

CHAPTER TWO

The Sentencing Guidelines

Guideline Simplification

The Commission identified comprehensive review of the sentencing guidelines as a top agency priority in 1995. The objective of this review is to improve federal sentencing by working closely with the judiciary and others to simplify and refine the guidelines. Dr. John H. Kramer, Executive Director of the Pennsylvania State Sentencing Commission and an expert in structured sentencing systems, accepted the Commission's request to lead the effort. The Commission decided that such a review was timely, given vast amounts of information available on: (1) approximately 300,000 cases sentenced under the guidelines since their inception, (2) numerous appellate opinions, (3) a growing body of academic literature and public comment, and (4) the empirical analyses of the guidelines conducted to date.

In the first phase of the simplification process, staff working groups prepared briefing papers on major guideline topics to provide a foundation for Commission consideration of relevant issues and possible options for refinement. Each paper:

- reviewed the history behind the original policy decisions,
- assessed how the particular guideline is working,
- identified the ways in which state sentencing commissions have addressed similar issues,
- summarized empirical and other research information, and
- outlined broad options for refinement.

The topics covered include: relevant conduct, the level of detail in Chapter Two, multiple counts, Chapter Three adjustments, sentencing options, departures, and the Sentencing Reform Act. The papers produced by these working groups provided sound bases for commissioners, staff, and the public to understand the major features of the current guidelines and assess proposals for change. At the conclusion of this phase of the simplification project, the background papers were posted on the Commission's Internet home page, and copies were made available to interested individuals and groups.

The Commission declared a moratorium on guideline amendments in 1996 (except for those necessary to implement congressional directives) in large measure to focus on the voluminous material produced by staff and gather insights from judges, attorneys, probation officers, and the academic community about the need for changes. During the second phase of the simplification project, commissioners received input from a variety of sources. One such source was a public hearing held August 12, 1996, in the Bryon White U.S. Courthouse in Denver (*see* Table 2). Devoted entirely to simplification issues, the hearing was divided into three major segments: (1) general comments from guidelines practitioners, (2) testimony from individuals who had testified at

Table 2
PUBLIC HEARING WITNESS LISTS

Proposed Amendments to the Sentencing Guidelines Washington, D.C. — March 11, 1996	Simplification of the Sentencing Guidelines Denver, Colorado — August 12, 1996
Mary Lou Soller <i>American Bar Association</i>	Judge Lewis Babcock Judge Zita Weinsienk Judge Wiley Daniel
David Wikstrom <i>New York Council of Defense Lawyers</i>	<i>U.S. District Court, District of Colorado</i>
Julie Stewart <i>Families Against Mandatory Minimums</i>	Richard Miklic Frederick Bach Kurt Thoene Christopher Perez
Alan Chaset <i>National Association of Criminal Defense Lawyers</i>	Suzanne Wall Juarez <i>U.S. Probation Office, District of Colorado</i>
Atlee W. Wampler III <i>Wampler Buchanan & Breen</i>	Michael Katz David Connor Raymond Moore Virginia Grady <i>Federal Public Defender's Office District of Colorado</i>
Judith Hall	Robert Litt <i>U.S. Department of Justice</i>
Lisa Campanella	Patrick Burke <i>Criminal Justice Act Panel Attorneys, CO</i>
	Arthur Nieto
	Michael Bender
	Kevin Reitz <i>University of Colorado Law School</i>
	Jeralyn Merrit

the Commission's 1986 hearing in Denver about their experience with nearly ten years of guideline sentencing, and (3) commentary from practitioners and researchers on relevant and acquitted conduct, drug offenses and the defendant's role in the offense, and departures/offender characteristics.

Commissioners considered additional important input from:

- a Judges Advisory Group composed of one judge from each circuit and members of the Criminal Law Committee of the Judicial Conference;
- discussions with Professors Michael Tonry and Daniel J. Freed and former Commission Chairman William W. Wilkins, Jr. at a February planning retreat;
- attendance at two meetings of the Criminal Law Committee and a separate meeting with the group's subcommittee on sentencing guidelines;
- a detailed survey of district court and appellate judges on guideline simplification issues conducted by the Federal Judicial Center;
- participation in three regional workshops for district court judges sponsored by the Federal Judicial Center;
- a seminar on guideline issues at the American Bar Association's annual convention; and
- numerous informal meetings with district court judges, prosecutors, federal defenders, and probation officers.

Beginning at its July meeting, commissioners voted to publish a series of simplification-related proposals in the *Federal Register* for comment in early January 1997, as part of the annual guideline amendment cycle. By the end of fiscal year 1996, five proposals had been approved for publication. These proposals covered the topics of relevant conduct, acquitted conduct, acceptance of responsibility, guideline consolidation, and circuit conflicts. Additional proposals, including potential revisions to the theft and fraud guidelines, role in the offense guidelines, and departure policy statements are under active consideration.

