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Legal Sidebar

Back in Action, the U.S. Sentencing Commission to Resolve Circuit Splits on Controlled Substances and Sentencing Reductions

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In 1984, Congress revolutionized federal sentencing. That year, Congress established the U.S. Sentencing Commission (the Commission) as an independent agency within the judicial branch and directed it to promulgate the first-ever federal sentencing guidelines. In 1987, the Commission published the inaugural U.S. Sentencing Guidelines manual (the Guidelines), which serves as the starting point and anchor for every federal sentence imposed across the country. Over 1.9 million defendants have been sentenced under the Guidelines since their inception.

Congress also required the Commission to "review and revise" the Guidelines, which it has done periodically. Between 2019 and July 2022, however, the Commission lacked a quorum and therefore the ability to propose amendments to the Guidelines. In August 2022, the Senate confirmed a full slate of seven new commissioners, restoring the Commission's quorum and thus enabling the Commission to initiate its amendments process. As a part of that process, in November 2022, the Commission published a list of final priorities for analysis and possible action. According to a timetable fixed in statute, should the Commission study a priority and approve prospective changes to the Guidelines, the Commission will submit the proposed amendments to Congress by May 1, 2023. Congress then has until November 1, 2023, to affirmatively reject any such amendments, or the amendments will take effect.

This Sidebar addresses one of the Commission's listed priorities: the resolution of two conflicts among the federal appeals courts involving the Guidelines. The first conflict relates to whether, for a "controlled substance offense" to trigger the Guidelines' "career offender" recidivist enhancement, the underlying controlled substance must be prohibited by the federal Controlled Substances Act (CSA) or whether a controlled substance prohibited only under state law can also lead to the career offender enhancement. The second conflict pertains to whether federal prosecutors may withhold a sentencing reduction from a federal defendant because the defendant raised a pre-trial Fourth Amendment challenge to the government's evidence.

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Given Congress's creation of the Commission and the Guidelines system, its role in the Guidelines amendments process, and its continuing interest in criminal sentencing, this Sidebar provides an overview of the Commission, the Guidelines, and the amendments process prior to summarizing the two Guideline conflicts.

Background

A 1983 Senate report observed that, for most of American history, federal judges enjoyed virtually "unfettered discretion" at sentencing: a judge generally could impose any sentence that fell within the broad bounds of the statutory minimum or maximum penalties set by Congress. In the 1970s and 1980s, federal judges, scholars, and others expressed concern about federal sentencing disparities—that similarly situated defendants were not receiving similar sentences—and urged Congress to do more to guide judges' discretion within these wide statutory limits. In 1984, Congress responded to these concerns by enacting the Sentencing Reform Act (SRA), found in Title II of the Comprehensive Crime Control Act of 1984. The SRA (1) created the Commission and (2) directed the Commission to develop mandatory guidelines that, when used by judges at sentencing, would promote greater uniformity in federal sentencing outcomes.

In 2005, the Supreme Court held that the mandatory Guidelines system violated the Sixth Amendment right to a jury trial because the Guidelines permitted a judge to enhance a sentence based on a judge's finding of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant. As a result, the Court construed the Guidelines as advisory, which, in the Court's view, avoided the Sixth Amendment issue. Under the current advisory Guidelines system, to determine a defendant's sentence, a federal judge must follow a three-step process. *First*, the judge will calculate the offense level (1 to 43) that corresponds to the crime of conviction, calculate the defendant's criminal history category (1 to 6), and then find the intersection of these two inputs on the 258-boxed-grid known as the Sentencing Table. Each box in the grid contains a range of months to which defendants are to be sentenced in typical cases. *Second*, after identifying the initial Guidelines range, a judge may "depart" from that range if the judge determines that the range is not appropriate in light of facts or circumstances specific to the defendant's case. *Third*, the judge will ensure that the final sentence complies with the sentencing values memorialized in 18 U.S.C. § 3553(a), including the principles that the sentence should be "sufficient, but not greater than necessary," to effectuate the purposes of punishment and that the sentence will not further unwarranted sentencing disparities. If the sentence ultimately imposed in step three differs from the sentence that the court would otherwise impose after steps one and two, the sentence is deemed a "variance."

The Guidelines Amendment Process

In the SRA, Congress instructed the Commission to "periodically . . . review and revise" the Guidelines in light of additional data, cases, and congressional directives. In the inaugural Guidelines, the Commission acknowledged that the Guidelines were "evolutionary."

