

CHAPTER TWO

The Sentencing Guidelines

Guideline Amendments

The legislation creating the Sentencing Commission provides that “[t]he Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.” 28 U.S.C. § 994(o). Given this congressional direction, the Commission has adopted an evolutionary approach to guideline development under which it periodically refines the guidelines in light of district court sentencing practices, appellate decisions, research, enactment of new statutes, and input from federal criminal justice practitioners. By statute, the Commission annually may transmit guideline amendments to the Congress on or after the first day of a regular session of Congress but not later than May 1. Such amendments become effective automatically upon expiration of an 180-day congressional review period unless the Congress, by law, provides otherwise. Occasionally, Congress also grants the Commission special authority to issue temporary, “emergency” amendments in connection with particular legislation.

Amendments Promulgated

Proposed amendments were published in the *Federal Register* on November 27, 2001, and January 17, 2002. The Commission received extensive written comment on the proposed amendments, and the Commission conducted a public hearing on the proposed amendments February 25 and 26 and March 19, 2002. On May 1, 2002, the Commission submitted to Congress ten amendments to the sentencing guidelines, commentary, and policy statements. The Commission established an effective date of November 1, 2002, for all of the amendments.

The amendments promulgated by the Commission in FY 2002 included amendments responding to congressional legislation and amendments addressing Commission interest. The following are the more significant changes to the sentencing guidelines, policy statements, and official commentary, set out by these two categories.

Congressional Legislation Amendments

The amendments addressing congressional legislation –

- responded to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 by increasing the penalties for terrorism offenses (including offenses against mass transportation and offenses involving threats that substantially disrupt governmental operations or result in costly cleanup measures); expanding the guidelines’ coverage of offenses involving bioterrorism; and creating a new guideline (§2M5.3) for offenses that involve providing material support for foreign terrorist organizations;

Table 2

PUBLIC HEARING WITNESS LIST

Proposed Amendments to the Sentencing Guidelines
Washington, DC — February 25 and 26, 2002

Glen Hanson, D.D.S.
National Institute on Drug Abuse

Deborah Frank, M.D.
Boston University School of Medicine

Ira J. Chasnoff, M.D.
Children's Research Triangle

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William Nolan
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Ronald H. Weich
*Zuckerman Spaeder LLP
On Behalf of the American Bar Association*

Richard P. Conaboy
*Senior District Judge
Middle District of Pennsylvania*

Julie Stewart
Families Against Mandatory Minimums

Jamie Fellner
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Table 2

PUBLIC HEARING WITNESS LIST

Proposed Amendments to the Sentencing Guidelines
Washington, DC — March 19, 2002

William D. McColl

Director of National Affairs, Drug Policy Alliance

Laura Murphy

Director, National Office, American Civil Liberties Union

Irwin Schwartz

President, National Association of Criminal Defense Lawyers

Jon Sands

Assistant Federal Public Defender for the District of Arizona

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Federal Public Defender for the District of Columbia

Larry D. Thompson

Deputy Attorney General, Department of Justice

Judge Sim Lake

*(via teleconference) Chair, Subcommittee on Sentencing Guidelines
U.S. Judicial Conference, Committee on Criminal Law*

- further addressed the Victims of Trafficking and Violence Protection Act of 2000 by broadening the scope of the prostitution guideline (§2G1.1) to cover all commercial sex acts as well as offenses involving the use of fraud to force a victim to engage in a commercial sex act; and
- added a mandatory condition to sections 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) that the defendant provide a DNA sample if the defendant is required to do so by the DNA Analysis Backlog Elimination Act of 2000.

Amendments Addressing Issues of Commission Interest

The amendments addressing issues of Commission interest –

- provided a new guideline (§2B1.5) for offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources;
- increased the penalties for offenses pertaining to the establishment of drug manufacturing operations (*e.g.*, managing a "crack house" or "rave club");
- revised references to ecstasy in the drug trafficking guideline (§2D1.1) to reflect more accurately the type and weight of ecstasy pills typically trafficked and consumed;
- provided a maximum base offense level of 30 for drug trafficking defendants who also qualify for a mitigating role adjustment under section 3B1.2;
- ensured that certain serious firearm career offenders are sentenced at or near the statutory maximum of life imprisonment; and
- expanded the scope of the category of persons who may be considered official victims for purposes of applying the enhancement in section 3A1.2.

