

**Minutes of the April 8, 1997,**  
**United States Sentencing Commission Business Meeting**

The meeting was called to order at 12:11 a.m. by Chairman Richard P. Conaboy in the Commissioners' Conference room. The following commissioners, staff, and guests participated:

Richard P. Conaboy, Chairman  
Michael S. Gelacak, Vice Chairman  
Michael Goldsmith, Vice Chairman  
Wayne A. Budd, Commissioner  
Deanell R. Tacha, Commissioner  
Michael Gaines, Ex Officio Commissioner  
Mary Frances Harkenrider, Ex Officio Commissioner  
John H. Kramer, Staff Director  
Paul K. Martin, Deputy Staff Director  
John R. Steer, General Counsel  
Alan Chaset, Representative, Practitioners' Advisory Group  
John A. Gilbert, Representative, Law Offices of Hyman, Phelps & McNamara  
Cathy Goodwin, Representative, Administrative Office of the Courts  
Greg Hunt, Representative, Probation Officers' Advisory Group  
Tom Hutchison, Representative, Federal Public Defenders  
Julie Stewart, President, Families Against Mandatory Minimums

Chairman Conaboy introduced June Cooper, who recently joined the Office of Administration as the personnel officer, Arthur Meltzer, who recently joined the Office of Policy Analysis as a research associate, and Greg Hunt, who will attend Commission meetings on behalf of the Probation Officers' Advisory Group.

Motion made by Commissioner Tacha to adopt the minutes of the February 14 and March 19, 1997, business meetings; seconded by Commissioner Budd. Passed unanimously.

**Amendments**

**A. Legislation**

**Conditions of Probation/Supervised Release (Amendment #29)**

This amendment addresses new conditions of probation and supervised release created by the Antiterrorism and Effective Death Penalty Act of 1996 and other statutory changes.

Motion made by Commissioner Tacha to adopt the revised proposed amendment, including the revised language of the mandatory conditions of probation #4 relating to a domestic violence crime; seconded by Commissioner Goldsmith. Passed unanimously.

### **Community Restitution (Amendment #31(B))**

This amendment is in response to section 205 of the Antiterrorism and Effective Death Penalty Act of 1996, which authorizes community restitution for certain drug offenses in which there is no identifiable victim.

Motion made by Commissioner Goldsmith to adopt the revised proposed amendment; seconded by Commissioner Tacha. Passed unanimously.

### **§2L1.2 Unlawfully Entering or Remaining in the United States (Amendment #3)**

This amendment implements sections 321 and 334 of the Illegal Immigration and Immigrant Responsibility Act of 1996. Section 321 amends the definition of aggravated felony in the Immigration and Nationality Act. Section 334 directs the Commission to promulgate guideline amendments for the crimes of unlawfully remaining in and illegally entering the United States.

Motion made by Commissioner Tacha to adopt the revised proposed amendment without options 1 and 2 and to delete in proposed Application Note 3, the language, "without criminal conviction" and to include in the aggravated felony definition the bracketed language; seconded by Commissioner Budd. Commissioners Goldsmith and Tacha voted in the affirmative, with Commissioners Budd, Conaboy, and Gelacak voting against. Failed, 2-3.

Chairman Conaboy moved the above motion with the inclusion of option 2. Commissioner Goldsmith seconded the motion. Commissioners Budd, Conaboy, Goldsmith, and Tacha voted in the affirmative, with Commissioner Gelacak voting against. Passed, 4-1.

### **Appendix A- Statutory Index (Amendment #4)**

This amendment responds to the Illegal Immigration and Immigrant Responsibility Act of 1996 by adding references to Appendix A for new crimes created by sections 108 (fleeing or evading a law enforcement checkpoint at high speed) and 216 (voting by any alien in a federal election) of the Act.

Motion made by Commissioner Tacha to adopt with the proposed application note; seconded by Commissioner Budd. Passed unanimously.

### **§2A2.2 Aggravated Assault, §2A6.1 Threatening Communications (Amendment #6)**

The primary purpose of this amendment is to incorporate the new interstate stalking offense and several new harassing communications offenses into the guidelines.

