



Guidelines

News from the U.S. Sentencing Commission

July 2002

Sentencing Commission Reports on Cocaine Sentencing Policy

Commission Recommends Statutory Revisions; Urges Three-Pronged Approach

Asserting its role as an advisor to Congress on federal sentencing policy, the United States Sentencing Commission, on May 22, released a comprehensive 112-page report to Congress advocating a reassessment of federal cocaine penalties. The chair of the Commission, Judge Diana E. Murphy, also appeared before the Senate Judiciary Committee to outline the Commission's position.

In her testimony before the Senate, Judge Murphy asked Congress to modify federal drug laws to target the most dangerous offenders for greater punishment while also addressing the wide disparity in treatment between crack and powder cocaine. The current laws, enacted by Congress in the mid-1980s, treat trafficking and mere possession of crack, an inexpensive smoked form of cocaine, significantly more severely than powder cocaine. Based upon an extensive year-long study, which includes an examination of thousands of federally prosecuted cocaine cases, expert testimony gathered from a series of public hearings, and a survey of United States district and appellate judges, the Sentencing Commission unanimously concluded that while greater punishment for crack cocaine than for powder cocaine is clearly

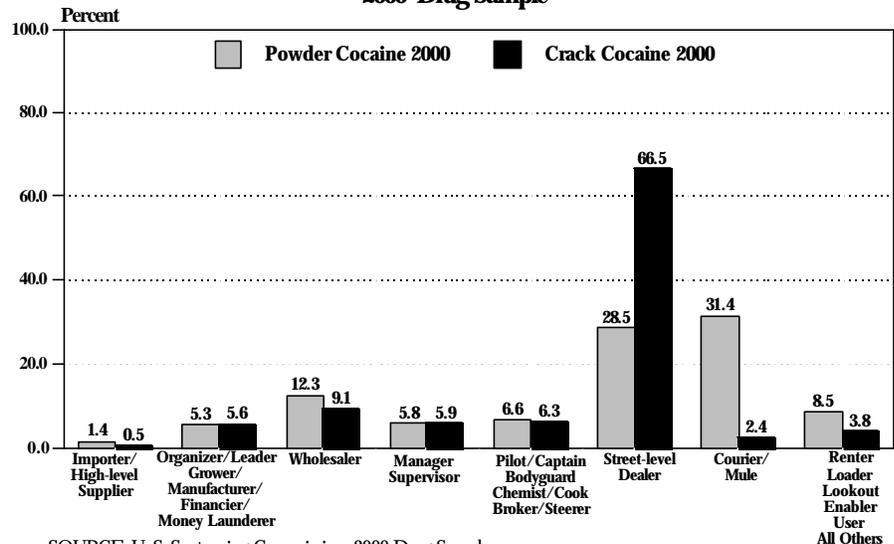
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Offender Function in Powder Cocaine and Crack Cocaine Cases

2000 Drug Sample



SOURCE: U. S. Sentencing Commission, 2000 Drug Sample.

The full text of the Commission's 2002 Report to the Congress: Cocaine and Federal Sentencing Policy is available online:

[Http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm](http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm)

Message from the Chair

The Commission has had a challenging agenda during this amendment cycle. We took on a number of important issues before September 11, and those catastrophic events caused us to divert resources to make terrorism a top priority. Already at the conclusion of last year's amendment cycle on May 1, 2001, we had sent to Congress a proposed amendment that substantially increased penalties for nuclear, chemical, and biological weapon offenses. These penalty increases became effective November 1, 2001, less than two months after the September 11 terrorist attacks. This year we undertook the task of implementing the USA PATRIOT Act, and a comprehensive amendment dealing with a wide variety of terrorism offenses was sent to Congress on May 1, 2002.

