

Chapter Two

The Sentencing Guidelines and Other Policy Issues

Reports to Congress

The Sentencing Reform Act created the Commission and enumerated its duties and powers.⁵ Among other things, the Sentencing Reform Act specifically authorized the Commission to “make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy.”⁶ The Commission often exercises this authority by submitting written reports to Congress, either on its own initiative or in response to specific directives from Congress. In preparing such reports, the Commission reviews legislation, analyzes sentencing data, studies scholarly literature, and elicits the views of stakeholders in the criminal justice system. Throughout the fiscal year, the Commission’s policy agenda included work on several reports to Congress.

Report on Mandatory Minimum Penalties

In October 2011, the Commission submitted a report to Congress assessing the impact of mandatory minimum penalties on federal sentencing. The Commission prepared the report pursuant to a congressional directive contained in section 4713 of the Matthew Shepherd and James Byrd, Jr. Hate Crimes Prevention Act of 2009,⁷ the Commission’s general authority under 28 U.S.C. §§ 994-995, and its specific authority under 28 U.S.C. § 995(a)(20). Preparation of the report spanned multiple fiscal years, during which time the Commission reviewed legislation, analyzed sentencing data, and studied scholarly literature. The Commission also sought the views of stakeholders in the criminal justice system in a variety of ways. The Commission consulted with its advisory groups and representatives from all three branches of the federal government, and heard

from social scientists, scholars, and others who apply or study mandatory minimum sentencing provisions.

Among other things, the statutory directive required the Commission to assess the compatibility of mandatory minimum penalties with the federal guideline system established under the Sentencing Reform Act and as modified by the Supreme Court’s decision in *Booker v. United States*⁸ and to discuss mechanisms other than mandatory minimum sentencing laws by which Congress may take action with respect to sentencing policy. To fulfill this part of the statutory directive, the report provided general findings and conclusions regarding mandatory minimum penalties and the federal sentencing guidelines. The Commission expressed its belief that a strong and effective sentencing guidelines system best serves the purposes of the Sentencing Reform Act. The Commission concluded that if Congress decides to exercise its power to direct sentencing policy by enacting mandatory minimum penalties, such penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently. The Commission suggested that Congress request prison impact analyses from the Commission as early as possible in its legislative process whenever it considers enacting or amending mandatory minimum penalties. The Commission recommended that Congress consider whether a statutory “safety valve” mechanism similar to the one available for certain drug trafficking offenders at 18 U.S.C. § 3553(f) may be appropriately tailored for low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties.

The report also included specific findings and recommendations regarding the four major offense types studied in the report. Regarding drug offenses, the Commission recommended that Congress consider marginally expanding the safety valve at 18 U.S.C. § 3553(f) to include certain non-violent

⁵ See generally 28 U.S.C. §§ 994-995.

⁶ See 28 U.S.C. § 995(a)(20).

⁷ Pub L. No. 111-84.

⁸ 543 U.S. 220 (2005).

offenders who receive two, or perhaps three, criminal history points under the guidelines. The Commission also recommended that Congress reassess both the severity and scope of the recidivist provisions at 21 U.S.C. §§ 841 and 960.

The Commission made several recommendations concerning firearm offenses. First, the Commission suggested that Congress consider amending 18 U.S.C. § 924(c) so that the enhanced mandatory minimum penalties for a “second or subsequent” offense apply only to prior convictions, and further consider amending the penalties for such offenses to lesser terms. The Commission also proposed that Congress eliminate the “stacking” requirement and amend 18 U.S.C. § 924(c) to give the sentencing court discretion to impose sentences for multiple violations of section 924(c) concurrently with each other. Finally, the Commission recommended that Congress consider clarifying the statutory definitions of the underlying and predicate offenses that trigger mandatory penalties under 18 U.S.C. § 924(c) and the Armed Career Criminal Act to reduce the risk of inconsistent application and litigation that those definitions have fostered and consider more finely tailoring the definitions of the predicate offenses that trigger the Armed Career Criminal Act’s mandatory minimum penalty.

