



GuideLines

News from the U.S. Sentencing Commission

Spring 2007

Senate Confirms Two Sentencing Commissioners



Photo by Kimberlee Hewitt

Commissioner Dabney Friedrich

On February 28, 2007, the United States Senate confirmed the nominations of Ms. Beryl A. Howell of Washington, D.C., and Ms. Dabney Langhorne Friedrich of Alexandria, Virginia, as members of the United States Sentencing Commission. President George W. Bush had recess appointed Ms. Howell and Ms. Friedrich to the Commission on December 12, 2006. The Senate confirmation will result in a reappointment for Ms. Howell and a first appointment to the Commission for Ms. Friedrich.

“Dabney Friedrich brings to the Sentencing Commission a wealth of valuable knowledge and experience, and we are, of course, delighted to retain Beryl Howell as a member of the Commission,” said Commission chair, Judge Ricardo H. Hinojosa.

Ms. Beryl A. Howell was first confirmed as a member of the United States Sentencing Commission on November 21, 2004. Ms. Howell serves as executive managing director and general counsel of Stroz Friedberg, LLC. She is the former general counsel of the Senate Committee on the Judiciary, where she worked on a variety of criminal justice, technology and other issues before the Committee. Prior to her work on the Senate staff, Ms. Howell served as an assistant U.S.

Amendment Package Sent to Congress

On May 1, 2007, the United States Sentencing Commission sent to Congress a package of sentencing guideline amendments regarding offenses that include crack cocaine offenses, terrorism, sex offenses, and intellectual property offenses.

The Commission promulgated—

- an amendment that modifies the penalties for crack cocaine offenses. The Commission’s amendment modifies the guideline drug quantity thresholds to provide guideline sentencing ranges that include the statutory mandatory minimum penalties for crack cocaine offenses. Accordingly, under the amendment, a first-time trafficking offense involving 5 grams of crack cocaine will receive a guideline sentencing range of 51 to 63 months, and a first-time trafficking offense involving 50 grams or more of crack cocaine will receive a guideline sentencing range of 97 to 121 months, before accounting for other relevant factors under the guidelines. Under the statutory mandatory minimum penalties, however, a five- and ten-year sentence will still

Amendments continued on page 2



Commissioner Beryl A. Howell

Commissioners continued on page 4

Amendments continued from page 1

be required, respectively. As a result, the Commission's amendment provides some relief to crack cocaine offenders impacted by the disparity created by federal cocaine sentencing policy.

At its April 27 public meeting, the Commission emphasized and expressed its strong view that the amendment is only a partial solution to some of the problems associated with the 100-to-1 drug quantity ratio. Any comprehensive solution to the 100-to-1 drug quantity ratio would require appropriate legislative action by Congress.

The Commission also announced that it will submit to Congress on or before May 15, 2007, a report on federal cocaine sentencing policy. The report will set forth current data and information that continue to support the Commission's consistently held position that the 100-to-1 crack-powder drug quantity ratio significantly undermines various congressional objectives set forth in the Sentencing Reform Act and elsewhere. The Commission also will make recommendations to Congress in the report for modifications to the statutory penalties for crack cocaine offenses. The Commission at its April 27 public meeting expressed its firm desire that this report will facilitate prompt congressional action addressing the 100-to-1 crack-powder drug quantity ratio.

- an amendment implementing provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005 and the Department of Homeland Security Appropriations Act of 2007 relating to terrorism offenses. The amendment addresses new offenses created by the PATRIOT Reauthorization Act relating to (1) narco-terrorism, (2) the smuggling of munitions or military equipment without the required validated export license, (3) the mining of U.S. navigable waters, and (4) the destruction or tampering with aids to maritime navigation. The amendment also addresses a new offense created by the Homeland Security Act pertaining to the construction, financing, or use of tunnels that cross the U.S. borders.

Guidelines

is published periodically by the
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002
www.ussc.gov
(202) 502-4500
Fax: (202) 502-4699

Ricardo H. Hinojosa — Chair
Ruben Castillo — Vice Chair
William K. Sessions III — Vice Chair
John R. Steer — Vice Chair
Dabney Friedrich — Commissioner
Michael E. Horowitz — Commissioner
Beryl A. Howell — Commissioner
Benton J. Campbell — *ex officio*
Edward F. Reilly, Jr. — *ex officio*

Office of Publishing and Public Affairs
(202) 502-4590

HelpLine 8:30 a.m.–5:00 p.m. (E.S.T.)
(202) 502-4545

Please direct all inquiries and address changes to the
Office of Publishing and Public Affairs
at the above address.

