

Report of the United States Sentencing Commission to the Judicial Conference of the United States

September 1999

Introduction

This brief report updates (1) developments regarding commissioner vacancies and (2) the ongoing work of the agency. Should you have any questions about these or any other matters pending before the Commission, please do not hesitate to contact the Commission's Office of the Staff Director.

Commission Vacancies

The Commission awaits final actions that, hopefully, will soon result in the appointment of a new, complete slate of commissioners. On June 24, 1999, the President announced his intention to nominate the following seven persons to serve on the Commission:

- (1) Judge Diana E. Murphy, Eighth Circuit Court of Appeals, to be Chair
- (2) Judge Ruben Castillo, Northern District of Illinois
- (3) Judge Sterling Johnson, Jr., Eastern District of New York
- (4) Judge William K. Sessions, III, District of Vermont
- (5) Judge Joe Kendall, Northern District of Texas
- (6) Professor Michael O'Neill, and
- (7) Mr. John R. Steer

This action was followed by submission to the U.S. Senate on August 5 of the first four names cited above. It is hoped that the remaining three nominations will be submitted this month and that the confirmation process will proceed expeditiously.

The Ongoing Work of the Commission

Policy Development Briefing Materials. Incoming commissioners will face the task of designing guideline amendments to implement a significant backlog of crime and sentencing-related legislation enacted by the 105th Congress. Commission staff are preparing briefing materials to assist incoming commissioners with the following legislative directives—

- The No Electronic Theft Act of 1997 directs the Commission to ensure that (1) the

guideline penalties for intellectual property offenses are sufficiently stringent to deter those crimes; and (2) the guidelines pertaining to intellectual property offenses provide for consideration of the value and quantity of infringed upon items. Legislation pending in the current Congress, if enacted, would clarify this Act and require the Commission to respond by the later of 90 days from the date of enactment or the date a quorum of commissioners is constituted.

- The Wireless Telephone Protection Act of 1998 directs the Commission to review and, if appropriate, amend the guidelines to provide an appropriate penalty for offenses involving the fraudulent cloning of wireless telephones.
- The Identity Theft and Assumption Deterrence Act of 1998 directs the Commission to review and, if appropriate, amend the guidelines to provide an appropriate penalty for each offense under 18 U.S.C. § 1028 relating to fraud in connection with identification documents.
- The Protection of Children from Sexual Predators Act of 1998 directs the Commission to provide a number of specified sentencing enhancements for various sexual offenses involving children.

Several other pieces of legislation enacted by the 105th Congress do not contain explicit directives to the Commission but nevertheless may warrant changes to the guidelines. Accordingly, Commission staff are preparing briefing materials for incoming commissioners on the following items–

- Congress (1) enacted legislation to prohibit certain aliens who are lawfully present in the United States under a non-immigrant visa from possessing a firearm; and (2) amended 18 U.S.C. § 924(c) to prohibit “possession” of a firearm in furtherance of a drug trafficking or violent crime (in addition to using or carrying a firearm during and in relation to such crime). This latter law also creates a tiered system of sentencing enhancement ranges, each with a mandatory minimum and presumed life maximum, in lieu of the former, fixed penalty of five years.
- The Methamphetamine Trafficking Control Act of 1998 increased the penalties for manufacturing, importing, or trafficking in methamphetamine by reducing by one-half the quantity of methamphetamine required to trigger the various mandatory minimum sentences in drug statutes. Legislation pending in the current Congress, if enacted, would build on this Act by directing the Commission essentially to equalize penalties for amphetamine and methamphetamine offenses and to provide sentencing enhancements for certain manufacturers of these drugs.
- Congress created a number of new tax offenses apparently aimed at protecting the privacy interests of the taxpayer in certain situations, and it also urged the Commission to examine guideline penalties for offenses involving nuclear, biological, and chemical weapons and materials.

In addition to the above crime legislation that awaits Commission action, incoming commissioners may have to revisit implementation of the Telemarketing Fraud Prevention Act of 1998 because of a unique situation created by the absence of commissioners during the last year. In response to directives contained in the Act, the Commission adopted a temporary emergency amendment to the sentencing guidelines that provides increased penalties for offenses involving telemarketing fraud. Specifically, the amendment built upon an amendment submitted to Congress in May 1998, by expanding the enhancement for “sophisticated concealment” to cover all forms of sophisticated means and by providing an enhancement if the offense impacted large numbers of vulnerable victims. This amendment became effective November 1, 1998. However, because of the absence of commissioners, the emergency amendment was not re-promulgated as a permanent amendment during the last amendment cycle, as has been past practice. As a result, the amendment may expire unless Congress grants the Commission additional emergency amendment authority to re-promulgate the amendment. In the absence of repromulgation, the issue of whether and when the amendment expires will likely result in litigation.

Congress continues to consider other crime legislation that, if enacted, can be expected to greatly impact the Commission’s agenda for the next year. Specifically, the Senate and House have passed juvenile crime legislation that contains a number of directives to the Commission concerning juvenile offenders and firearms offenses. The Senate version, S. 254, directs the Commission to promulgate sentencing guidelines for juvenile offenders within one year of the date of enactment. The House version, H.R. 1501, directs the Commission to work with the Attorney General to develop graduated sanctions for juvenile offenders. There are substantial differences between the two bills – particularly in the area of gun control – and the bill currently is in conference.

Annual Report and Sourcebook. This summer, the Commission published its *1998 Annual Report and 1998 Sourcebook of Federal Sentencing Statistics*. The annual report presents an overview of the Commission; describes the agency’s varied research, training, and clearinghouse activities; and provides information about federal criminal cases sentenced under the guidelines during fiscal year 1998. The sourcebook presents descriptive statistics on the implementation of the sentencing guidelines and provides selected district, circuit, and national sentencing data.