The report noted that the Commission’s preliminary review of the available sentencing data suggests that the mandatory minimum penalties for certain non-contact child pornography offenses may be excessively severe and as a result are being applied inconsistently. This report made no specific recommendations relating to child pornography offenses, in light of the more comprehensive study of child pornography offenses being undertaken by the Commission and expected release of a report concerning those offenses. Finally, the report included a finding that the problems associated with certain mandatory minimum penalties are not observed, or are not as pronounced, in identity theft offenses, which the Commission attributed, in part, to the fact that 18 U.S.C. § 1028A requires a relatively short mandatory penalty and does not require stacking of penalties for multiple counts. The Commission also noted limitations in its ability to make specific findings about the application of mandatory minimum penalties in identity theft cases

because the aggravated identity theft statute is relatively new and is used in only a handful of districts.

Report on National Security Offenses

In December 2011, the Commission submitted a report to Congress in response to the directive in Section 107 of the Comprehensive Iran Sanctions Accountability and Divestment Act of 2010.⁹ The directive required the Commission to “study and submit to Congress a report on the impact and advisability of imposing a mandatory minimum sentence for violations of” the offenses under Section 5(a) of the United Nations Participation Act of 1945¹⁰; Sections 38, 39, and 40 of the Arms Export Control Act¹¹; and the Trading With the Enemy Act.¹²

The report included a discussion of the Commission data analyzed during the preparation of the report, which revealed that only one of the statutes identified in the directive, section 2778, is used with any frequency.¹³ The report noted that section 2778 is used to prosecute individuals involved in a broad range of conduct. For example, the unlicensed exportation to Mexico of a single firearm, intended solely for personal use, violates the statute, as well as conduct that is “particularly damaging to national security”¹⁴ because it involves the “provision of war armaments or other goods and services to: (1) State sponsors of international terrorism; (2) foreign nations subject to an arms embargo; (3) designated foreign terrorists or

⁹ Pub. L. No. 111–195.

¹⁰ 22 U.S.C. § 287c(a).

¹¹ 22 U.S.C. §§ 2778, 2779, and 2780.

¹² 50 U.S.C. App’x §§ 1 *et seq.*

¹³ Since fiscal year 1999, Commission data revealed that the only statute listed in the directive used with any frequency is section 2778. Commission data revealed no convictions under sections 287c, 2779, or 2780 and only 6 individual offenders have been convicted under the Trading with the Enemy Act, 50 U.S.C. App’x §§ 1 *et seq.* For purposes of the analyses in the report, the Commission used fiscal years 2008–2010 in order to provide Congress with the most current information concerning sentencing practices for the statutes listed in the directive.

¹⁴ See Letter from Lisa O. Monaco, Assistant Attorney General for National Security, U.S. Dept. of Justice, to Judge Patti B. Saris, Chair, U.S. Sentencing Commission at 5 (Sept. 9, 2011).

proliferators of Weapons of Mass Destruction; (4) a chemical, biological, or nuclear weapons program; or (5) a missile program.”¹⁵

In light of these facts, the Commission concluded that mandatory minimum penalties for the offenses listed in the directive, if enacted, may be too broad, noting that section 2778 covers a wide range of offense conduct that results in varying degrees of impact on national security. A mandatory minimum penalty applicable to all section 2778 offenses may be overly broad for the full range of conduct prosecutable under that statute, which could result in inconsistencies in application similar to those noted in the Commission’s *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011).¹⁶ There may be cases in which a mandatory minimum penalty for violating section 2778 is perceived as too severe because the offense had little impact on national security. The report further noted that although the Commission recognizes the potential threat to national security caused by certain conduct covered by the statutes listed in the directive, there is a difference of opinion among the commissioners regarding whether Congress should enact mandatory minimum penalties for these statutes. The Commission unanimously recommended that if Congress decided to enact mandatory minimum penalties for these offenses, such penalties should be limited to offenses that are damaging to national security.

Report on the Impact of *United States v. Booker* on Federal Sentencing

Throughout the fiscal year, the Commission prepared to submit a report to Congress on the impact of the Supreme Court’s *United States v. Booker* decision on federal sentencing. In preparing this report, the Commission analyzed 15 years of sentencing data at the circuit, district, and judge levels and by specific offense type and performed an updated multivariate analysis on demographic differences in sentencing. In addition to reviewing case law and studying scholarly literature, the Commission reexamined the views of those

stakeholders in the federal criminal justice system that had testified and submitted written comments at the Commission’s seven regional public hearings in 2009 and 2010 and the views of federal district judges contained in responses to the Commission’s 2010 Survey of United States District Judges. The Commission also held a public hearing on February 16, 2012 on federal sentencing options after *Booker*.

