

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, 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 on the date set by the Commission after a 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

In 1998, the Commission passed and submitted to Congress a number of amendments, several of which address issues of conflict among various federal circuit courts of appeal. Proposed amendments were published in the *Federal Register* on January 6. The Commission received extensive written comment on the proposed amendments. On March 12, the Commission conducted a general public hearing on the proposed amendments (see Table 2). Additionally, the Commission on March 5 conducted a special public hearing in San Francisco² devoted exclusively to the proposed revision of the guidelines’ loss definition and other proposed amendments to the theft, fraud, and tax guidelines (§§2B1.1, 2F1.1, and 2T1.1).

An additional, temporary amendment was promulgated in September in response to a directive contained in the Telemarketing Fraud Protection Act, Pub. L. 105–184.³ Issues for comment regarding the Commission’s response to the directive were published in the *Federal Register* on August 21. The Commission on October 19 published the temporary amendment which was adopted in response to the directive.

The Commission established an effective date of November 1, 1998, for all of the amendments, including the temporary, emergency amendment pertaining to telemarketing fraud.

² This hearing was held in conjunction with the American Bar Association’s National Institute on White Collar Crime.

³ The directive was enacted after the Commission submitted its amendments to the Congress on May 1.

The amendments promulgated by the Commission in 1998 include (1) amendments responding to congressional directives and addressing congressional interest, (2) amendments resolving circuit conflicts, and (3) miscellaneous amendments. The following are the more significant changes to the sentencing guidelines, policy statements, and official commentary.

Congressional Directive and Interest Amendments

The amendments responding to congressional directives and addressing congressional interest—

- increased the penalties for fraud offenses that use mass marketing to carry out the fraud;
- increased the penalties in the theft, property destruction, and arson guidelines for offenses that involve the property of a national cemetery (in response to a directive contained in the Veterans' Cemeteries Protection Act of 1997, Pub. L. 105–101);
- increased the penalties under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms) for a defendant who is convicted under 18 U.S.C. § 922(d) for transferring a firearm to a person prohibited from possessing or otherwise being involved with a firearm;
- increased the penalties for fraud offenses that involve sophisticated means and added an additional increase in §3A1.1 (Hate Crime Motivation or Vulnerable Victim) for offenses in which there is a large number of vulnerable victims (both increases are in response to the Telemarketing Fraud Protection Act of 1998, Pub. L. 105–184).

Circuit Conflict Amendments

The amendments resolving circuit conflicts—

- clarify the distinction, for guideline “grouping” purposes, between statutes that require imposition of a consecutive sentence of imprisonment only if imprisonment actually is imposed (*e.g.*, 18 U.S.C. § 3146 (Penalty for Failure to Appear)) and statutes that require both a minimum term of imprisonment and a consecutive sentence (*e.g.*, 18 U.S.C. § 924(c) (Use of a Firearm in Relation to a Crime of Violence or a Drug Trafficking Offense));
- clarify that an adjustment under §3B1.3 (Abuse of Position of Trust) applies to a defendant who is an imposter, as well as to a defendant who legitimately holds and abuses a position of trust;
- clarify that an adjustment under §3C1.1 (Obstruction of Justice) must relate either to the defendant's offense of conviction (including relevant conduct) or to a closely related case, and that the obstructive conduct must occur during the investigation, prosecution, or sentencing of the defendant's offense of conviction;

Table 2

PUBLIC HEARING WITNESS LIST

Public Hearing on Telemarketing Fraud

Washington, DC – February 10, 1998

Jonathan Rusch
U.S. Department of Justice

Brigit Small
American Association of Retired Persons

Sarah Resnick
National Association of Attorneys General

Lee Norrgard
American Association of Retired Persons

Public Hearing on Federal Theft, Fraud, and Tax Crimes

San Francisco, CA – March 5, 1998

James Bruton, III
Williams & Connolly

Katrina Pflaumer
*U.S. Attorney's Office, Western District of
Washington*

Mark Matthews
U.S. Department of Justice

Ephraim Margolin
*National Association of Criminal Defense
Lawyers*

Richard Speier, Jr.
Internal Revenue Service

Mark Flanagan, Jr.
McKenna & Cuneo

Charles Meadows, Jr.
Meadows, Owens, Collier, Reed, Cousins & Blau

Frank Bowman
Gonzaga University School of Law

Paula Junghans
Martin, Junghans, Snyder & Bernstein

David Cohen
Law Offices of David Cohen

Justin Thornton
American Bar Association

Earl Silbert
Law Offices of Earl Silbert

Gerald Goldstein
Goldstein, Goldstein and Hilley

James Felman
Kynes, Markman & Felman

David Axelrod
Vorys, Sater, Seymour and Pease

Benson Weintraub
Law Offices of Benson Weintraub

Mary Spearing
U.S. Department of Justice

Table 2

**PUBLIC HEARING WITNESS LIST
(continued)**

Public Hearing on Proposed Amendments to the Sentencing Guidelines
Washington, DC – March 12, 1998