Motion made by Commissioner Tacha to adopt the new revised proposed amendment with §2A6.2 having a base offense level of 14; seconded by Commissioner Budd. Commissioners

Budd, Conaboy, Gelacak, and Tacha voted in the affirmative, with Commissioner Goldsmith abstaining. Passed, 4-0-1.

**Economic Espionage (Amendment #7)**

This amendment addresses several new statutes including: 18 U.S.C. § 1030(a)(7), which prohibits extortion by threats to damage or impair a non-public government computer or a computer of a financial institution; 18 U.S.C. § 1831, which prohibits economic espionage; and 18 U.S.C. § 1832, which prohibits theft of trade secrets.

Motion made by Commissioner Goldsmith to adopt; seconded by Commissioner Tacha. Passed unanimously.

**§2D2.1 - Flunitrazepam (Amendment #8)**

This amendment addresses the Drug-Induced Rape Prevention Act of 1996, which increases the penalties for offenses involving the trafficking in flunitrazepam.

Motion made by Commissioner Tacha to table; seconded by Commissioner Goldsmith. Passed unanimously.

**§2D2.1 - Listed Chemicals, §2D1.12 - Prohibited Equipment (Amendment #9)**

This amendment responds to several miscellaneous provisions of the Comprehensive Methamphetamine Control Act of 1996.

Motion made by Commissioner Tacha to adopt, with a 4-level increase under §2D1.12(b)(1); seconded by Commissioner Goldsmith. Commissioners Goldsmith and Tacha voted in the affirmative, with Commissioners Budd, Conaboy, and Gelacak voting against. Failed, 2-3.

Motion made by Commissioner Tacha to adopt, with a 2-level increase under §2D1.12(b)(1). Commissioner Tacha withdrew the motion pending further discussion.

**Appendix A - Statutory Index (Amendment #11)**

This amendment adds references to Appendix A that correspond to new crimes created by the Health Insurance Portability and Accountability Act of 1996 and the Omnibus Consolidated Appropriations for Fiscal Year 1997.

Motion made by Commissioner Tacha to adopt, with 18 U.S.C. § 669 referenced to §2B1.1 not §2F1.1; seconded by Commissioner Budd. Passed unanimously.

## **B. Emergency Amendments**

### **Amendment 1 - Precursor Chemicals**

Motion made by Commissioner Tacha to re-promulgate as a permanent amendment, effective November 1, 1997; seconded by Commissioner Goldsmith. Passed unanimously.

### **Amendment 2 - Alien Smuggling**

Motion made by Commissioner Tacha to re-promulgate as a permanent amendment, effective November 1, 1997, with revised language in §2L1.1(b)(1) providing a three level downward departure if an offense was committed other than for profit; seconded by Commissioner Budd. Passed unanimously.

### **Amendment 4 - Involuntary Servitude**

Motion made by Commissioner Tacha to re-promulgate as a permanent amendment, effective November 1, 1997; seconded by Commissioner Goldsmith. Passed unanimously.

### **Amendment 3 - Document Fraud**

Motion made by Commissioner Tacha to re-promulgate as a permanent amendment, effective November 1, 1997, with revised language providing a three-level downward departure if an offense was committed other than for profit; seconded by Commissioner Goldsmith. Passed unanimously.

## **C. Circuit Conflicts**

### **§1B1.1 - Application Instructions, §3C1.1 - Obstruction of Justice (Amendment #6)**

This amendment addresses a circuit conflict regarding the scope of conduct covered by the obstruction enhancement under §3C1.1.

Motion made by Commissioner Tacha to adopt, with the deletion in Application Note 2 of the quotation marks around the language "of conviction"; seconded by Commissioner Goldsmith. Commissioner Tacha amended her motion to exclude Application Note 1, which Commissioner Goldsmith seconded. Commissioners Budd, Conaboy, Goldsmith, and Tacha voted in the affirmative, with Commissioner Gelacak voting against. Passed, 4-1.

