

Minutes of the August 26, 1992
United States Sentencing Commission Telephone Conference

The meeting was called to order at 2:01 p.m. by Chairman William W. Wilkins, Jr., in the conference room of the United States Sentencing Commission.

Chairman Wilkins, as well as Ex Officio Commissioner Maloney, Deputy Staff Director Martin, General Counsel Steer, Director of Training and Technical Assistance Henegan, and Principal Technical Advisor Hoffman were present. Commissioners Carnes, Gelacak, Mazzone, and Nagel participated via the telephone.

Chairman Wilkins announced that a meeting of the Judicial Working Group organized to examine the drug guidelines would be held at the Sentencing Commission on September 21, 1992, at 9:00 a.m.

Amendments

#1 §1A4(b) The Guidelines' Resolution of Major Issues (Policy Statement)

This amendment modifies language that could be interpreted to be more restrictive of departures than the Commission intended.

Commissioners Gelacak and Nagel indicated that they would not vote in favor of the amendment. Therefore, a vote was not taken because it was clear that there would not be at least four favorable votes.

Commissioner Nagel expressed support for Commission action in this area, but thought that this particular proposal needed more study. Also, she stated that because this is a key issue among the Judiciary, judges ought to be permitted to comment on any proposal in the 1992-93 amendment cycle.

#2 §1B1.10 Retroactivity of Amended Guideline Range (Policy Statement)

This amendment expands the listing in §1B1.10(d) to implement the directive in 28 U.S.C. § 994(u) with respect to the guideline amendments #433, 448, and 461, effective November 1, 1992.

Amendments #433 and 461 modify the commentary in U.S.S.G. §4B1.2 to, among other things, expressly state that a felon-in-possession offense is not a "crime of violence" under the Career Offender guideline.

Commissioners Carnes, Mazzone, Nagel, and Wilkins voted in the affirmative. Commissioner Gelacak voted "no." Passed.

Amendment #448 modifies U.S.S.G. §2D1.8 (Renting or Managing a Drug Establishment) to correlate the offense level with the scale and seriousness of the underlying drug offense.

Commissioners Carnes and Wilkins indicated that they would not vote in favor of the amendment. Therefore, a vote was not taken because it was clear that there would not be at least four favorable votes.

#3 §1B1.1 Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

In §1B1.11(b)(1) (effective November 1, 1992), the term "offense" (defined in §1B1.1 to mean offense and all relevant conduct) is not the correct term; for *ex post facto* purposes, the controlling factor is the offense of conviction.

Passed unanimously.

#4 §2D1.1 Unlawful Manufacturing, Importing, or Trafficking (Including Possession with intent to Commit These Offenses): Attempt or Conspiracy (Commentary)

This amendment (1) adds equivalencies for two controlled substances not currently listed in the Drug Equivalency Tables in the Commentary to §2D1.1; (2) makes explicit the interaction between the minimum offense level for certain controlled substances in the Drug Quantity Table and the instructions for determining a combined offense level for a case with multiple controlled substances; (3) revises Application Note 12 to clarify the meaning of this commentary and resolve a split between the circuits; and (4) adds Application Note 15 to make clear that in the case of a pharmaceutical preparation that is classified as a Schedule III, IV, or V substance by the Drug Enforcement Administration under 21 C.F.R. §1308.13-15 (even though it contains a small amount of a Schedule I or II controlled substance), the Drug Enforcement Administration classification under 21 C.F.R. § 1308.13-15 also applies to application of the guidelines.

Commissioners Carnes, Mazzone, Nagel, and Wilkins voted in the affirmative to adopt the amendment without the proposed changes in Application Note 12. Commissioner Gelacak voted "no."

Commissioners Gelacak and Nagel indicated that they would not vote in favor of the proposed changes in Application Note 12. Therefore, a vote was not taken because it was clear that there would not be at least four favorable votes.

Commissioner Nagel stated that the proposed changes in Application Note 12 were substantive and should be made only during the regular amendment cycle.

#5 §2F1.1 Fraud and Deceit (Commentary)

The revision to the first paragraph of Application Note 7 makes explicit that loss in fraud cases, as in theft and tax cases, means the value of the property at the time it was stolen and does not include interest.

Passed unanimously.

