant behavior under certain conditions;
- provided a new departure policy statement at section 5K2.21 (Dismissed and Uncharged Conduct) that clarifies that the court may accept a plea agreement and nevertheless depart upward based on conduct that was dismissed or uncharged as part of the plea agreement.

Technical Amendments

The technical amendments

- corrected a typographical error in the Chemical Quantity Table in section 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) regarding certain quantities of Isosafrole and Safrole by changing those quantities from grams to kilograms;
- corrected an omission made during prior Commission deliberations on the Comprehensive Methamphetamine Control Act of 1996 by adding an enhancement in section 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) and 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy) for environmental damage; and
- updated sections 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) to include a new sex offender condition as a specific mandatory condition rather than list it in a footnote.

Policy Teams

As part of its continuing analysis of the sentencing guidelines and related sentencing issues, the Commission annually identifies a number of priorities for the coming year and, in some cases, beyond. Selected priority areas are examined and analyzed by interdisciplinary policy teams, each comprising a cross section of the Commission staff (*e.g.*, legal staff, policy analysis staff, and training staff).

Policy teams generally study a specific guideline subject area, profile relevant sentencing practices, identify areas of concern, and recommend options for Commission action. During the process, each group typically reviews legislative history and recent legislative enactments; relevant court decisions; monitoring data regarding sentencing practices; case files of sentenced defendants; reports of frequent questions about guideline application related to that specific area (HelpLine calls) from probation officers, judges, and attorneys; and public comment. The teams also solicit input from the Practitioners' Advisory Group, the Probation Officers Advisory Group,¹ and other interested persons and government agencies as appropriate.

Economic Crimes Policy Team

After providing support for the Commission's May 1, 2000, promulgation of guideline amendments dealing with access devices and identity theft, the Economic Crimes Policy Team continued its examination of the Commission's Economic Crime Package and counterfeiting issues.

During 2000, the team refined the elements of the Economic Crime Package which includes proposals for (1) consolidating the guidelines in regard to offenses sentenced pursuant to the theft, fraud, and property destruction guidelines, (2) increasing punishment levels for economic offenses (including tax) involving larger loss amounts, and (3) comprehensively rewriting the loss definition for theft and fraud offenses, to address, among other things, circuit conflicts and other case law and application issues.

The team also developed proposals to resolve circuit conflicts regarding (1) offenses that include aggravated conduct that involves the business of receiving stolen property, (2) the determination of tax loss in corporate diversion cases, and (3) fraudulent misrepresentation that the defendant acted on behalf of a charitable organization. The team also developed possible responses to the College Scholarship Fraud Prevention Act of 2000, Pub. L. 106-420.

Counterfeiting Policy Team

The Counterfeiting Policy Team met with representatives of the U.S. Secret Service and the Treasury Department to better understand their concerns about punishment levels for counterfeiting offenses, given the increased prevalence of digital counterfeiting. In addition to examining the characteristics of counterfeiting offenses and offenders, the team conducted an extensive case coding

¹ The Probation Officers Advisory Group, organized in June 1992, provides input from field officers on Commission priorities and proposed amendments. The 15-member group is composed of one probation officer from each circuit, plus an additional officer from the Fifth, Ninth, and Eleventh Circuits (due to their size). In addition, a probation officer in each district is designated as a liaison to his/her respective circuit representative.

The Practitioners' Advisory Group (PAG), a voluntary membership organization composed of approximately 50 practicing attorneys, provides defense bar perspectives on Commission policies, sentencing procedures, and proposed guideline amendments. In addition, representatives of the National Association of Criminal Defense Lawyers (NACDL), the American Bar Association Federal Sentencing Guidelines Committee, and the Federal Public and Community Defenders also attend most meetings.

project. The team also began work on a comprehensive report on counterfeiting offenses and formulated amendment options for possible Commission action.

Identity Theft and Cellular Cloning Policy Teams

On May 1, 2000, the Commission sent to Congress an amendment that increased penalties for identity theft and cellular telephone cloning consistent with the directives of the Identity Theft and Assumption Deterrence Act, Pub. L. 105-31, and the Wireless Telephone Protection Act, Pub. L. 105-72, respectively. Work on the sentencing enhancement proposed by the Commission was informed by the research conducted by the Identity Theft and Cellular Cloning Policy Teams, reported to the Commission on December 15, 1999.