At the February 2012 public hearing, the Commission heard testimony from over twenty witnesses including district and circuit court judges; representatives from the Department of Justice, the Federal Public and Community Defenders, and the American Bar Association; the director of the Federal Bureau of Prisons; defense attorneys; members of the academic community; and several community interest groups. Following a panel about the current state of federal sentencing, participants engaged in a roundtable discussion about improving the advisory guideline system, which focused discussion on the Commission’s proposals set forth in the Chair’s October 12, 2011 prepared testimony before the House Judiciary Committee’s Subcommittee on Crime, Terrorism, and Homeland Security; and a roundtable discussion about the different options for implementing a mandatory guideline system that comports with the Sixth Amendment, which included discussion of so-called “topless” guidelines, “*Blakely*-ization,” and a proposal for reform by the Honorable William K. Sessions III, United States District Judge for the District of Vermont and a former chair of the Commission. Various academics, community interest groups, and practitioners then compared the options for reforming the present advisory guidelines system. The Commission’s report was released in early 2013.

Report on Penalties for Child Pornography Offenses

Throughout the fiscal year, the Commission prepared a report to Congress examining the penalties for child pornography offenses, as a complement to its 2009 report, *History of the Child Pornography Guidelines*, which chronicled the federal non-production child pornography guidelines from their inception. The Commission continued this examination because, in the past two decades, cases in which offenders have been sentenced under the

¹⁵ *Id.* at 5-6.

¹⁶ See Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) at 345.

child pornography guidelines, while only a small percentage of the overall federal criminal caseload, has grown substantially both in total numbers and as a percentage of the total caseload. In addition, since the enactment of the PROTECT Act of 2003 and *United States v. Booker*, there has been a steadily decreasing rate of sentences imposed within the applicable guidelines ranges in non-production cases. The Commission received input from a variety of sources, including the Department of Justice and the defense bar, that §2G2.2, which addresses non-production child pornography offenses, and corresponding penal statutes should be reexamined and revised. Further, in the Commission's 2010 survey of the federal judiciary, approximately 70 percent of federal district judges who responded indicated that guideline penalty ranges under §2G2.2 for receipt and possession of child pornography offenses are too high, and that the statutory mandatory minimum penalty for receipt offenses is too high.

In preparing this report, the Commission reviewed the most current social science research, case law, legislation concerning child pornography offenses, and conducted extensive data analyses examining several thousand federal child pornography cases. It reviewed the presentence reports and other sentencing documents in virtually all cases in which federal offenders were sentenced under the child pornography guidelines in fiscal year 2010 (both production and non-production cases) and all cases in which federal offenders were sentenced under the non-production guidelines in fiscal years 1999 and 2000. The Commission also reviewed the sentencing documents in federal non-production cases from the first quarter of fiscal year 2012, and studied the recidivism rates of non-production offenders sentenced in fiscal years 1999 and 2000. The Commission sought the views of stakeholders in the criminal justice system in a variety of ways, including by conducting regional public hearings on sentencing generally and consulting with its standing advisory groups. The Commission also held a public hearing on February 15, 2012, where it heard testimony from experts in technology and behavioral social sciences related to child pornography and sex offenses, members of the judiciary, representatives from the Department of Justice, the Federal Public and Community

Defenders, the National Center for Missing and Exploited Children and other victim advocates, law enforcement officials, and treatment providers. The Commission's report was released in early 2013.

Amendments Promulgated

The legislation creating the 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."¹⁷ Given this congressional directive, 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 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 Congress, by law, provides otherwise. Occasionally, Congress also grants the Commission special authority to issue temporary, "emergency" amendments in connection with particular legislation.

Proposed amendments were published in the *Federal Register* on January 19, 2012. The Commission received written comment on the proposed amendments from a variety of sources, as will be discussed in more detail below. The Commission also conducted a public hearing on the proposed amendments on March 14, 2012. On April 30, 2012, the Commission submitted to Congress multiple amendments to the sentencing guidelines, commentary, and policy statements. For these amendments, the Commission established an effective date of November 1, 2012.