The revision to Application Note 7(b) clarifies the provisions relating to fraudulent loan applications and, for consistency, adds a sentence addressing departures.

Commissioners Carnes, Mazzone, Nagel, and Wilkins voted in the affirmative to adopt the proposed changes in Application Note 7(b), without the listed examples. Commissioner Gelacak voted "no." (The sentences, "Note also that...on the loan" and "Where the loss...may be warranted" will be voted on in separate motions.)

Commissioners Carnes and Gelacak indicated that they would not vote in favor of the proposed addition in Application Note 7(b) of the sentence, "Note also that...on the loan." Therefore, a vote was not taken because it was clear that there would not be at least four favorable votes.

Commissioners Gelacak and Nagel indicated that they would not vote in favor of the proposed addition in Application Note 7(b) of the sentence, "Where the loss...may be warranted." Therefore, a vote was not taken because it was clear that there would not be at least four favorable votes.

The revision to Application Note 10 adds a sentence pertaining to a downward departure to parallel the first sentence (pertaining to an upward departure).

Commissioners Gelacak and Nagel indicated that they would not vote in favor of the proposed addition in Application Note 10. Therefore, a vote was not taken because it was clear that there would not be at least four favorable votes.

The revision to Application Note 11 deletes an unclear sentence and replaces it with more standard departure language.

Commissioners Gelacak and Nagel indicated that they would not vote in favor of the proposed addition in Application Note 11. Therefore, a vote was not taken because it was clear that there would not be at least four favorable votes. Commissioner Carnes stated that she would have voted in the affirmative.

#6 §2K1.3 Unlawful Receipt, Possession, or Transportation of Explosive Materials: Prohibited Transactions Involving Explosive Materials (Commentary)

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition: Prohibited Transactions Involving Firearms or Ammunition (Commentary)

This amendment clarifies the meaning of the terms used in these guidelines (e.g., the terms "another felony offense" and "another offense" refer to use or possession of a firearm during a robbery or drug sale and not to possession of a firearm in connection with the sale of that

firearm). In addition, it corrects a clerical error in a reference (in Application Note 15 of §2K2.1, the reference to "(a)(5)" is corrected to read "(a)(4)(B), or (a)(6)").

Commissioners Carnes, Gelacak, Mazzone, and Wilkins voted in the affirmative to adopt Application Note 11 of §2K1.3. Commissioner Nagel voted "no."

A motion was made to add to Application Note 11 a sentence to the effect that, "Operation of this application note does not preclude application of §5K2.6 (Weapons and Dangerous Instrumentalities (Policy Statement))." Passed unanimously. (In response to this action, Commissioner Nagel changed her vote on the previous motion to the affirmative.)

The Commission unanimously adopted Application Note 18, with the addition of a sentence to the effect that, "Operation of this application note does not preclude application of §5K2.6 (Weapons and Dangerous Instrumentalities (Policy Statement))."

#7 §3C1.1 Obstructing or Impeding the Administration of Justice (Commentary)

This amendment clarifies that the defendant's accountability under these sections includes conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.

Commissioners Carnes, Mazzone, Nagel, and Wilkins voted in the affirmative to adopt. Commissioner Gelacak voted "no." Passed.

#8 §4A1.2 Definitions and Instructions for Computing Criminal History (Commentary)

This amendment substitutes "serious criminal conduct" for similar misconduct or receipt of a substantial portion of income from criminal livelihood" to better express the Commission's intent as to the appropriate criteria for considering prior sentences outside the applicable time period.

Commissioners Carnes, Mazzone, Nagel, and Wilkins voted in the affirmative to adopt the proposed changes, with the deletion of the word "serious" and the insertion instead of the words "similar, or serious dissimilar,." Commissioner Gelacak voted "no." Passed.

#9 §7B1.1 Classification of Violations (Policy Statement)

When this section was adopted, the definitions of crime of violence and controlled substance offense in §7B1.1 were intended to be identical to the definitions of those terms in §4B1.2. However, changes to the definitions in §4B1.2 have created inconsistencies between the definitions in the two sections. This amendment addresses this issue by referencing the terms in §7B1.1 directly to the definitions in §4B1.2.

Passed unanimously.

Chairman Wilkins adjourned the meeting at 3:40 p.m.