

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 an 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 2001, the Commission passed and submitted to Congress a number of amendments, including significant changes to penalties for white collar offenses. Proposed amendments were published in the *Federal Register* on November 7, 2000, and January 26, 2001. The Commission received extensive written comment on the proposed amendments and conducted a general public hearing on March 19, 2001. Following that hearing, the commissioners voted to promulgate a number of permanent amendments which were submitted to Congress on May 1, 2001.

In addition to these permanent amendments, temporary, emergency amendments were promulgated in response to directives contained in the Methamphetamine Anti-Proliferation Act of 2000 and the Ecstasy Anti-Proliferation Act of 2000. Proposed amendments and issues for comment regarding the Commission’s response to these directives were published in the *Federal Register* on January 26, 2001; and on May 9, 2001, the Commission published in the *Federal Register* the temporary amendments that were adopted in response to the directives.

The Commission established an effective date of November 1, 2001, for all of the amendments described in the preceding paragraph with the exception of the temporary, emergency amendments. The temporary, emergency amendments became permanent amendments effective November 1, 2001.

Table 2

PUBLIC HEARING WITNESS LIST

Proposed Amendments to the Sentencing Guidelines
Washington, DC — March 19, 2001

Robert S. Mueller, III

Acting Deputy Attorney General, U.S. Department of Justice

Charles O. Rossotti

Commissioner, U.S. Internal Revenue Service

John Malone

Bureau of Alcohol, Tobacco & Firearms

A.J. Kramer

Jon Sands

Federal Public & Community Defenders

Brian Maas

New York Council of Defense Lawyers

Edward A. Mallett

David E. Nichols

Charles S. Grob

National Association of Criminal Defense Lawyers

Julie Stewart

Families Against Mandatory Minimums

William D. McColl

Julie Holland

The Lindesmith Center – Drug Policy Foundation

Richard Glen Boire

The Center for Cognitive Liberty & Ethics

Rick Doblin

Multidisciplinary Association for Psychedelic Studies

The amendments promulgated by the Commission in FY 2001 include (1) amendments responding to congressional directives and addressing issues of congressional interest; (2) amendments addressing Commission interest; and (3) amendments resolving circuit conflicts. The following are the more significant changes to the sentencing guidelines, policy statements, and official commentary, set out by these three categories.

Congressional Directive and Interest Amendments

The amendments responding to congressional directives and addressing congressional interest

- increased the penalties for amphetamine and methamphetamine laboratory operators who create a substantial risk of harm to human life, the environment, or to minor or incompetent individuals;
- increased the penalties for amphetamine offenses by treating amphetamine identically to methamphetamine at a 1:1 ratio;
- increased the penalties for “ecstasy” offenses (*i.e.*, offenses involving MDA, MDMA, MDEA, and PMA);
- increased the penalties for offenses involving the trafficking of certain List I chemicals, specifically ephedrine, pseudoephedrine, and phenylpropanolamine, as well as benzaldehyde, hydriodic acid, methylamine, nitroethane, and norpseudoephedrine;
- addressed the new offense of stealing or transporting across state lines anhydrous ammonia with knowledge that such anhydrous ammonia will be used to manufacture a controlled substance by referencing such offense to section 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask or Equipment, Chemical, Product, or Material);
- increased the penalties for offenses involving GHB;
- provided mandatory restitution for offenses involving the manufacture of methamphetamine;
- addressed new human trafficking offenses by (1) referencing new offenses involving forced labor and peonage to section 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) and by expanding that guideline to provide increased punishment; (2) referencing new offenses involving the trafficking of children to engage in commercial sex acts to sections 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material); and (3) creating a new guideline, section 2H4.2, for offenses involving willful violations for the Migrant and Seasonal Agricultural Worker Protection Act;

