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# ***U.S. Sentencing Guidelines***

## ***Their Impact on Federal Drug Offenders***

By  
GREGORY D. LEE, M.P.A.

**N**ot long ago, defendants in similar Federal cases but different judicial districts often received different sentences, ranging from probation to several years in prison. Then, after being sent to prison, defendants became eligible for parole automatically after serving only about one-third of their sentences. Thus, a 5-year prison sentence became, in reality, less than 2 years' incarceration.

The Sentencing Reform Act of 1984, part of Title II of the Comprehensive Crime Control Act of 1984, took steps to prevent such scenarios from occurring. The Comprehensive Crime Control Act established the U.S. Sentencing Commission, a nine-member panel working as an independent agency of the Federal judiciary. The commission's seemingly monumental task was to overhaul the sentencing policies of the Federal criminal justice system; its mission, to achieve uniformity and proportionality in sentencing. This article explains the changes made by the commission to sentencing guidelines and how these changes affect enforcement of Federal drug laws.

### **THE PUNISHMENT FITS THE CRIME**

In the past, the latitude given Federal judges created wide disparity in sentencing. The guidelines were designed to close the gap by requiring that defendants be sentenced



according to their criminal backgrounds and the seriousness of the crime(s) they commit. Thus, a defendant with two prior convictions who commits a crime will receive more prison time than a defendant with no criminal record who commits an identical crime.

The guidelines also factor in the particular role the defendant played in the criminal endeavor and any aggravating or mitigating circumstance that would warrant either an increase or decrease in the sentence. However, the commission mandated that the sentence range be narrow. That is, the maximum prison sentence cannot exceed the minimum sentence by more than 25 percent or 6 months, whichever is greater.<sup>1</sup>

As part of the same legislation that created the U.S. Sentencing Commission, Congress established mandatory minimum sentences for certain Federal crimes, including drug offenses. Mandatory minimum

penalties also limit the discretion of Federal judges by requiring that sentences be based solely on the type and amount of drugs involved, the criminal history of the defendant, and other aggravating circumstances, such as possession of a weapon during the crime. Unlike the sentencing guidelines, however, mandatory minimums give judges little flexibility in sentencing.

### **FEDERAL PAROLE ABOLISHED**

Previously, the U.S. Parole Commission could, and often did, authorize the early release of Federal prisoners. The Sentencing Reform Act limited this authority by abolishing Federal parole. As a result, defendants serve their court-imposed sentences, minus approximately 15 percent for good behavior, if applicable. Such sentence reductions may not exceed 54 days per year. Other types of early release are prohibited.

### **LONGER PRISON SENTENCES**

The sentencing guidelines, in conjunction with Federal mandatory minimum sentences, have resulted in longer prison sentences for offenders who violate Federal drug laws. According to the Bureau of Justice Statistics, from 1980 to 1989, the average sentence for Federal drug offenders increased by 59 percent. In 1980, drug traffickers received an average sentence of 48.1 months; in 1985, 60.8 months; in 1988, 71.3 months; and in 1990, 84 months.<sup>2</sup> Furthermore, without parole, Federal prisoners now serve almost their entire sentences.

### **THE SENTENCING TABLE**

Federal judges sentence offenders according to a table established by the guidelines. Using a two-dimensional grid, the table categorizes offenses according to the seriousness of the crime (levels 1 through 43) and the defendant's criminal history (categories I through VI). The higher the level, the longer the possible sentence. The maximum offense mandates a life sentence. Lower figures represent the minimum a defendant with no criminal history would receive.

The sentencing tables used in drug cases base punishments on the type and the amount of the drug, as well as the criminal history of the defendant. Heroin and methamphetamine violations receive greater punishments than those involving cocaine or marijuana. Also, offenses involving crack cocaine receive substantially higher sentences than those dealing with cocaine in its powdered form, due to crack's higher addictive qualities.



**“ Coupled with mandatory minimum sentences, the sentencing guidelines may provide a strong deterrent to drug law violators. ”**

*Special Agent Lee, formerly an instructor at the Drug Enforcement Administration's Office of Training in Quantico, Virginia, currently is assigned to the DEA's Islamabad, Pakistan, Office.*

Defendants convicted of conspiracy or an attempt to commit any offense involving a controlled substance warrant the same level as if they had completed the objective of the conspiracy. For example, if two or more people conspire to import 500 kilograms of cocaine, but the plane containing the drugs crashes into the Gulf of Mexico, the defendants would be punished the same as if the plane had landed safely in the United States.

