



GuideLines

News from the U.S. Sentencing Commission

July 2003

Highlights of the PROTECT Act

On April 30, 2003, the President signed into law the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the PROTECT Act). The Act contains several significant provisions relevant to the federal sentencing system. Among them, the Act limits the number of federal judges on the Sentencing Commission to not more than three and requires the chief judge of each district to ensure that sentencing information is submitted to the Sentencing Commission.

The Act –

- requires *de novo* appellate review of certain departure decisions;
- creates a new statutory provision governing how sentences on remand are to be conducted;
- directs the Sentencing Commission, within 180 days, to review the grounds for downward departure authorized by the guidelines and to promulgate amendments to ensure that the incidence of downward departures are substantially reduced;
- prohibits the Sentencing Commission from adding any new grounds for downward departure in Part K of Chapter 5 until May 1, 2005;
- directs the Sentencing Commission to, upon request, make its records and data available to the House and Senate Judiciary Committees, and the data available to the Attorney General;

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Sentencing Commission Sends Amendments to Congress

The United States Sentencing Commission on May 1, 2003, sent to Congress a package of amendments to the federal sentencing guidelines that will provide sentencing increases or expanded coverage for a number of offenses including white collar frauds, terrorism, cybercrime, oxycodone trafficking, campaign finance offenses, and manslaughter. The amendments become effective November 1, 2003, following a 180-day congressional review period.

White Collar Frauds

Included in the package was an amendment that significantly increases penalties for corporate and other serious white collar frauds. This amendment makes permanent and builds upon a temporary amendment that became effective January 25, 2003. The Commission previously approved the temporary amendment using emergency authority granted by Congress in the Sarbanes-Oxley Act of 2002.

The amendment significantly impacts offenses such as wire fraud, mail fraud, and securities fraud by increasing the base penalties and adding sentencing enhancements that apply to these crimes. It expands the scope of a recently enacted sentencing enhancement that targeted officers and directors of publicly

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Judge Diana E. Murphy, Commission chair (center) welcomes new members of the Sentencing Commission, U.S. District Court Judge Ricardo H. Hinojosa(left), and former Deputy Assistant Attorney General Michael E. Horowitz (right). An investiture ceremony was held at the Supreme Court of the

Message from the Chair

Diana E. Murphy

One of the most interesting aspects of serving as Chair of the Sentencing Commission is the correspondence that comes in the mail. I am not referring to position papers or commentary responding to issues for comment or published notices of proposals and priorities, but rather to more personal letters. Many of them are critical of something the Commission has done or not done. Some of them voice appreciation or encouragement. Others make suggestions or offer new ideas. Some make reflective comments on the guidelines or offer the frankest feedback. Occasionally judges share specific thoughts about when the guidelines work best and when they are found wanting.

The most joyfully received in the first instance are quite naturally the more rare commendatory letters, but there is much to learn from the others. Sometimes changes have been made as a result or initiatives launched – in fact such correspondence played a critical role in the Commission’s decision to create its ad hoc advisory groups on the organizational guidelines and Native American sentencing issues. We learn about unintended communications – photographs that may be intended to add a lively look to a newsletter may appear self aggrandizing. Information in the newsletter no doubt strikes some as repetitive, but the newsletter reaches a broad audience in all branches of government and the many groups interested in federal sentencing policy, some of which do not receive other communications about guideline developments. Many times we are able to provide correspondents with exactly the information they seek – whether it relates to the impact of the guidelines on women or issues of racial disparity or other policy areas. Some once critical correspondents have become allies as we work together on issues of justice in sentencing. This is indeed an interactive process. Thanks for the help!