¹⁷ See 28 U.S.C. § 994(o).

Table 2

PUBLIC HEARING WITNESS LIST
Federal Child Pornography Crimes
Washington, DC
February 15, 2012

James Fottrell

*Child Exploitation and Obscenity Section,
 Criminal Division
 United States Department of Justice
 Washington, DC*

Gerald R. Grant

*Digital Forensics Investigator
 Office of the Federal Public Defender
 Western District of New York*

Brian Levine, Ph.D.

*Professor, Department of Computer Science
 University of Massachusetts, Amherst
 Amherst, Massachusetts*

Gene G. Abel, M.D.

*Medical Director, Behavioral Medicine Institute
 Founder and President, Abel Screening, Inc.
 Atlanta, Georgia*

Jennifer A. McCarthy, Ph.D.

*Assistant Director & Coordinator, Sex Offender
 Treatment Program
 New York Center for Neuropsychology & Forensic
 Behavioral Science
 Brooklyn, New York*

Michael C. Seto, Ph.D.

*Director of Forensic Rehab. Research,
 Integrated Forensic Program
 Royal Ottawa Health Care Group
 Brockville, Ontario*

Richard Wollert, Ph.D.

Vancouver, Washington

Janis Wolak

*Senior Researcher
 Crimes Against Children Research Center
 Durham, New Hampshire*

Steven DeBrotta

*Assistant United States Attorney
 United States Department of Justice
 Southern District of Indiana*

Captain Kirk Marlowe

*Virginia State Police Bureau of Criminal Investigation
 High Tech Crimes Division
 NOVA-DC Internet Crimes Against Children Task Force
 Richmond, Virginia*

Michelle Collins

*Director, Exploited Child Unit
 National Center for Missing and Exploited Children
 Alexandria, Virginia*

Sharon Cooper, M.D.

*Adjunct Professor, Pediatrics
 University of North Carolina-Chapel Hill
 School of Medicine
 Fayetteville, North Carolina*

Susan Howley

*Chair, Victims Advisory Group
 Washington, DC*

Honorable Margaret C. Rodgers

*Chief Judge
 Northern District of Florida*

Francey Hakes

*National Coordinator, Child Exploitation Prevention
 & Interdiction
 United States Department of Justice
 Washington, DC*

Deirdre von Dornum

*Assistant Federal Defender
 Federal Defenders of New York
 Southern & Eastern District of New York*

Table 2 (continued)

PUBLIC HEARING WITNESS LIST
Federal Sentencing Options After Booker
Washington, DC
February 16, 2012

Hon. Paul Barbadoro

*United States District Judge
District of New Hampshire*

Matthew Axelrod

*Associate Deputy Attorney General
United States Department of Justice*

Charles E. Samuels, Jr.

*Director
Federal Bureau of Prisons*

Raymond Moore

*Federal Public Defender
Districts of Colorado and Wyoming*

Hon. Gerard Lynch

*United States Circuit Judge
United States Court of Appeals for the Second Circuit*

Hon. Andre M. Davis

*United States Circuit Judge
United States Court of Appeals for the Fourth Circuit*

Henry Bemporad

*Federal Public Defender
Western District of Texas*

Professor Susan R. Klein

*Alice McKean Young Regents Chair in Law
University of Texas School of Law*

Matthew Miner

*Attorney
Washington, DC*

Hon. Theodore McKee

*Chief United States Circuit Judge
Third Circuit Court of Appeals*

Hon. William K. Sessions III

*United States District Judge
District of Vermont*

Michael Nachmanoff

*Federal Public Defender
Eastern District of Virginia*

Professor Frank Bowman

*Floyd R. Gibson Missouri Endowed Professor of Law
University of Missouri School of Law*

Michael Volkov

*Attorney
Washington, DC*

Professor Sara Sun Beale

*Charles L. B. Lowndes Professor of Law
Duke University School of Law*

Professor Michael Tonry

*Russell M. and Elizabeth M. Bennett Chair
in Excellence
University of Minnesota Law School*

