

Minutes of the September 10, 1991, United States Sentencing Commission Business Meeting

The meeting was called to order at 10:21 a.m. by Chairman William W. Wilkins, Jr., in the library of the U.S. Sentencing Commission. The following Commissioners, staff, and guests participated:

William W. Wilkins, Jr., Chairman
Julie E. Carnes, Commissioner
Helen G. Corrothers, Commissioner
Michael S. Gelacak, Commissioner
George E. MacKinnon, Commissioner
A. David Mazzone, Commissioner
Ilene H. Nagel, Commissioner
Carol Pavilack Getty, Ex Officio Commissioner
Paul L. Maloney, Ex Officio Commissioner
Phyllis J. Newton, Staff Director
Paul K. Martin, Deputy Staff Director
John R. Steer, General Counsel
Nolan Clark, Deputy General Counsel
David Debold, Special Counsel
Sharon Henegan, Director of Training and Technical Assistance
Peter Hoffman, Principal Technical Advisor
Pamela Montgomery, Senior Staff Attorney
Andy Purdy, Chief Deputy General Counsel
David Rauma, Director of Evaluation
Winthrop Swenson, Legislative Counsel
Fred Bennett, Federal Public Defender
Tom Hutchison, Federal Public Defender
Vicki Portney, Criminal Division, DOJ
Roger Pauley, Criminal Division, DOJ

Chairman Wilkins introduced Marguerite Cephias, who recently joined the Office of General Counsel as a staff attorney. He also introduced Probation Officers Roxanne Plater, from the Eastern District of Michigan, and Robin Hillen, from the District of Maryland.

-- Motion made by Commissioner Corrothers to adopt the minutes of the August 6, 1991, Commission meeting; seconded by Commissioner MacKinnon. Passed unanimously.

David Rauma reported that the Office of Evaluation is making progress in analysis and writing of its report. He stated that the evaluation working group is meeting next week to discuss analysis of disparity and that the Research Advisory Group is meeting October 9, 1991. He also mentioned that the contract with Richard Berk, Chairman of the Research Advisory Group, to write a supplementary analysis to the Evaluation report is finalized.

Commissioner Carnes reported that the Criminal History Working Group is still examining the career offender guideline in terms of the decay factor to determine if it excludes possible career offenders and also to determine whether it is over-inclusive because of the career offender definition.

Andy Purdy reported that the Drug Working Group was working with the Monitoring Unit to determine sentencing practices in drug cases involving less culpable defendants and mitigating role.

David Debold, reporting on the Acceptance of Responsibility Working Group, stated that the group completed review of public comment and priority I "Hot Line" calls. He reported that the scope of conduct for which a defendant must accept responsibility in order to receive the reduction is the only emerging case law issue of significance as of now. He further reported that the overall plea-to-trial ratio had not changed significantly since the inception of guidelines. The group is also reviewing departure cases related to acceptance of responsibility.

Nolan Clark reported that the Environmental Working Group held a preliminary meeting with representatives from both the Environmental and Natural Resources division of the Department of Justice and the Environmental Protection Agency to determine the best method to combine resources. He further reported that the group had reviewed monitoring data and "Hot Line" calls for guidance on emerging issues.

Pamela Montgomery reported that the Child Sex Offenses Working Group was preparing a qualitative study for the Commission's review. She reported that the group was reviewing 225 FY 1990 cases and legislative history of pertinent statutes.

Paul Martin, reporting on the Alternatives to Imprisonment Working Group, stated that the program assessment subgroup was completing its report, the statistical modeling subgroup was still reviewing data regarding court imposition of alternatives currently available in the guidelines and that the full staff working group would meet next week.

Win Swenson, reporting on legislative affairs, stated that the House Committee on the Judiciary is expected to mark up its crime bill in approximately two weeks. He reported that the bill from which the Committee would be working contains fewer mandatory minimums than the Senate crime bill and that the Commission's revocation proposals are included. He reported that congressional staff are analyzing data relating to organizational sanctions in preparation for possible hearings, although he stated that such hearings appear unlikely to be held. He also reported that reaction on the Hill to the Mandatory Minimum Report has been quiet, although, informally, some congressional staffers have indicated the possibility of hearings on the report.

Commentary Amendments

Item #2: §1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

Motion made by Commissioner Corrothers to adopt; seconded by Commissioner Mazzone. Passed unanimously.

Item #3: §1B1.5 Interpretation of References to Other Offense Guidelines

Motion made by Commissioner Corrothers to adopt; seconded by Commissioner Nagel. Passed unanimously.

Item #4: §2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

Motion made by Commissioner Nagel to adopt the proposed commentary with the deletion of "how much of a bribe is paid" and the insertion of "the value of the bribe" and conforming changes; seconded by Commissioner MacKinnon. Passed unanimously.

Item #5: §2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit these Offenses)

Motion made by Commissioner Nagel to adopt the revised language to the proposed commentary; seconded by Commissioners Corrothers and Mazzone. Passed unanimously.

