

*Day One—Plenary Session II*  
**Brief Overview of the**  
**"Economic Crime Package"**

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**PLENARY SESSION II:  
BRIEF OVERVIEW OF THE "ECONOMIC CRIME PACKAGE"**

VICE CHAIR STEER: The next part of our program involves a presentation from two of our experienced Commission staff members who are going to briefly describe the so-called "Economic Crime Package."

Andy Purdy, our acting general counsel, will handle that portion of the presentation. And Dr. Courtney Semisch, one of our senior researchers, will present a statistical picture of sentencing as it currently exists for the so-called "Economic Crime Offenses."

Andy, I will turn the floor over to you.

MR. PURDY: Thank you. I have been asked to, first, give an overview of how the guidelines work as a context for the next two days; but, particularly, for a number of our participants who don't have very much familiarity with the federal sentencing guidelines.

Now the Sentencing Reform Act of 1984 that was discussed earlier today established the Sentencing Commission and led to the creation of the sentencing guidelines. The Sentencing Reform Act was trying to further the four purposes of sentencing laid out in the statute, and there was some discussion earlier today about whether the fact that there is a deterrent or there isn't a deterrent effect should affect a particular sentencing policy decision.

We have to keep in mind that there are four purposes of sentencing that the Act speaks of: deterrence, just punishment, incapacitation and rehabilitation.

The Sentencing Reform Act attempted to promote honesty in sentencing by abolishing parole on the federal level and significantly reducing good time credits. It also promoted uniformity in sentencing by attempting to reduce unwarranted disparity. And it attempted to promote proportionality in sentencing by creating a system that imposes appropriately different sentences for criminal conduct of differing severity. We will see, briefly, how the guidelines attempt to achieve some of these purposes.

Now, one of the main building blocks for the drafting of the sentencing guidelines was to look at data. And you will recall that Dr. Rebovich showed in his study that people disagree about which kinds of offenses deserve more or less punishment. So, what the first Sentencing Commission did—and I notice the first chair, Judge Wilkins, just entered the room a moment ago—was to take a close look and analyze sentencing data as to what judges did before the guidelines, what factors the judge found to be significant, and how much of a difference it made in a particular sentence.

So, for example, in looking at robbery cases, they found that differences in the amount of money taken made a difference, as did whether or not a weapon was used or whether or not injury was caused by the offense. So that was a fundamental starting point for the drafting of the guidelines, particularly the punishment levels, which is one of the subjects that we will be talking about today and tomorrow.

But the original Commission made a change from past practice in the white collar and the economic crime areas. The Commission tried to set up punishment levels that would reduce the percentage of defendants for these offenses who receive straight probation and increase the percentage who receive at

least some deprivation of liberty—not necessarily straight jail, but perhaps some alternatives to incarceration which we will talk about briefly.

Now, the sentencing guidelines manual is the main way that you get to this, the sentencing table—and this is just a portion of the sentencing table. It goes up to level 12 and then jumps up to level 43 so that you can read the numbers.

But, the vertical axis is offense seriousness, so the guidelines allow the users to come up with an offense level for each defendant. And the horizontal axis comes up with a criminal history category for each defendant, and the intersection of the points leads to a range.

In this example, you see Offense Level 8, Criminal History Category IV, leads to a sentencing range of 10 to 16 months. (See Figure Purdy-1.) As a general proposition, when the sentencing judge is faced with a particular range, the judge will impose a sentence within that range unless there is a legally sufficient reason to depart from the range.

And the sentencing guidelines are often thought about in terms of this as the whole process. But, as Judge Conaboy mentioned time and time again—not that I ever got tired of hearing it, but he may have gotten tired of saying it—that it is really two steps. You come up with your range, but the judge's role is not yet done. The judge has to determine what to do in the range and has to determine whether or not to depart from the sentencing range.

Now, when you look at the table, the offense levels, each offense level is about a 12.5 percent difference in sentencing as you go up. The Sentencing Commission provided ranges that were the maximum permissible under the Sentencing Reform Act, where the maximum of the range is no greater than 25 percent greater than the minimum of the guidelines range, except, of course, at the low end where you have a minimum of six months.

Now, the sentencing guidelines structured, but didn't eliminate, the exercise of judicial discretion, and you can see from the sentencing data from the most recent year available that about 65 percent of guideline sentences in the last year were within the guideline range. A small fraction, under one percent, were above the range, and about 16 percent were below the range.

About 19 percent of the cases resulted in a downward departure from the range on a government motion that the defendant provided substantial assistance in the investigation or prosecution of another person.