Professor Douglas Berman

*Robert J. Watkins/Procter & Gamble Professor of Law
The Ohio State University Moritz College of Law*

Mary Price

*General Counsel
Families Against Mandatory Minimums*

Marc Mauer

*Executive Director
The Sentencing Project*

David Debold

*Chair
Practitioners Advisory Group*

Lisa Wayne

*President
National Association of Criminal Defense Lawyers*

James E. Felman

*Co-chair, Criminal Justice Section Committee
on Sentencing
American Bar Association*

Table 2 (continued)

PUBLIC HEARING WITNESS LIST
Proposed Amendments to the Federal Sentencing Guidelines
Washington, DC
March 14, 2012

John Buretta

*Deputy Assistant Attorney General of the
Criminal Division
United States Department of Justice*

Kathryn Nester

*Federal Public Defender
District of Utah*

David Debold

*Chair
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Marjorie Peerce

*New York Council of Defense Lawyers
New York, New York*

Samuel Buell

*Professor of Law
Duke University School of Law
Durham, North Carolina*

Sara Stephens

*President
Appraisal Institute
Chicago, Illinois*

David Howell

*Executive Vice President & Chief Information Officer
McEneaney Associates Inc., Realtors
McLean, Virginia*

Teresa Brantley

*Chair
Probation Officers Advisory Group*

Amy Pope

*Deputy Chief of Staff & Counselor to the
Assistant Attorney General of the Criminal Division
United States Department of Justice*

Melanie Morgan

*Morgan Pilate, LLC
Olathe, Kansas*

Scott Masumoto

*Assistant Special Agent in Charge
Washington Division
Drug Enforcement Administration*

Michael Baumann, Ph.D.

*Staff Scientist
Intramural Research Program
National Institute of Drug Abuse*

Penny Beardslee

*Deputy Federal Public Defender
Eastern District of Michigan*

Tristram Coffin

*United States Attorney
District of Vermont*

Marjorie Meyers

*Federal Public Defender
Southern District of Texas*

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

The Commission responded to the directives in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),¹⁸ which required the Commission to review the guidelines and policy statements applicable to persons convicted of securities, mortgage and financial institution fraud. Section 1079A(a)(1)(A) of the Dodd-Frank Act directed the Commission to “review and, if appropriate, amend” the guidelines and policy statements applicable to “persons convicted of offenses related to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and policy statements account for the potential and actual harm to the public and financial markets from the offenses.” Section 1079A(a)(2)(A) directed the Commission to “review and, if appropriate, amend” the guidelines and policy statements applicable to “persons convicted of fraud offenses related to financial institutions or federally related mortgage loans and any other similar provisions of law, to reflect the intent of Congress that the penalties for the offenses under the guidelines and policy statements ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions.”

In responding to these two directives, the Commission undertook an analysis of sentencing data for cases sentenced under USSG §2B1.1 involving securities fraud, commodities fraud, bank fraud, and mortgage fraud, including an examination of the guideline application factors relevant to those offenses. The Commission also studied its prior work in these areas, including its “Economic Crime Package,” a six-part amendment to the guidelines effective November 1, 2001, as well as its implementation of the directives relating to fraud offenses, obstruction of justice offenses, and other economic crimes in the Sarbanes-Oxley Act of 2002.¹⁹ The Commission also received

testimony at a public hearing and written public comment from the Department of Justice, the Federal Public and Community Defenders, the Commission’s advisory groups, representatives of the real estate industry, and other interested parties.

Based upon consideration of its analysis and the comment and testimony received, the Commission promulgated a multi-part amendment responding to the two directives to the Commission in the Dodd-Frank Act. The amendment—

- implemented the directive on securities fraud and similar offenses by (1) amending §2B1.1 (Theft, Property Destruction, and Fraud) to provide a special rule for determining actual loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity based on what is sometimes referred to as the “modified rescissory method”; (2) amending §2B1.4 (Insider Trading) to provide a minimum offense level of 14 if the offense involved an organized scheme to engage in insider trading; and (3) amending the Commentary to §2B1.4 to provide more guidance on the applicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill) in insider trading cases.
- implemented the directive on mortgage fraud and financial institution fraud, (1) amending the credits against loss rule in the Commentary to §2B1.1 for cases involving mortgage fraud where the collateral has not been disposed of by the time of sentencing to provide that, in such a case, the fair market value is determined as of the date on which the guilt of the defendant has been established, and there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value; and (2) amending the Commentary to §2B1.1 to provide that a defendant should not avoid the application

¹⁸ Pub. L. No. 111–203.

