

**Minutes of the February 2, 2000,  
United States Sentencing Commission Business Meeting**

The meeting was called to order by Chair Diana E. Murphy at 10:04 a.m. in the Commissioners' Conference room. The following commissioners and staff participated:

Diana E. Murphy, Chair  
Ruben Castillo, Vice Chair  
William Sessions, Vice Chair  
John R. Steer, Vice Chair  
Sterling Johnson, Jr., Commissioner  
Joe Kendall, Commissioner  
Michael O'Neill, Commissioner  
Michael Gaines, *Ex Officio* Commissioner  
Laird C. Kirkpatrick, *Ex Officio* Commissioner  
Timothy McGrath, Acting Staff Director  
A. Donald Purdy, Acting General Counsel  
Jeanneine Gabriel, Senior Education Sentencing Practice Specialist  
Paul Hofer, Senior Research Associate  
Pamela Montgomery, Deputy General Counsel

Chair Murphy began the meeting with the Report of the Chair. She listed a number of events the commissioners would be participating in during the next few months including the Federal Public Defender's meeting in February, the ABA Conference in July, and the training session for probation officers in May. She also mentioned that she, several commissioners, and the Acting Staff Director attended the Symposium on State and Federal Sentencing Guidelines held in St. Louis this past January. Chair Murphy announced the formation of a legislative subcommittee consisting of herself and Commissioner O'Neill, with Commissioners Sessions and Steer as co-chairs. Commissioners Sessions and Steer stated that the subcommittee would focus on congressional relationships and legislative issues of interest to the Commission, such as our upcoming budget request. Additionally, Chair Murphy mentioned that the Commission would be holding an economic crimes symposium in October 2000, with Commissioners O'Neill and Steer appointed as co-chairs of organizing it.

As part of the staff director's report, Acting Staff Director McGrath introduced Susan Hayes, who recently joined the Commission as executive assistant to Chair Murphy, Judicial Fellow Amy Clifford, Federal Public Defender John Butcher, who is on temporary assignment to the Commission from New Mexico, and Julie Sickles, the Commission's new receptionist. He announced the posting of various job vacancies in the Office of Policy Analysis and Office of Administration and Planning. Finally, Mr. McGrath stated that the Commission submitted its annual budget request to Congress.

Motion made by Commissioner Johnson to adopt the minutes of the January 6, 2000, business

meeting; seconded by Commissioner O'Neill. Passed unanimously.

Acting General Counsel Purdy summarized public comment received in response to the Commission's December *Federal Register* publication of proposed priorities.

Motion made by Commissioner Steer to adopt the December 8, 1999, *Federal Register* publication of proposed Commission priorities as the Commission's final agenda for the amendment cycle ending May 1, 2000; seconded by Commissioner Johnson. Passed unanimously.

Motion made by Commissioner Sessions to publish in the *Federal Register* a notice of intent to promulgate a permanent amendment to implement the No Electronic Theft Act, with the deletion of the brackets around the intended promulgation of not later than (May 1, 2000) and the date by which to submit comment (March 10, 2000); seconded by Commissioner O'Neill. Passed unanimously.

Deputy General Counsel Montgomery summarized the public law related to sexual predators (Pub. L. No. 105-314), including that it created new offenses, increased criminal penalties, and provided directives to the Commission. Acting General Counsel Purdy then briefed the Commission on the proposed amendments and issues for comment related to this public law.

Action Item #1 - - Sexual Predators

This amendment addresses the new offense at 18 U.S.C. § 1470, which makes it unlawful to transfer obscene materials to a minor. The amendment proposes to reference the offense in the Statutory Index (Appendix A) to the guideline covering the importing, mailing, or transporting of obscene matter, §2G3.1.

Action Item #2 - - Sexual Predators

The Commission proposes inviting comment on whether and how it should amend the guidelines to cover the new offense at 18 U.S.C. § 2425, which prohibits the use of the mail or any facility or means of interstate commerce to knowingly transmit identifying information about a minor with the intent to entice, encourage, offer, or solicit anyone to engage in prohibited sexual activity.

Action Item #3 - - Sexual Predators

This amendment proposes to add commentary language to the guideline covering possession of child pornography, §2G2.4, to clarify whether an individual computer file (as opposed to disk on which it and many other files may be located) is an "item" of child pornography for purposes of the enhancement in §2G2.4(b)(2). An issue for comment as to how items should be quantified for purposes of the enhancement was also presented.