The guidelines are an offense of conviction-based system, for the most part, and various statutes are directed to particular guidelines. The kinds of offenses that we will be talking about today are particularly driven, frequently, to the fraud guideline that I will talk about. Courtney will talk about the theft guideline.

The basic structure of the guidelines in Chapter Two are to provide a base offense level which is essentially a minimum level for the defendants convicted of the statutes that take you to that particular guideline; quite a number of statutes take you to the fraud guideline.

Then you have specific offense characteristics and they can differ depending on which Chapter Two guideline you are in. But, under subsection (b)(1), as you see up on the screen, is a synopsis of the loss table that we will talk about in a second. So, if the loss—some would call it the harm caused by the offense—exceeded \$2,000, you start getting increases in the severity levels. (See Figures Purdy-2, Purdy-3.)

Also, subsection (b)(2), more than minimal planning, if present in the case, results in a two-level increase, which is about a 25-percent increase in the sentence. And that particular specific offense characteristic has been used so frequently that the question has been raised about whether it is really worth the trouble of having to determine it in every case. So one of the issues that may be part of the panel discussion later will be whether or not to eliminate this particular specific offense characteristic and somehow build in the punishment levels in other places.

Another specific offense characteristic—Deputy Attorney General Holder referred to subsection (b)(3)—applies if the offense was committed through mass marketing. That was the Commission's response to the Telemarketing Act and it provides a two-level increase. Additional enhancements are applicable if the defendant misrepresents the nature of his relationship with charitable, education or religious organizations, if the offense involved evading law enforcement, conscious or reckless risk of injury, possession of a dangerous weapon or if the offense jeopardized the safety of a financial institution.

If the defendant personally derived more than \$1 million in proceeds, then four additional offense levels are added to that defendant's offense level, with a floor of level 24 establishing the minimum level for that kind of offense.

The low end of the loss table is shown here on your screen and we have, for each additional loss amount, one-level increments. The current table provides one-level increments all the way up, and Courtney will talk a little bit about the frequency of where the offenders fall for theft and fraud offenses for different loss amounts.

And you can see some examples in the loss table of higher amounts, and this has been a particular focus of the Economic Crime Package, in terms of where you might consider increasing punishment levels. You have the increases provided there.

Now, Chapter Three of the *Guidelines Manual* provides for additional increases as a way to promote proportionality, if these factors are present in any case. It doesn't depend on whether you were convicted of a particular statute that took you to a particular Chapter Two guideline.

If you qualify for a victim-related adjustment, such as your offense harmed a vulnerable victim; or for a role in the offense adjustment, if you were a leader or organizer, you get an increase. If you were a substantially less culpable participant, you will get a decrease in the offense level.

Obstruction of justice provides an additional increase. The multiple counts rules, for cases involving more than one offense of conviction, provide a mechanism by which you are directed to get to a particular offense level, using the concept that, if there is significant additional harm, then there will be some incremental punishment for that particular defendant.

Acceptance of responsibility is a provision frequently given where there is a plea agreement and it is applicable where the defendant accepts responsibility for the facts connected with the offense of conviction.

Criminal history provides the horizontal axis of the sentencing table. Prior length of sentence is the key determinant for severity of the criminal history component. The defendant's criminal justice status—was the offender in criminal justice status such as on probation at the time of the offense—and how recent was the offense, also can contribute to the significance of the criminal history score.

Now, we are showing here the low end of the sentencing table, the first 12 levels, and you can see on the far left margin the Zones A, B and C. It is within this portion of the larger sentencing table, that there are alternatives provided for the judge, alternatives to straight incarceration in those cases. (See Figure Purdy-4.)

So, when you are talking in the panel later today and discussing alternatives to incarceration, you will see the basic choices that the Commission has made about where the judge should have alternatives to straight incarceration, in the absence of a departure, of course.

Now, Zone A is the zone of maximum flexibility for the sentencing judge. If a defendant's offense level falls in this lowest end of the sentencing table, a judge may impose straight probation, some alternative like community confinement, home detention, or the like, or straight prison.

Zone B, which is a fairly narrow range of offense levels, provides somewhat less flexibility for the judge. The judge cannot give straight probation without giving a condition requiring some confinement. Zone B requires, that at a minimum, the minimum of the range be served at some kind of alternative: home detention, community confinement, or the like.

Zone C provides the least flexible range of sentencing alternatives for the sentencing judge. There, the sentencing judge faced with a defendant in that range, must give at least half of the minimum as straight incarceration and then can give additional time as alternatives.

Finally, Zone D, the remainder, makes up the great bulk of the sentencing table in which the judge must give a term of imprisonment consistent with the guideline range.

