
Guide Lines



News from the U.S. Sentencing Commission

January 1996

Sentencing Commission's Work Reviewed in Oversight Hearing

The Chairman of the House Subcommittee on Crime urged the Sentencing Commission not to be chilled in its guideline reform efforts by congressional rejection of two Commission proposals. The comments came during an oversight hearing December 14, 1995, on the Commission and the federal sentencing guidelines, part of a routine oversight process established by Chairman Bill McCollum (R-FL) to review the work of the various components of the federal criminal justice system. The subcommittee has held oversight hearings in previous months on offices within the Department of Justice, including the Criminal Division and the Federal Bureau of Prisons.

In his opening statement, Chairman McCollum characterized the guidelines as a "complicated, finely-tuned system that has done a superb job of accomplishing the objective of federal sentencing uniformity."

At the same time, he urged the Commission to continue the evolutionary process envisioned by the Sentencing Reform Act to improve the guidelines. "I would hope that what we did in rejecting the crack cocaine and money laundering [amendments] does not put any chilling effect on your efforts to try to make reforms," he said.

Rep. John Conyers (D-MI), ranking minority member on the full House Judiciary Committee, commented that Congress, in creating the Sentencing Commission and mandatory minimum

penalties, has developed a system that "locks up more of its people than under any system ever devised in recorded civilization." He went on to express concern about whether "a Commission should continue to exist that disregards the reality as prominently as it has since it's been created," but recognized the part Congress plays in increasing penalties.

Sentencing Commission Chairman Richard P. Conaboy, accompanied by Staff Director Phyllis J. Newton and General Counsel John R. Steer, focused his remarks primarily on three issues: first, the vital role the guidelines play in effective crime control and sentencing policies; second, the Commission's ongoing role as an independent, expert agency to assist the Congress and the executive branch in evaluating and developing those policies; and third, continuing Commission efforts to make the guideline system more effective.

(See *Hearing on page 8*)

Guideline Amendments Take Effect Nov. 1

An unusual amendment cycle came to a close November 1, 1995, with enactment of a series of guideline amendments that respond, in large measure, to legislation contained in the 1994 Crime Bill. One day prior to the amendments taking effect, President Clinton signed legislation passed by the House and Senate to disapprove two proposed amendments – equalization of base penalties for crack and powder cocaine, and revision and consolidation of the money laundering guidelines (see story, page 7). This is the first time in the Commission's history that guideline amendments submitted to Congress for review have been disapproved prior to taking effect.

The Commission did not publish a new Guidelines Manual at the normal time this year because of the uncertainty surrounding the fate of these two amendments. The revised Manual was delivered to judges, probation officers, assistant U.S. attorneys, and federal defenders in mid-December.

(See *Amendments on page 7*)

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Senator Edward M. Kennedy addresses a capacity crowd at the Commission's second Symposium on Crime and Punishment in the United States. For more symposium highlights, turn to page 2.

450 Attend Corporate Crime Symposium

Approximately 450 people – many from the corporate community – convened at the Capital Hilton in Washington, D.C., on September 7-8, 1995, for the Commission's Second Symposium on Crime and Punishment in the United States.

The symposium, "Corporate Crime in America: Strengthening the 'Good Citizen' Corporation," focused on changes in corporate and

encouraged the government to coordinate further its sometimes overlapping enforcement efforts.

Business experts agreed that coordination of government enforcement policies is critical. William B. Lytton, Vice President and General Counsel, Electronics Sector, Lockheed Martin Corporation, stated that non-guideline enforcement policies often create "conflict

measures to inform all of the company's employees of the program and to convince them that top management is committed to it [, and be] ... adequately staffed with people who are able to carry out the program to investigate, analyze, and report violations when they occur."

A symposium proceedings book that chronicles activities at the conference is in production at the Commission and will be made available to the public in February.

A videotape of the symposium can be borrowed for viewing or copying by writing the Commission's Office of Communications, One Columbus Circle, NE, Washington, D.C. 20002-8002, or purchased by contacting International Meetings, Inc. at (301)654-2346.■

“People committed to high ethical standards and carefully considered policies can, in fact, reduce corporate crime.”