John Bliss
International AntiCounterfeiting Coalition

Shari Steele
Electronic Frontier Foundation

David Wikstrom
New York Council of Defense Lawyers

Ted Brown
Internal Revenue Service

Dennis Lynch
Department of the Treasury

Robin Spires
Robin Piervinanzi
Christopher Fleming
Mary Jo Rakowski

Kathleen Williams
Federal Public and Community Defenders

Public Hearing on Proposed Amendments
Washington, DC – June 17, 1998

Kyle O'Dowd
Families Against Mandatory Minimums

Fred Bennett
Practitioners Advisory Group

- exclude from application of §3C1.1 (Obstruction of Justice) a defendant's denial of drug use while on pretrial release; and
- permit a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity (except under three circumstances) and provide a definition of "significantly reduced mental capacity."

Miscellaneous Amendments

The miscellaneous amendments adopted by the Commission in 1998—

- add to §5B1.3 (Conditions of Probation) a condition of probation regarding deportation (in response to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); and
- incorporate into §5K2.0 (Grounds for Departure) the principal holding and key analytical points of *Koon v. United States*, 518 U.S. 81 (1996).

In addition, the Commission passed two amendments during the 1997–1998 cycle that did not require submission to Congress. First, the Commission updated the commentary in §2C1.4 (Payment or Receipt of Unauthorized Compensation) and §2J1.1 (Contempt) to reflect legislative changes in the statutory provisions covered by these guidelines. Second, the Commission updated the Statutory Index to reflect a new child pornography offense and several statutory re-designations.

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, in 1998 the Commission strengthened its legislative strategy to provide members of Congress and their staffs with timely and valuable sentencing-related information and analyses.

Throughout the year, the Commission 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. Detailed below are a few examples of policy initiatives that involved 1998 Commission collaboration with Congress.

Telemarketing Fraud. In 1998, the Commission conducted a detailed study of telemarketing fraud offenses in conjunction with its multi-year comprehensive assessment of fraud and related guidelines. As a result of its analysis, the Commission recommended to the leadership of the House and Senate Judiciary Committees that Congress amend 18 U.S.C. § 2326 (Enhanced Penalties for Telemarketing Fraud) to (1) provide a simpler statutory enhancement, (2) cover conspiracy offenses, and (3) clarify the mandatory restitution provisions for these offenses. The Commission also promulgated amendments to the guidelines providing sentencing enhancements for offenses

involving mass marketing and for offenses involving sophisticated concealment. In part as a response to the Commission's recommendations, Congress passed the Telemarketing Fraud Prevention Act of 1998. The Commission subsequently promulgated emergency amendments to the guidelines providing for separate sentencing enhancements for fraud offenses that involve sophisticated means (modifying the amendment providing for the sophisticated concealment enhancement) and all offenses perpetrated against a large number of vulnerable victims. The Commission submitted the emergency amendments to Congress with a second report explaining the rationale for the emergency amendments and their expected impact on sentencing. The report also included recommendations for monitoring the effectiveness of congressional statutory improvements and the Commission's guideline amendments.

Desecration of Veterans' Cemeteries. The Veterans' Cemetery Protection Act of 1997 directed the Commission to provide a sentencing enhancement of not less than two levels for any offense against the property of a national cemetery. To implement this directive, the Commission amended the theft (§2B1.1), property destruction (§2B1.3), and arson (§2K1.4) guidelines to provide a two-level sentencing enhancement for theft from or destruction of the property of a national cemetery.

Homicide. In 1998, the Commission continued its detailed study of the guidelines for homicide offenses to determine whether they adequately account for the variety, severity, and ranges of offense behavior. As a result of its research and analysis, the Commission recommended to Congress that the statutory penalty for voluntary manslaughter be increased from ten to 20 years. The Commission had found that manslaughter defendants in the two most serious criminal history categories may not be receiving sentences that appropriately reflect the seriousness of their criminal history. Moreover, because of the statutory maximum constraint, there is little or no room within the available statutory range for upward departures in egregious cases.