Policy Teams

As part of its continuing analysis of the sentencing guidelines and related sentencing issues, the Commission annually identifies a number of priorities for the coming year and beyond. Selected priority areas are examined and analyzed by interdisciplinary policy teams, each comprising a cross section of the Commission staff (*e.g.*, legal staff, policy analysis staff, and training staff).

Policy teams generally study a specific subject area, profile relevant sentencing practices, identify areas of concern, and recommend options for Commission action. During the process, each group typically reviews legislative history and recent legislative enactments; relevant court decisions; sentencing data regarding current practices; case files of sentenced defendants; reports of frequent questions about guideline application related to that specific area (based on HelpLine

calls from probation officers, judges, and attorneys); and public comment. The teams also solicit input from the Practitioners Advisory Group, the Probation Officers Advisory Group, and other interested persons and government agencies as appropriate.

Drug Policy Team

In fiscal year 2002, the Drug Policy Team focused on federal cocaine sentencing policy. The team conducted an intensive case review that involved analyzing 1,600 cocaine offense cases sentenced in fiscal year 2000 (approximately 20 percent of all federal cocaine offenses that year). This endeavor involved coding important variables such as the defendant's function in the offense, the geographic scope of the offense, and the presence of aggravating factors (*e.g.*, weapon involvement, bodily injury, sales to protected persons, and sales in protected areas). The team also conducted an extensive literature review to learn more about the relative harmfulness of crack cocaine and powder cocaine, including the drug's addictiveness and prenatal effects. A thorough legislative history of the mandatory minimum laws that established the current 100-to-1 drug quantity ratio was also conducted along with a comparison of the federal penalty structure to state penalty structures.

In May 2002, as a result of this comprehensive study, the Commission issued a 112-page report to Congress examining the current federal penalty structure for crack cocaine and powder cocaine offenses. The report contained concrete recommendations for Congress to consider regarding statutory and guideline penalties for cocaine offenses. Chair Murphy presented the recommendations at a hearing before the Senate Judiciary Subcommittee on Crime and Drugs on May 22, 2002.

Terrorism Policy Team

In response to the events of September 11, 2001, Congress passed the USA PATRIOT Act of 2001. This legislation, which the President signed on October 26, 2001, (1) created a number of new terrorism, money laundering, and currency offenses and (2) increased statutory maximum penalties for a number of existing offenses.

The Commission quickly formed a policy team that, in the course of five months, worked closely to address the following issues –

- (1) Changing the Statutory Index to the *Guidelines Manual* and certain guidelines in Chapter Two (Offense Conduct) of the manual to incorporate several newly created predicate offenses to “federal crimes of terrorism” and certain existing predicate offenses that had not had guidelines references. The team also examined the possible amendment of a number of other guidelines to cover conduct pertaining to mass transportation systems and possession of biological agents.
- (2) Amending the Statutory Index to reference the offense of harboring or concealing terrorists, and creating a new guideline for offenses that deal with providing material support to designated foreign terrorist organizations.

- (3) Adding an encouraged, structured upward departure in guideline section 3A1.4 (Terrorism) for offenses that involve terrorism but do not otherwise qualify as offenses that involved or were intended to promote “federal crimes of terrorism” as defined for application of the terrorism adjustment in section 3A1.4.
- (4) Amending the structuring guideline at section 2S1.3 to incorporate a number of new money laundering provisions, including bulk cash smuggling.

The work of the Terrorism Policy Team resulted in the Commission’s adoption of the Terrorism amendments that were forwarded to Congress on May 1, 2002.

Section 5G1.3 Policy Team

The Commission formed a small policy team to address a request from the Criminal Law Committee of the Judicial Conference of the United States that consideration be given to resolving a circuit conflict regarding sentencing guideline 5G1.3. The guideline provides for the imposition of consecutive, concurrent, or partially concurrent sentences when a defendant is subject to a prior undischarged sentence of imprisonment. A circuit split had developed as to whether a downward departure could be given to a defendant whose prior sentence of imprisonment had been fully discharged and who otherwise would have received “credit” had the sentence been undischarged.