Among the findings were the following–

The number of guideline cases reported to the Commission increased 3.9 percent from 48,848 in 1997 to 50,754 cases in 1998. Demographic characteristics of offenders changed in some areas and remained stable in others. Historically, females have accounted for approximately 15 percent of federal criminal cases, and this remained true in 1998 (15.1%). During 1998, the percentage of White (32.0%) and Black (26.5%) offenders each decreased from 1997 levels, while the percentage of offenders of Hispanic origin increased by slightly more than three percentage points (to 37.0%). This shift in the racial/ethnic composition of the offender population continues a trend that began several years ago. The proportion of offenders who are not U.S. citizens increased to 31.9

percent, continuing a seven-year trend. The average age of federal offenders was 34.2 years (median= 32 years). More than seven percent (7.2%) graduated from college. The percentage of offenders who did not graduate from high school has been increasing, reaching 43.5 percent in 1998. Offenders in 1998 were slightly younger and less educated than in 1997.

Trial rates under the guidelines have declined from a high of approximately 15 percent of cases in 1993 to 6.4 percent in 1998. However, historically, these rates vary considerably by both district and offense type. In 1998, district trial rates ranged from 1.0 percent to 21.9 percent, while for offense type, the range was from 1.0 percent in environmental cases to 27.8 percent in kidnapping cases.

Two-thirds (66.3%) of 1998 sentences were within their applicable guideline ranges. Substantial assistance departures, for the fifth straight year, remained lower than 20 percent (19.3% in 1998). Across districts, the rates of substantial assistance departures ranged from 1.7 percent to 43.6 percent. Of the 121 guidelines used in 1998 as a primary guideline, 40 had no substantial assistance departures. Downward departures (other than substantial assistance departures under \$5K1.1) continued an eight-year trend and increased to 13.6 percent. The rates of downward departures ranged across districts from 0.0 percent to 61.0 percent. Of the 121 guidelines used in 1998 as primary guidelines, 38 had no downward departures for reasons other than substantial assistance. Upward departures remained at approximately one percent (0.8% in 1998) for the sixth straight year. Of the 121 guidelines used in 1998 as primary guidelines, 67 guidelines had no upward departures.

The vast majority of offenders (78.6%) were sentenced to imprisonment without a provision for alternative confinement. Of those offenders sentenced to some form of imprisonment, the average term was 58.1 months (median= 30 months), continuing a small but steady decline in the length of prison sentences that began in 1993. With the exception of immigration offenders, the majority of offenders who were in guideline zones eligible for non-prison sentences did, in fact, receive alternative confinement. In addition to a term of prison or probation, 34.0 percent of the offenders were also ordered to pay a fine, restitution, or both.

Guide to Publications and Resources. In furtherance of its mandate to promote research and disseminate information on sentencing, the Commission in early September sent to press its catalog which lists and describes the Commission's available publications, data, and information resources. The publication will be available in late September or early October.

Internet Web Site. This summer, the Commission also continued to expand its offerings on its Internet web site (*USSC OnLine* at www.ussc.gov). Users can choose from nine information categories that allow documents to be read on-screen before a user elects to down-load or print the material. In addition, the home page is updated frequently to keep the public abreast of meetings, legislative developments, new publications, and new

training materials. The home page continues to be visited approximately 7,000 times per month.

Training. In 1999, the Commission continued to provide training on guideline application and related sentencing issues at a variety of training programs, including ongoing programs sponsored by the Federal Judicial Center (FJC) and the Department of Justice. Participants included federal judges, probation officers, prosecuting and defense attorneys, law clerks, and others interested in the sentencing process.

In May 1999, as part of the Commission's effort to address the long established need for defense bar training, the Commission once again co-sponsored with the Federal Bar Association the Eighth Annual National Seminar on the Federal Sentencing Guidelines. The seminar was attended by approximately 350 participants, mostly defense attorneys and probation officers.

The Commission's "HelpLine" also continued to provide guideline application assistance to approximately 200 calls per month.

The Commission staff continues to work collaboratively with the FJC and the Administrative Office of the U.S. Courts (AO) to plan and develop educational and informational programming for the Federal Judicial Television Network (FJTN). For example, representatives of the Commission's training staff and the AO Office of General Counsel worked together with the FJC to produce a live broadcast on restitution that aired in July 1999. The program featured a step-by-step process for determining victims and compensable harms for restitution purposes. Work is underway with the FJC to expand the Commission's programming on the FJTN during the next year.

Fraud/Loss Field Test. At the direction of the last Commission, Commission staff also have continued to work on the proposed comprehensive rewrite of the loss definition for fraud and theft offenses. Last summer, the Commission "field tested" an amendment proposed in the spring of 1998 in conjunction with the Criminal Law Committee of the Judicial Conference. Briefing materials have been prepared and await input and review by the new commissioners.

Conclusion

As the Sentencing Commission awaits the appointment of a new slate of commissioners, it continues with its day-to-day activities of data collection, training, monitoring relevant case law, providing technical assistance and public information, and serving as a clearinghouse of federal sentencing information. In the area of policy development and modifications to the guidelines, however, the agency is severely hampered due to the lack of commissioners. While the Commission staff has been preparing briefing materials on guideline policy options pertaining to legislation enacted by the 105th Congress, only commissioners can vote to publish proposed amendments for comment and only commissioners can propose new guideline amendments to Congress.