—Richard P. Conaboy,
Chairman, U.S. Sentencing Commission

business culture since sentencing guidelines for organizational offenders became effective in 1991. Sentencing Commissioners Wayne A. Budd and Michael Goldsmith co-chaired the event.

Commission Chairman Richard P. Conaboy opened the symposium by stating that at the core of the organizational guidelines is the notion that "people committed to high ethical standards and carefully considered policies can, in fact, reduce corporate crime."

He described the symposium as a fulfillment of the Commission's statutorily prescribed responsibilities to disseminate relevant criminal justice information and as a way of examining the guidelines' new policy of providing "carrot and stick" incentives for companies to establish strong crime-controlling measures.

Highlights of the symposium included a keynote address by Senator Edward M. Kennedy, who urged companies to exercise strong commitment to the "good corporate citizen" principles contained in the guidelines. Senator Kennedy also

and confusion" and can be significant impediments to achieving the guidelines' underlying good corporate citizenship policies.

Joseph E. Murphy, Senior Attorney, Bell Atlantic, agreed, but said government must go further. He said that "companies today that take aggressive ethics and compliance steps run high risks of being beaten with their own acts, beaten with the carrots that were suppose to lure them to do good things."

He argued that government should improve its overall approach to corporate compliance by strengthening incentives for companies to invest in rigorous compliance measures.

Government representatives, while generally supportive of compliance programs, emphasized that they must be effective.

Robert S. Litt, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, stated that at a minimum effectiveness means that a "compliance program has to have the active and full support of a company's top management[,] ... concrete and specific

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Chairman's Message

by Richard P. Conaboy

As I look back on my first year as Chairman, I am pleased to see the Sentencing Commission continuing to assist Congress, the courts, and the criminal justice system in improving federal sentencing. Recent congressional and public discussion relating to the Commission has been dominated by cocaine sentencing policy. While this issue is very important, it has overshadowed for many the broad scope of responsibilities that is the major focus of the Commission's work.

A series of guideline amendments took effect November 1 that, to a large extent, respond to directives contained in the most recent crime bill. In terms of Commission initiatives, one highlight of these amendments is a revision to guideline 5G1.3, a provision that addresses the issue of consecutive/concurrent sentencing. For years, judges and probation officers in particular had cited the guideline as confusing and cumbersome. I believe the revised guideline not only will be much simpler to apply, but the process by which it was revised in cooperation with the concerned groups can serve as a model for future amendment efforts.

We are making significant headway in our comprehensive assessment of the guidelines to ensure that they are meeting the congressional objectives outlined in the Sentencing Reform Act and subsequent legislation. For example, our extensive review of substantial assistance departures is nearing completion and will play a key role in better understanding this important facet of guideline sentencing. Results from a nationwide study of public opinion about the type and severity of punishment for federal crimes will help inform the Commission's decision making on future guideline revisions. Furthermore, this "Just Punishment Study" responds to a statutory research directive to examine the purposes of sentencing.

Our Guideline Simplification project is progressing nicely, and I look forward to hearing from all interested persons when the Commission publishes options for comment in 1996. To facilitate consideration of these major projects, the Commission has declared an informal hiatus on guideline amendments in the coming year – except, of course, as necessary to implement new legislation passed by Congress.

Please contact the Commission at any time if we can be of assistance.■

Commission Suspends Visiting Probation Officer Program

The Sentencing Commission recently announced its decision to suspend operation of its popular visiting probation officer program. Chairman Conaboy commented on the success of this program which has brought 100 officers to the Commission from 45 districts: "During the last seven years, the Sentencing Commission and participating probation officers have benefitted mutually from this program. These probation officers worked on our hotline, assisted in the amendment process, and participated in various research projects. The program also helped probation officers become proficient in guideline application and gain exposure to the many types of cases sentenced in the federal system."

This decision was reached only after a thorough review of the Commission's current limitations on fiscal and staff resources. First, the program costs the Commission approximately \$75,000 per year in *per diem* and travel expenses for the visiting officers. In this time of increasingly tight budgets, an expenditure of this magnitude had to be reexamined.