- increased penalties for cases in which the defendant engaged in a pattern of activity of sexual abuse or sexual exploitation of a minor, and also in cases involving the transportation of minors for prostitution or prohibited sexual conduct;
- created a new Chapter Four guideline, section 4B1.5 (Repeat and Dangerous Sex Offender Against a Minor), that applies to repeat child sex offenders;
- increased the penalties for stalking offenses and conformed the definition of stalking in section 2A6.2 (Stalking or Domestic Violence) to statutory changes;
- increased the penalties for offenses that involve the importation, exportation, and attempted exportation of nuclear, chemical, and biological weapons, materials or technologies and incorporated into section 2M6.1 (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons or Facilities, Biological Agents, Toxins or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction) two new offenses, specifically, 18 U.S.C. § 175, pertaining to biological weapons, and 18 U.S.C. § 229, pertaining to chemical weapons; and
- referred to section 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Return Information) new tax offenses created by the Internal Revenue Service Restructuring and Reform Act of 1998 and the Taxpayer Browsing Protection Act of 1997.

Amendments Addressing Issues of Commission Interest

The Commission interest amendments

- set forth an Economic Crime Package that (1) consolidated, in section 2B1.1, the theft, property destruction, and fraud guidelines; (2) revised the loss table for the consolidated guideline and for tax offenses; (3) revised the definition of “loss”; and (4) conformed the “sophisticated concealment” enhancement in the tax guidelines to the “sophisticated means” enhancement in the new consolidated guideline;
- revised the money laundering guidelines to tie more closely the offense levels for money laundering conduct with the underlying offense and to provide graduated increases based on the seriousness of the underlying conduct that was the source of the criminally derived funds;
- revised section 2L1.2 (Unlawfully Entering or Remaining in the United States) to provide a more graduated and proportionate sentencing enhancement (between eight and 16 levels) for a prior conviction of an aggravated felony;
- expanded the eligibility for the two-level reduction in section 2D1.1(b)(6) to include defendants with an offense level of less than level 26;
- increased penalties for offenses involving the manufacture of counterfeit bearer obligations of the United States;

- consolidated sections 2C1.3 (Conflict of Interest) and 2C1.4 (Payment or Receipt of Unauthorized Compensation) in order to simplify guideline application involving unauthorized compensation of certain federal employees;
- increased the penalties for offenses involving more than 100 firearms by amending the firearms table in section 2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to provide two-level increments;
- conformed the definition of “prohibited person” in §§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials) and 2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to the definition found in relevant statutes pertaining to explosive and firearm offenses, respectively; and
- clarified that the relevant time to determine whether a person qualifies as a “prohibited person” for firearms and explosives offenses is as of the time the defendant committed the instant offense.

Circuit Conflicts

The amendments resolving circuit conflicts

- clarified that a factual statement made by the defendant during the plea colloquy must be made as part of the plea agreement in order to be considered a stipulation for purposes of section 1B1.2(a);
- clarified, in section 2A2.2 (Aggravated Assault), that (1) both the base offense level of 15 and the weapon enhancement in subsection (b)(2) shall apply to aggravated assaults that involve a dangerous weapon with the intent to cause harm; and (2) an instrument not ordinarily used as a weapon may qualify as a dangerous weapon for purposes of section 2A2.2 if the defendant uses such instrument with the intent to cause harm;
- provided that the application of section 2B1.1(b)(7) (formerly section 2F1.1(b)(4)(A)) applies if the defendant falsely represented that the defendant was acting to obtain a benefit for a charitable, educational, political, or religious organization or government agency, regardless of whether the defendant actually was associated with the organization or agency;
- clarified that a defendant who is accountable under section 1B1.3 (Relevant Conduct) only for conduct in which the defendant personally was involved, and who personally performed a limited function in concerted activity, is not automatically precluded from being considered for a mitigating role adjustment under section 3B1.2 (Mitigating Role);

United States Sentencing Commission

- provided, in cases involving a defendant who underreports income on both individual and corporate tax returns, that tax loss is the sum of the federal income tax due from the corporation and the amount of federal income tax due to the individual;
- clarified that money laundering counts and counts of conviction for the underlying offense from which the funds were criminally derived shall be grouped pursuant to section 3D1.2(c);
- provided that multiple counts of child pornography distribution, receipt, and possession shall be grouped pursuant to section 3D1.2(d); and
- clarified that an offense committed after the commission of any part of the instant offense cannot be counted as a prior felony conviction for purposes of sections 2K1.3 and 2K2.1.

