

CHAPTER TWO

The Sentencing Guidelines

Guideline Amendments

Introduction

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, congressional enactment of new statutes, and input from federal criminal justice practitioners.

By statute, the Commission may transmit annually guideline amendments to the Congress on or after the first day of a regular session of Congress but not later than May 1. Such amendments become effective automatically upon expiration of a 180-day congressional review period unless the Congress, by law, provides otherwise.

Amendments Promulgated

In 1997, the Commission made a number of amendments to the guidelines, many of which implement legislation enacted by the 104th Congress (*e.g.*, the Comprehensive Methamphetamine Control Act of 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and the Antiterrorism and Effective Death Penalty Act of 1996). Proposed amendments were published in the *Federal Register* on January 2, and February 25, 1997. The Commission received extensive written comment and conducted a public hearing on the proposed amendments in Washington, D.C., on March 18, 1997 (see Table 2).

At its February and March 1997 meetings, the Commission responded to congressional directives by adopting four emergency amendments which became effective on May 1, 1997.¹ Also on May 1, the Commission submitted to Congress 27 non-emergency amendments to the sentencing guidelines, policy statements, and official commentary, along with statements of the

¹ One of the emergency amendments, responding to a directive in the Comprehensive Methamphetamine Control Act, provided higher penalties for offenses involving precursor chemicals intended for use in manufacturing controlled substances, and was adopted by the Commission in February 1997, prior to the public hearing. The three other emergency amendments, responding to directives in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, were adopted soon after the hearing.

Table 2

PUBLIC HEARING WITNESS LIST

Proposed Amendments to the Sentencing Guidelines
Washington, D.C. – March 18, 1997

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reasons for each amendment.² These non-emergency amendments became effective November 1, 1997, following the requisite 180-day period of congressional review.

Significant amendments adopted by the Commission in 1997 made the following changes in the operation of the guidelines. The amendments:

- increased the penalties for offenses involving list I chemicals that are important to the manufacture of controlled substances;
- increased penalties for methamphetamine trafficking and importation offenses;
- added an enhancement (inviting an upward departure in extreme cases) for environmental violations occurring in association with illegal drug manufacturing or other drug trafficking offenses;
- increased penalties for offenses involving trafficking and simple possession of flunitrazepam (a “date rape” drug);
- expanded the definition of serious bodily injury to include sexual abuse and aggravated sexual abuse;
- added a new guideline to cover the new federal offense of stalking and the relatively new federal offenses of domestic violence;
- added an enhancement for international counterfeiting;
- increased penalties for offenses involving peonage, involuntary servitude, and slave trade;
- increased penalties for immigration offenses (including enhancements for prior felony convictions, the use or possession of a dangerous weapon, and the occurrence – or creation of the risk – of death or serious bodily injury, along with a cross reference to the most appropriate murder guideline in certain circumstances);
- increased penalties for naturalization and passport offenses (including an enhancement for prior felony convictions and narrowing the class of cases that qualifies for a reduced penalty for “non-profit” offenses);
- increased penalties for persons who unlawfully enter or remain in the United States following conviction of certain offenses;
- changed the policy statement relating to retroactive application of an amendment that reduces a guideline range to provide that a court may not reduce the term of imprisonment of an incarcerated individual below time served and to clarify that a

² Four of the 27 amendments that were reported to Congress were repromulgations of the four emergency amendments that became effective on May 1, 1997.

reduction in the term of imprisonment imposed upon revocation of supervised release is not authorized by the policy statement;

- added conditions of probation and supervised release to the pertinent guidelines to reflect recently enacted statutory requirements;
- conformed the restitution guidelines to new statutory provisions, including procedures for payment of full restitution to a victim of the offense and general directions for the payment of “community restitution” in drug offenses in which there is no identifiable victim; and
- clarified that the “express threat of death” enhancement in the robbery guideline applies when a combination of the defendant’s actions and words instill in a reasonable person a fear for that person’s life.

In addition, the Commission passed four other amendments during the 1996-1997 cycle that did not require submission to Congress. First, the Commission adopted an amendment in response to *United States v. LaBonte*. In *LaBonte*, the Supreme Court invalidated the way in which the Commission defined “maximum term authorized” for purposes of fulfilling the requirement of 28 U.S.C. § 994(h) to specify sentences for certain categories of career offenders at or near the maximum term authorized for those offenders. In response to *LaBonte*, the Commission amended the career offender guideline (§4B1.1) to reflect that the “maximum term authorized” includes all sentencing enhancements that apply because of the defendant’s prior criminal history.