Editor — Michael Courlander
Production — Jeanne Doherty

- an amendment implementing the Adam Walsh Child Protection and Safety Act of 2006. The amendment provides a new guideline in section 2A3.5 for failure to register as a sex offender and provides greater penalties if a defendant commits certain offenses after failing to register. The amendment also provides a means of considering defendants' voluntary attempts to correct the failure to register. Further, the amendment provides an additional new guideline for certain aggravated offenses related to the requirement to register as a sex offender. This sentence would run consecutive to any sentence imposed for the failure to register offense or any sentence imposed for an enumerated underlying offense. The amendment also implemented other provisions of the Adam Walsh Act that provided enhanced penalties for sexual offenses.

The Commission voted to re-promulgate as a permanent amendment—

- a temporary, emergency amendment that implemented a directive in the Stop Counterfeiting in Manufactured Goods Act regarding criminal infringement of copyright or trademark. The Act had directed the Commission to review and, if appropriate, amend the

Amendments continued on page 3

Amendments continued from page 2

sentencing guidelines applicable to persons convicted of trafficking in counterfeit labels (18 U.S.C. § 2318) or trafficking in counterfeit goods or services (18 U.S.C. § 2320).

The guideline amendment addresses the way in which the court determines an offense’s “infringement amount” in cases involving counterfeit labels that are not affixed to goods. The amendment instructs that the infringement amount is based on the retail value of the genuine good that the counterfeit label would help imitate if the label’s use would lead a reasonably informed purchaser to believe that the counterfeit good was an identifiable, genuine good.

In addition to repromulgating the temporary, emergency amendment, this amendment also provides instruction on how to compute infringement amount in a case involving use of a circumvention device under 7 U.S.C. §§ 1201 and 1204. Finally, the amendment adds trafficking in circumvention devices to the existing enhancement that increases the sentence for offenses involving the manufacture, importation, or uploading of infringing items.

The Commission voted to promulgate as an emergency and permanent amendment –

- an amendment implementing a directive in the Telephone Records and Privacy Protection Act of 2006. The Commission implemented the directive by referencing the new offense at 18 U.S.C. § 1039 created by the Act to the guideline covering other private or protected information (§2H3.1).

The Commission also promulgated —

- an amendment addressing two aspects of criminal history: minor offenses and related cases. Among other things, the amendment modifies guideline 4A1.2(c)(1) by moving fish and game violations and local ordinance violations to the list of excluded offenses under section 4A1.2(c)(2).
- an amendment implementing a number of drug-related provisions of the PATRIOT Reauthorization Act and the Adam Walsh Act, addressing new offenses created by the Acts.
- an amendment addressing the new offense at 38 U.S.C. § 2413 created by the Respect for America’s Fallen Heroes Act, which prohibits certain demonstrations at Arlington National Cemetery and other cemeteries under the control of the National Cemetery Administration.
- an amendment modifying the policy statement at section 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). The amendment provides four examples of circumstances that, provided the defendant is not a danger to the safety of any other person or to the community, would constitute “extraordinary and compelling reasons” for such a reduction.

Except for the temporary, emergency amendment implementing the directive in the Telephone Records Act, the amendments will take effect November 1, 2007, unless Congress disapproves them during a six-month review period. The Telephone Records Act amendment took effect May 1, 2007, under emergency authority provided by the Act.

The text of the Commission’s amendments and the accompanying 2007 report to Congress, *Cocaine and Federal Sentencing Policy*, are available on the Commission’s website, www.ussc.gov. ■

Commissioners continued from page 1

attorney and deputy chief of the Narcotics Section of the U.S. Attorney's office in the Eastern District of New York. She was formerly an associate at Schulte, Roth & Zabel in New York City and a clerk for the Honorable Dickinson R. Debevoise in the District of New Jersey. During her tenure on the Senate Judiciary Committee, Ms. Howell worked for Senator Patrick J. Leahy (D-VT) (chairman and ranking member on the full Committee), and for the Technology and the Law Subcommittee and the Antitrust, Business Rights and Competition Subcommittee. Ms. Howell received her B.A. from Bryn Mawr College and her J.D. from Columbia University School of Law, where she was a Harlan Fiske Stone Scholar.