South Dakota Hearing

On June 19, 2001, the Sentencing Commission held a public hearing in Rapid City, South Dakota, in response to the March 2000 Report of the South Dakota Advisory Committee to the United States Commission on Civil Rights, which recommended that an assessment of the impact of the United States sentencing guidelines on Native Americans in South Dakota be undertaken. The recommendation was based on the widespread perception in South Dakota that Native Americans, by virtue of being subject to federal prosecution and sentencing rather than state prosecution and sentencing, receive harsher sentences under the federal guidelines than they would under a similar state sentence. The purpose of the hearing was to provide the Commission with an opportunity to hear from various witnesses who have first-hand experience with the process of criminal investigation, prosecution, and sentencing in South Dakota and the federal sentencing guidelines. Approximately 100 people attended the hearing.

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 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 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; sentencing data regarding current 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

Table 3

PUBLIC HEARING WITNESS LIST

Rapid City, South Dakota — June 19, 2001

Elsie Meeks

Commissioner, U.S. Commission on Civil Rights

William Kindle

President, Rosebud Sioux Tribe

Michael Jandreau

Chair, Lower Brule Sioux Tribe

Andrew Grey, Sr.

Chair, Sisseton-Wahpeton Sioux Tribe

Charles Murphy

Chair, Standing Rock Sioux Tribe

Michelle G. Tapken

Interim U.S. Attorney, South Dakota

Ted L. McBride

Beadsley, Jensen & Von Wald, Rapid City, SD

Lisa Thompson

*Executive Director, Child Advocacy Center,
Ft. Thompson, SD*

Terry L. Pechota

Viken, Viken, Pechota, Leach & Dewell, L.L.P.

John Yellow Bird Steele

President, Oglala Sioux Tribe

Gregg Bourland

Chair, Cheyenne River Sioux Tribe

Tom J. Peckham

Nordhaus, Haltom, Taylor, Albuquerque, NM

Tom Ranfranz

Chair, Flandreau Santee Sioux Tribe

The Honorable Lawrence L. Piersol

Chief U.S. District Judge

Marlys Pecora

*Victim Witness Specialist, U.S. Attorney's Office,
Pierre, SD*

Robert Van Norman

Federal Public Defender, Rapid City, SD

Frank R. Pommersheim

University of South Dakota School of Law

Marty Hansford

District Manager, BIA

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

As part of its work on the Economic Crime Package of amendments, the Economic Crimes Policy Team, in October 2000, assisted Vice Chair John R. Steer and Commissioner Michael E. O'Neill in planning for the Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses. The two-fold purpose of the symposium was to discuss sentencing policy for economic crimes generally and to discuss the impact of new technology on investigating, prosecuting, and sentencing economic crimes.

The team completed the Commission's multi-year review of economic crime issues and facilitated the Commission's review and promulgation of the historic Economic Crime Package of amendments which, among other things, resolved 12 circuit conflicts. The team also completed work on a counterfeiting amendment.

The Economic Crime Package passed by the Commission included six major components: (1) the consolidation of the theft, property destruction, and fraud guidelines; (2) a revised loss table for the consolidated guideline and a similar table for tax offenses; (3) a revised definition of loss for the consolidated guideline; (4) revisions to the guidelines that refer to the loss table in the consolidated guideline; (5) technical and conforming amendments; and (6) conforming the "sophisticated concealment" enhancement in sections 2T1.1 and 2T4.1 to the "sophisticated means" enhancement in the consolidated guideline. In addition, the amendment addressed circuit conflicts involving tax loss in section 2T1.1.