Item #6: §2F1.1 Fraud and Deceit

Motion made by Commissioner MacKinnon to adopt the proposed commentary with the following changes: insertion in Application Note 7, second paragraph, after "loss" of "or intended loss:"; insertion in Application Note 7(a) after "fraudulently" of "represented that stock is worth"; insertion in Application Note 7(b) after "recovered" and "recover" of a comma punctuation mark; restoration of the first sentence of the current Application Note 10 with the example "where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it."; deletion in Application Note 7(c) of the word "defense"; insertion in Application Note 7(c) after "delivered," of "or retrofitting the product so that it can be used for its intended uses," and the title of Application Note 7(c) to read, "Consequential Damages in Procurement Fraud and Product Substitution Cases"; seconded by Commissioner Carnes. Passed with four votes. Commissioners Corrothers, Gelacak and Nagel voted "No."

Item #7: §2H1.1 Conspiracy to Interfere with Civil Rights; Going in Disguise to Deprive of Rights

Motion made by Commissioner Corrothers to adopt the proposed commentary with the restoration in Application Note 2 of "plus any applicable" and the deletion of the comma after characteristics in the same sentence; seconded by Commissioner Nagel. Passed unanimously.

Item #8: §2J1.6 Failure to Appear by Defendant

Motion made by Commissioner Corrothers to adopt; seconded by Commissioner Carnes. Passed with five votes. Commissioners Gelacak and MacKinnon abstained.

Item #9: §2J1.7 Commission of Offense While on Release

Motion made by Commissioner MacKinnon to adopt proposed commentary with the deletion of "(generally, by the government filing a sentencing-enhancement information)" and the insertion of "sufficient" before "notice" and "by the court or the government" after "defendant"; seconded by Commissioner Mazzone. Passed with six votes. Commissioner Carnes abstained.

Item #10: §2N2.1 Violations of Statutes and Regulations Dealing with any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product

Motion made by Commissioner Carnes to adopt the insertion in Application Note 1 of "or reckless" immediately before "conduct"; seconded by Commissioner Mazzone. Passed with five votes. Commissioners Nagel and Gelacak abstained.

Motion made by Commissioner Nagel to defer changes to Application Note 2 until the next amendment cycle; seconded by Commissioner Carnes. Passed with four votes. Commissioners Wilkins, Corrothers and MacKinnon voted "No."

Motion made by Commissioner MacKinnon to delete Application Note 2 of §2N2.1; seconded by Commissioner Corrothers. Failed, 3-4. Commissioners Carnes, Gelacak, Mazzone and Nagel voted "No."

Item #11: §3D1.2 Groups of Closely-Related Counts

Motion made by Commissioner MacKinnon to adopt; seconded by Commissioners Corrothers, Mazzone and Nagel. Passed unanimously.

Item #12: §4B1.2 Definitions of Terms Used in Section 4B1.1
(Application Note 3)

Motion made by Commissioner Mazzone to adopt the proposed commentary with the insertion of "classified" instead of "considered"; seconded by Commissioner MacKinnon. Passed unanimously.

§4B1.2 Definitions of Terms Used in Section 4B1.1
(Application Note 2)

Motion made by Commissioner Nagel to defer. Motion failed with no positive votes.

Motion made by Commissioner Corrothers to adopt the proposed commentary and Commissioner Mazzone seconded. Commissioner MacKinnon amended the motion to include the deletion of ", rather than uncharged conduct" and the insertion of language referencing instant offense as opposed to a prior offense. Passed with five votes. Commissioner Nagel voted "No" and Commissioner Gelacak abstained.

Item #13: §6B1.2 Standards for Acceptance of Plea Agreements

Motion made by Commissioner Nagel to defer until the next amendment cycle; seconded by Commissioner Carnes. Failed, 2-4. Commissioners Wilkins, Corrothers, Gelacak and Mazzone voted "No."

Motion made by Commissioner Mazzone to adopt; seconded by Commissioner Corrothers. Failed, 3-4. Commissioners Carnes, Gelacak, MacKinnon, and Nagel voted "No."

Item #14: §2B1.1 Larceny, Embezzlement, and Other Forms of Theft;
§2B4.1 Bribery in Procurement of Bank Loan and other
Commercial Bribery; §2F1.1 Fraud and Deceit

Failed for lack of a motion.

Item #1: §1B1.2 Applicable Guidelines

Motion made by Commissioner Mazzone to adopt; seconded by Commissioner Carnes. Failed, 3-4. Commissioners Wilkins, Gelacak, MacKinnon and Nagel voted "No."

Motion made by Commissioner Nagel to adopt the proposed commentary with the deletion of the proposed language in the first sentence and the insertion after "stipulation" of "is set forth in a written plea agreement or made between the parties on the record during a plea or sentencing hearing proceeding", restoration of "admits" instead of "stipulate" and insertion in the third sentence of the second paragraph of "a plea agreement" instead of "the plea"; seconded by Commissioner MacKinnon. Passed with four votes.

Commissioners Corrothers, Gelacak and Mazzone voted "No." Commissioner Carnes asked to withdraw her "Yes" vote, and the motion failed.

A motion was made by Commissioner Mazzone to adopt the previous motion with the deletion of "or sentencing hearing"; seconded by Commissioner MacKinnon. Passed with five votes. Commissioner Gelacak voted "No" and Commissioner Nagel abstained.

Chairman Wilkins adjourned the meeting at 1:33 p.m.