Ms. Dabney Friedrich served as associate counsel at the White House from 2003 until the commencement of her current position with the Sentencing Commission. Prior to serving in that capacity, she was counsel to Chairman Orrin G. Hatch of the U.S. Senate Judiciary Committee from 2002-2003. From 1995 until 2002, she was an assistant U.S. attorney, first for the Southern District of California (1995-1997) and then for the Eastern District of Virginia (1998-2002). Prior to that (1994-1995), she was an associate in private practice at Latham & Watkins in San Diego. From 1992-1994, she was law clerk to now Chief Judge Thomas F. Hogan (U.S. District Court for the District of Columbia). Ms. Friedrich received her B.A. from Trinity University, her Diploma in Legal Studies from Oxford University, and her J.D. from Yale Law School. ■

Commission Honors Judge Murphy With Portrait Dedication Ceremony

The United States Sentencing Commission honored its former chair, Judge Diana E. Murphy, in a portrait dedication ceremony held at the Thurgood Marshall Federal Judiciary building on April 16, 2007. The portrait of Judge Murphy was painted by Cyd Wicker, noted portrait artist.

Judge Murphy of Minneapolis, Minnesota, has been a judge on the United States Court of Appeals for the Eighth Circuit since 1994. The Commission's third chair, she was nominated by President Clinton and served the Commission from 1999-2003. A recipient of the prestigious Edward J. Devitt Distinguished Service to Justice Award in 2001, Judge Murphy spearheaded several notable Commission undertakings. During her tenure, she oversaw (1) a comprehensive report to Congress advocating a reassessment of federal cocaine penalties, (2) a survey of Article III judges regarding the operation of the sentencing guidelines, and (3) a large-scale study of departures from the federal sentencing guidelines.

Under Judge Murphy's leadership, the Commission responded to congressional directives contained in the Sarbanes-Oxley Act of 2002, the USA PATRIOT Act of 2003, the Homeland Security Act of 2002, the PROTECT Act of 2003, and numerous other laws. She also oversaw the formation and completion of work of two advisory groups: one studying issues relating to the organizational guidelines and the other examining the impact of the federal sentencing guidelines on Native Americans in Indian Country.

Current Commission chair, Judge Ricardo H. Hinojosa, presided over the portrait dedication ceremony. Speakers included Senator Amy Klobuchar, U.S. Senator for Minnesota; Patrick M. O'Brien, assistant secretary, U.S. Department of the Treasury; John P. Elwood, assistant to the Solicitor General; Tim McGrath, former staff director of the Commission; and Judge Sterling Johnson, U.S. district judge, ED New York. ■



Judge Diana E. Murphy's Portrait by Cyd Wicker

Photo by David Ginsberg/Eclipse Productions



Judge Ricardo H. Hinojosa introduces former chair Judge Murphy.

Photo by Melvin C. Long

Update on Commission's Guidelines Training Efforts

The Commission continues to set a proactive training schedule, most recently focusing on the commencement of its Spring Training Initiative for 2007. The Commission is returning to a scenario-based approach to training with the goal of providing practical guidance to those who work consistently with the federal sentencing guidelines. The Commission also continues to work collaboratively with the Department of Justice's National Advocacy Center, the Federal Judicial Center, and the U.S. Probation and Pretrial Services Training Academy to provide guidelines training for new prosecutors, new judges, and new probation officers.

In addition, the Commission aired the first in a series of interactive collaborative broadcasts on the Federal Judicial Television Network (FJTN) on March 1, 2007. The March 1st broadcast was titled *Advanced Guideline Issues: Firearms*. A second broadcast, *Advanced Guideline Issues: Relevant Conduct*, is scheduled for June 21, 2007.

The Sixteenth Annual National Seminar on Federal Sentencing Guidelines is scheduled for May 23-25, 2007, in Salt Lake City, Utah. Last year's participants numbered over 575 and the Commission is looking forward to yet another seminar with record numbers of participants this year. For more information about the Sentencing Commission's training programs, please contact Margaret Olaghery, training coordinator at the Commission's Office of Education and Sentencing Practice at (202) 502-4564. ■

Visiting Probation Officer Program Reinstated

The Sentencing Commission has recently announced that it is reinstating its temporary duty program for probation officers, with the first assignments to begin in June 2007.

While at the Commission, participants help staff the HelpLine, become involved in the guideline amendment process, and assist with ongoing projects. Visiting probation officers benefit by becoming proficient in guideline application and by gaining exposure to the many types of cases sentenced across the country. They also broaden their exposure to the criminal justice system by observing Commission operations, especially in the areas of guideline development and refinement. The visiting probation officers then return to their districts as valuable resources to their colleagues and the court. The Commission benefits by interacting with visiting officers who apply the guidelines on a regular basis. The officers provide the Commission with an increased understanding of the practical concerns that confront practitioners.

