

Minutes of the November 30, 1993,
United States Sentencing Commission Business Meeting

The meeting was called to order at 10:04 a.m. by Chairman William W. Wilkins, Jr., in the conference room of the Sentencing Commission. The following Commissioners, staff, and guests participated:

William W. Wilkins, Jr., Chairman
Michael S. Gelacak, Commissioner
A. David Mazzone, Commissioner
Ilene H. Nagel, Commissioner
Gary Katzmann, Ex Officio Commissioner
Phyllis J. Newton, Staff Director
Paul K. Martin, Deputy Staff Director
John R. Steer, General Counsel
Peter Hoffman, Principal Technical Advisor
Winthrop M. Swenson, Deputy General Counsel
Fred Bennett, Representative, Practitioners' Advisory Group
Tom Hutchison, Representative, Federal Public Defenders
Roger Pauley, Representative, Criminal Division, DOJ
Vicki Portney, Representative, Criminal Division, DOJ

Commissioner Carnes was unable to attend the meeting but participated via telephone conference.

Chairman Wilkins introduced Probation Officers Eric Ordeneaux (M.D. Fl.) and Bill Pool (M.D. Pa.), both on temporary assignment to the Commission.

Motion made by Commissioner Nagel to adopt the minutes of the November 9, 1993, meeting, as amended. Passed unanimously.

General Counsel Steer reported that the Senate passed its version of the crime bill and early next year will go to conference on the bill with the House.

Staff Director Newton, reporting on the Crack Working Group report, stated that the group has finished data gathering for the research component of the report and this section as well as other chapters are in draft form. She stated that a draft of the full report might be ready for distribution to Commissioners next week. The report is taking longer than originally envisioned because the working group expanded a few of its research chapters, added a new chapter on the crack trade, and needed to incorporate the BJS study into the report. Commissioner Nagel asked Gary Katzmann to obtain a statement from DEA explaining the basis for their conclusions in their draft crack-cocaine report.

Commissioner Nagel, reporting on the Environmental Advisory Working Group, stated that the group, comprised of people from industry, NRDC, EPA, DOJ, corporate defense attorneys, and academics met for almost two years. She stated that they did a tremendous

job, independent of what one believes regarding the substance of the proposal. By a vote of 15 to one, the group submitted concrete recommendations, as opposed to general principles, to the Commission. According to both Commissioners Nagel and Gelacak, the expectation is that the recommendations will go through some process once the Commission is fully constituted. They also expressed concern that the advisory group proposal not be attributed to the Commission as its work product. Commissioner Nagel suggested that the Commission meet with the advisory group. Commissioner Gelacak stated that there has been congressional interest to meet with the advisory group, independent of the Commission. The Commission agreed that the report should be made available to the public for comment. There was general consensus to prepare a cover letter under the Staff Director's signature to be sent with the report to all interested parties. A notice will be published in the Federal Register announcing the availability of the report and soliciting comments.

Amendments

1. §2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

Amendment (A) keys the mandatory minimum levels in the Drug Quantity Table to levels 30 and 24, rather than 32 and 26, and sets the upper limit of the Table at level 38.

Amendment (B) adds an additional enhancement in §2D1.1 for weapon use/assault.

Amendment (C) revises §2D1.1(a)(3) to provide a ceiling in the Chapter Two offense levels for defendants who receive a mitigating role adjustment under §3B1.2.

Motion made by Commissioner Carnes to publish Options (A) and (B). Commissioners Carnes, Gelacak, Mazzone, and Wilkins voted in favor, with Commissioner Nagel abstaining. Passed, 4-0-1.

2. §3B1.1 Aggravating Role

This amendment revises §3B1.1 by defining "participant" more comprehensively, providing that subsection (b) applies when the defendant managed or supervised at least four other participants, and clarifies the interaction of §3B1.1 with §3B1.2 in the case of a defendant who would otherwise qualify as a minor or minimal participant but exercises limited supervision over other participants with minor or minimal roles.

Motion made by Commissioner Carnes to publish. Commissioners Carnes, Gelacak, Mazzone, and Wilkins voted in favor, with Commissioner Nagel abstaining. Passed, 4-0-1.