The Commission resolved the conflict by adding an application note to the guideline to make it clear that a downward departure is not prohibited in the case of a prior term of imprisonment that has been fully discharged if subsection (b) of section 5G1.3 would have applied had the term of imprisonment been undischarged.

In the course of its work, the policy team determined that three additional conflicts had arisen under section 5G1.3. The Commission therefore directed that the policy team continue its work on the guideline into the next amendment cycle.

Criminal History Policy Team

The Commission determined that it was time for a thorough review of the *Guideline Manual’s* Chapter Four – Criminal History. A policy team was formed and early on observed that the original Commission stated in the introductory comments to Chapter Four that it intended to review additional recidivism data in the future because at the time it was unable to make a definitive judgment as to the reliability of the data that then existed. No such review had ever been conducted. Based on the team’s recommendation, the Commission decided to undertake such a study that, when completed, could be used in the review of Chapter Four – Criminal History. It is anticipated that this study, including the tasks of gathering and analyzing the data, will be completed during the 2003 amendment cycle. The recidivism data can then be used during subsequent amendment cycles for possible improvements to Chapter Four.

In the interim, the team reviewed possible sentencing alternatives. Ultimately, however, the Commission decided to await completion of the collection and analysis of the recidivism data before further considering this topic.

Cultural Heritage Policy Team

The Commission became persuaded that the current economic crime guidelines for theft and fraud were inadequate to address federal crimes against cultural heritage resources.

Examples of such crimes are vandalism of war memorials and historic sites, theft of a Native American ceremonial mask, or illegal excavation of human remains on federal and Indian lands. A policy team was formed and with information and collaboration from Native American Indian tribes, the Departments of Justice and the Interior, as well as many other groups and commentators, a new guideline at section 2B1.5 was developed and ultimately promulgated by the Commission on March 20, 2002. This new guideline will be used to sentence criminal violations of the Archaeological Resource Protection Act, the Native American Graves Protection and Repatriation Act, and general federal statutes when cultural heritage resources are the object of theft, damage, or destruction.

Cultural heritage crimes often involve pecuniary harm such as archaeological value, cost of restoration and repair, and commercial value, all of which are defined in the new guideline by reference to federal regulations. In addition, such crimes often involve intangible harms, such as the deprivation of the transcendent and irreplaceable value of cultural heritage resources.

The new guideline provides increased punishment when the crime involves places dedicated to the preservation of cultural heritage resources and public education, such as the national park system, national historic landmarks, national monuments, national memorials, national marine sanctuaries, and national cemeteries. Further incremental punishment can result if the offense involves human remains or if the heritage resource is specifically protected by federal law, such as funerary objects, items of cultural patrimony, and certain archaeological and ethnological materials designated by treaties. Finally, the use of destructive devices or weapons and motivation for financial gain or commercial purpose are additional factors that will increase punishment under the new guideline.

Advisory Groups

The Commission has established several advisory groups in an effort to obtain systematic input on ways to improve the guidelines. The two standing advisory groups to the Commission are the Practitioners Advisory Group and the Probation Officers Advisory Group. In 2002, the Commission also established the Organizational Guidelines Ad Hoc Advisory Group and the Native American Ad Hoc Advisory Group.

Practitioners Advisory Group

The Practitioners Advisory Group (PAG) provides defense bar perspectives on Sentencing Commission policies, sentencing procedures, and proposed guideline amendments. The advisory

group, consisting of approximately 55 criminal defense attorneys, also disseminates information regarding sentencing issues to the criminal defense community through its membership. In 2002, the Practitioners Advisory Group had co-chairs, Mr. Barry Boss, a partner in the law firm of Cozen & O'Connor and Mr. James Felman, a partner in the law firm of Kynes, Markman & Felman.