Second, given the short, six-week assignment served by most probation officers, the resources expended by Commission staff to coordinate and facilitate the program had reached a prohibitive point given the Commission's many other responsibilities.

Probation officers scheduled for 1995 will be able to serve their temporary duty assignments. Unfortunately, those

probation officers on the waiting list for 1996 will not be scheduled to come to the Commission as expected previously. With the suspension of the temporary assignment program, the hotline will be handled exclusively by Commission staff.

The Commission hopes to reinstate the temporary assignment program at some point in the future if the resource issues can be addressed satisfactorily.■

Sentencing Commission Tentative Meeting Dates

Generally, the Commission meets in public session the second Monday of each month. All meetings are held at the Thurgood Marshall Federal Judiciary Building.

2/14/96	Commission Meeting
3/11/96	Commission Meeting
4/9/96	Commission Meeting
5/7/96	Commission Meeting

Commission Oversight Hearing – December 14, 1995

Rep. Bill McCollum
Chairman, House Subcommittee on Crime

“...All in all, it’s a complicated, finely tuned system that has done a superb job of accomplishing the objective of federal sentencing uniformity. There is also little doubt that the sentencing guidelines – along with the mandatory minimum sentences and the abolition of parole – have toughened up federal criminal justice. Sentences for federal drug offenses illustrate the point: From 1980 to 1989, the average sentence for federal drug offenders increased by 59 percent. In 1980, drug traffickers received an average sentence of 48 months; and in 1990, 84 months. Thanks in no small part to the guidelines, the federal system is generally regarded as the toughest system in the country today.

This hearing provides an important opportunity for us to examine a number of issues regarding the Commission and the guidelines. A central question is how well the guidelines are working. They have clearly reduced disparities in sentencing, but have they done so by unduly limiting judicial discretion, and by adding excessively cumbersome complexity to the sentencing process?

Judge Richard P. Conaboy
Chairman, U.S. Sentencing Commission

...[W]e believe the system should continue to work in this independent and objective fashion, and Congress should look to the Commission to provide leadership and expertise on sentencing policy issues. Sometimes it will be to Congress’s advantage, and the ends of justice will be served, by permitting the Commission some leeway in handling particularly complex or politically difficult issues, subject to Congress’s directives and right of final review. Then, as Congress evaluates the Commission’s recommendations, it adds an element of direct accountability to the American public, thus completing a delegation and review system that will best promote effective criminal justice policymaking



While many in Congress and the criminal justice community believe the guidelines have contributed strongly to a more effective justice system, we recognize that the guidelines have been the subject of significant criticism. Much of that criticism, we believe, has stemmed simply from the fact that sentences under the guidelines are more consistently tough than sentences under the fully discretionary pre-guidelines system of sentencing. We discount much of this criticism because we believe that tough sentences for dangerous offenders play a critical role in crime prevention.

Other criticism, however, has focused on the perceived rigidity and complexity of the guidelines and the cost of implementing the guidelines both in terms of court resources and the resources spent by prosecutors and defense attorneys on sentencing issues under the guideline system. The Commission plans to address these criticisms as well as our ongoing responsibilities through a straightforward agenda for the Commission and Commission staff.

This four-point initiative involves (1) the continued fulfillment of the Commission’s statutory responsibilities, (2) an evaluation of problem areas within the sentencing guidelines system; (3) simplification of the guidelines, and (4) organizational assessment.



Overall, we believe the guidelines and the Commission have brought about three positive changes in the criminal justice system. First, the system is more honest. With the abolition of parole, there is truth in sentencing for the first time in the federal courts. Second, the system is generally more consistent, tougher, and fairer. Similar defendants who commit similar crimes are now sentenced in a similar manner. And third, the system is more effective. The certainty by which punishment is imposed under the guidelines will provide increased deterrence to future criminal conduct. In sum, the federal sentencing process has successfully undergone the first stages of sweeping reform Congress envisioned.

Chief Judge Jon O. Newman
United States Court of Appeals for the Second Circuit

My interest in the Sentencing Guidelines is of long standing. I was one of the few federal judges who supported the Sentencing Reform Act of 1984, and publicly urged, and testified in favor of, the adoption of sentencing guidelines. Though I continue to believe that the principle of having sentencing guidelines is sound, it is my conclusion, after watching the operation of the Guidelines for the eight years of their existence, that the current Guidelines are in need of substantial revision.