Now, we'll talk briefly about departures. If there are legally sufficient reasons involving aggravating or mitigating circumstances of a kind or to a degree that warrants a sentence outside the range, the judge has some flexibility.

Let me give you an overview of the Economic Crime Package, and I want to reiterate what Vice Chair Steer said. This is not to suggest that in the next plenary session you will be talking about the specifics of the Economic Crime Package, but just to give you some context.

The package would combine the three major kinds of economic crime guidelines—theft, fraud, and property destruction—into one guideline. That way, there will not be problems about which guideline should apply in particular cases; because of differences in those guidelines the courts have to litigate this determination. The package will put them all together, all those offenses go in one guideline with one loss table and one definition of loss.

In addition, the package revises the loss table to provide two-level steps rather than one to help reduce the need for fact finding, and it would eliminate the two-level enhancement for more than minimal planning.

Finally, it increases the punishment levels above the lower loss amounts. Courtney will show you an illustration of an alternative loss table that could be considered by the Commission to revise and increase punishment levels above the lower amounts.

And, finally, to resolve case law conflicts and to clarify the determination of loss, the package includes a major revision to the definition of loss that most of these economic crimes use.

Now, I will turn it over to Courtney.

DR. SEMISCH: Now that you have some context and understanding of how the guidelines work, I want to show you, using the most current data that we have from the Sentencing Commission, what some of the trends are for these theft and fraud offenses and also what changes could come about if, as Andy described, this kind of Economic Crime Package were to be passed by the Commission.

Overall, in 1999, the economic offenders comprised about 12,000 cases. To put that in context, we had 55,000 cases in our datafile this past year. So, while it is not the majority of offenders, it is certainly a substantial number.

The fraud cases, meaning those offenders who were sentenced under the fraud guideline, comprise about 6,000 of these, so that is about half of the economic offenders. And there were about 3,000 that were sentenced under the theft guideline this year. (See Figure Semisch-1.)

The category "referring," actually is describing cases that were sentenced under any of 19 different guidelines that range from copyright to counterfeiting, protected species, some forms of money laundering. What those guidelines have in common is that they all refer to the loss table in the fraud guideline for calculating an offense level for those offenders. Those make up almost 2,000 cases, a substantial number.

So, to any extent that the loss table is changed, those offenders certainly would be affected, and that is something to keep in mind.

For comparison purposes, I have included the number of tax cases and these are the offenders that are sentenced under the tax guidelines, comprising the smallest group of economic offenders and varying between 500 and 1,000 each year.

What I am going to be focusing on for this presentation is the data for the fraud and the theft offenders primarily because the Economic Crime Package that the previous Commission had considered talked about consolidating the fraud and theft guidelines and also since those comprise the majority of economic offenders. That is about 10,000 of the cases, so that is really the heartland of the cases we are talking about.

Both the fraud and theft guidelines have specific offense characteristics that can increase sentences for those offenders. But the analysis that we have done has shown that it is primarily the amount of loss and the use of the more than minimal planning enhancement that drives the sentences for these offenders.

In talking about loss, you can see here on the vertical axis the number of offenders sentenced under each of these guidelines, fraud and theft. And, across the bottom, is a breakdown of the fraud loss table. What is immediately apparent is that the largest number of offenders are sentenced at the lower end of the loss table, the majority of offenders have lower amounts of loss. (See Figure Semisch-2.)

In fact, if you look at that greater than \$10,000 category, for the theft offenders, two-thirds of those theft offenders are at or below that category. One-third of the fraud offenders are in that \$10,000 and under category. And the second-third of the fraud offenders are in that greater than \$20,000 to greater than \$70,000 category. Then, the remaining third of the fraud offenders are at the greater than \$120,000 and above. Point being, most of them are falling at the lower end of the loss table.

The second specific offense characteristic in both the fraud and the theft guidelines that primarily drives the sentences for these offenders is the more than minimal planning enhancement. That adds two levels for fraud and from two to four levels for theft depending on other elements being present.

Overall, 85 percent of fraud offenders receive this enhancement. For theft offenders, the number is 63 percent. So the majority of offenders for theft and fraud are getting some enhancement in their sentence for more than minimal planning.

But there is a little bit of differentiation as you look across loss amounts, where those at the very lowest levels—not necessarily the majority—are getting the enhancement; but as you get to the higher loss levels—especially for fraud—all of the offenders are getting that enhancement. (See Figure Semisch-3.)

So, if considering taking more than minimal planning out as a separate specific offense characteristic and putting it in somewhere else, one might want to take into consideration that the loss levels are related to the use of that enhancement.