Our amendments this year also address a number of other important areas. The Commission enacted a new guideline to protect our cultural heritage and national treasures, addressed discharged terms of imprisonment, and increased penalties for foreign public bribery cases by making them consistent with those for domestic bribery cases. We have strengthened guidelines that implement the Victims of Trafficking and Violence Protection Act by ensuring that appropriately severe sentences for sex trafficking crimes apply to all types of commercial sex acts and by targeting offenders who use fraud to entrap victims. Other amendments expand protection for prison workers under the official victims enhancement and comply with a statutory directive in 28 U.S.C. § 994(h) by providing a sentence at or near the statutory maximum of life imprisonment for certain dangerous career offenders. An amendment to the drug guidelines includes a safety valve clarification, increases penalties for operators of crack houses and rave clubs and for certain ecstasy offenders, and caps the base offense level for defendants who played a mitigating role in an offense. The last provision will be of special interest to those of you who have expressed concern about the sentencing impact of drug quantity on minimally involved offenders.

The Commission also placed on its agenda the very difficult issue of cocaine sentencing policy. In order to make the most informed policy decision we could, the Commission conducted an extensive research project on federal cocaine cases, solicited public comment, and heard testimony at three public hearings from the Department of Justice and other law enforcement representatives, the medical and scientific communities, and civil rights groups, and met with members of Congress and their staff. The Commission unanimously concluded that while greater punishment for crack cocaine than for powder cocaine is warranted, the current 100 to 1 drug quantity ratio between the two forms of cocaine should be changed in light of information now available. After many conversations on the Hill, we chose to recommend legislative changes to Congress instead of moving forward with an actual guideline amendment at this time. The Commission has submitted its recommendations to Congress in a report that is described in greater detail in an accompanying article in this newsletter.

The Commission has recently formed an ad hoc advisory group to review the general effectiveness of the sentencing guidelines for corporations and other organizations, particularly the criteria for an effective program to ensure an organization's compliance with the law. The organizational guidelines have spawned complementary efforts by a number of regulatory and law enforcement authorities and have led to compliance programs across the country to prevent and detect criminal conduct. These guidelines have been in place for over a decade, however, and suggestions have been made as to how they might be strengthened.

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Photo: Lane



Honorable Diana E. Murphy, chair of the United States Sentencing Commission; judge, United States Court of Appeals for the Eighth Circuit

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The 16 person advisory group is made up of a variety of experienced individuals, and we expect their contribution to be particularly timely and important in light of the current focus on preventing large scale corporate wrongdoing. The group will serve for 18 months and will make at least one interim report to the Commission in the course of its work. Todd Jones, former United States Attorney for Minnesota and now a partner at the law firm of Robins, Kaplan, Miller & Ciresi, is chair of the group.

The Commission has also formed an ad hoc advisory group to consider possible improvements in respect to the application of the federal sentencing guidelines to Native Americans who come under the Major Crimes Act. One stimulus for formation of the advisory group was the Commission's June 2001 public hearing in Rapid City, South Dakota. The hearing addressed concerns raised by the South Dakota Advisory Committee to the United States Commission on Civil Rights about the impact of the guidelines on Native Americans in Indian country who are prosecuted in federal court for crimes that otherwise would fall under state law. The hearing also prompted the Commission to conduct three intensive training sessions in South Dakota in November 2001 to teach local attorneys, other counselors, and probation officers about use of the guidelines. This diverse and knowledgeable advisory group also will serve for 18 months and is chaired by the Honorable Lawrence Piersol, chief judge of the U.S. District Court for the District of South Dakota.