Let me make clear that my criticism has nothing to do with the severity of punishment. I am not here to urge that the punishments for particular offenses should be reduced, nor that they should be increased. My concern is that the Guidelines are too rigid, too detailed, and too cumbersome, and that, in several important respects they reflect ill-advised policy decisions, none of which is required by the Sentencing Reform Act and none of which has been followed by any of the several state commissions that have adopted sentencing guidelines.



Sentencing will never be an exact science. Congress made a useful contribution in 1984 by authorizing the creation of a Sentencing Commission and empowering it to promulgate sentencing guidelines. But the guidelines that the first Commission gave us are urgently in need of revision. After eight years of experience, it is time to make the needed changes.

Judge J. Harvie Wilkinson, III
United States Court of Appeals for the Fourth Circuit

My own sense is that there has been a significant shift in judicial opinion in favor of the Guidelines since they first took effect on November 1st, 1987. At that time there was a good deal of grumbling on the part of federal judges about three things: (1) the loss of sentencing discretion; (2) the strictness of the Guidelines;

and (3) the complexity of the Guidelines scheme.

The Guidelines have now been in effect for some eight years, and I think that the level of judicial support for them has risen appreciably. In part, of course, this is due simply to increased familiarity with their operation. But that is only a partial explanation. Judges have come to appreciate the essential coherence of the Guidelines scheme and the enormous work that went into their formulation, including that of my respected colleague on the Fourth Circuit, Judge William W. Wilkins, Jr., who served as the first Chairman of the Sentencing Commission. The intricacy of the Guidelines was unavoidable given the wide variety of federal offenses which the Guidelines cover. The remarkable thing, however, is that the Guidelines work. More than that, they work well. Terms such as Base Offense Level, Specific Offense Characteristics, Adjustments and Enhancements, Grouping of Counts, and Criminal History Category have become as much second nature to the judicial branch as *res judicata* and *collateral estoppel*. In short, judges have accepted this scheme and appreciated that it makes internal good sense. Many of us hope it will become in time a model for more uniform sentencing in state courts as well.



The Guidelines thus do not eliminate discretion. What they do is curb the kind of wild, unrestrained discretion that no one can justifiably defend and that results in defendants whose conduct is for all intents and purposes indistinguishable receiving dramatically different sentences.

Judge Emilio M. Garza
United States Court of Appeals for the Fifth Circuit

... [By] that time, having tried a substantial number of cases under both pre-Guidelines and Guidelines procedures, I was convinced that uniformity and proportionality in sentencing were best served through the use of sentencing guidelines. After presiding over some three hundred sentencing determinations as a federal district court judge, and having reviewed countless others since my appointment to the Court of Appeals, I remain convinced that the Guidelines are far superior to *ad hoc* determinations of sentencing factors and their relative significance by individual judges. Those judges who continue to object to the Guidelines seem to believe that they can do a better job of imposing just sentences in individual cases. However, I have yet to hear one of these judges address whether his definition of an individualized sentence matches the definitions of other judges who share in his critical opinion. No one judge at any level holds the key to justice. I submit that within the community of federal judges, there is wide-ranging

opinion on sentencing matters; even among the critics of the Guidelines, there would be great disagreement over what would constitute a better alternative. I fully realize that there will always be a tension between judicial discretion and reasonable sentence uniformity. The greater the discretion to determine individualized sentences, the lesser the uniformity of sentences. The greater the uniformity of sentences, the lesser the discretion to determine individualized sentences. Fine tuning this tension will be a recurring problem, but in my opinion the Guidelines strike a far

better balance than the discretionary system they replaced.

Thomas N. Whiteside
Deputy Chief U.S. Probation Officer, South Carolina

Generally, the guidelines are as complex as the behavior of the criminal defendant to which they apply. Some are pretty simple, but as offenses become more sophisticated and prior records become extensive, the sentencing issues are more involved. Many of the defendants that we see in federal court today would present a sentencing dilemma under any system. Certainly, in many cases, more of the court's resources are spent in determining the appropriate sentence than under the old law. It was at the outset and still is reasonable to conclude that a system that strives to be equitable, fair, and honest will use more of its resources in time than a system without a mandate.