The Commission generally follows a process to revise the Guidelines, known as the "amendment cycle," which contains several steps and a schedule for these steps. The Commission's amendment cycle typically begins in June with the publication in the *Federal Register* of proposed priorities for agency analysis and possible further action and a request for public comment on these priorities. The Commission reviews and considers any public comment and, in August of the same year, publishes in the *Federal Register* a list of final priorities. The agency next performs additional research and confers with key stakeholders, and this engagement may include public hearings. In January of the following year, the Commission publishes proposed amendments in the *Federal Register* and again requests public comment.

The Commission may revise the proposed amendments based on this comment and further stakeholder input. The commissioners will vote on any proposed amendments in April.

If the Commission approves any proposed amendments that year, the SRA requires the Commission to submit such amendments to Congress by May 1. The SRA then provides Congress with a review period of 180 days to modify or disapprove the proposed amendments. The SRA further states that the amendments will take effect on November 1, unless Congress modifies or rejects the amendments.

The timeline looks somewhat different for the Commission's 2022-2023 amendment cycle given the lack of quorum prior to August 2022. On October 5, 2022, following the confirmation of seven new commissioners and the restoration of its quorum, the Commission published its list of proposed priorities and sought public comment on these proposed priorities. On November 9, 2022, the Commission published its list of final priorities.

The Commission may amend the Guidelines to, among other things, resolve a Guideline question that has generated a conflict, or a "split," among the federal appellate courts. As the Supreme Court stated, "[I]n charging the Commission 'periodically [to] review and revise' the Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." In its 2022-2023 list of final priorities, the Commission identified two such questions that have divided the federal courts of appeals.

Controlled Substance Offenses and the Career Offender Guideline

In its published final priorities, the Commission indicated interest in resolving a circuit split as to "whether an offense must involve a substance controlled by the Controlled Substances Act to qualify as a 'controlled substance offense'" under the Career Offender Guideline. The Career Offender Guideline is a by-product of the SRA. The SRA instructed the Commission to adopt a sentencing enhancement for a federal defendant who (1) committed, as an adult, a "crime of violence" or a controlled substance offense and (2) has at least two prior felonies, each of which is a "crime of violence" or a controlled substance offense. A federal defendant who satisfies these twin criteria is defined by the Commission as a "career offender."

The career offender designation is consequential. Congress specified that a recidivist who satisfies these criteria is to receive "a sentence to a term of imprisonment at or near the maximum term authorized." The Commission has implemented this provision in two ways. As the Supreme Court explained, the career offender designation affects a defendant's criminal history category and the offense level for the crime of conviction. First, "each defendant who qualifies for career offender status is automatically placed in criminal history 'Category VI,' the highest available under the Guidelines." Second, the Guidelines then assign a career offender to "the appropriate offense level based on the so-called 'offense statutory maximum.'" According to the Commission, in 83% of FY2017-FY2021 cases the career offender designation increased the average final offense level from 23 (corresponding with a Guidelines range of 92-115 months in prison) to 31 (188-235 months in prison), a difference of a range of 96-120 months in prison.

To trigger the career offender designation, and the prospect of higher sentences, a judge must determine what constitutes a qualifying "controlled substance" offense. The Commission defines a "controlled substance offense" as "an offense under federal or state law" that "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance" with "intent to manufacture, import, export, distribute, or dispense." As Justice Sonia

Sotomayor recently pointed out, however, this definition does not dictate whether the relevant "controlled substance" (e.g., cocaine) must be one that is prohibited under federal or state law. The federal courts of appeals are divided on this question and therefore on when the career offender enhancement applies.

On one end of the split, the U.S. Courts of Appeals for the Second and Ninth Circuits define a "controlled substance," for career offender purposes, as a substance banned under federal law (i.e., the CSA). These courts have reasoned that referencing only the CSA would further the SRA's goal of promoting uniformity in sentencing, particularly as state definitions of a "controlled substance" offense are varied. In addition, these courts have invoked the presumption that, unless Congress clearly indicates otherwise, the meaning of federal law—including the Guidelines—does not depend on state law. Similarly, in considering the definition of a "drug trafficking offense" under other Guideline provisions, the Fifth and Eighth Circuits have looked to the CSA, not state law, for the meaning of a "controlled substance." The First Circuit has also signaled its support for the federal-only approach to defining a "controlled substance," finding it "appealing."