Action Item #4 - - Sexual Predators

This amendment addresses a Commission directive to clarify that the phrase “distribution of pornography” applies to the distribution of pornography for both pecuniary gain and any nonpecuniary interest.

Action Item #5 - - Sexual Predators

This amendment responds to Commission directives to provide for an appropriate enhancement if the defendant: (1) used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual activity, and (2) knowingly misrepresented his/her actual identity with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual conduct.

Action Item #6 - - Sexual Predators

The Commission proposes to invite comment on how to most appropriately implement a directive requiring the Commission to ensure that the sentences, guidelines, and policy statements for offenders convicted of offenses relating to transportation of minors for illegal sexual activity are appropriately severe and reasonably consistent with the other relevant directives and the relevant existing guidelines.

Action Item #7 - - Sexual Predators

The Commission proposes inviting comment on implementing a directive to increase penalties in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor.

Motion made by Commissioner Steer to publish in the *Federal Register* for comment the revised proposed amendment package relating to Action Items 1-7, with additional language to be drafted relating to Action Item 5 and electronic communications, with a comment deadline of March 10, 2000; seconded by Commissioner Kendall. Passed unanimously. The Commission indicated that because of the complexity of the issues involved, particularly with respect to Action Items 6 and 7, guidelines may not be promulgated on all published issues for comment or proposed amendments during this amendment cycle.

Proposed Amendments: - - Firearms

Senior Research Associate Hofer briefed the Commission on the ongoing work of the Firearms Policy Team. He also discussed, with Acting General Counsel Purdy, proposed amendments relating to implementing Public Law No. 105-386 (An Act to Throttle Criminal Use of Guns) and recent court decisions.

These proposed amendments and issues for comment respond to statutory changes made by Pub. L. No. 105-386, which amended 18 U.S.C. § 924(c). Revised proposed amendment (A) clarifies the application of a weapon enhancements in an the definition of brandishing. Revised proposed amendment (B) clarifies when the court should impose the minimum term of imprisonment. Revised proposed amendment (C) relates to underlying offense. Revised proposed amendment (D) excludes 18 U.S.C. § 924(c) from the career offender guideline for purpose of the instant offense of conviction.

Motion made by Commissioner Castillo to publish in the *Federal Register* for comment the revised proposed firearm amendments, with a comment deadline of March 10, 2000; seconded by Commissioner Sessions. Commissioners accepted Commissioner Steer's amendment to publish an issue for comment asking whether the Commission should amend throughout the guidelines the phrase, "brandish, display or possess." Passed unanimously.

#### Proposed Amendment - - Telephone Cloning

Jeanneine Gabriel briefed the Commission on telephone cloning. She discussed the Wireless Telephone Protection Act (Pub. L. No. 105-172) and the activities and technology associated with telephone cloning. Ms. Gabriel, with Acting General Counsel Purdy, discussed the proposed amendments related to this public law.

The Wireless Telephone Protection Act directed the Commission to review and amend the sentencing guidelines, if appropriate, to provide an appropriate penalty for offenses involving the cloning of a wireless telephone. This proposal presents two amendment options to implement the directive, as well as issues for comment. Option 1 would limit an enhancement to manufacture or distribution of cloned wireless telephone. Option 2 would expand an enhancement to manufacturers/distributors of access device.

Motion made by Commissioner O'Neill to publish in the *Federal Register* for comment the revised cloning proposed amendments and issues for comment; seconded by Commissioner Kendall. Passed unanimously.

#### Proposed Amendment - - Circuit Conflicts

Acting General Counsel Purdy reviewed proposed issues for comment relating to circuit conflicts. The Commission requests public comment on whether, and in what manner, it should address by amendment circuit court conflicts relating to aberrant behavior departures, drug sales in protective locations, violations of judicial orders, post conviction rehabilitation departures, and dismissed/uncharged conduct.

Motion made by Commissioner Sessions to publish in the *Federal Register* for comment proposed issues for comment on circuit conflicts, with a comment deadline of March 10, 2000; seconded by Commission Castillo. Passed unanimously.

Proposed Amendments - - Technical Amendments

Acting General Counsel Purdy reviewed the proposed Technical Amendments. These proposed amendments make technical and conforming changes to various guidelines.

Motion made by Commissioner Steer to publish in the *Federal Register* for comment the proposed technical amendments, with a comment deadline of March 10, 2000; seconded by Commissioner O'Neill. Passed unanimously.

Chair Murphy adjourned the meeting at 11:55 a.m.