Robert H. Edmunds, Jr.
Former U.S. Attorney, Middle District of North Carolina

There was initially a great deal of resistance to the guidelines from prosecutors. There is a saying familiar to trial attorneys, that they know what a case is worth. Often the guideline result was not consistent with the attorney's evaluation of the case, and therefore, at least at the beginning, many prosecutors looked for ways to manipulate the guidelines to reach a result that satisfied their long-held beliefs.... As the Department consistently upheld its commitment to the guidelines, as education efforts continued, and as new prosecutors were hired who knew no other system, internal resistance steadily declined.



I must concede that there were some districts which struggled against the Department's guiding hand. Where the United States Attorney was hostile to the guidelines, that attitude was often reflected in the charge and plea practices there. Such districts remain a nagging problem. However, I felt that between 1988 and 1993 the guidelines were winning the hearts and minds of line prosecutors in most districts. ”

[Complete witness statements are available in the General Directory of the Commission's home page.]

departing were pursuant to a plea agreement (22.9%) and criminal history category over-representing the defendant's involvement (15.1%).

Upward departures constituted only 0.9 percent of all cases in 1995. The most frequently cited upward departure reasons were inadequacy of criminal history in reflecting the offense seriousness (39.2%) and risk of future conduct based on prior conduct or record (13.3%).

Sentencing Alternatives to Prison

In 1995, 43.6 percent of the cases eligible for alternatives to imprisonment received a sentence of straight probation, 24.3 percent

received probation accompanying some form of confinement, and the remaining 32.1 percent received a prison term or a sentence split between prison and community confinement. Among these cases, larceny offenders were the least likely (21.0%) to be incarcerated and immigration violators the most likely (71.0%). The much higher rate of imprisonment for immigration cases, when compared against other offense types, may result from a lack of alternatives to imprisonment for non-citizens awaiting deportation.

Prison Sentences

More than three-fourths (78.7%) of all guideline sentences in 1995 included a

term of imprisonment. Of these, the vast majority (94% of the 29,982 cases) received straight prison time (*i.e.*, without a term of alternative confinement). The median length of imprisonment for all defendants sentenced to prison in 1995 was 33.0 months, while the mean length was 63.2 months; both measures continued a decline begun in 1993 when the median prison sentence was 37.0 months and the mean 67.0 months.

During 1995, murder was the most severely punished offense, with an average sentence of 253.2 months. The shortest prison sentences were for embezzlement offenses (average sentence 7.6 months).■

[Graphic Omitted for On-Line Version]

Legal Forum

Supreme Court Addresses Departures and Substantial Assistance

The Supreme Court issued two guideline-related opinions shortly before recessing, one of which could dramatically revise the way courts of appeal review departures. In Koon v. United States, No. 94-1664, 1996 WL 315800 (U.S. June 17, 1996), the Court examined the appellate review standard of the Sentencing Reform Act (SRA), 18 U.S.C. § 3742(e)(4), and unanimously held that the “appellate court should not review the departure decision *de novo*, but instead should ask whether the sentencing court abused its discretion.” Although the Court was divided as to how that standard applied to the particular factors in this case, the majority held that the Ninth Circuit Court of Appeals erroneously applied the *de novo* standard of review in rejecting departure factors relied upon by the district judge. The case was affirmed in part, reversed in part, and remanded.

The Koon decision focused on the Ninth Circuit’s reversal of the district judge’s eight-level downward departure in the sentences of two Los Angeles police officers, Stacey Koon and Laurence Powell. The officers were convicted of violating constitutional rights under color of law, 18 U.S.C. § 242, for their use of force in arresting Rodney King. Although the applicable guideline at section 2H1.4 set an imprisonment range of 70 to 87 months, the district court granted the defendants a five-level downward departure because the victim’s misconduct “contributed significantly to provoking the offense behavior,” (5K2.10) and an additional three-level departure based on a combination of four factors: (1) the officers’ susceptibility to abuse in prison, (2) their loss of not only their jobs, but their careers in the law enforcement profession, (3) the burden they had suffered from successive state and federal prosecutions, and (4) the low risk they posed for recidivism. The departure resulted in a sentencing range of 30 to 37 months, and the district judge sentenced each to 30 months imprisonment. On appeal, the Ninth Circuit reviewed the departure decision *de novo*, and rejected each rationale.