While the Commission had intended to focus its attention primarily on guideline simplification issues this amendment cycle, significant sentencing-related legislation was enacted in the closing weeks of the 104th Congress. Some of this legislation contained specific directives to the Commission; other legislation, while not containing directives, effected changes requiring Commission attention. The legislation addressed, among other issues, mandatory restitution, immigration, drug precursors, special assessments, terrorism, international counterfeiting, carjacking, and methamphetamine penalties. In addition, the Commission continued its work on developing new recommendations for cocaine sentencing policy as mandated by Congress.

Guideline Assessment

The Commission's assessment project is reviewing the sentencing guidelines to study their effectiveness at accomplishing the purposes of sentencing and to guide the Commission's simplification efforts. In 1996, the Commission initiated the following assessment program projects: the Intensive Study Sample Project (ISS); a review of sentencing and guideline literature; a comparison of state and federal sentencing guidelines; and studies of disparity, offense seriousness, criminal history, drug offenses, and the ways in which the guidelines are applied.

Intensive Study Sample

On an ongoing basis, federal courts supply the Commission with documents about each defendant sentenced. The Commission, in turn, reviews basic sentencing and demographic data and enters this information into its Monitoring database. The data provide a record that includes characteristics of the offense (*e.g.*, monetary loss) and of the defendant (*e.g.*, prior criminality), court decisions (*e.g.*, fact-finding, guideline application, departures), and the court's disposition (*e.g.*, type and length of sentence imposed).

This database is the Commission's primary statistical resource for its *Annual Report and 1996 Sourcebook of Federal Sentencing Statistics*. It suggests areas where guideline amendments may be needed and informs the Commission's deliberations about new amendments, research projects, reports to Congress, prison impact projections, and responses to the many special requests for statistical information from Congress, the courts, governmental agencies, and the academic community.

The Intensive Study Sample (ISS) will supplement the existing Monitoring database with information that will assist the assessment program's disparity, offense seriousness, drug offense, and criminal history projects. Variables to be collected for the ISS include personal characteristics such as: the defendant's employment history, military background, drug and alcohol use, and number of children; whether or not the defendant was financially supporting children; and whether or not the defendant was on welfare. New offense-related variables will include the presence or absence of victims, the age of any victims, defendant culpability and function in the offense, and the number and type of weapons used.

In 1996, four offices within the Commission assisted with the development of a detailed data-collection instrument for the ISS. Subsequently, Commission staff began coding a five-percent random sample of 1995 cases (approximately 2,000 cases). The pertinent variables will be extracted, coded, and merged with existing data elements from the Monitoring files to provide the basis for a variety of assessment analyses.

Criminal History

Using the ISS data to supplement the Monitoring database, staff will: (1) assess the effectiveness of the current method of calculating criminal history in distinguishing offenders with less serious prior records from those with more serious prior records, and (2) compare other criminal history measurement models to the current structure. The goal of this project is to determine whether the Commission can develop a more effective criminal history measure. ISS

prior offense variables for the analyses will include: type of offense, weapon use, drug use, dollar loss, and type and length of sentence, along with additional measures of violence associated with these past offenses.

Drug Offense Analysis

To expand the Commission's information base on drug offenses, Commission staff examined approximately 800 drug cases drawn from the Intensive Study Sample. This sample was representative of all drug offenders sentenced under the guidelines during 1995 and was drawn to help identify patterns of offender functions within drug conspiracies and to examine the effectiveness of the guidelines in linking punishment with the offender's role. Staff examined characteristics of drug offenders and offenses along two primary dimensions: drug type (*i.e.*, powder cocaine, crack cocaine, heroin, marijuana, and methamphetamine) and the defendant's role within a conspiracy (*e.g.*, high-level supplier, defendant employing special skill, manager/supervisor, street-level dealer, courier, lookout).

Disparity Studies

In constructing the Sentencing Reform Act of 1984, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. In a 1991 study mandated by Congress, the Commission found that sentences imposed on offenders convicted of bank robbery, cocaine trafficking, heroin distribution, and bank embezzlement were dramatically more uniform under the guidelines than were sentences imposed on similar offenders before the guidelines.

The Commission is currently engaged in several additional studies concerning sentencing disparity. In 1996, a study of sentencing disparity among judges before and after guideline implementation was undertaken, and its preliminary report proceeded to review. This study is using a "natural experiment"¹ methodology to determine if disparities due to philosophical and other differences among judges have been reduced under the guidelines. The study will include factors such as offense type, the defendant's criminal history, and demographic factors.

Other Commission studies concerning disparity focus on differences among offenders rather than differences across judges. For example, the Commission has engaged an outside contractor to study the effects of race, gender, and other personal characteristics on sentences. The Commission has also continued its in-house research to evaluate the effects of extra-legal factors (*e.g.*, gender, race) and the impact of some legally relevant factors (*e.g.*, drug type) on the likelihood and length of incarceration.

¹ The study examined differences among judges who belong to identical random case assignment pools before and after guideline implementation. Random assignment ensures that cases received by judges are comparable.

Comparing State and Federal Guidelines

Over the last ten years, the number of states adopting sentencing guidelines has increased dramatically. For the State and Federal Guideline Comparative Context Project, Commission staff: (1) collected and updated information on all state guideline systems, and (2) used 14 federal cases sentenced in 1994 to compare federal guideline sentences with those of four state guideline systems. For its state comparisons, the study selected the Minnesota, Oregon, Pennsylvania, and Virginia guidelines systems.