¹⁹ Pub. L. No. 107–204.

of the 4-level enhancement in §2B1.1(b)(15)(B) (which applies if the offense involved specific types of financial harms) because the harm that was otherwise likely to result from the offense conduct did not occur because of fortuitous federal government intervention, such as a “bailout”; and

- implemented both directives, by amending the departure provisions in §2B1.1 to provide additional examples of cases in which a departure may be warranted.

In promulgating this amendment at its April 13, 2012 public meeting, the Commission noted that it received public comment from a number of stakeholders that a broader review of the operation of the fraud guidelines should be undertaken. In light of its analysis and this public comment, the Commission concluded that continued analysis of the fraud guidelines is warranted in future amendment cycles and that the Commission will continue its multi-year review of the fraud guideline.²⁰

Human Rights

The Commission completed a multi-year study of the guidelines’ treatment of offenses involving serious human rights violations, including genocide, torture, war crimes, and the use or recruitment of child soldiers. In 2009, Congress authorized a new section within the Department of Justice “with responsibility for the enforcement of laws against suspected participants in [such] offenses.”²¹ These “serious human rights offenses” are punishable under federal law as violations of 18 U.S.C. §§ 1091, 2340A, 2441, and 2442. One of the goals of this statute was to prevent individuals who have committed serious human rights offenses abroad from avoiding responsibility by coming to

the United States. In addition to prosecuting serious human rights offenses directly, therefore, enforcement efforts include prosecuting for immigration or naturalization fraud those individuals whose fraud conceals their involvement or possible involvement in a serious human rights offense.

The Commission studied both the various Chapter Two guidelines applicable to serious human rights offenses and the guideline applicable to immigration and naturalization fraud offenses. The Commission’s study included that analysis of data, consideration of information concerning prior federal prosecutions for human rights violations, and review of the legislative history of substantive human rights statutes. The Commission also received testimony at a public hearing and written public comment from the Department of Justice, the Federal Public and Community Defenders, the Commission’s Probation Officers Advisory Group, the Department of Homeland Security, and other interested parties.

As a result of the study, the Commission promulgated an amendment that—

- revised the guidelines applicable to cases involving human rights violations by (1) establishing a new Chapter Three adjustment at §3A1.5 (Serious Human Rights Offense) that applies if the defendant was convicted of a serious human rights offense and provides a tiered adjustment corresponding to the differing statutory penalties that apply to such offenses; (2) amending §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport) to establish a new specific offense characteristic that provides tiered enhancements and minimum offense levels if the defendant committed an immigration fraud offense to

²⁰ See *U.S. Sent’g Comm’n. Public Meeting Minutes*, Washington, DC (Apr. 13, 2012), available at www.ussc.gov/Legislative_Public_Affairs_Public_Hearings_and_Meetings.

²¹ Pub. L. No. 111–122.

conceal the defendant's participation in a serious human rights offense or to conceal the defendant's involvement in a military, paramilitary, or police organization that was involved in a serious human rights offense; and (3) ensuring that the offense of committing a war crime in violation of 18 U.S.C. § 2441 is referenced to the appropriate guidelines in Appendix A (Statutory Index).

The Commission concluded that this approach accounts for the particularly egregious nature of serious human rights offenses while generally maintaining the proportionality provided by the various Chapter Two guidelines that cover such offenses.

BZP (N-Benzylpiperazine) Offenses

The Commission studied whether to add the Schedule I stimulant BZP (N-Benzylpiperazine) to the Drug Equivalency Table provided in Application Note 10(D) in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and, if so, to determine the marijuana equivalency for BZP. The Commission undertook this study in response to concerns raised by the Second Circuit Court of Appeals and others regarding the sentencing of offenders convicted of offenses involving BZP.²²

The Commission analyzed federal sentencing data and case law involving offenders convicted of offenses involving BZP, reviewed the relevant scientific literature, and received expert testimony relating to BZP at a March 2012 hearing in Washington, DC. The Commission also reviewed public comment and hearing testimony received from the Department of Justice, the Federal Public and Community Defenders, probation officers, the Commission's advisory groups, and others.