The Supreme Court agreed with the Ninth Circuit that the district court erred in considering career loss and low recidivism risk as departure factors because these factors were adequately considered by the guidelines. However, it held that the other factors – victim misconduct, susceptibility to prison abuse, and the burdens of successive prosecutions – were “sentencing determinations well within the sound discretion of the District Court.” The Court noted

that “whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially given that they see so many more Guidelines cases.” But this does not mean appellate review is an “empty exercise,” the Court said. “The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.”

In Melendez v. United States, 95-5661, 1996 WL 327175 (U.S. June 17, 1996), the Supreme Court resolved a conflict among the courts of appeals by rejecting the argument that the Sentencing Commission created a “unitary” motion system for substantial assistance departures. The Court held that a government motion pursuant to policy statement §5K1.1 attesting to the defendant’s substantial assistance and requesting that the district court depart be-

...this does not mean appellate review is an “empty exercise,” the court said. “The abuse of discretion standard includes review to determine that the discretion was not

low the minimum of the applicable guideline range does not authorize a departure below a lower statutorily mandated minimum sentence. The Court ruled that there was nothing in 18 U.S.C. § 3553 or 28 U.S.C. § 994(n) that suggests “that the Commission itself may dispense with 18 U.S.C. § 3553(e)’s motion requirement, or alternatively ‘deem’ a motion requesting or authorizing different action – such as a departure below the guideline minimum – to be a motion authorizing the district court to depart below the statutory minimum.”

According to the Court, “Congress did not charge the Commission with ‘implementing’ section 3553(e)’s Government motion requirement, beyond adopting provisions constraining the district court’s discretion regarding the particular sentence selected.” ■

Commission Reports to Congress on Computer Crime

Do the sentencing guidelines deter computer fraud? This is the question Congress posed to the Commission in the Antiterrorism and Effective Death Penalty Act of 1996.

In responding to this question, the Commission reviewed its database of guideline convictions under the pertinent statute (18 U.S.C. § 1030(a)(4) and (5)), conducted a search to determine whether any recidivism had occurred within the group of persons convicted of violating that statute, developed a profile of a “typical offender” within that group, and conducted a literature review of deterrence studies of “white collar” crime.

However, no definitive assessment could be made of the deterrent effect of the existing guidelines on computer crime because of (1) an inability to determine how much computer crime was occurring before the guidelines went into effect, (2) the relatively small number (approximately 60) of guideline convictions to date under the pertinent statute, and (3) the general difficulty of determining the deterrent effect of any criminal sanction.

The “typical offender” profile indicated that computer criminals tend to be somewhat better educated individuals who have less significant criminal histories than those convicted of other fed-

eral crimes. The profile also indicated that, to date, the typical computer criminal has not been a sophisticated user but is, rather, likely someone with a pedestrian level of computer expertise who misuses his employer’s computer system in committing his offense.

A Commission working group is currently consulting with representatives of the Department of Justice’s Computer Crime Division about proposals to amend the guidelines to better account for an anticipated increase in the level of computer crime due to expanded use of the Internet and other technological developments. ■

Child Sex Offenders to Receive Tougher Sentences

The Sentencing Commission sent to Congress two amendments to the guidelines in late April that will significantly increase the penalties for individuals convicted of certain child sex offenses. The Commission also submitted a report to Congress that analyzed all 1994 and 1995 cases involving sexual abuse, child pornography, or the promotion of prohibited sexual contact. The amendments and report respond to congressional directives in the Sex Crimes Against Children Prevention Act of 1995 and the Telecommunications Act of 1996.

The amendments sent to Congress increase sentences for all pornography guidelines by approximately 25 percent. Sentences for promotion of prostitution and prohibited sexual conduct were increased by about one third. An additional 25-percent increase was provided for the use of a computer in child pornography offenses.