— Judge Diana E. Murphy

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warranted, specifically in cases involving violence, the current 100-to-1 drug quantity ratio between the two forms of cocaine is not appropriate. The Sentencing Commission's report to Congress, entitled *Cocaine and Federal Sentencing Policy*, sets forth concrete recommendations for statutory and guideline modifications to the federal sentencing structure for cocaine offenses. The Sentencing Commission recommends that Congress adopt a three-pronged approach for revising federal cocaine sentencing policy:

- ❶ increase the quantity of crack cocaine required that triggers an automatic mandatory minimum sentence. Specifically, the five-year mandatory minimum threshold quantity for crack cocaine offenses should be adjusted from the current 5 grams trigger to at least 25 grams and the current ten-year threshold quantity from 50 grams to at least 250 grams (and repeal the mandatory minimum for simple possession of crack cocaine);
- ❷ direct the Sentencing Commission to provide appropriate sentencing enhancements to increase penalties should the drug crime involve: (a) a dangerous weapon (including a firearm); (b) bodily injury resulting from violence; (c) distribution to protected individuals and/or locations; (d) repeat felony drug trafficking offenders; and (e) importation of drugs by offenders who do not perform a mitigating role in the offense; and
- ❸ maintain the current statutory minimum threshold quantities for powder cocaine offenses at 500 grams triggering the five-year mandatory minimum penalty and 5,000 grams for the ten-year mandatory minimum penalty (understanding that the contemplated specific guideline sentencing enhancements would effectively increase penalties for the more dangerous and more culpable powder cocaine offenders).

Would You Like To Receive Sentencing Commission Electronic Mail Notices?

Subscribers to Receive Periodic Updates on Significant Commission News

The Commission has instituted an e-mail "broadcast" system as a supplement to the Commission's web site. The system will now send electronic mails to interested persons about *Federal Register* notices, meetings and public hearings, and other significant news about the sentencing guidelines and the Commission. Only persons who subscribe to this service on the Commission's web site will receive these electronic mails.

The electronic mails will not be sent on a set schedule, but only when there is important information to communicate. The electronic mails will include links to significant items on the Commission's web site (www.ussc.gov) and will not include any attachments. The subscription list generated by this service will not be provided to others. Moreover, these electronic mails will be "broadcast" e-mails, meaning that recipients will not be able to reply directly to the e-mails.

Interested persons can "opt in" to this system now by signing up on the Commission's web site at www.ussc.gov.

In justifying its recommendations, the Commission made the following major findings about cocaine offender profiles examined between fiscal years 1995 and 2000:

- Contrary to the general objective of the 1986 legislation to target “serious” and “major” traffickers, two-thirds of federal crack cocaine offenders were street-level dealers. Only 5.9 percent of federal crack cocaine offenders performed trafficking functions most consistent with the functions described in the legislative history of the Anti-Drug Abuse Act of 1986 as warranting a five-year penalty, and 15.2 percent performed trafficking functions most consistent with the functions described as warranting a ten-year penalty;
- The current penalty structure was based on beliefs about the association of crack cocaine offenses with certain harmful conduct – particularly violence – that are no longer accurate. In 2000, for example, three quarters of federal crack cocaine offenders had no personal weapon involvement, and only 2.3 percent discharged a weapon. Therefore, to the extent that the 100-to-1 drug quantity ratio was designed in part to account for this harmful conduct, it sweeps too broadly by treating all crack cocaine offenders as if they committed those more harmful acts, even though most crack cocaine offenders, in fact, had not;
- The negative effects of prenatal crack cocaine exposure are identical to the negative effects of prenatal powder cocaine exposure and are significantly less severe than previously believed;
- The overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000. This has contributed to a widely held perception that the current penalty structure promotes unwarranted disparity based on race. Although this assertion cannot be scientifically evaluated, the Commission finds even the perception of racial disparity problematic because it fosters disrespect for and lack of confidence in the criminal justice system.

These conclusions led the Commission to unanimously conclude that the various congressional objectives can be achieved more effectively by decreasing the 100-to-1 drug quantity ratio.

The Commission's May 2002 report on cocaine sentencing policy is available online at www.ussc.gov. ■

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The recommendations, if adopted, would narrow the difference between average sentences for crack cocaine and powder cocaine offenses from 44 months to approximately one year. Specifically, the Commission estimates that the average sentence for crack cocaine offenses would decrease from 118 months to 95 months, and the average sentence for powder cocaine offenses would increase from 74 months to 83 months. Importantly, the guideline sentencing range based solely on drug quantity for crack cocaine offenses still would be significantly longer (approximately two-to-four times longer) than powder cocaine offenses involving equivalent drug quantities.