In light of this analysis, comment, and testimony, the Commission concluded that BZP is a stimulant with pharmacologic properties similar to that of amphetamine, but is only one-tenth to one-twentieth as potent as amphetamine, depending on the particular user's history of drug abuse. Accordingly, in order to promote uniformity in sentencing BZP offenders and to reflect the best available scientific evidence, the Commission promulgated an amendment that—

- revised the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to establish a marijuana equivalency for offenses involving BZP (N-Benzylpiperazine, a Schedule I stimulant) providing that 1 gram of BZP equals 100 grams of marijuana.

Safety Valve in §2D1.11

The Commission studied whether to amend §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to provide a sentence reduction if the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) (commonly referred to as the "safety valve" criteria) similar to the 2-level decrease at subsection (b)(16) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The Commission undertook this study to address proportionality concerns in offenses involving list I and list II chemicals sentenced under §2D1.11. List I chemicals are important to the manufacture of a controlled substance and usually become part of the final product, while list II chemicals are generally used as solvents, catalysts, and reagents.²³ Section 2D1.11 is generally structured to provide base offense levels that are tied to, but less severe than,

²² See *United States v. Figueroa*, 647 F.3d 466 (2d Cir. 2011).

²³ See USSG §2D1.11, comment. (backg'd.).

the base offense levels in §2D1.1 for offenses involving the final product.

The Commission analyzed federal sentencing data and case law involving offenders convicted of offenses involving list I and list II chemicals sentenced under §2D1.11. The Commission also reviewed public comment received from the Department of Justice, the Federal Public and Community Defenders, probation officers, the Commission’s advisory groups, and others. Finally, the Commission received testimony at a March 2012 hearing in Washington, DC

In light of this analysis, comment, and testimony, the Commission promulgated an amendment that—

- amended §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to add a new “safety valve” reduction for listed chemical offenses parallel to the “safety valve” reduction in §2D1.1 for controlled substance offenses (*i.e.*, it provides a 2-level decrease if the defendant meets the “safety valve” criteria set forth in subdivisions (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases)) and new commentary relating to the “safety valve” reduction in §2D1.11 that is consistent with the commentary relating to the “safety valve” reduction in §2D1.1.²⁴

The Commission determined that adding the 2-level reduction for meeting the safety valve criteria in §2D1.11 will promote the proportionality the Commission has intended to achieve between §§2D1.1 and 2D1.11.

²⁴ See USSG §2D1.1, comment. (n. 21).

Circuit Conflicts

The Commission’s statutory obligation to “periodically review and revise the guidelines”²⁵ includes the task of eliminating conflicts among the circuit courts with respect to the interpretation of the guidelines.²⁶ The Commission considered two circuit conflicts during fiscal year 2012 and promulgated amendments to resolve those circuit conflicts. The amendments—

- addressed a circuit conflict over the application of the enhancements found at subsections (b)(1)(A) and (B) of §2L1.2 (Unlawfully Entering or Remaining in the United States) to a defendant who had a prior drug trafficking conviction and was sentenced on two more separate occasions for that prior conviction (*e.g.*, because of a revocation of probation, parole, or supervised release), to provide that any additional term of imprisonment imposed upon revocation is counted only if it was imposed before the defendant was deported or unlawfully remained in the United States.
- addressed a circuit conflict regarding when a prior sentence for a misdemeanor offense of driving while intoxicated or driving under the influence (or any similar offense by whatever name it is known) is counted toward the defendant’s criminal history score by amending the Commentary to §4A1.2 (Definitions and Instructions for Computing Criminal History) to clarify that convictions for driving while intoxicated and similar offenses are always counted, without regard to how the offenses are classified.

²⁵ See 28 U.S.C. § 994(o).

²⁶ *Braxton v. United States*, 500 U.S. 344 (1991) (holding that the initial and primary task of eliminating conflicts among the circuit courts with respect to the statutory interpretation of the guidelines lies with the Commission).