## DEPARTURES FROM THE GUIDELINES

### Commission-Mandated Adjustments

In formulating the guidelines, the commission analyzed thousands of cases and based punishments on scenarios considered typical for certain crimes. Still, in some instances, aggravating or mitigating circumstances may warrant departure from the guidelines.

Based on its research, the commission anticipated when departures likely would occur. The guidelines provide for adjustments, up or down, in cases where, for example, the defendant obstructs justice, physically restrains the victim, and/or plays a major or minor role in the crime.

Thus, if a defendant organizes, leads, manages, or supervises a criminal activity, the sentence increases, depending on the specific role and the number of co-defendants involved. On the other hand, if a defendant clearly plays a minor role, the sentence decreases accordingly.

The punishment also increases if a defendant abuses a position of public or private trust or uses a special skill to commit or conceal an offense.

By definition, a "special skill" is not possessed by members of the general public and usually requires substantial education, training, or licensing to learn and use. Examples of individuals with special skills include accountants, attorneys, boat captains, pilots, chemists, and demolition experts.<sup>3</sup>

“

***U.S. sentencing guidelines...mandate consideration of the defendant's criminal history, the severity of the crime, and other aggravating or mitigating factors.***

”

A hypothetical situation may serve to illustrate sentences based on defendants' roles. A group of people conspire to smuggle 12 tons of marijuana into the United States from Thailand. They use a fishing vessel to transport the contraband to a deserted beach where they off-load it. Investigators arrest the organizers, managers, supervisors, and the boat captain, as well as the individuals who off-loaded the drugs onto the beach. Assuming identical criminal backgrounds, according to the guidelines, the organizers would receive more prison time than the managers and supervisors, who would receive more time than the captain or those who merely unloaded the illicit cargo. But, the captain would receive

a greater sentence than the off-loaders, because of the special skill required to navigate a boat.

Regardless of their skills and abilities, defendants who complete drug transactions within 1,000 yards of a school or college,<sup>4</sup> or who use pregnant or juvenile accomplices,<sup>5</sup> also receive increased sentences. In contrast, defendants may receive reduced sentences for clearly accepting personal responsibility for their criminal conduct. That is, defendants who, for example, cooperate with authorities, express remorse to their victims, or make restitution for their crimes may receive reduced sentences. However, merely entering a guilty plea does not entitle a defendant, as a matter of right, to a reduced sentence.

### Court-Ordered Departures

The commission recognizes that some cases will not fit the guidelines, even with adjustments, and will require departures. Still, judges who depart from the guidelines must provide written justification for doing so.

Some offenses mandating an increase above the guidelines include significant disruption of a governmental function, extreme conduct by the defendant, substantial property damage or loss, and extreme psychological injury to the victim.<sup>6</sup> In drug cases, death or serious bodily injury resulting from the use of controlled substances that the defendant distributed would warrant an increase in the sentence. In cases that carry mandatory minimum penalties, the sentence doubles, at least. If an individual commits such a violation after a prior felony drug conviction, the sentence doubles again. Coupled

## Drug Offense Sentencing Tables

### Cocaine

Base Offense Level	Amount	Sentence Range
26	500 g < 2 kg	63 - 150 months
28	2 < 3.5 kg	78 - 175 months
30	3.5 < 5 kg	97 - 210 months
32	5 < 15 kg	121 - 262 months
34	15 < 50 kg	151 - 327 months
36	50 < 150 kg	188 - 405 months
38	150 < 500 kg	235 months - Life
40	500 < 1,500 kg	292 months - Life
42	1,500 kg or more	360 months - Life

### Marijuana

Base Offense Level	Amount	Sentence Range
26	100 < 400 kg	63 - 150 month
28	400 < 700 kg	78 - 175 months
30	700 < 1,000 kg	97 - 210 months
32	1,000 < 3,000 kg	121 - 262 months
34	3,000 < 10,000 kg	151 - 327 months
36	10,000 < 30,000 kg	188 - 405 months
38	30,000 < 100,000 kg	235 months - Life
40	100,000 < 300,000 kg	292 months - Life
42	300,000 kg or more	360 months - Life

### Heroin and Methamphetamine

Base Offense Level	Amount	Sentence Range
32	1 < 3 kg	121-262 months
34	3 < 10 kg	151-327 months
36	10 < 30 kg	188-405 months
38	30 < 100 kg	235 months - Life
40	100 < 300 kg	292 months - Life
42	300 kg or more	360 months - Life

with mandatory minimum sentences, the sentencing guidelines may provide a strong deterrent to drug law violators.

