

Chapter Two

The Sentencing Guidelines

The legislation creating the Sentencing Commission provides 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, 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 upon expiration of a 180-day congressional review period unless the Congress, by law, provides otherwise. Occasionally, Congress also grants the Commission special authority to issue temporary, “emergency” amendments in connection with particular legislation.

Policy Issues

Cocaine Sentencing

The Commission identified as a policy priority for the amendment cycle ending May 1, 2007, “continuation of its work with the congressional, executive, and judicial branches of the government and other interested parties on cocaine sentencing policy,” including reevaluating the Commission's 2002 report to Congress, *Cocaine and Federal Sentencing Policy*. During the amendment cycle, the Commission formed a staff policy team to (1) update its analysis of key sentencing data about cocaine offenses and offenders; (2) review recent scientific literature regarding cocaine use, effects, dependency, prenatal effects, and prevalence; (3) research trends in cocaine trafficking patterns, price, and use;

(4) survey the state laws regarding cocaine penalties; and (5) monitor case law developments.

To further assist in its consideration of federal cocaine sentencing policy, the Commission received statements and heard expert testimony from the executive branch, the federal judiciary, defense practitioners, state and local law enforcement representatives, medical and treatment experts, academicians, social scientists, and interested community representatives at hearings on November 14, 2006, and March 20, 2007. The Commission also received substantial written public comment on federal cocaine sentencing policy throughout the amendment cycle. The Commission's findings were explained in a report presented to Congress in May 2007 that included a number of recommendations for modifications to the statutory penalties for crack cocaine offenses.

The Commission's work in this area also included an amendment to section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) that provides a modest two-level reduction in the offense level for crack cocaine offenses. Specifically, the amendment modified the drug quantity thresholds in the Drug Quantity Table so as to assign, for crack cocaine offenses, base offense levels corresponding to guideline ranges that include the statutory mandatory minimum penalties. Accordingly, pursuant to the amendment, five grams of cocaine base are assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60-month) statutory minimum for such offenses), and 50 grams of cocaine base are assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120-month) statutory minimum for such offenses). Crack cocaine offenses for quantities above

Table 2

PUBLIC HEARING WITNESS LIST
Cocaine and Federal Sentencing Policy
Georgetown University Law Center – Washington, D.C.
November 14, 2006

Joseph T. Rannazzisi

Drug Enforcement Administration

R. Alexander Acosta

U.S. Department of Justice

A.J. Kramer

Federal Public Defenders

David Debold

Practitioners Advisory Group

Stephen Saltzburg

American Bar Association

Carmen Hernandez

National Association of Criminal Defense Lawyers

Chuck Canterbury

Fraternal Order of Police

Elmore Briggs

*D.C. Department of Health, Addiction Recovery and
Prevention Administration*

The Honorable Reggie B. Walton

U.S. Judicial Conference, Committee on Criminal Law

Dr. Nora Volkow

National Institute on Drug Abuse

Dr. Harolyn Belcher

Johns Hopkins University

Dr. Alfred Blumstein

Carnegie-Mellon University

Dr. Bruce Johnson

Institute for Special Populations Research

Dr. Peter Reuter

University of Maryland

Julie Stewart

Families Against Mandatory Minimums

Jesselyn McCurdy

American Civil Liberties Union

Hilary Shelton

*National Association for the Advancement of Colored
People*

Ryan King

The Sentencing Project

Nkechi Taifa

Open Society Institute

Angela Arboleda

National Council of La Raza

Table 2 (continued)

PUBLIC HEARING WITNESS LIST
Proposed Amendments to the Sentencing Guidelines
Washington, D.C.
March 20, 2007

Jonathan Wroblewski
U.S. Department of Justice

Miriam Conrad
Federal Public Defender, District of Massachusetts

Elisabeth Ervin
Probation Officers Advisory Group

John C. Richter
U.S. Attorney, Western District of Oklahoma

Paul Almanza
Joe Koehler
John Morton
U.S. Department of Justice

Jon M. Sands
Amy Baron-Evans
Federal Public Defenders

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Honorable Reggie B. Walton
U.S. Judicial Conference, Committee on Criminal Law

Eric E. Sterling
Criminal Justice Policy Foundation

Deborah Small
Break the Chains

Anne E. Blanchard
Federal Public Defenders

Mary Price
Families Against Mandatory Minimums

Stephen Saltzburg
American Bar Association

Shawn Driscoll
American Trucking Association

Peter J. Pantuso
American Bus Association

Frederic Hirsch
Entertainment Software Association

and below the mandatory minimum threshold quantities similarly were adjusted downward by two levels. The amendment also included a mechanism to determine a combined base offense level in an offense involving crack cocaine and other controlled substances.