Miscellaneous and Technical Amendments

Other guideline amendments promulgated in fiscal year 2012 made various miscellaneous and technical changes to the guidelines that—

- responded to an application issue regarding the applicable guideline range in a case in which the defendant is sentenced on multiple counts of conviction, at least one of which involves a mandatory minimum sentence that is greater than the minimum of the otherwise applicable guideline range, by amending §5G1.2 (Sentencing on Multiple Counts of Conviction) to clarify that when any count involves a mandatory minimum that restricts the defendant’s guideline range, the guideline range is restricted as to all counts.
- responded to jurisprudence and legislation by (1) repealing the policy statement at §5K2.19 (Post-Sentencing Rehabilitative Efforts) in light of *Pepper v. United States*, 131 S. Ct. 1229 (2011); (2) responding to the Cell Phone Contraband Act of 2010, Pub. L. 111–225, which amended 18 U.S.C. § 1791 to make it a class A misdemeanor to provide a mobile phone or similar device to an inmate or for an inmate to possess a mobile phone or similar device, by amending §2P1.2 (Providing or Possessing Contraband in Prison) to ensure that a prison contraband offense involving a cellular phone will receive a base offense level of at least 6; and (3) ensuring that certain offenses amended or created by the Prevent All Cigarette Trafficking Act of 2009, Pub. L. 111–154; the Indian Arts and Crafts Amendments Act of 2010, Pub. L. 111–211; and the Animal Crush Video Prohibition Act of 2010, Pub. L. 111–294, are referenced to the appropriate guidelines in Appendix A (Statutory Index).
- made various technical and conforming changes to the guidelines to promote

accuracy, completeness, and stylistic consistency, including a reorganization of the application notes in §§2D1.1 and 2D1.11 so that the order of the application notes better reflects the order of the guidelines provisions to which they relate.

Assistance to Congress

The Sentencing Reform Act gives the Commission the responsibility to advise Congress about sentencing and related criminal justice issues. In fiscal year 2012 the Commission worked closely with Members of Congress and their staffs to provide them timely sentencing-related information and analyses.

The Commission continued to provide Congress with extensive real-time sentencing data, analysis, and reports on federal sentencing trends. These materials were delivered routinely to Congress and made available through the Commission’s website in order to assist Congress in its work on criminal justice issues. In fiscal year 2012, the Commission launched its Interactive Sourcebook, which enables Congress and the public to have greater access to Commission data.

In October 2011, Honorable Patti B. Saris, Chair of the Commission, testified before the House Judiciary Committee, Subcommittee on Crime, Terrorism, & Homeland Security at a hearing entitled *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker*. The Commission made recommendations to Congress for strengthening the federal sentencing guidelines system, including providing more robust appellate review, clarifying statutory directives to the Commission and sentencing courts that are in tension, and requiring courts to give the guidelines substantial weight at sentencing.

The Commission held numerous briefings with congressional staff throughout the year regarding the Commission’s recommendations, the Commission’s policy priorities and proposed

amendments; developing sentencing case law; the case law's impact on the Commission's work and on federal sentencing generally; and information received by the Commission during its public hearings. The Commission also conducted congressional briefings and answered congressional inquiries in other areas of criminal law, including health care and other white collar frauds, economic espionage offenses, sex offenses, and drug offenses.

In particular, the Commission conducted numerous congressional briefings related to the Commission's October 2011 report to Congress assessing the impact of mandatory minimum penalties on federal sentencing, including the Commission's recommendations that if Congress decides to enact mandatory minimum penalties, such penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to those offenders who warrant such punishment, and (3) be applied consistently.

On August 7, 2012, the Commission submitted a letter for inclusion in the record of the August 1, 2012, Senate Judiciary Committee's hearing, "Rising Prison Costs: Restricting Budgets and Crime Prevention Options." The letter provided information regarding the growth of the federal prison population and discussed some of the factors that have contributed to the increase. The letter also reiterated the recommendations contained in its October 2011 report to Congress on mandatory minimum penalties.

The Commission routinely supplied Congress with pertinent publications and resource materials including the *Guidelines Manual*, annual reports and sourcebooks, research reports, and other published materials.

The year 2012, as used in this report, refers to the fiscal year 2012 (October 1, 2011, through September 30, 2012).