The Sentencing Commission undertook the study following a series of events, including the introduction of legislation by Senators Jeff Sessions and Orrin Hatch to modify cocaine penalties and a joint letter to the Commission from Senate Judiciary Committee Chair Patrick Leahy and Ranking Minority Member Hatch, requesting a report on the subject.

“The Commission seeks to bring about adjustments in cocaine sentencing policy,” said Commission Chair Judge Diana E. Murphy. “It is our hope that this report and recommendation will prove helpful to Congress and lead to adjustments in federal cocaine penalties.” ■

Sentencing Commission Bolsters Guidelines for Terrorism

Commission Also Increases Penalties for Offenses Involving Cultural Heritage Resources

The United States Sentencing Commission on May 1, 2002, 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 terrorism and cultural heritage resource offenses. The amendments will become effective November 1, 2002, absent congressional action.

“The Commission has been extraordinarily busy this amendment cycle,” said Commission Chair Judge Diana E. Murphy, “and I am happy to report that we have accomplished work on a multitude of diverse issues that includes terrorism, drug offenses, sex trafficking crimes, cultural heritage offenses, and violations of the Foreign Corrupt Practices Act.”

The Commission took numerous actions in response to the USA PATRIOT Act (The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001), which was enacted into law on October 26, 2001. The Commission, through a multi-part amendment, provided severe penalties for offenses against mass transportation systems and interstate gas or hazardous liquid pipelines. The Commission also increased sentences for threats that substantially disrupt governmental or business operations or result in costly cleanup measures. The Commission action also expanded the guidelines' coverage of offenses that involve bioterrorism, and it created a new guideline to cover the provision of material support to foreign terrorist organizations. The amendment also punishes certain attempts and conspiracies to commit terrorism as if the offense had been carried out and invites the court to depart up to the sentencing guidelines' terrorism enhancement in instances where the offense is an act of terrorism that does not meet the specific criteria for the enhancement. The Commission also authorized a supervised release term following imprisonment of up to life for a defendant convicted of a federal crime of terrorism that resulted in substantial risk of death or serious bodily injury to another.

Heightened Penalties for Cultural Heritage Offenses

In response to concerns raised by the Departments of Justice and Interior and many Native American tribes and communities that the guidelines were inadequate with respect to offenses involving cultural heritage resources, the Commission developed a new guideline that specifically covers such offenses. The new guideline (§2B1.5) applies to a variety of offenses that involve the theft of, damage to, destruction of, or illicit trafficking in, cultural heritage resources (*e.g.*, national memorials, archeological resources, national parks, and national historic landmarks).

Offenses involving cultural heritage resources are fundamentally different from general property crimes because, unlike other property crimes in which the primary harm is pecuniary, the harm involved in cultural heritage resource offenses is, in

Amendments *continued from page 5*

great part, non-pecuniary. The new guideline reflects this intrinsic difference by providing a base offense level that is higher than that provided for other property offenses and a loss calculation that is based on the commercial value, archeological value, and the cost of restoration and repair, as appropriate to the particular resource involved. The new guideline also provides a number of enhancements, including an enhancement if the offense involved a pattern of misconduct and an enhancement that covers certain specially protected resources (*e.g.*, sacred objects) and resources from specially protected locations (*e.g.*, a national park or memorial). In other amendment action, the Commission —

General Counsel Testifies Before House Subcommittee

On May 14, 2002, the Commission's general counsel, Charles Tetzlaff, testified before the House Subcommittee on Crime, Terrorism, and Homeland Security regarding the amendment that would cap the base offense level at 30 for drug trafficking defendants who perform a mitigating role.