Following promulgation of this amendment, the Commission solicited public comment in July and September 2007 regarding whether the amendment should be applied retroactively. Commission staff also began preparing a retroactivity impact analysis to assess the potential impact of retroactive application of the amendment.

Terrorism

The Commission formed a policy team to study the USA PATRIOT Improvement and Reauthorization Act of 2005 (“PATRIOT Reauthorization Act”), Pub. L. No. 109–177, and the Department of Homeland Security Appropriations Act of 2007 (“Homeland Security Act”), Pub. L. 109–295. The PATRIOT Reauthorization Act created several new offenses, including offenses addressing narco-terrorism, smuggling goods from the United States, mining United States navigable waters, and transporting biological and chemical weapons. It also increased the statutory maximum penalty for violations of the International Emergency Economic Powers Act from ten to 20 years of imprisonment. The Homeland Security Act created a new offense in 18 U.S.C. § 554 regarding the construction of border tunnels and subterranean passages that cross the international boundary between the United States and another country, and directed the Commission to consider a number of factors and promulgate or amend the guidelines to provide increased punishment for these offenses.

The Commission promulgated new guidelines to address narco-terrorism offenses and offenses involving border tunnels. It also provided guideline references for the other offenses created or amended by those acts. The new offense of narco-terrorism, 21 U.S.C. § 960a, provides a penalty of not less than twice the statutory minimum punishment under

21 U.S.C. § 841(b)(1) and not more than life imprisonment. The Commission promulgated a new guideline at section 2D1.14 (Narco-Terrorism) to reflect that such an offense differs from basic drug trafficking offenses because it involves trafficking that benefits terrorist activity. The Commission also promulgated a new guideline for border tunnel offenses at section 2X7.1 (Border Tunnels and Subterranean Passages). The new guideline provides that offenders who use a tunnel or passage to smuggle in certain contraband, including weapons of mass destruction, or members of a terrorist organization, will receive a four-level increase in addition to the offense level applicable to the underlying smuggling offense to effectuate the statute’s doubling of the statutory maximum penalty for the underlying offense when a border tunnel is used.

Additionally, the Commission implemented a directive in section 1191(c) of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162, by creating a new policy statement at section 5K2.24 (Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform) providing that an upward departure may be warranted if, during the commission of the offense, the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. § 716.

Sex Offenses

The Commission formed a policy team to study the Adam Walsh Child Protection and Safety Act of 2006 (“Adam Walsh Act”), Pub. L. 109–248. This act created a new offense for the failure to register as a sex offender and included a directive to the Commission to consider the seriousness of the sex offender’s conviction that gave rise to the requirement to register, relevant further offense conduct during the period for which the offender failed to register, and the offender’s criminal history. The Adam Walsh Act further created other new sexual offenses, and enhanced penalties for existing sexual offenses.

The Commission responded to the directive by promulgating a new guideline at section 2A3.5 (Failure to Register as a Sex Offender) that provides significant enhancements if a defendant commits certain offenses after failing to register. Further, the Commission promulgated a new guideline provision at section 2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) that provides additional punishment for certain aggravated offenses related to the requirement to register as a sex offender to run consecutive to any sentence imposed for the failure to register offense or any sentence imposed for an enumerated underlying offense. The amendment also implemented other provisions of the act that provided enhanced penalties for sexual offenses.