**§1B1.10 - Retroactivity (Amendment #11)**

This amendment addresses recent litigation, Helpline questions, and administrative concerns regarding the operation of the policy statement governing amendment retroactivity.

Motion made by Commissioner Tacha to adopt; seconded by Commissioner Goldsmith. Commissioners Goldsmith and Tacha voted in the affirmative, with Commissioners Budd, Conaboy, and Gelacak voting against. Failed, 2-3.

Deferred for future consideration.

**§2B3.1 - Express Threat of Death (Amendment #14)**

This amendment addresses a split among the circuit courts regarding the application of the "express threat of death" enhancement in §2B3.1 (Robbery).

Motion made by Commissioner Tacha to adopt; seconded by Commissioner Budd. Commissioners Budd, Conaboy, Goldsmith, and Tacha voted in the affirmative, with Commissioner Gelacak abstaining. Passed, 4-0-1.

**§3C1.1 - Obstruction of Justice (Amendment #23)**

This amendment addresses a circuit conflict regarding the appropriate standard of proof when the court applies the enhancement for perjury.

Motion made by Commissioner Tacha to adopt; seconded by Commissioner Budd. Commissioners Budd, Conaboy, Goldsmith, and Tacha voted in the affirmative, with Commissioner Gelacak abstaining. Passed, 4-0-1.

**§4B1.2 - Career Offender (Amendment #27)**

This amendment resolves a circuit conflict with respect to definitions of terms used in §4B1.1 (Career Offender) and addresses several related issues.

Motion made by Commissioner Tacha to adopt; seconded by Commissioner Budd. Commissioners Budd, Conaboy, Goldsmith, and Tacha voted in the affirmative, with Commissioner Gelacak abstaining. Passed, 4-0-1.

**§3A1.1 - Hate Crime Motivation or Vulnerable Victim (Amendment #28, Issue 6)**

This amendment addresses a circuit conflict regarding "victim of the offense" in the vulnerable victim guideline. In addition, it clarifies a possible ambiguity regarding the scope of conduct to be considered when applying the hate crime motivation enhancement.

Motion made by Commissioner Tacha to adopt; seconded by Commissioner Goldsmith. Commissioners Budd, Conaboy, Goldsmith, and Tacha voted in the affirmative, with Commissioner Gelacak abstaining. Passed, 4-0-1.

**Fine for Costs of Imprisonment/Supervision (Amendment #28, Issue 10)**

This amendment addresses a circuit conflict regarding whether a court may impose a fine for costs of imprisonment and/or supervision under §5E1.2 when it has not imposed a punitive fine.

Motion made by Commissioner Tacha to adopt Option Two; seconded by Commissioner Goldsmith. Commissioners Budd, Conaboy, Goldsmith, and Tacha voted in the affirmative, with Commissioner Gelacak abstaining. Passed, 4-0-1.

**§5K2.13 - Diminished Capacity (Amendment #28, Issue 15)**

This amendment addresses a circuit conflict regarding the definition of "non-violent offense" for purposes of granting a diminished capacity departure under §5K2.13.

Motion made by Commissioner Budd to adopt Option Two; seconded by Commissioner Gelacak. Commissioners Budd, Conaboy, and Gelacak voting in the affirmative, with Commissioners Goldsmith and Tacha voted against. Failed, 3-2.

Motion made by Commissioner Tacha to adopt Option One; seconded by Commissioner Goldsmith. Commissioners Goldsmith and Tacha voted in the affirmative, with Commissioners Budd, Conaboy, and Gelacak voting against. Failed, 2-3.

**Term of Supervised Release (Amendment #30)**

This amendment clarifies that exemptions to mandatory minimum sentences granted under §§5C1.2 or 5K1.1 apply to sentences of supervised release as well as to sentences of imprisonment.

Motion made by Commissioner Tacha to adopt; seconded by Commissioner Budd. Passed unanimously.

**Effective Date**

Motion made by Commissioner Gelacak to specify November 1, 1997, as the effective date for the regular amendments approved for submission to Congress; seconded by Commissioner Budd. Passed unanimously.

Chairman Conaboy adjourned the meeting at 2:09 p.m.