The amendment enhances sentences in cases involving (1) the possession or use of equipment to manufacture telephone cloning devices; (2) the production or trafficking of any authorized access devices or counterfeit access devices such as stolen credit cards and wireless cloned telephones; or (3) the unauthorized transfer or use of any means of identification to produce or obtain any other means of identification.

Firearms Policy Team

The Firearms Policy Team completed its examination regarding (1) the implications of the broadened scope of 18 U.S.C. § 924(c), in response to *Bailey v. United States*² and (2) circuit conflicts regarding application of the guidelines to firearm offenses. The team suggested policy options for the Commission's consideration, and the Commission's subsequent guideline amendments on firearms were sent to Congress on May 1, 2000. The amendments became effective November 1, 2000. Subsequently, the team developed options for Commission consideration concerning offenses involving more than 50 firearms.

Nuclear, Biological, and Chemical Weapons Policy Team

During 2000, the Nuclear, Biological, and Chemical Weapons Policy Team continued its study of issues prompted by (1) congressional concerns expressed in the National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104-201; (2) new offenses created by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132; and (3) the Chemical Weapons Convention Implementation Act of 1998, Pub. L. 105-277. The team began drafting a report detailing its findings and proposed policy options for the Commission's consideration.

Sexual Predators Act Policy Team

In early 2000, the Sexual Predators Act Policy Team concluded its initial study of statutory directives and issues pertaining to the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105-314, and the Sex Crimes Against Children Prevention Act of 1995, Pub. L. 104-71. Following these inquiries, the Commission promulgated the following guideline amendments that went to Congress on May 1, 2000: (1) enhancements to guidelines 2A3.2 and 2G1.1 for offenses

² 516 U.S. 137 (1995).

involving misrepresentation of identity or use of a computer; (2) enhancements for violations of chapter 117 of title 18, United States Code (involving transportation of minors for prostitution or other prohibited sexual conduct); and (3) a clarification that distribution of pornography applies to distributions involving both monetary remuneration and non-pecuniary interests.

For the balance of 2000, the team continued its consideration of the directive requiring that the Commission “provide for an appropriate enhancement in any case in which the defendant engaged in a pattern of activity of sexual abuse and exploitation of a minor.” In addition, the team studied the general directive in the Act requiring the Commission to ensure “that the sentences, guidelines, and policy statements for offenders convicted of such offenses are appropriately severe and reasonably consistent with the other relevant directives and the relevant existing guidelines.” Implementation of this directive prompted the team to include examination of the appropriate offense levels for defendants convicted of sexual abuse offenses that are not committed in violation of chapter 117 of title 18, United States Code (e.g., offenses committed on Native American lands).

Drug Policy Team

The Drug Policy Team was created in 2000 to study several topics related to congressional enactments and directives regarding drug offenses. These included Ecstasy, methamphetamine, amphetamine, and list I chemicals related to methamphetamine manufacture. The Commission was required to promulgate amendments, using emergency amendment authority, in each of these areas.

Ecstasy

The team studied the terms of the Ecstasy Anti-Proliferation Act of 2000, Pub. L. 106-310, which gave the Commission emergency amendment authority and directed the Commission to amend the guidelines for Ecstasy-related drug offenses, to reflect the seriousness of the offenses and the need to deter them, and to ensure that the offenses reflect (1) the need for aggressive law enforcement action and (2) dangers associated with unlawful activity including, the rapidly growing incidence of Ecstasy abuse and the threat to public safety because of such abuse, the young age at which children are beginning to use Ecstasy, the fact that Ecstasy is frequently marketed to youth, and the large number of doses per gram of the controlled substance. The team subsequently proposed policy options for the Commission’s consideration.