Guidelines

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Congress has recently made major changes in federal sentencing in the PROTECT Act, signed into law by the President on April 30, 2003, and further changes are being discussed. One draft initiative would significantly change drug sentences (the Vital Interdiction of Criminal Terrorist Organizations Act of 2003 or VICTORY Act). Another bill, called the Judicial Use of Discretion to Guarantee Equity in Sentencing Act of 2003 (JUDGES Act), would repeal the Feeney Amendment portion of the PROTECT Act. The Commission is actively engaged in commenting on these legislative proposals and providing data and other information about the operation of the guidelines system and the crimes being sentenced. We have made a special effort to provide early information on the substantive and procedural provisions in the PROTECT Act and have received many calls asking about the reporting requirements for chief judges and for sentencing courts. In response we have worked with the Criminal Law Committee of the Judicial Conference to prepare and circulate to all courts a June 17 memo on the “Documentation Required by Congress to be Sent to the Commission.”

The PROTECT Act directs the Commission to review the authorized grounds for downward departures to reduce their frequency substantially, and to promulgate any necessary amendments to that end. The Act gave the Commission a deadline of October 27, 2003, for this task. We certainly need your help with this directive and are publishing related issues for comment and will have a public hearing in late summer.

The Twelfth Annual National Seminar on the Federal Sentencing Guidelines, cosponsored by the Commission and the Federal Bar Association, was held in

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Miami on May 28-30. This year we had a record attendance of over 500, and there was much attention given to recent developments. The Commission was also well represented at the Second Circuit Judicial Conference in early June. Vice Chairs Castillo and Sessions and Commissioner O'Neill spoke on guideline issues at the judges' meeting, and I talked at the general session about sentencing white collar criminals, touching on guideline changes in response to the Sarbanes-Oxley Act and developing issues. Immediately after that conference, the Commission met with the Criminal Law Committee. The Commission's two ad hoc advisory groups are close to making their final reports. The ad hoc group on the Organizational Guidelines will present its report at a public meeting with the Commission in October, and the Native American Sentencing Issues group will do the same in November.

Finally, a warm welcome to our two new commissioners – Judge Ricardo Hinojosa and Commissioner Michael Horowitz. ■

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traded corporations who commit securities violations for particularly substantial increases in penalties. Under the permanent amendment, it applies to registered brokers, dealers, and other investment advisors who defraud investors or employers.

The amendment makes permanent the emergency amendment of January 25, 2003. That amendment established significant sentencing enhancements for white collar offenses that affect a large number of victims or endanger the solvency or financial security of publicly traded corporations, other large employers, or 100 individual victims. The amendment also increased penalties significantly for offenders who obstruct justice by destroying documents or records.

Terrorism and Cybercrime

The Commission promulgated a multi-part terrorism amendment, responding to provisions of the USA PATRIOT ACT of 2001, the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, and the Terrorist Bombings Convention Implementation Act of 2002. The Commission addressed new offenses involving the transfer or possession of certain biological agents and toxins; increased the penalties for tampering with the public water system; and expanded the arson guideline to sanction offenses involving the destruction of a public transportation system, a state or government facility, an infrastructure facility, or a place of public use.

In response to the Homeland Security Act of 2002, the Commission sent Congress an amendment bolstering penalties for offenses under 18 U.S.C. § 1030, the computer crime statute. This amendment addresses the serious harm and invasion of privacy that can result from offenses involving the misuse of, or

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Hinojosa and Horowitz Named to Sentencing Commission

Chief Justice William H. Rehnquist, at an investiture ceremony held at the Supreme Court of the United States, on June 25, 2003, administered the oath of office to two new members of the U.S. Sentencing Commission: United States District Court Judge Ricardo H. Hinojosa of McAllen, Texas, and former Deputy Assistant Attorney General Michael E. Horowitz of Chevy Chase, Maryland. President George W. Bush on May 27 had appointed Judge Hinojosa and Mr. Horowitz to six-year terms as commissioners.

Judge Hinojosa, who has served on the U.S. District Court for the Southern District of Texas since 1983, also serves as an adjunct professor at the University of Texas School of Law. From 1976 until 1983, he was an attorney with the Ewers & Toothaker Law Firm in McAllen, Texas, and was a partner at the time he became a judge. He graduated Phi Beta Kappa and with honors from the University of Texas at Austin in 1972 and earned his law degree from Harvard Law School in 1975.