Counterfeiting Policy Team

Prompted by concerns raised by the Department of the Treasury and the United States Secret Service about the operation of, and the penalties provided by, the counterfeiting guideline (section 2B5.1, Offenses Involving Counterfeit Bearer Obligations of the United States), the Counterfeiting Policy Team studied issues related to counterfeiting offenses, including the increasing use of personal computers and digital printers to manufacture counterfeit currency. Following the team's inquiry, the Commission promulgated an amendment that added a two-level enhancement for

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.

manufacturing, in addition to the minimum offense level of 15, which was designed to ensure some degree of additional punishment for all offenders who engage in manufacturing activity. The purpose of the change was to punish equally the “as needed” counterfeiters and the offset stockpile counterfeiters.

Money Laundering Policy Team

The Money Laundering Team conducted an in-depth analysis of cases sentenced under the money laundering guidelines and developed options for comprehensive changes to the penalty structure for money laundering offenses. The revision of the money laundering guidelines in relation to the substantive offenses that generated the illicit proceeds has been the subject of Commission study for the past ten years and resulted in a significant amendment.

With the new amendment in 2001, the Commission consolidated the two money laundering guidelines, sections 2S1.1 and 2S1.2, into one guideline, section 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity). The amendment tied offense levels for money laundering more closely to the underlying conduct that was the source of the criminally derived funds. The consolidated guideline separates money laundering defendants into two categories (direct and third-party money launderers) for purposes of determining the base offense level. Direct money launderers are those who commit or would be accountable under relevant conduct (section 1B1.3(a)(1)(A)) for the underlying offense that generated the criminal proceeds. Third-party money launderers are those who launder the proceeds generated from underlying offense(s) the defendant did not commit or would not be accountable for under relevant conduct (section 1B1.3(a)(1)(A)).

In addition, the amended guideline provides an enhancement designed to reflect the differing seriousness of the underlying conduct that was the source of the criminally derived funds. The consolidated guideline also provides three alternative enhancements which are designed to (1) ensure that all direct money launderers receive additional punishment for committing both the money laundering offense and the underlying offense and (2) reflect the differing seriousness of money laundering conduct depending on the nature and sophistication of the offense.

Sexual Predators Act Policy Team

After facilitating Commission review and promulgation of a significant guideline amendment in 2000, the Sexual Predators Team conducted a comprehensive examination of the guidelines under which most sex crimes are sentenced and completed work prompted by the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105-314. This laid the groundwork for the Commission’s promulgation of a three-part amendment in 2001.

The team examined the congressional directive to increase penalties in cases in which the defendant engaged in a pattern of activity of sexual abuse or sexual exploitation of a minor. This work informed the Commission in its promulgation of the amendment that provided a new Chapter Four guideline (section 4B1.5, Repeat and Dangerous Sex Offender Against a Minor), which focuses on repeat child sex offenders and which creates a tiered approach to punishing defendants convicted of certain sex crimes and who present a continuing danger to the public.

The amendment also makes several modifications to section 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen (Statutory Rape)), providing an enhancement for offenses involving the transportation of minors for prostitution or prohibited sexual conduct. The amendment also resolved a circuit conflict regarding the grouping of multiple counts of possession, receipt, or transportation of images containing child pornography.

Drugs Policy Team

The Drug Policy Team completed work it began in 2000 on several topics related to congressional enactments and directives regarding drug offenses. These included offenses involving ecstasy, methamphetamine, amphetamine, and List I chemicals related to methamphetamine manufacture.

The Drug Team was formed in response to section 3663 of the Ecstasy Anti-Proliferation Act of 2000 directing the Commission to amend the guidelines for drug offenses involving 3,4-methylenedioxy methamphetamine, 3,4-methylenedioxy amphetamine, 3,4-methylenedioxy-N-ethylamphetamine, paramethoxymethamphetamine (PMA), or any “other controlled substance, as determined by the Commission in consultation with the Attorney General, that is marketed as ecstasy and that has either a chemical structure substantially similar to that of 3,4-methylenedioxy methamphetamine or an effect on the central nervous system substantially similar to or greater than that of 3,4-methylenedioxy methamphetamine.” The team also evaluated penalties for GHB, amphetamine, List I chemicals used in the production of methamphetamine and amphetamine, anhydrous ammonia, and iodine. The team also examined the dangers to persons and the environment posed by illegal methamphetamine laboratories.