List I Chemicals

The team also studied the issues related to the three-part directive in the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 106-310, which required enhanced punishment for List I chemicals related to the manufacture of methamphetamine. The directives required the Commission to (1) “to provide increased penalties for offenses involving ephedrine, phenylpropanolamine (PPA), or pseudoephedrine”; (2) “to establish, based on scientific, law enforcement, and other data the Commission considers appropriate, a table in which the quantity of controlled substance that could reasonably have been manufactured shall be determined by using a table of manufacturing conversion ratios for ephedrine, PPA, and pseudoephedrine”; and (3) “to increase penalties for offenses involving any List I chemical other than ephedrine, PPA, and pseudoephedrine, such that those penalties reflect the dangerous nature of such offenses, the need for aggressive law enforcement action to fight such offenses, and the extreme dangers associated with unlawful activity

involving methamphetamine and amphetamine.” Based on its analysis of these issues, the team proposed to the Commission policy options for the emergency amendments.

Methamphetamine and Amphetamine

The team studied the directive in the Methamphetamine Anti-Proliferation Act of 2000, Pub. L. 310, that required the Commission, pursuant to emergency amendment authority, to provide increased guideline penalties for amphetamines so that those penalties become comparable to the base offense level for methamphetamine. The team proposed to the Commission for its consideration a number of policy options. The team, because of similarities of dextroamphetamine to amphetamine, proposed that the Commission, when addressing the permanent amendments related to amphetamine, consider making the penalties for dextroamphetamine identical to amphetamine, and consider other corresponding changes.

The Act required the Commission, again pursuant to emergency amendment authority, to increase penalties for methamphetamine and amphetamine manufacturing offenses that create substantial risk of harm to human life, the environment, minors, or incompetents. The team developed options for the Commission to consider during the 2000–2001 amendment cycle.

Money Laundering Policy Team

In May 2000, the Commission chartered the Money Laundering Policy Team to support the Commission’s work in the area of revising sentencing guidelines for federal money laundering offenses. The policy team was instructed to develop viable options for revising the money laundering guidelines that tie offense levels for money laundering more closely to the underlying criminal conduct that was the source of the criminally derived funds. In furtherance of that goal, the team began a detailed data analysis of a representative sample of money laundering cases for presentation during the 2000–2001 amendment cycle.

No Electronic Theft Act Policy Team

The NET Act Policy Team, building on its report that was completed in February 1999, continued its work in developing possible responses to the No Electronic Theft Act of 1997, Pub. L. 105-147. The Act criminalizes computer theft of copyrighted works, whether or not the

defendant derives a direct financial benefit or commercial advantage from the act of misappropriation. The Act directs the Commission to (1) provide that the guideline range for intellectual property offenses is sufficiently stringent to deter those offenses and (2) ensure that the pertinent guideline considers the retail value and quantity of the intellectual property infringed upon.

Relying on its February 1999 report, the team used the report to engage in a dialogue with the Department of Justice, congressional staff, and representatives of industries most affected by intellectual property offenses. This team's work culminated with the Commission promulgating a temporary, emergency amendment that went into effect on May 1, 2000, and was made permanent on November 1, 2000.

Assistance to Congress

The Sentencing Reform Act gives the Commission the responsibility to advise Congress about sentencing and related criminal justice issues. To fulfill this responsibility, in 2000 the Commission continued to provide members of Congress and their staffs with timely and valuable sentencing-related information and analyses. In addition, to strengthen the Commission's good working relationship with Congress, commissioners met with several members of Congress throughout the year regarding a variety of matters.

During 2000, the Commission responded orally or in writing to numerous congressional requests for assistance (*e.g.*, requests for federal sentencing and criminal justice data, technical assistance in drafting legislation, explanations of guideline application, and regular updates on Commission action in response to recently enacted crime and sentencing-related legislation). The Commission also frequently corresponded with members of Congress, providing its views and analyses of proposed legislation and the ways in which proposed legislation may impact the guidelines. Throughout the year, the Commission also supplied numerous Commission publications and resource materials to members of Congress and their staff.

In addition to providing routine responses to congressional inquiries, the Commission testified at two congressional hearings in 2000. On May 11, 2000, Vice Chair John R. Steer, testified about mandatory minimum penalties before the House Governmental Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources. Specifically, Vice Chair Steer testified about drug sentencing trends, how statutory mandatory minimum penalties interact with the federal sentencing guidelines, and the operation of the safety valve.