Probation Officers Advisory Group

The Probation Officers Advisory Group (POAG) was established by the Commission to assist the Commission in carrying out its statutory responsibilities under the Sentencing Reform Act of 1984 and to represent U.S. probation officers in the area of sentencing. Throughout the year, the group continued to assist the Commission by providing input on guideline application and sentencing-related issues. The group consists of approximately 15 probation officer representatives, including one representative from the Federal Probation/Pretrial Services Officers Association and one representative from the Office of Probation and Pretrial Services in the Administrative Office of the U.S. Courts. In 2002, there were two chairs of POAG: Ms. Ellen Moore, supervising U.S. probation officer for the Middle District of Georgia, followed by Ms. Cathy Battistelli, sentencing guidelines specialist for the District of New Hampshire.

Organizational Guidelines Ad Hoc Advisory Group

In February 2002, the Commission established an ad hoc advisory group to review the general effectiveness of the federal sentencing guidelines for organizations. The Commission has asked the group to place particular emphasis on examining the criteria for an effective program to ensure an organization's compliance with the law. With the arrival of the tenth anniversary of the organizational guidelines, the Commission decided to form the ad hoc advisory group after soliciting public comment on the need, scope of work, and membership of the group. The advisory group – composed of industry representatives, scholars, and experts in compliance and business ethics – will serve for 18 months and will make at least one interim report to the Commission in the course of its work. Mr. B. Todd Jones, former United States Attorney for Minnesota and now a partner at the law firm of Robins, Kaplan, Miller & Ciresi, is serving as chair of the group.

Native American Ad Hoc Advisory Group

In May 2002, the Sentencing Commission formed the Native American Ad Hoc Advisory Group to consider viable methods to improve the operation of the federal sentencing guidelines in their application to Native Americans prosecuted under the Major Crimes Act. The Native American advisory group is comprised of 16 members representing a variety of interested groups, including the National Congress of American Indians, the U.S. Commission on Civil Rights, the Bureau of Indian Affairs, tribal members, the federal judiciary, and law enforcement officials. The Native American advisory group is chaired by the Honorable Lawrence Piersol, chief judge of the U.S. District Court of South Dakota. The group, which will meet over a period of 18 months, will present one interim report and a subsequent final recommendation to the Commission.

Assistance to Congress

The Sentencing Reform Act gives the Commission the responsibility to advise Congress about sentencing and related criminal justice issues. To fulfill this responsibility, in 2002 the Commission continued to provide members of Congress and their staffs with timely and valuable sentencing-related information and analyses. Commissioners met with members of Congress throughout the year regarding a variety of matters.

During 2002, the Commission responded orally or in writing to numerous congressional requests for assistance (*e.g.*, requests for federal sentencing and criminal justice data, technical assistance in drafting legislation, explanations of guideline application, and regular updates on Commission action in response to recently enacted crime and sentencing-related legislation). The Commission also corresponded with members of Congress, providing its views and analyses of proposed legislation and the ways in which proposed legislation may impact the guidelines. Throughout the year, the Commission also supplied Commission publications and resource materials to members of Congress and their staffs.

In addition to its routine responses, on May 22, 2002, Commission chair, Judge Diana E. Murphy, testified before the Senate Subcommittee on Crime and Drugs about federal cocaine sentencing policy. At the hearing, Judge Murphy submitted for congressional consideration a comprehensive report on federal cocaine sentencing policy, highlighted the Commission's most important findings, and outlined several recommendations regarding possible statutory and guideline modifications which were unanimously adopted by the Commission. Judge Murphy also presented information about the estimated impact of the Commission's recommendations.

On May 14, 2002, General Counsel Charles Tetzlaff testified before the House Subcommittee on Crime, Terrorism, and Homeland Security about amendments to the guidelines that had been submitted for congressional review on May 1, 2002. Mr. Tetzlaff's testimony focused on the Commission's amendment to the drug trafficking guideline. The four-part amendment to section 2D1.1 increased penalties for certain offenders convicted under 21 U.S.C. § 856 (Establishment of Manufacturing Operations), modified guideline commentary to more accurately reflect the weight of trafficked ecstasy pills, clarified application of the two-level reduction for offenders who meet the "safety valve" criteria, and provided a maximum base offense level of 30 (corresponding to 97 to 121 months) for defendants who receive a mitigating role adjustment under section 3B1.2 (Mitigating Role). Mr. Tetzlaff also testified about amendments to the guidelines covering terrorism offenses, cultural heritage resources offenses, career offenders, sex trafficking, public corruption, and official victims.