The team reviewed a substantial amount of public comment (written and verbal) on issues related to these penalties and formulated policy options for the Commission’s consideration. In addition, it prepared materials for the chair’s testimony before Congress regarding MDMA penalties and drafted a Commission report to Congress on MDMA.

Nuclear, Biological, and Chemical Weapons Policy Team

After completing a comprehensive two-year review of issues related to offenses involving nuclear, biological, and chemical weapons, the Nuclear, Biological, and Chemical Weapons Policy Team issued its report in December 2000. The team report and subsequent Commission amendment responded, in part, to the Sense of Congress contained in section 1423(a) of the National Defense Authorization Act for Fiscal Year 1997.

Informed by the team’s research, the Commission increased the base offense levels for offenses that involve the importation, attempted importation, exportation and attempted exportation of nuclear, chemical, and biological weapons, materials or technologies. The amendment also substantially revised the guidelines to incorporate two new offenses: 18 U.S.C. § 175, relating to biological weapons, and 18 U.S.C. § 229, relating to chemical weapons. The amendment created three alternative base offense levels and three specific offense characteristics to address offenses involving injury or death; substantial disruption of public, governmental, or business functions or services; and substantial expenditure of funds for clean-up and decontamination efforts.

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 2001 the Commission continued to provide members of Congress and their staffs with timely and valuable sentencing-related information and analyses. In keeping with the Commission's strong working relationship with Congress, commissioners met with members of Congress throughout the year regarding a variety of matters.

In the wake of the tragic terrorist attacks in New York and Washington, D.C., on September 11, 2001, the Commission acted quickly to assist Congress in the fight against terrorism. The Commission appointed two commissioners, Judge Sterling Johnson and Judge Joe Kendall, as liaisons to Congress on terrorism. As part of this undertaking, Judge Johnson and Judge Kendall met with several members of Congress to discuss how the Commission can further assist Congress and the law enforcement community in the renewed fight against terrorism. In addition, the Commission initiated an immediate review of the federal sentencing guidelines for terrorism offenses, which will include responses to the recently enacted USA PATRIOT Act, Pub. L. 107-56, and other terrorism-related legislation. On May 1, 2001, the Commission also submitted for congressional review an amendment that substantially increased penalties for certain offenses involving the possession, transfer, use, importation and exportation of nuclear, chemical, and biological weapons, materials, or technologies. This amendment became effective on November 1, 2001.

During 2001, 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 view and analysis 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 staffs.

In addition to its routine responses to congressional inquiries, the Commission testified at two congressional hearings in fiscal year 2001. On October 13, 2000, Chair Murphy and Vice Chair Steer testified at an oversight hearing before the Senate Criminal Justice Oversight Subcommittee. Chair Murphy reported on the Commission's progress in addressing the backlog of legislative directives and sentencing-related legislation from the 105th Congress that resulted from the year-long absence of voting commissioners and updated the subcommittee on the Commission's work for the guideline amendment cycle ending May 1, 2001. Chair Murphy also spoke about the Commission's 15-year review of the operation of the guidelines, its economic crime symposium, and the agency's budget situation. Vice Chair Steer testified about trends in departure rates and provided extensive background material using the Commission's sentencing database. On March 21, 2001, Chair Murphy testified before the Senate Caucus on International Narcotics Control about changes made to the federal sentencing guidelines for ecstasy trafficking in response to the Ecstasy Anti-Proliferation Act of 2000, Pub. L. 106-310. Chair Murphy spoke about the harmful pharmacological and physiological effects, the trafficking pattern, and use of ecstasy by minors, as well as the new guideline's expected significant impact on sentences for serious ecstasy traffickers.