The amendments also increase pornography production sentences by 25 percent if computers were used to solicit participation in sexually explicit conduct by or with a minor for the production of child pornography. In order to ensure lengthy incarceration of the most dangerous repeat offenders, the Commission clarified the definition of a “pattern of activity” as used in the guidelines. These amendments will automatically become effective on November 1, 1996, after a 180-day period of congressional

review unless Congress enacts legislation to the contrary.

The Commission report notes that sex offenses against minors represent a tiny portion of all federal sentencings – 423 cases in two years studied – and only a small percentage of the total number of such cases nationwide are prosecuted federally. Because of the nature of federal jurisdiction, in recent years, 77 percent of federal offenders convicted of child sexual abuse were Native American. Child pornography offenders were more representative of the general population. The report notes that a significant portion of child pornography offenders have a criminal history that involves the sexual abuse or exploitation of children. Research suggests that those with such histories are at a greater risk of recidivism.

The Commission also recommended that Congress increase certain statutory maximum penalties so that the guideline amendments designed to increase sentences are allowed to operate to their full extent without being capped by existing statutory limits. ■

Commission Holds Denver Hearing on Guideline Simplification

The Sentencing Commission convened a public hearing on August 12, 1996, in the federal courthouse in Denver to hear suggestions for simplifying the federal sentencing guidelines. While the hearing was open to comment on all simplification issues, attention was focussed on three of the priority issues of the simplification project: acquitted conduct, drug offenses and role in the offense, and departures/offender characteristics.

The hearing was part of the multi-year project begun in 1995 to comprehensively assess and refine the federal sentencing guidelines. During the first phase of this review, Commission staff examined data on more than 250,000 cases sentenced under the guidelines, numerous

appellate decisions, academic literature, and extensive public comment. Commission staff prepared briefing papers on major guideline topics to provide a foundation for the project and to identify possible options for refinement.

Said Judge Richard P. Conaboy, Commission Chairman, "Perhaps the greatest criticism of the guidelines I have heard, apart from their severity in certain drug cases, a result driven in large part by mandatory minimum statutes, is their complexity and rigidity. The Commission plans to examine these criticisms through its simplification project and search for workable solutions."

The Commission will hold another hearing in March of

(Simplification from page 1)

guideline simplification efforts in the 1996-1997 amendment cycle include:

Relevant Conduct

- (1) clarifying/streamlining the relevant conduct guideline, assuming no substantive policy changes; and
- (2) developing options to limit the use of acquitted conduct at sentencing.

Level of Detail/Guideline Complexity

- (1) simplification of guidelines/specific offense characteristics through consolidation or elimination;
- (2) clarification of the definition of loss;
- (3) examination of problematic cross references; and
- (4) revision of the Acceptance of Responsibility adjustment.

Departures/Offender Characteristics

- (1) developing options for

revising/clarifying the language describing the "heartland concept" in Chapter One and departure policy statements in Chapter Five in light of the recent U.S. Supreme Court decision in Koon v. United States, No. 94-1664, 1996 WL 3155800 (U.S. June 17, 1996); and

- (2) focusing on family and community ties, age, and combinations of factors.

Criminal History

- (1) re-ordering and streamlining Chapter Four; and
- (2) revising assignment of criminal history points to better target serious, repeat offenders.

Appellate Litigation and Other Statutory Issues

- (1) consideration of the impact of the Koon decision on appellate review of guideline sentences and on the need to revise the introduction to the *Guidelines Manual* and Departure Section (§5K2.0) to address the deference appellate courts should afford district courts on guideline

determinations; and

- (2) consideration of widening the bands in monetary and drug tables to decrease litigation.

Drug Sentencing/Role in the Offense

- revising the Role in the Offense guideline to better reflect actual experience, case law development, and to provide sufficient flexibility when sentencing drug offenders.

Introduction to the Guidelines Manual

- updating the introduction to reflect the evolution of the guideline sentencing process.