And, when you look at the use of the enhancement for theft, there is that interesting downturn at the higher levels. That is a small number of cases; I think that maybe there are 15 cases there. But, there is a downturn, an interesting factor that we haven't yet explored further.

So, with loss and more than minimal planning primarily driving these sentences, the next obvious question is, "What do the sentences look like?"

The bars in this chart show the percent of offenders in each of those loss amount categories who received a sentence of incarceration. If you look at that greater than \$10,000 category, that is the first one-third mark, so one-third of the fraud offenders are in that category or below. About 50 percent of those received a term of incarceration. (See Figure Semisch-4.)

The corresponding black dot on that chart is indicating that the median sentence for those offenders was eight months. And, as you read across the chart, you see what you would expect, an increase in certainty and severity of punishment when you get to the higher levels, with, of course, the exception of the greater than \$80 million category and that one definitely stands out. And the answer to that is that there is a large proportion of those offenders getting substantial assistance departures.

Here is similar information for the theft offenders. The theft guidelines start at a slightly lower offense level, so you are actually seeing more of them that are staying in Zone A. So there is a smaller

percentage of those imprisoned at the lower levels compared to fraud. And, also, that loss table starts at \$100 or less, so that makes up some of that difference. (See Figure Semisch-5.)

But you see the same general trend, if you look at the greater than \$10,000 category for this one which indicates the two-thirds mark, meaning two-thirds of the theft offenders are at or below that dollar amount; about 42 percent of those are getting incarceration. And the median sentence for those is about eight months.

Again, you see some of those fluctuations at the top end and there are fewer cases up there, so one or two cases are going to have a big impact on those percentages. But you do see the general continuing trend of increasing severity and certainty.

Since loss is such a driving force for these fraud and theft offenders and the Economic Crime Package, I wanted to give you sort of a context for discussion: what the loss tables look like now and what impact possible changes to the loss table might have.

I have a chart that is just a graphic depiction of the current loss table. That dotted line is the current 2F1.1, the fraud loss table. Up the side of the chart is the increasing offense levels that are associated with the increasing loss levels that go to the right across the bottom of the chart. (See Figure Semisch-6.)

Because more than minimal planning obviously plays into these sentences and is an important factor, I have included a dashed line that indicates, for each loss amount, what the increase in offense level would be if you also included more than minimal planning in figuring that offense level.

The solid line is a proposed loss table that the previous Commission had considered, and we picked that one because it was the most recent one that had been considered and it would be an interesting point to start discussion about changes in the table, whether they are needed and what impact that they would have.

What you can see is that for that first third of those fraud offenders, up to the \$10,000 group, the solid line and the dotted line are about the same, so this particular change in the table wouldn't make much difference in sentence for this group. And we know that they are primarily based on loss for that group, and based less on more than minimal planning, so it pretty much tracks along the current table.

For the middle third of those fraud offenders, you see a slight increase in the offense levels for that group.

And for that large range of loss, the third third of offenders, you see more substantial increases in offense level for those offenders based on this consideration of changing the loss table.

So what does that mean in terms of sentences? Well, as sort of a quick picture of what that might look like, keeping in mind that breakdown of the lower third, the middle third and the upper third of fraud offenders that I have been describing, that white bar for each of these groups shows the current sentencing range for the groups that are in that loss level, from the \$2000 to the \$10,000 loss amount. And I have combined the fraud and the theft ones for this. (See Figure Semisch-7.)

The left side of the chart shows the number of months sentenced—this is based on the sentencing table—showing the current sentences, so that is a range of zero to six months.

Implementing that solid line, that was on the previous chart, that one table consideration, would leave that range exactly the same and that is represented by the black bar.

For that middle third of the fraud cases, the white bar shows the current sentencing range, between eight and 14 months. And implementing the different loss table that I showed you and also eliminating more than minimal planning which sort of builds it into the loss table under that option, raises that guideline range from ten to 16 months, which is about an increase of two months.

Finally, for those upper-level offenders where, you can see easily on the line chart that there was a pretty big increase in sentencing severity. The range is currently 21 to 27 months. With the loss table represented by the solid line, would be 27 to 33 months, so that is an increase of about six months for those offenders.

So that is what the current sentencing trends look like. Thank you.

VICE CHAIR STEER: Thank you, Andy and Courtney. Well, we have gone from a very interesting and provocative theoretical discussion to a presentation in which we have seen some of the minutiae of the sentencing guidelines. Our next panel, hopefully, will probably be somewhere in the middle, in trying to apply theory within the context of the sentencing guidelines. I would now like to turn the program over to Judge Commissioner Joe Kendall who will moderate our next panel and introduce the panel members.