Mr. Tetzlaff's testimony can be found on the Commission's website at <http://www.ussc.gov/hearings.htm>

- expanded the guidelines to cover new money laundering offenses such as bulk cash smuggling and establishing or maintaining correspondent, "payable-through," and shell bank accounts;
- addressed concerns that the penalties were too low for certain offenders convicted under 21 U.S.C. § 856; this statute originally was enacted to target "crack houses," but more recently has been used to convict defendants who promote drug use at commercial dances parties frequently called "raves";
- limited the exposure of low-level drug offenders to increased penalties based on drug quantities that overstate the defendant's culpability given the defendant's role, function, and lack of authority in the drug trafficking offense (see box at left);
- ensured that appropriately severe sentences for sex trafficking crimes apply to commercial sex acts such as production of child pornography, in addition to prostitution, and targeted offenders who use fraud to entrap victims; and provided a guideline sentence at or near the statutory maximum of life imprisonment for cases in which certain serious firearm offenses establish the defendant as a career offender. ■

Andy Purdy to Help with Cyberspace Protection

Donald A. (Andy) Purdy, Jr., long-time chief deputy general counsel to the U.S. Sentencing Commission, has accepted a one-year appointment to a senior position with the White House board that President Bush created late in 2001 to coordinate all federal activities popularly referred to as cyberspace protection. Mr. Purdy will serve as deputy to the vice chair and senior advisor for IT security and privacy to the President's Critical Infrastructure Protection Board. The board is made up of senior officials from the major departments and is directed by the President's Executive Order to coordinate all federal activities related to the protection of information systems and networks supporting critical infrastructures at the federal, state, and local levels. One of the major tasks of the board is to create a National Strategy for Cyberspace Protection.

Mr. Purdy will work in the areas of cybercrime, privacy protection, government procurement and maintenance of more secure products and systems, and information sharing in the industry sectors dealing with health care, manufacturing, and air transportation. ■

Donald A. (Andy) Purdy, Jr. currently serves as senior advisor for IT security and privacy and deputy to the vice chair on the President's Critical Infrastructure Protection Board.

Sentencing Commission Convenes Native American Ad Hoc Advisory Group

The United States Sentencing Commission has announced the formation of a Native American Ad Hoc Advisory Group to consider any viable methods to improve the operation of the federal sentencing guidelines in their application to Native Americans prosecuted under the Major Crimes Act. The Native American advisory group will be comprised of 16 members representing a variety of interested groups, including the National Congress of American Indians, the U.S. Commission on Civil Rights, the Bureau of Indian Affairs, tribal members, the federal judiciary, and law enforcement officials. The Native American advisory group will be chaired by the Honorable Lawrence Piersol, chief judge of the U.S. District Court of South Dakota. The Native American advisory group, which will meet over a period of 18 months, will present one interim report and a final written recommendation to the Commission.

In June 2001, the Commission held a public hearing in Rapid City, South Dakota, to hear firsthand about the issues facing Native Americans who are prosecuted for crimes in the federal system. Testimony was presented by various witnesses with experience in federal investigation, prosecution, and sentencing in South Dakota. After the hearing, the Commission considered a number of initiatives aimed at addressing some of the concerns raised by witnesses. One such initiative involved sending Commission staff to South Dakota to provide defense attorneys with training seminars on the application of the federal guidelines. Seminars were held in Rapid City, Pierre, and Sioux Falls in October and November 2001. Approximately 100 defense lawyers attended these seminars. On September 19, 2001, the Commission requested public comment on the formation of an ad hoc advisory group to address Native American issues. The Commission received universally favorable public comment on this idea. ■

Tentative Calendar of Public Meetings

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

August 28
September 18
October 30
November 20
December 3
January 8, 2003

Native American Ad Hoc Advisory Group Members

HONORABLE LAWRENCE PIERSOL, Chief Judge, U.S. District Court, District of South Dakota (Chair)

ROBERT ECOFFEY, Director, Office of Law Enforcement Services, Bureau of Indian Affairs