Internet subscribers should check periodically the Commission's website at <http://www.ussc.gov> for details on the simplification process (including the dates of additional public hearings) and copies of proposed amendments as they are made available. ■

FJC Issues Survey Findings on Operation of Sentencing Guidelines

Focusing on ways the guidelines might be made “simpler, more flexible, and less burdensome,” the Federal Judicial Center (FJC) surveyed all district judges and chief probation officers on the operation of the guidelines.

Three hundred and fifty-four judges and 69 chief probation officers responded to the survey, which was conducted at the request of the Judicial Conference’s Committee on Criminal Law. In May 1996, the FJC issued its preliminary report detailing its findings. A few highlights:

District judges and chief probation officers were asked to rank the top five guideline issues requiring substantive change. The most common responses were:

- Departures;
- Alternatives to incarceration;
- Relevant conduct;
- Use of quantity in drug cases; and
- Role in the offense.

District judges rated the four following guideline changes as most important:

- Increasing the availability of downward departures;
- Amending the guidelines less frequently;
- Consolidating similar guidelines; and
- Providing greater guidance on the circumstances warranting departure.

Chief probation officers, on the other hand, rated as most important:

- Providing clearer and more consistent terms and definitions throughout the *Guidelines Manual*;
- Amending the guidelines less frequently;
- Consolidating similar guidelines; and
- Providing greater guidance on the mechanics of re-sentencing.

District judges rated the following issues as most difficult aspects of the guidelines sentencing process:

- Fashioning a non-§5K1.1 departure and supporting rationale;
- Determining monetary loss in fraud cases;
- Determining drug quantity in drug cases; and
- Applying the multiple count rules.

Chief probation officers rated as most difficult the following:

- Applying appellate case law;
- Determining monetary loss in fraud cases;
- Fashioning a non-§5K1.1 departure and supporting rationale; and
- Determining role adjustments.

Since the report’s release, the FJC has received a small number of additional responses which will be included in its final report. The final report, slated for a Fall release, will also include responses from a separate survey of appellate judges ■

Sentencing Commission to Reconsider Cocaine Sentencing Policy

Congressional Directive Sets Parameters for Policy

Pursuant to a directive from Congress, the Sentencing Commission will reconsider the issue of cocaine and federal sentencing policy during its 1996-97 amendment cycle. The Commission first formally reviewed federal cocaine sentencing policy in response to a directive in the Violent Crime Control and Law Enforcement Act of 1994.

On February 28, 1995, the Commission issued a report to Congress in which it recommended that changes be made to the current cocaine sentencing scheme, including changes to the statutory 100-to-1 quantity ratio between crack cocaine and powder cocaine used in calculating sentences under the guidelines. The Commission subsequently sent to Congress proposed changes to the sentencing guidelines implementing recommendations made in the report.

On October 30, 1995, President Clinton signed legislation rejecting the Commission's proposed guideline amendments (Public Law 104-38). In that legislation, the Commission was directed to submit to Congress new recommendations regarding changes to the statutes and

sentencing guidelines governing sentences for cocaine offenses. The legislation sets out a number of factors that the Commission is required to consider in developing the new recommendations.

The Commission has been actively engaged in responding to the legislation. On January 2, 1996, and July 2, 1996, the Commission published notices in the *Federal Register* requesting comment regarding implementation of this congressional directive, including comment on appropriate enhancements for violence and other harms associated with crack and powder cocaine, as well as the quantity ratio that should be substituted for the current 100-to-1 ratio.

In addition, the Commission consulted with key congressional leaders regarding the timetable and procedures for its response to the 1995 legislation. Additional research is also being conducted that will draw significant new information from more than 2,000 federal cases to inform the Commission's judgment on the proper cocaine sentencing policy. ■

Sentencing Commission Tentative Meeting Calendar

Washington, D.C. Commission meetings are held in the Thurgood Marshall Federal Judiciary Building. Internet subscribers may access meeting agendas on the Commission's web page at <http://www.ussc.gov>.

Date/Time	Activity	Location
September 19 - 9:30 a.m.	Public Commission Meeting	Washington, D.C.
October 29 - 9:30 a.m.	Public Commission Meeting	Washington, D.C.
November 13 - 9:30 a.m.	Public Commission Meeting	Washington, D.C.
December 10 - 9:30 a.m.	Public Commission Meeting	Washington, D.C.