Probation offices wishing to participate in this program should contact Pamela Montgomery, Director and Chief Counsel of Training, at (202) 502-4540. ■

Judge Hinojosa Addresses Judicial Conference Members

United States Sentencing Commission chair, Judge Ricardo H. Hinojosa, addressed the Judicial Conference of the United States at its meeting on March 13, 2007, in Washington, D.C. Judge Hinojosa updated the Conference on the activities of the Sentencing Commission since he last spoke to the Conference in September 2006.

Judge Hinojosa addressed such topics as the composition of the Commission, the Commission's work during the current amendment cycle, cocaine sentencing, and available 2006 and 2007 sentencing data. The chair also spoke about the issues raised in two cases currently before the Supreme Court, *United States v. Rita* and *United States v. Claiborne*. ■

Tentative Public Meeting Calendar

(All Commission public meetings are held in Washington, D.C. unless otherwise noted.)

August 29, 2007	January 9, 2008
September 20, 2007	February 13, 2008
October 24, 2007	March 13, 2008
November 14, 2007	April 16, 2008

Sourcebook Highlights Sentencing Trends

Federal courts sentenced 72,585 cases under the federal sentencing guidelines in fiscal year 2006 (hereinafter “2006”) according to statistics from the Commission’s 2006 *Sourcebook of Federal Sentencing Statistics*. This represents an increase of 0.2 percent over the 72,462 cases sentenced in fiscal year 2005 (hereinafter “2005”).

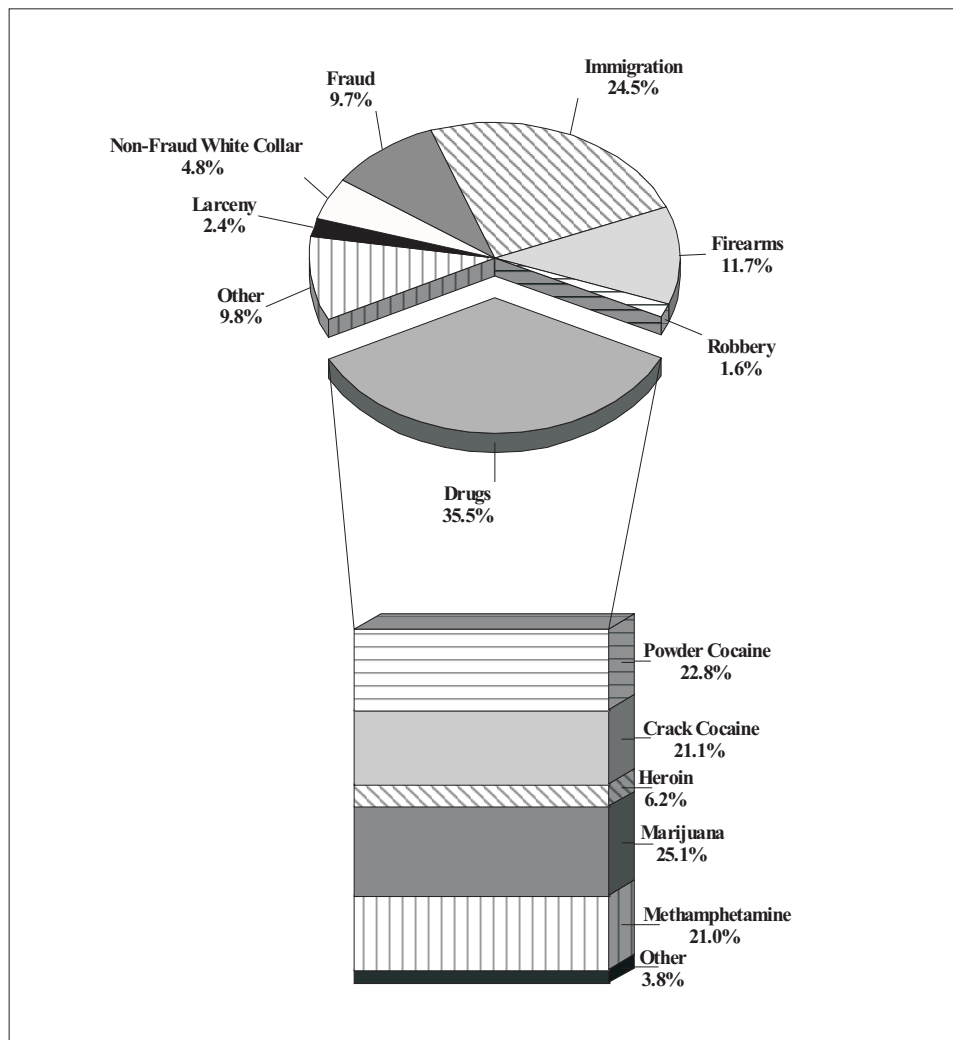
The Commission’s *Sourcebook* provides extensive information about federal criminal cases sentenced under the guidelines. Highlights include sentencing profiles of judicial districts, detailed information on guideline departures, plea and trial rates by district and circuit, data on appeals of sentencing decisions, and information about organizational defendants.