Second, the Commission made a number of technical and conforming changes to the policy statements in Chapter Six, Part A (Sentencing Procedures) to reflect changes in Rule 32 in the *Federal Rules of Criminal Procedure* and to update case law references.

Third, the Commission amended the statutory references in various guidelines to reflect statutory changes resulting from the codification of title 49, United States Code.

Finally, the Commission amended Appendix A (the Statutory Index) to make it more comprehensive. The amendment adds references for additional offenses, including offenses created by recently enacted legislation, and reflects the codification of title 49, United States Code.

Assistance to Congress

The Sentencing Reform Act gives the Commission the responsibility to advise Congress on sentencing and related criminal justice issues. To fulfill this responsibility, the Commission in 1997 continued to strengthen its legislative program designed to provide members of Congress and their staffs with timely and valuable sentencing-related information and analysis.

Throughout the year, the Commission briefed the staff of many new members of the 105th Congress, including all new members of the House and Senate Judiciary Committees. In addition, Commission staff responded to hundreds of congressional requests for assistance. These inquiries, both written and oral, included requests for federal sentencing and criminal justice data, analyses of proposed legislation, explanations of guideline operation, technical assistance in drafting legislation,

and Commission publications and resource materials. Described below are examples of congressional actions for which the Commission provided technical assistance in 1997.

Juvenile Crime. The first session of the 105th Congress saw the introduction and consideration of a wide variety of crime and sentencing legislation. Among the major crime bills introduced were several bills addressing juvenile crime. Included in these juvenile crime bills were directives to the Commission to provide guidance for the sentencing of: (1) juveniles adjudicated delinquent in federal courts, and (2) juvenile offenders prosecuted federally as adults. Other related provisions would require significant changes in sentencing policy concerning gang members and the use of offenders' criminal records.

Sentencing in the District of Columbia. The District of Columbia Truth in Sentencing Commission was created as a part of Public Law 105-33, a bill designed in part to revitalize the District of Columbia. The D.C. Commission was charged by the legislation to make recommendations to the D.C. Council about the sentencing of certain D.C. felons. The legislation also provided for the Attorney General to prepare changes to the District's sentencing laws if six of the seven voting members of the Commission cannot agree on a recommendation or if the D.C. Council fails to enact the Commission's recommendations within a specified time period.

Veterans' Cemeteries. Both the House and Senate passed bills in 1997 to target property crimes committed at veterans' cemeteries. The House version would direct the Sentencing Commission to provide specified sentence increases for vandalism and theft at national cemeteries. The Senate counterpart would provide increased maximum statutory penalties for vandalism and theft at national cemeteries, but contained a more general directive to the Commission about implementing increases in the guidelines.

Telemarketing Fraud and Use of Firearms. The House and Senate considered legislation addressing telemarketing fraud and the use of guns in drug trafficking or violent crime. It is anticipated that Congress will complete action on these bills in 1998.

Other Policy Initiatives

Cocaine Sentencing Policy

On April 29, 1997, the Sentencing Commission for the second time recommended that federal penalties for powder and crack cocaine be revised. Federal law currently distinguishes between the two principal forms of cocaine by requiring much harsher sentences for trafficking in crack cocaine compared to powder cocaine (five grams of crack and 500 grams of powder cocaine both trigger the same five-year mandatory minimum penalty, a differential known as the "100-to-1 quantity ratio").

In a unanimous report, the Sentencing Commission said that "although research and public policy may support somewhat higher penalties for crack than for powder cocaine," the current penalty structure, including the 100-to-1 quantity ratio, "cannot be justified." Instead of offering a single new ratio, however, the Commission recommended a range of possible options to adjust both powder and crack penalties. The Commission presented two fundamental rationales for its conclusions on federal cocaine sentencing policy. First, the Commission found that federal sentencing policy plays an important role in the proper allocation of federal, state, and local

resources in the national drug control effort. Towards this end, the Commission reasoned that federal sentencing policy should reflect federal law enforcement priorities and that the appropriate primary target for federal drug enforcement is the mid- and upper-level trafficker. Second, the Commission determined that while mid- and upper-level cocaine dealers should be sentenced to five- and ten-year minimum prison terms respectively, the current five-year threshold of five grams for crack cocaine offenders resulted in low-level dealers being sentenced at inappropriate severity levels and as a result contributed to the misallocation of resources.

The report and recommendations were submitted pursuant to a congressional directive that was part of legislation that rejected the Commission's first set of recommendations, issued in 1995, on federal cocaine sentencing policy.