On the other end of the split, in the U.S. Courts of Appeals for the Fourth, Seventh, Eighth, and Tenth Circuits, a prior conviction for a substance prohibited under state law can trigger the career offender designation, and give rise to greater sentencing exposure, regardless of whether the substance is prohibited in the CSA. In reaching this conclusion, these Circuits have referred to the plain text of the Commission's definition of a "controlled substance offense" and held that "an offense under federal or state law" modifies "controlled substance." Because a qualifying controlled substance can be prohibited under federal or state law, these Circuits recognize a broader set of offenses that may give rise to the career offender designation and corresponding enhanced sentencing.

The Supreme Court was asked to review this split during the 2021 term, but the Justices denied the petition. In a separate statement joined by Justice Amy Coney Barrett, Justice Sotomayor expressed concern that defendants sentenced in the second category of circuits "are subject to far higher terms of imprisonment for the same offenses as compared to defendants similarly situated in the Second or Ninth Circuit." In the case that the Justices declined to review, the Fourth Circuit affirmed a district court's conclusion that a defendant committed a prior "controlled substance" offense under Virginia law, though the offense would not have constituted a "controlled substance" offense under the federal CSA. The district court designated the defendant a career offender and sentenced him to 120 months in prison. Without the career offender designation, the defendant's Guidelines range would have been 37-46 months. Because, according to Justice Sotomayor, the "unresolved divisions among the Courts of Appeals can have direct and severe consequences for defendants' sentences," she stated her "hope" that the Commission would "address this division to ensure fair and uniform application of the Guidelines." The Commission announced its intention to resolve the dispute in its final priorities.

Sentencing Reductions and Motions to Suppress

The Commission also noted in its final priorities that it intends to address "whether the government may withhold" a sentence reduction for acceptance of responsibility "because a defendant moved to suppress evidence." This issue stems from the SRA's requirement that the Commission issue "general policy statements" on the acceptance and effect of guilty pleas. The Commission in turn explained that judges tended to reduce the sentences of federal defendants who pled guilty because admitting guilt is "indicative of a lower probability of recidivism," "reduc[es] the burden on the court system," and avoids the "risk of acquittal" as to some or all of the charges.

The Commission initially adopted a single Guideline provision to account for these sentencing reductions. In the inaugural manual, the Guidelines gave a sentencing judge the discretion to reduce a defendant's offense level calculation by two levels for "acceptance of responsibility," defined today as "truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely

denying any additional relevant conduct for which the defendant is accountable." In a 1992 amendment that was further modified by a 2003 amendment, the Commission added a second relevant provision. It is this subsequent provision that is the source of the current split. The provision states that a federal defendant who commits a relatively serious offense—reflected in an offense level of at least 16—may receive an additional one-level reduction only upon the motion of the government. The government's motion must state that the defendant has provided assistance to the prosecutors and timely notified them of the intention to plead guilty, "thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently."

The question that has split the circuits is whether a defendant may forfeit that additional one-level reduction by moving to suppress evidence and thereby forcing the prosecution to prepare for and contest the motion to suppress. Generally, before trial a federal defendant may claim that the government's evidence was obtained in violation of the Fourth Amendment and therefore may not be utilized by the government at trial. The Tenth Circuit has held that the government may not use such a suppression motion as a basis to withhold the additional one-level reduction, reasoning that although there may be some overlap between the two, "preparation for a motion to suppress is not the same as preparation for a trial." The Ninth and D.C. Circuits agree with this approach. On the other hand, the Second and Fifth Circuits permit the government to deny the one-level reduction, explaining that litigating a suppression motion may be the functional equivalent of a trial, or the "main proceeding" in the case overall.

The Supreme Court declined review of a petition raising this split during the 2020 term, prompting Justice Sotomayor to issue a separate statement joined by Justice Neil Gorsuch. She emphasized her view of the sentencing disparities that can result from the circuit split: "The present disagreement among the Courts of Appeals means that similarly situated defendants may receive substantially different sentences depending on the jurisdiction in which they are sentenced," as "the reduction can shift the Guidelines range by years, and even make the difference between a fixed-term and a life sentence." Justice Sotomayor urged the Commission to ensure that the guideline provision governing the one-level reduction is "applied fairly and uniformly."

Congressional Considerations

The Commission will submit any proposed amendments to Congress by May 1, 2023. With the ball in its court, Congress will have the opportunity to review and affirmatively reject the proposed amendments by November 1, 2023. In addition, or in the alternative, Congress may consider amending the recidivist enhancement statute that forms the basis for the "career offender" Guideline or issuing a statutory directive to the Commission to amend the Guidelines in accordance with its preferred approach to the splits.

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