Drugs

The Commission created a policy team to study the drug-related provisions of the PATRIOT Reauthorization Act, and the Adam Walsh Act. The PATRIOT Reauthorization Act created two new offenses: 21 U.S.C. § 865 (Smuggling methamphetamine or methamphetamine precursor chemicals into the United States while using facilitated entry programs), which imposes a mandatory consecutive sentence of 15 years' imprisonment; and 21 U.S.C. § 860a (Consecutive sentence for manufacturing or distributing, or possessing with intent to manufacture or distribute, methamphetamine on premises where children are present or reside), which is punishable by a statutory maximum term of not more than 20 years' imprisonment. The Adam Walsh Act created a new offense in 21 U.S.C. § 841(g) (Internet sales of date rape drugs), which is punishable by a statutory maximum term of not more than 20 years' imprisonment.

The Commission (1) provided enhancements for cases involving the smuggling of methamphetamine or its precursors, the trafficking or manufacture of methamphetamine in the presence of children, and the sale of date rape drugs over the Internet; and (2) referenced the new offenses to the appropriate guidelines in Appendix A (Statutory Index).

Intellectual Property

The Commission formed a policy team to study a directive in the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109–181. The Commission considered an empirical analysis of cases sentenced under section 2B5.3, a case law and literature review, and input from industry representatives and other interested groups, in regard to the proposed amendment that became effective November 1, 2007.

The Commission also reviewed information compiled in response to a directive in the Telephone Records and Privacy Protection Act of 2006 ("Telephone Records Act"), Pub. L. No. 109–476. The Commission promulgated an amendment to refer cases involving the new offense at 18 U.S.C. § 1039 created by the Telephone Records Act to section 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Information).

Transportation

The Commission established a policy team to study various provisions of the Safe, Accountable, Flexible Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109–59 ("SAFETEA:LU") and the PATRIOT Reauthorization Act. SAFETEA:LU and the PATRIOT Reauthorization Act created a number of new transportation-related offenses and increased the scope and penalties for several existing statutes. The Commission referenced new offenses and those with increased scope or penalties to the appropriate guidelines in Appendix A.

Section 307(c) of the PATRIOT Reauthorization Act directed the Commission to review the guidelines to determine whether a sentencing enhancement is appropriate for any offense under sections 659 or 2311 of title 18 of the United States Code. The team met with industry representatives and other interested groups, conducted an empirical analysis of cases sentenced under section 2B1.1, and reviewed case law and literature. The Commission responded to the directive by expanding the scope of an existing enhancement in section 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving

Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) to cover cargo theft.

Criminal History

The Commission established a policy team to examine issues related to Chapter Four (Criminal History). To assist the Commission in its consideration of criminal history, in November 2006 the Commission hosted two round-table discussions to receive input from federal judges, prosecutors, defense attorneys, probation officers, and members of academia. In addition, the Commission gathered information through its training programs, the public comment process, and comments received during a public hearing in March 2007. The Commission considered case law and state guideline systems' treatment of certain minor offenses and multiple past offenses, and a detailed study of misdemeanor and petty offenses and the criminal history rules that govern them, particularly section 4A1.2(c)(1). The study included analysis of a sample of 11,300 offenders sentenced in fiscal year 2006 to determine the type of misdemeanors and petty offenses counted in the criminal history score, the frequency with which they occurred, and the particular guideline provisions that caused them to be counted. In addition, the Commission examined evidence of recidivism for a sample of offenders sentenced in 1992 who were subsequently released from imprisonment and monitored for two years.

The Commission promulgated an amendment that made three modifications to the treatment of minor offenses, particularly at section 4A1.2(c)(1). First, the amendment amended the guidelines to state that fish and game violations and local ordinance violations (except those that are state violations) should not be counted in a defendant's criminal history score. Second, the amendment changed the probation criteria at section 4A1.2(c)(1) from a term of "at least one year" to a term of "more than" one year. Third, the amendment resolved a circuit conflict over the manner in which a non-listed offense is

determined to be "similar to" an offense listed at section 4A1.2(c)(1) and (2).

The Commission also made changes to simplify the rules for counting multiple prior sentences by eliminating the term "related cases" and instead using the terms "single" and "separate" sentences. This change in terminology and methodology was designed to clear up confusion over the term "related cases" and to resolve a number of circuit conflicts that had developed over the rules relating to multiple prior offenses.