KEVIN GOVER, Partner, Steptoe & Johnson

PHIL HOGEN, Associate Solicitor for Indian Affairs, U.S. Department of Interior

DIANE HUMETEWA, Assistant U.S. Attorney, District of Arizona

MAGDELINE E. JENSEN, Chief Probation Officer, Tucson, AZ

THOMAS L. LECLAIRE, Of Counsel, Snell & Wilmer, Phoenix, AZ

ELSIE MEEKS, Vice Chair, U.S. Commission on Civil Rights

HONORABLE DONALD W. MOLLOY, Chief Judge, U.S. District Court, District of Montana

RICHARD MONETTE, Tribal Chairman, Turtle Mountain Band of Chippewa Indians

TOM PECKHAM, Partner, Nordhaus Law Firm, Albuquerque, NM

MARLYS PECORA, Victim Witness Specialist, U.S. Attorney's Office, South Dakota

CELIA RUMANN, Assistant Professor of Law, University of St. Thomas School of Law

JON SANDS, Assistant Federal Public Defender, District of Arizona

TRACY TOULOU, Director, Office of Tribal Justice, U.S. Department of Justice

KEVIN WASHBURN, General Counsel, Indian Gaming Commission

Sixteen Named Ad Hoc Organizational Guidelines Advisors



"The 16 members of the advisory group were selected because of their expertise in the areas of criminal law, business ethics and compliance, and the federal sentencing guidelines for organizations, and are intended to represent a cross-section of industries, non-profit organizations, academic institutions, and government."

The United States Sentencing Commission recently formed an ad hoc advisory group to review the general effectiveness of the federal sentencing guidelines for organizations. The Commission has asked the group, during its 18-month tenure, to place particular emphasis on examining the criteria for an effective program to ensure an organization's compliance with the law.

"The organizational guidelines have had a startling impact on the implementation of compliance and business ethics programs over the last ten years," said Commission chair, Judge Diana E. Murphy. "These guidelines provide incentives for voluntary reporting and cooperation but punish an organization's failure to self-police. There is more interest than ever in these guidelines and we have received some suggestions for strengthening them. In order to foster dialogue about possible refinements to the organizational guidelines, we formed this ad hoc advisory group. In light of the current focus on preventing large-scale corporate wrongdoing, we believe the group's work will be very timely."

The 16 members of the advisory group were selected because of their expertise in the areas of criminal law, business ethics and compliance, and the federal sentencing guidelines for organizations, and are intended to represent a cross-section of industries, non-profit organizations, academic institutions, and government. Todd Jones, former United States Attorney for Minnesota and now a partner at the law firm of Robins, Kaplan, Miller & Ciresi, will chair the group. In accepting his responsibilities as chair of the advisory group, Mr. Jones observed, "[C]orporate misconduct and organizational behavior are topics of much discussion in boardrooms and courtrooms across the country. . . . [M]any of these discussions revolve around issues of internal governance and compliance with the law, which are the bedrock of the organizational sentencing guidelines. It is hoped that the focused work of the advisory group will prove invaluable to the Commission as it ultimately determines what, if any, refinements to Chapter Eight are needed at this point in the evolution of the guidelines." ■

Federal Sentencing Guidelines for Organizations

After a three-year period of research, study, and public comment, the organizational sentencing guidelines became effective November 1, 1991. The guidelines provide incentives, in the form of reduced criminal penalties, for organizations to report violations, cooperate in criminal investigations, discipline responsible employees, and take the steps needed to prevent and detect criminal conduct by their agents.

By contrast, the guidelines mandate high fines for organizations that have no meaningful programs to prevent and detect criminal violations or in which management was involved in the crime. The guidelines take into account the potential range of organizational criminal culpability, from an inadvertent record keeping violation to an organization created solely for criminal purposes.

For more information about the organizational sentencing guidelines, visit the Commission's website at <http://www.ussc.gov/orgguide.htm>.