3. §3B1.2 Mitigating Role

This amendment revises (1) the Introductory Commentary of Chapter Three, Part B; (2) Section 3B1.1; and (3) the Commentary of §3B1.2, providing a clearer definition of the defendant who merits a mitigating role reduction and greater consistency in application.

Motion made by Commissioner Carnes to publish, substituting paragraph seven from last year's draft for paragraph three and adding language concerning paragraph 2(c) and paragraph nine from last year's draft. Passed unanimously.

4. §2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

Issue for comment concerning whether §2D1.1 should be restructured so that the scale of the offense is based upon the quantity of the controlled substance with which the defendant was involved in a given time period.

The proposed amendment would determine the guideline range based upon the largest amount of controlled substances with which the defendant was involved in any [30 day] period. An exception would be provided in the case of major traffickers.

Publication failed for lack of a motion.

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

Amendment (A) adds definitions of hashish and hashish oil to §2D1.1(c) in the notes following the Drug Quantity Table.

Amendment (B) provides a statement in the commentary that in the case of marijuana having a moisture content that renders the marijuana unsuitable for consumption without drying, an approximation of the weight of the marijuana without such excess moisture content is to be used.

Amendment (C) adds an application note setting forth the definition of a plant.

Chairman Wilkins moved to publish (A) and (B). Passed unanimously.

Chairman Wilkins moved to publish (C). Commissioners Carnes and Wilkins voted in favor, with Commissioners Gelacak, Mazzone, and Nagel voting against. Failed, 2-3.

6. §2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

This amendment addresses the situation in which controlled substances were sold at a "protected location," but the location of the drug transaction was determined by law enforcement officers rather than by the defendant.

Option One addresses this issue as a special instruction.

Option Two addresses this issue as a downward departure consideration.

Publication failed for lack of a motion.

7. §2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

In cases involving a clandestine laboratory in which the manufacturing of a controlled substance has not been completed, this amendment provides that an amount equal to 50% of the theoretical yield is to be used as a proxy for actual yield.

Issue for comment concerning whether the percentage of theoretical yield for such estimate should be a percentage higher or lower than 50%, whether different percentages should be developed for different controlled substances or manufacturing processes, and whether the estimate should be based on the most abundant precursor on hand or some other method.

Publication failed for lack of a motion.

Commissioner Nagel requested that analysis be completed on this proposal prior to future submission for Commission consideration.

8. §2K2.4 Use of Firearm, Armor-Piercing Ammunition, or Explosives During or in Relation to Certain Crimes

This amendment revises the Commentary to §2K2.4 by (1) expanding the list of examples to which Application Note 2 applies; and (2) clarifying that if an enhancement from §2K2.4 applies, any specific offense characteristic for use or possession of any weapon in the offense is not to be applied.

Motion made by Commissioner Carnes to publish. Passed unanimously.

9. Chapter Five, Part G (Implementing the Total Sentence of Imprisonment)

Amendment (A) adds an additional paragraph of commentary to §5G1.1 (Sentencing on a Single Count of Conviction) to clarify that where the guideline sentence is determined by the statutorily authorized maximum sentence under §5G1.1(a) or the statutorily required minimum sentence under §5G1.1(b), the guideline range from Chapter Five, Part A, remains the applicable guideline range for other purposes (e.g., determining the eligibility for retroactive application of an amended guideline range under §1B1.10 or determining the appropriateness of a departure from the guideline range under §4A1.3).

Amendment (B) revises the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) to state that 18 U.S.C. § 3624(c) clearly provides that multiple terms of supervised release run concurrently.

Chairman Wilkins moved publication of (A) and (B). Passed unanimously.

10. Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part K (Substantial Assistance to Authorities) (Policy Statement)

This amendment is a consolidated amendment relating to offender characteristics and departures derived from the proposals and comments submitted by the Judicial Conference Committee on Criminal Law, the Department of Justice, and the Federal Public and Community Defenders.

Publication failed for lack of a motion.

11. §8C2.5 Culpability Score

This amendment conforms §8C2.5 to changes in §3E1.1 (Acceptance of Responsibility) made in 1992 (amendment 459).