Intellectual Property Offenses. The No Electronic Theft Act of 1997 directed the Commission to (1) ensure that the applicable guideline range for a crime committed against intellectual property (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2329 of title 18, United States Code) is sufficiently stringent to deter such a crime; and (2) ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed.

The Commission has taken several steps towards implementing this legislation during 1998. In January 1998, the Commission published in the *Federal Register* a proposal from the Department of Justice on the implementation of these directives as well as a general issue for comment on how the directives might best be carried out. In March 1998, the Commission received public comment and heard testimony at a public hearing from a number of interested outside groups on how to implement the Act.

In April 1998, the Commission met with representatives of interested outside groups to develop possible options for amending §2B5.3, the offense guideline pertaining to intellectual property offenses. After those discussions, the staff prepared a number of amendment options for the Commission (revamping options prepared earlier in April for possible Commission consideration). The Commission research staff also conducted an empirical study of sentencing in copyright and trademark infringement cases. At a public meeting on April 23, 1998, the Commission considered a revised proposed amendment prepared by Commission staff and two revised proposals from the Department of Justice, as well as the results of the empirical study. The Commission did not promulgate any of the proposed amendments but voted instead to publish the

proposals to seek further public comment. Additional public comment was received by August 31, 1998, and that comment was summarized by the staff for commissioner review in September 1998.

In October 1998, Congress adjourned, leaving only the chair to preside over the Commission. Prior to this, however, the Commission chartered a formal policy development team charged with further refining the work for consideration by a newly appointed Commission.

Cloning of Wireless Telephones. The Wireless Telephone Protection Act of 1998 provided a general directive to the Commission to review and amend, if appropriate, the guidelines to provide an appropriate penalty for offenses involving the cloning of wireless telephones, including attempts and conspiracies. In response to this directive, the Commission initiated a review of the guidelines (particularly §2F1.1 (Fraud & Deceit)) and the pertinent statutory provisions to determine whether and how the Commission should amend the guidelines to provide an appropriate penalty for such offenses. As part of this review, Commission staff has met with interested outside groups to learn about cellular phone cloning and the equipment used to perpetrate the offense. The Commission also published an issue for comment in November 1998 requesting public input about whether the Commission should provide a tailored specific offense characteristic in §2F1.1 or whether a cross reference would be appropriate if the cloning offense was used to facilitate another offense. The Commission additionally requested comment on whether it should provide a special rule in the loss definition for cases involving stolen, unauthorized, or counterfeit access devices used in cloning offenses.

Other Policy Initiatives

Economic Crime Package

In addition to responding to legislative policy initiatives, in May 1997, the Commission set as one of its top priorities a multi-year systematic study of the guidelines for fraud, theft, and tax offenses. The Commission continued this analysis in 1998. These economic offenses account for more than a quarter of all the cases sentenced in the United States federal district courts. Previously, the Commission had received testimony and survey results from the federal judiciary. In addition, the Department of Justice had indicated that the sentences for these offenses were inadequate to appropriately punish defendants in cases in which the monetary loss was large. In March 1998, the Commission held a public hearing on these issues in San Francisco in conjunction with the American Bar Association's White Collar Crime Institute.

After approximately one year of data collection, analyses, public comment, and public hearings, the Commission developed a comprehensive "economic crimes package" designed to—

- create new loss tables for fraud, theft, and tax offenses that would result in higher sentences for offenses involving large monetary losses;
- consolidate the theft, fraud, and property destruction guidelines; and
- clarify the definition of loss for selected economic crimes.

Although the package narrowly failed to pass during the amendment cycle ending May 1, 1998, the Commission committed itself to continue its development. Working in conjunction with

the Criminal Law Committee of the Judicial Conference, the Commission conducted a field-test of the proposed loss definition by surveying federal judges and probation officers who applied the definition to actual cases. In October 1998, the Commission issued a report of its findings, *A Field Test of Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines*. Among the findings was that more than 80 percent of the judges stated that the proposed loss definition produced results that were more appropriate than the current definition. Encouraged by these findings, the Commission voted to formally seek public comment on possible changes to the economic crimes guidelines and instructed staff to continue work on the economic crimes package. The proposed changes can be found in the November 30, 1998, edition of the *Federal Register* (63 F.R. 602).