Amendments Promulgated

Proposed amendments were published in the *Federal Register* on January 30, 2007. The Commission received written comment on the proposed amendments from a variety of sources. The Commission also conducted two public hearings during the 2006–2007 amendment cycle, the first on November 15, 2006, concerning federal cocaine sentencing policy and the second on March 20, 2007, on all proposed amendments. On May 1, 2007, the Commission submitted to Congress multiple amendments to the sentencing guidelines, commentary, and policy statements. For these amendments, the Commission established an effective date of November 1, 2007.

In addition to these permanent amendments, the Commission promulgated one temporary, "emergency" amendment in response to the Telephone Records and Privacy Protection Act of 2006 ("Telephone Records Act"), Pub. L. No. 109–476. On April 25, 2007, the Commission published in the *Federal Register* the temporary, "emergency" amendment that was adopted in response to the directive in the Telephone Records Act. The effective date of the amendment was May 1, 2007. The amendments promulgated by the Commission in fiscal year 2007 include amendments responding to congressional directives and enacted legislation and other areas of Commission interest.

Specifically, the Commission —

- amended the Drug Quantity Table at section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) to reduce penalties for crack cocaine offenses by two levels as a modest step toward addressing the problems associated with crack cocaine penalties as articulated in the Commission’s May 2007 report to Congress, *Cocaine and Federal Sentencing Policy*. The amendment retains consistency with applicable statutory mandatory minimums. On July 31, 2007, and September 27, 2007, the Commission published issues for comment regarding whether the crack cocaine amendment or the criminal history amendment effective November 1, 2007, should be applied retroactively;
- revised the rules for counting multiple prior sentences and the rules for using misdemeanor and petty offenses in determining a defendant’s criminal history score pursuant to section 4A1.2 (Definitions and Instructions for Computing Criminal History);
- modified the policy statement at section 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons) to provide examples of circumstances that would constitute “extraordinary and compelling reasons” for purposes of modifying a term of imprisonment pursuant to 18 U.S.C. § 3582 (c)(1)(A);

In addition, the amendments promulgated by the Commission in fiscal year 2007 that responded to congressional directives or otherwise addressed recently enacted legislation —

- responded to a directive and other various provisions in the USA PATRIOT Improvement and Reauthorization Act of 2005 (“PATRIOT Reauthorization Act”), Pub. L. No. 109–177, by (1) referencing new transportation offenses and those with increased scope or penalties created by those acts to the appropriate guidelines in Appendix A; (2) expanding section 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) to enhance penalties for offenses involving cargo theft; (3) creating a new guideline at section 2D1.14 (Narco-Terrorism) for offenses under 21 U.S.C. § 960a; (4) modifying section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) to enhance sentences for violations of 21 U.S.C. § 865 (smuggling methamphetamine or its precursor chemicals into the United States by a person enrolled in a facilitated entry program administered by the federal government) and 21 U.S.C. § 860a (consecutive sentence for manufacturing or distributing, or possessing with intent to manufacture or distribute, methamphetamine on premises where children are present or reside); and (5) referencing various new offenses created by the PATRIOT Reauthorization Act to appropriate preexisting guidelines;
- responded to a directive and other provisions in the Adam Walsh Child Protection and Safety Act of 2006 (“Adam Walsh Act”), Pub. L. No. 109–248, by (1) creating two new guidelines, section 2A3.5 (Failure to Register as a Sex Offender) and section 2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender); (2) making changes to Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse and Offenses Related to Registration as a Sex Offender) and Part G (Offenses involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity); section 2J1.2 (Obstruction of Justice), section 3D1.2 (Groups of Closely Related Counts), section 4B1.5 (Repeat and Dangerous Sex Offender Against Minors), section 5B1.3 (Conditions of Probation), section

5D1.2 (Terms of Supervised Release); section 5D1.3 (Conditions of Supervised Release); (3) referencing various new offenses created by the Adam Walsh Act to appropriate preexisting guidelines; (4) providing a definition of “minor” in relevant guidelines that is consistent with its definition elsewhere in the guidelines; and (5) modifying section 2D1.1 to enhance sentences for violation of 21 U.S.C. § 841(g) (Internet sale of date rape drugs);