Chairman Wilkins moved publication. Passed unanimously.

Additional Consolidation of Chapter Two Offense Guidelines

This amendment consolidates §2N3.1 (Odometer Laws and Regulations) with §2F1.1 (Fraud and Deceit); §2T2.1 (Non-Payment of Taxes) with §2T2.2 (Regulatory Offenses); §2D2.1 (Unlawful Possession; Attempt or Conspiracy) with §2D2.2 (Acquiring a Controlled Substance by Forgery, Fraud, Deception, or Subterfuge; Attempt or Conspiracy); and §2A2.3 (Minor Assault) with §2A2.4 (Obstructing or Impeding Officers) to simplify operation of the guidelines.

Chairman Wilkins moved publication. Passed unanimously.

Issue for comment concerning whether and how the guidelines, policy statements, and pertinent statutory provisions should be amended to provide greater sentencing flexibility, or authority for modification of a previously imposed sentence of imprisonment, in the case of older, infirm defendants who do not pose a significant risk to public safety.

Motion made by Commissioner Nagel to publish, with the deletion of the word "significant." Passed unanimously.

1. §2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

Amendment (C) revises §2D1.1(a)(3) to provide a ceiling in the Chapter Two offense levels for defendants who receive a mitigating role adjustment under §3B1.2.

Motion made by Commissioner Carnes to publish. Commissioners Carnes, Gelacak, Mazzone, and Wilkins voted in favor, with Commissioner Nagel voting against. Passed, 4-1.

§1B1.3 Relevant Conduct

This amendment addresses the consideration of conduct for which the defendant has been acquitted after trial under §1B1.3.

Motion made by Commissioner Gelacak to publish; seconded by Commissioner Nagel. Commissioners Gelacak, Mazzone, and Nagel voted in favor, with Commissioners Carnes and Wilkins voting against. Passed, 3-2.

10. Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part K (Substantial Assistance to Authorities) (Policy Statement)

This amendment is a consolidated amendment relating to offender characteristics and departures derived from the proposals and comments submitted by the Judicial Conference Committee on Criminal Law, the Department of Justice, and the Federal Public and Community Defenders.

Motion made by Commissioner Gelacak to publish. Commissioner Gelacak voted in favor of the proposal, with Commissioners Carnes, Mazzone, Nagel, and Wilkins voting against. Failed, 1-4.

Motion made by Commissioner Nagel to publish, with the removal of bracketed language in the first paragraph and paragraph two of the Commentary as well as the words "without more" in paragraph two. Commissioners Gelacak and Nagel voted in favor, with Commissioners Carnes, Mazzone, and Wilkins voting against. Failed, 2-3.

Chairman Wilkins adjourned the meeting at 11:50 a.m.

Addendum:

Subsequently, by telephone poll of the Commissioners, the Commission approved for publication the following two amendments contained in the set of amendments earlier considered at the November 30 meeting.

6(B) §2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

This amendment revises the Commentary to §2D1.2 to make explicit that §3B1.1 (Aggravating Role) operates independently of §2D1.2.

Chairman Wilkins moved publication. Passed unanimously.

10. Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part K (Substantial Assistance to Authorities) (Policy Statement)

This amendment is a consolidated amendment relating to offender characteristics and departures derived from the proposals and comments submitted by the Judicial Conference Committee on Criminal Law, the Department of Justice, and the Federal Public and Community Defenders.

Motion made by Commissioner Gelacak to publish. Commissioners Gelacak, Mazzone, Nagel, and Wilkins voted in favor, with Commissioner Carnes voting against. Passed, 4-1.

On December 8, 1993, the Judicial Conference Committee on Criminal Law voted unanimously at its semi-annual meeting to request that the Commission publish a question on the application of the Lysergic Acid Diethylamide amendment (#488) made retroactive by the Commission.

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

Issue for comment on whether an amendment listed in §1B1.10 should be applied by using the complete set of amended guidelines, thereby making all contemporaneous amendments retroactive as well, or whether only the particular listed amendment should be used.

On December 8 and 9, 1993, the Commission unanimously approved publication.