Federal Offenders and Offenses

In 2006, 86.7 percent of all federal offenders were men, a slightly higher percentage than the 86.4 percent figure from 2005. The racial and ethnic composition of federal offenders remained fairly stable, with Hispanics accounting for 43.1 percent of all federal offenders in 2006, followed by White offenders (29.1%) and Black offenders (23.8%). The average age of federal offenders sentenced in 2006 was 34.8 years, with a median age of 33 years. The Commission also received information on 217 organizations that received a criminal sentence in 2006.

Thirty-six percent of all defendants sentenced under the guidelines in 2006 were convicted of drug offenses. Cocaine accounted for the largest number of drug violations (43.9%) (with powder cocaine cases accounting for 22.8 percent of all drug cases and crack cocaine cases accounting for 21.1 percent of all drug cases), followed by marijuana (25.1%) and methamphetamine (21.0%).

The other common crimes were immigration offenses (24.5%), firearms offenses (11.7%), fraud (9.7%) and non-fraud white collar offenses (4.8%).



Sourcebook continued on next page

Sourcebook continued from page 6

Trends in Offense Types

Since the guidelines were implemented, drug offenses have always constituted the largest group of cases sentenced each year in the federal system. The 26,267 drug cases in 2006 represent a 2.0 percent increase from 2005. The number of immigration cases dropped slightly from 17,717 in 2005 to 17,574 in 2006, a 0.8 percent decrease.

Types of Sentences

More than 95 percent of federal offenders pled guilty to some or all of the charges against them in 2006. Trials occurred most often in murder cases (32.1%), but more than one-third of the 3,107 federal criminal trials held in 2006 concerned drug trafficking cases.

In 2006, 7.5 percent of all guideline sentences involved only probation, while 3.9 percent included a sentence of probation together with some form of confinement. Most of the guideline sentences in 2006 (88.6%) included a term of imprisonment. Of these, the vast majority (96.7% or 61,561 cases) received a sentence of incarceration only (*i.e.*, without a term of alternative confinement). A small percentage (2.9%) received a sentence split between prison and community confinement.

The median length of imprisonment for all defendants sentenced to prison in 2006 was 37 months, while the mean length was 60 months. Of drug offenders who were eligible for a mandatory minimum punishment, 25.2 percent received a lower sentence pursuant to the “safety valve” provision of 18 U.S.C. § 3553(f).

Sentences Within and Outside the Guideline Range

Overall rates of sentences imposed relative to the guideline range did not change from the period after the decision in *United States v. Booker* (January 12, 2005, to September 30, 2005) to 2006. For both time periods, sixty-two percent of all cases were sentenced within the guideline range. In 2006, government sponsored below-range sentences (which combine departures under §5K1.1 Substantial Assistance, §5K3.1 Early Disposition Program, and other government sponsored sentences) accounted for 24.6 percent of cases, up slightly from 23.8 percent in 2005 after *Booker*. Most of this increase can be attributed to section 5K3.1 Early Disposition Program departures, which rose from 6.2 percent of all cases in 2005 after *Booker* to 7.4 percent in 2006.

The increase in government sponsored below-range sentences corresponds to a small decrease in the number of other below-range sentences, which fell from 12.9 percent in 2005 after *Booker* to 12.0 percent in 2006. Above-range sentences account for approximately two percent of all cases in both time periods.

The Commission’s 2006 *Sourcebook of Federal Sentencing Statistics* and its 2006 *Annual Report* are available on the Commission’s web site at www.usc.gov/annrpts.htm. ■



GuideLines

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002