On the same day the Commission issued its new recommendations, President Clinton commended the Commission for its work and asked the Attorney General and the Director of the Office of National Drug Control Policy to review the recommendations and the principles underlying them. In July, the President endorsed a specific proposal for changes to current federal cocaine sentencing policy within the parameters recommended by the Commission. The President's proposal would change the quantity levels for both powder and crack cocaine that trigger the five-year mandatory minimum sentence: the five gram trigger for crack cocaine would change to 25 grams and the 500 gram trigger for powder cocaine would change to 250 grams.

At the conclusion of the first session of the 105th Congress, neither the President's proposal nor any of several competing proposals had been acted on by either the House of Representatives or the Senate.

Money Laundering Sentencing Policy

On September 18, 1997, the Sentencing Commission reported to Congress that the "broad and inconsistent use of money laundering penalties, coupled with an inflexible, arbitrarily determined guideline structure is resulting in substantial unwarranted disparity and disproportionality in the sentencing of money laundering conduct."

In its report, the Commission identified a number of factors that have contributed to the current situation, the most fundamental being the historical context in which the current penalty structure was devised. Because the money laundering guidelines took effect in November 1987, just six months after the money laundering laws were enacted by Congress, these particular guidelines were formulated without reference to actual prosecutorial or sentencing experience and without the benefit of judicial interpretation of the new laws.

Based on its understanding of the types of crimes about which Congress was most concerned in enacting the new statutes, and information from the Department of Justice about how its organized crime and narcotics enforcement units intended to use the new laws, the Commission anticipated that money laundering prosecutions would address two main types of offenses. These are: (1) activities essential to the operation of organized crime, and (2) offenses in which financial transactions – separate from the underlying offense – encourage or facilitate further crime. As a result, the Commission set relatively high penalties for the money laundering guidelines that were not tied to any guideline measurement of the underlying crime's seriousness.

Actual sentencing experience in the past decade, however, has demonstrated a different reality. The practical outcome of the current penalty structure is that substantially greater penalties may attach for money laundering prosecutions when the underlying offense conduct is a less serious crime like fraud, and substantially lesser penalties may attach for more serious money laundering crimes like drug trafficking.

The Commission's detailed analysis of actual sentencing practices indicates that: (1) money laundering sentences are being imposed for a much broader scope of conduct than anticipated; (2) there is distortion of the intended relationship between the harm caused and the measurement of offense seriousness; and (3) guideline application is resulting in a lack of sentencing proportionality and uniformity. The Commission's research graphically illustrates the extent of this imbalance; there can be an 85-to-95 percent increase in penalties for the same offense conduct if money laundering is charged in addition to an underlying fraud offense. This contrasts with the possibility of a 75-to-86 percent decrease in the severity of the sentence if money laundering is charged instead of drug trafficking. The Commission also found significant judicial dissatisfaction with the current money laundering sentencing guidelines, noting that the departure rate for the past five years is 32 percent greater than the average for all offenses.³

Economic Crimes Guidelines

During 1997, the Commission conducted a detailed review of the monetary tables and related features of the theft, fraud, and tax guidelines. This review began as part of the Commission's comprehensive guideline assessment project and also responded to concerns from guideline users, including the Department of Justice and the Judicial Conference's Criminal Law Committee, that the monetary tables were too lenient for larger-scale economic crimes and, therefore, the punishments for these offenses needed to be increased.

Under current sentencing policy, sentences for fraud, theft, and other economic crimes are determined primarily by the amount of loss caused. In reviewing sentencing policy for these offenses, the Commission found two issues to be central to its study: the "loss" monetary tables and the definition of the term "loss" in the commentary of the theft and fraud guidelines. Focusing on the loss tables, the Commission considered: (1) whether a structure involving fewer increments with each increment increasing by two levels would be preferable to the current table that involves a greater number of one-level increments; (2) whether penalties according to the table should be increased for offenses involving larger monetary losses (and perhaps decreased for small-dollar-loss offenses); (3) whether the separate penalty increase for more-than-minimal planning should be deleted and, instead, incorporated into the loss tables; and (4) whether a new, more narrowly focused sentence increase for a sophisticated concealment scheme should be added to the theft and fraud guidelines.

With regard to the definition of loss, the Commission invited and considered public comment on an array of issues and problems identified by courts and practitioners. In addition, the Commission convened a group of experienced federal judges, prosecutors, and defense attorneys to assist in its deliberations on this issue.

³ Excluded are departures attributable to substantial assistance.

In April 1997, the Commission considered but did not adopt a revised version of the loss tables. However, Commissioners shortly thereafter reaffirmed their desire to continue work on these issues by placing them at the top of their agenda for the 1997-98 amendment cycle. During the summer and fall of 1997, the Commission agreed to seek further comment on two loss table options and a number of related amendment proposals.