Defendants can receive a shorter sentence if they provide substantial assistance to authorities, defined as providing investigators and prosecutors with information leading to the indictment of other offenders. Only the prosecution can motion for a reduced sentence based on the substantial assistance clause of the guidelines.

The possibility of receiving a reduced sentence often provides a powerful incentive for defendants to cooperate. The assistance they provide often results in the arrest and prosecution of previously unknown accomplices and the seizure of hidden assets that would have gone undetected otherwise.

### CRITICISM OF THE GUIDELINES

Although the guidelines have brought uniformity to Federal sentencing, they have generated considerable controversy. From 1987,

Base Offense Levels, which range from 1 to 43, correspond to the seriousness of the crime committed. In drug cases, they depend on the type and the amount of the drug. Level 43 commands a life sentence in all cases. The sentence range represents the minimum category I sentence, for a defendant with no criminal history, and the maximum category VI sentence, for a defendant with an extensive criminal background.

Source: U.S. Sentencing Commission, *Guidelines Manual*, (Nov. 1991), 76-78, 280.

when the guidelines took effect, to 1989, when the U.S. Supreme Court upheld their constitutionality,<sup>7</sup> over 150 Federal judges claimed that the guidelines violated the Constitution and refused to follow them.<sup>8</sup>

Even today, Federal judges criticize the guidelines, mainly because they limit their discretion in sentencing, especially in drug matters. In fact, several Federal judges around the Nation have removed themselves from the random draw by which criminal cases are assigned in order to avoid imposing what they believe are excessive sentences in drug offenses.<sup>9</sup>

### EVOLUTIONARY PROCESS

The sentencing guidelines have evolved since their inception in 1987 and will continue to do so. As judges sentence according to the guidelines, and as they depart from them, the commission gains insight into what areas require modification. The group meets at least once each year to review the guidelines, and revisions are published in the Federal Register. The changes become effective after 180 days, unless Congress enacts a law to the contrary.

With the passage of the Violent Crime Control and Law Enforcement Act of 1994, Congress hopes to reduce punishments for individuals convicted of low-level drug violations. The act waives mandatory minimum sentences in cases in which offenders did not act as organizers, leaders, managers, or supervisors and did not use guns, commit violence, or harm others while committing their crimes. In addition, offender must have only minor

criminal histories and must cooperate with authorities.<sup>10</sup>

### CONCLUSION

U.S. sentencing guidelines have changed the way judges sentence Federal offenders. They mandate consideration of the defendant's criminal history, the severity of the crime, and other aggravating or mitigating factors. The guidelines place a limit on the sentencing discretion of judges and provide harsher sentences where warranted.

Some view the guidelines as too harsh and inflexible. Others believe they are not strict enough. And still others champion them as a necessary deterrent to crime because of the certainty of the sentence to be served. Despite the debate, the sentencing guidelines, coupled with mandatory minimum penalties, clearly have raised the ante for individuals contemplating violating Federal drug laws. ♦

#### Endnotes

<sup>1</sup> 28 USC Section 994 (b)(2).

<sup>2</sup> "Federal Criminal Case Processing, 1980-89, with Preliminary Data for 1990," Bureau of Justice Statistics, October 1991, 17.

<sup>3</sup> U.S. Sentencing Commission, *Guidelines Manual* (USSG), Section 3B1.3, (Nov. 1991), comment. (n.2).

<sup>4</sup> USSG, Section 2D1.2 applies an enhancement for defendants convicted under 21 USC, Sections 859, 860, and 861.

<sup>5</sup> USSG, Sections 2D1.2, 3A1.1.

<sup>6</sup> USSG, Ch.3, Pt.k.

<sup>7</sup> *Mistretta v. United States*, 488 US 361 (1989).

<sup>8</sup> Sandra Torrey, "Some Federal Judges Just Say No to Drug Cases," *The Washington Post*, May 17, 1993, F7.

<sup>9</sup> *Ibid.*

<sup>10</sup> The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Sec. 80001, 108 Stat. 1985.

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