Mr. Horowitz is currently a partner with the law firm of Cadwalader, Wickersham & Taft in Washington, D.C. Previously, he served in the Justice Department's Criminal Division as Deputy Assistant Attorney General in 1999 and as chief of staff from 2000-2002. From 1991 through 1999, Mr. Horowitz was an assistant United States attorney in the Southern District of New York, where he served as deputy chief of the Criminal Division and chief of the Public Corruption Unit. Mr. Horowitz received his B.A. *summa cum laude* from Brandeis University in 1984 and a J.D. *magna cum laude* from Harvard Law School in 1987.

By statute, the Sentencing Commission is composed of seven voting members and two nonvoting ex-officio members. No more than four commissioners may be members of the same political party, and no more than three may be federal judges. ■

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damage to, computers. The amendment provides significantly enhanced penalties for computer offenses that involve (1) computer systems used to operate a critical infrastructure, or used by a government entity in furtherance of the administration of justice, national defense, or national security; (2) a heightened level of intent to cause damage to a protected computer; and (3) substantial disruption of a critical infrastructure.

Oxycodone Trafficking

The Sentencing Commission also increased substantially the penalties for oxycodone trafficking offenses. Oxycodone is a Schedule II narcotic prescribed for the treatment of pain. The Commission has been concerned about the increasing illicit use of oxycodone (particularly the drug OxyContin), the health and societal consequences associated with its use, and the rising number of federal cases sentenced for the drug's trafficking.

Campaign Finance Offenses

In response to increases in statutory maximum penalties contained in the Bipartisan Campaign Reform Act of 2002, the Commission made permanent a temporary, new guideline to cover offenses cited in the Federal Election Campaign Act of 1971. The guideline amendment addresses violations involving (1) the amount of money an individual, corporation, political action committee, or national political committee may contribute to a federal political campaign; (2) the insertion of foreign money into federal election campaigns; or (3) purposeful and detrimental misrepresentations about a candidate's position that are made by someone who fraudulently identifies himself as working for that candidate's campaign.

Manslaughter

The Sentencing Commission increased the base offense level for reckless involuntary manslaughter from a range of 15-21 months to a range of 27-33 months for a first offender. The Commission increased the penalty for criminally negligent involuntary manslaughter offenses, from a range of 6-12 months to a range of 10-16 months. These increases are based on a Commission study examining state penalties and input from the Commission's Ad Hoc Advisory Committee on Native American Sentencing Issues, the Department of Justice, and the Federal and Community Public Defenders. The amendment also reflects recent congressional interest in achieving harsher penalties for drunk driving cases that, through reckless conduct, result in death. ■

Tentative Calendar of Public Meetings

For your convenience, meeting agendas and materials can be accessed via the Commission's website: www.usc.gov. All meetings are held in Washington, DC, unless otherwise noted. Dates may be subject to change.

August 20
September 24
October 8
November 10

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- amends the guidelines to require a formal motion by the government at the time of sentencing in order for the defendant to receive an additional one-level reduction for acceptance of responsibility;
- directs the Commission to promulgate a policy statement authorizing a departure of no more than 4 levels for government motion pursuant to an early disposition program.

In regard to child sex crimes, the Act –

- makes a number of amendments to policy statements in the *Guidelines Manual* (see §5K and §5H) that restrict the availability of downward departures in certain sex offense cases;
- increases penalties for selected offenses dealing with transportation for illegal sexual activity, sexual exploitation of minors, and human trafficking;
- creates a mandatory minimum term of 20 years for kidnapping of a minor; increases the supervised release term so that it is now up to life;
- provides “two strikes, you’re out” mandatory life imprisonment for an instant child sex offense and one prior child sex offense; and
- provides specific enhancements for trafficking, receipt and possession of child pornography based on the number of images. ■