- responded to the Department of Homeland Security Appropriations Act, Pub. L. No. 109–295, by creating a new guideline at section 2X7.1 (Border Tunnels and Subterranean Passages) for offenses under 18 U.S.C. § 554;¹
- responded to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users, Pub. L. No. 109–59, by referencing two new offenses created by the act to appropriate preexisting guidelines;
- responded to a directive in the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162, by (1) creating a new policy statement at section 5K2.24 providing that an upward departure may be warranted if, during the commission of the offense, the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. § 716; and (2) referencing a new privacy offense to created by the act to section 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information);
- responded to the Respect for America’s Fallen Heroes Act, Pub. L. No. 109–228, by referring a new offense at 38 U.S.C. § 2413 (concerning certain demonstrations at Arlington National Cemetery and at cemeteries controlled by the

National Cemetery Administration) to section 2B2.3 (Trespass) and by providing an enhancement at section 2B2.3(b)(1) for such offenses;

- responded to the Security and Accountability for Every Port Act of 2006, Pub. L. No. 109–347, by referring a new offense at 31 U.S.C. § 5363 (which prohibits the acceptance of any financial instrument for unlawful Internet gambling) to section 2E3.1 (Gambling Offenses);
- re-promulgated as a permanent amendment the temporary, emergency amendment that referred new offenses under 18 U.S.C. § 1039 (regarding fraud in connection with illegally obtaining confidential phone records information) to section 2H3.1; and
- re-promulgated as a permanent amendment the temporary, emergency amendment that implemented an emergency directive in the Stop Counterfeiting in Manufactured Goods Act, Pub. L. No. 109–181, by amending section 2B5.3 (Criminal Infringement of Copyright or Trademark) to refine the rules for calculating “infringement amount” in Application Note 2 of section 2B5.3, and by expanding section 2B5.3(b)(3) to enhance sentences for trafficking in “circumvention devices.”

Other guideline amendments promulgated in fiscal year 2007—

- corrected typographical errors in subsection (b)(13)(C) of section 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) and subsection (b)(1) of section 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) and added the amendment correcting these typographical errors to the list of amendments in

¹ This provision was redesignated as 18 U.S.C. § 555 by section 553 of the Consolidated Appropriations Act of 2008, Pub. L. 110–161.

subsection (c) of section 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) that may be applied retroactively;

- corrected typographical errors in subsection (a) of section 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) and Application Note 14 of section 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and clarified the grouping rules at section 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) when a defendant is sentenced on multiple counts contained in separate indictments.

Assistance to Congress

The Sentencing Reform Act gives the Commission the responsibility to advise Congress about sentencing and related criminal justice issues. In fiscal year 2007, the Commission worked closely with members of Congress and their staffs, providing them with timely and valuable sentencing-related information and analyses.

The Commission continued providing Congress (and other stakeholders) with virtually real-time data collection, analysis, and reporting on federal sentencing trends. These materials were delivered routinely to Congress and made available through the Commission's website in order to assist Congress in its own analysis of the impact *Booker* and its progeny have had on criminal justice issues. The Commission also held numerous briefings with congressional staff to explain the developing case law such as the Supreme Court's decisions in *Rita*, *Gall*, and *Kimbrough*; the case law's impact on the work of the Commission specifically; and the impact on federal sentencing generally.

In June 2007, the chair of the Commission testified before the House Subcommittee on Crime, Terrorism, and Homeland Security about statutory

mandatory minimum penalties generally, and federal cocaine sentencing policy specifically. This testimony followed congressional briefings on the Commission's work in the area of cocaine sentencing. During these briefings, Commission staff presented the Commission's data and research in the area of federal cocaine sentencing, including detailed briefings on the Commission's May 2007 report to Congress, *Cocaine and Federal Sentencing Policy* and its amendment to the guidelines for crack cocaine offenses.

In fiscal year 2007, the Commission also responded to congressional requests for other federal sentencing and criminal justice data, including prison impact analyses, and provided technical assistance in drafting legislation. The Commission also corresponded with members of Congress about proposed legislation, offered explanations and training on guideline application to congressional staff, and provided regular updates on Commission action in response to recently enacted crime and sentencing-related legislation.

The Commission also routinely supplied Congress with pertinent publications and resource materials including the *Guidelines Manual*, annual reports and sourcebooks, research reports, and other published materials.