To ensure accuracy of the state guideline calculations, Commission staff provided important facts from each federal case to staff at the four state sentencing commissions and asked them to “sentence” these defendants using their own guidelines. Once calculated, the state guideline ranges were compared to the defendant’s federal guideline range. The comparisons illustrated similarities and differences in guidelines application between the state and federal systems, and provided specific information on the ways different jurisdictions calculate offense severity and criminal history.

The study found that, on average, the federal system exposed defendants to higher expected time to be served than the four states, with an average time served in these cases of 76.6 months. The averages for the states were: Minnesota (44.3 months), Virginia (38.4 months), Pennsylvania (27.6 months), and Oregon (20.5 months). The sentencing differences reflected different penalty structures in the guidelines and limits and sensitivity to correctional resources in the states.

Guideline Amendments

Introduction

The legislation creating the Sentencing Commission provided 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 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

The following is a list of enactments from the second session of the 104th Congress that require Commission review:

- Telecommunications Act of 1996
- Antiterrorism and Effective Death Penalty Act of 1996
- Anti-counterfeiting Consumer Protection Act of 1996
- Church Arson Prevention Act of 1996
- Health Insurance Portability and Accountability Act of 1996
- National Defense Authorization Act for Fiscal Year 1997
- Omnibus Consolidated Appropriations Act
- Public Law 104-214, relating to witness retaliation and jury tampering
- Carjacking Correction Act of 1996
- Comprehensive Methamphetamine Control Act of 1996
- Economic Espionage Act of 1996
- Drug-Induced Rape Prevention and Punishment Act of 1996

upon expiration of a 180-day congressional review period unless the Congress, by law, provides otherwise.

Amendments Promulgated

In 1996, the Commission decided not to promulgate guideline amendments except as necessary to implement legislation enacted by Congress. This one-year hiatus in the amendment process was important to allow a period of time for previous changes to “settle in” and to permit more deliberate consideration of broader guideline issues. Consequently, the Commission published a limited number of proposed amendments for public comment in the *Federal Register* in early 1996. In addition, as part of the Commission’s normal amendment process, a public hearing on the proposals (see Table 2) was conducted in Washington, D.C., on March 11, 1996.

On May 1, 1996, the Commission submitted to Congress two legislatively directed amendments to the sentencing guidelines. These amendments took effect on November 1, 1996, following the requisite 180-day period of congressional review. The amendments made the following changes in the operation of the guidelines:

- increased the guideline penalties for offenses involving the sexual exploitation of minors and the promotion of prostitution or other prohibited sexual conduct; and
- increased the guideline penalties if a computer was used to advertise or transmit material involving the sexual exploitation of a minor, if possession of the material resulted from the defendant’s use of a computer, or if a computer was used to solicit participation of a minor in sexually explicit conduct to produce the material.

Before the 104th Congress adjourned, it passed and the President signed a number of legislative initiatives that involved changes in criminal law, prompting their review by the Commission for possible amendment action. Although not all of the legislation requires modification of the guidelines, some of the new laws may require an extensive Commission response. For example, the Antiterrorism and Effective Death Penalty Act of 1996 requires the Commission to create or amend existing guidelines relating to restitution, special assessments, and conditions of probation and supervised release. The same Act also calls for changes in the guidelines’ terrorism enhancement and requires minimum guideline penalties for various computer crimes. The Commission used the emergency authority provided by the Act to expand the guidelines’ definition of terrorism to cover both international and domestic terrorism. This amendment took effect November 1, 1996.

In addition, during the second session of the 104th Congress, the Commission submitted two reports to Congress in response to legislation. It issued a report on child pornography and other sex offenses, as directed by the Sex Crimes Against Children Prevention Act of 1995. The Commission also prepared a report on the deterrent effect of existing guidelines as they apply to computer crimes, as required by the Antiterrorism and Effective Death Penalty Act of 1996. These reports were submitted to Congress in June and are available on the Commission’s Internet web site.

Assistance to Congress

The Commission continues to expand its ability to provide policymakers with timely and complete information, devoting particular effort to providing it at the outset of sentencing policy discussion. During 1996, Commission staff responded to more than a hundred congressional requests for assistance. These inquiries, both written and oral, included requests for technical assistance in drafting legislation, explanations of guideline operation, and Commission publications and resource materials.

Other requests require the Commission to analyze its comprehensive federal sentencing database. In 1996, congressional requests included analyses of carjacking offenses, elimination of good conduct time for certain crimes of violence, the impact of the implementation of the Child Pornography Protection Act, the prevalence of mules and couriers in powder cocaine cases, median powder cocaine quantities, the distribution of drug type among "safety valve" cases, the frequency of crack cocaine possession cases, and the impact of granting good conduct time to defendants sentenced to less than one year in prison. To provide policymakers with the broadest possible range of information, the Commission, when feasible, will provide Congress with data beyond its sentencing database. For example, to inform a member of Congress who was considering raising federal penalties for prison escape, the Commission recently compared state experiences with prison escapes to the federal record on this issue.