

**DRAFT**

U.S. Sentencing Commission Meeting

June 13, 1988

Chairman Wilkins called the Commission to order at 2:30 p.m. All Commissioners were present. Also present were Staff Director Sid Moore and several members of the Sentencing Commission staff.

John Steer gave a status report on litigation. He stated that the Supreme Court has granted a writ of certiorari before judgment to the Court of Appeals for the Eighth Circuit in a case challenging the constitutionality of the Commission. The issues raised are in that case are separation of power and unlawful delegation of legislative power. Mr. Steer noted that the Solicitor General's Office will be filing a supplemental motion that will request the case be scheduled for argument in the early fall.

Mr. Steer also stated that the Commission has filed briefs defending its constitutionality in six Circuits. The Ninth Circuit heard oral argument on May 13, 1988 and a decision from that court is expected soon. At the District Court level, approximately 90 judges have ruled the guidelines unconstitutional, while 61 have upheld them. In terms of district courts (counting multiple judges as one court where the result is uniform in that district) 52 courts have invalidated the guidelines, while 43 courts have upheld them.

Eric Simon gave a status report on ASSYST. He stated that the probation officers who have tested ASSYST have given favorable comments about the program. The Commission approved the distribution of a test copy of ASSYST to probation officers in every judicial district. The Commissioners also discussed the possibility of providing more computers to the probation officers if the Commission's budget permitted.

Charles Betsey gave a status report on the monitoring project. Mr. Betsey informed the Commission that a sample of the approximate 640 cases received to date shows drug offenses as the largest group of cases (34%). Mr. Betsey explained, however, that the sample's results are not reliable because the sample was taken from a relatively small number of cases.

Commissioner Block distributed a summary of the draft report on organizational defendants sentenced in the period 1984-87. Commissioner Block noted that, excluding antitrust offenses (which have already been addressed in the Guidelines), there are fewer than 250 sentences of organizations a year in federal courts, and that the majority are for fraud offenses. The Commission reviewed some of the reported data on fine distribution and collection. There was also discussion of both the data on the "loss" associated with cases in the report and the data on the fine/loss multiple.

Jeffrey Parker distributed and discussed the revised draft of guidelines for organizational defendants. He said the current draft is less complicated than the draft circulated to the Commission in February. It is more explicit in its discussion of rules for calculating loss, treating the costs of enforcement costs, and the factors for using different multiples. At the end of the presentation there was a discussion of the appropriate length of the guidelines for organizational defendants. The Commissioners agreed to review the newest draft and to forward to Commissioner Block their comments and suggestions.

#### Guideline Amendments

The Commission next considered a series of 18 proposed amendments to the Guidelines. The Commission agreed that over the next several months it would vote on these and other amendments proposed by the staff. Those which were tentatively approved would be held for publication and public comment later in the year.

In a series of motions made by Commissioner MacKinnon and seconded by Commissioner Corrothers, the Commission--after discussion and revision--approved the following amendments:

#### §1B1.1: Application Instructions

The application instruction contained references to the "total offense level." The amendment clarifies these references by deleting the term "total" and making the instruction track the

worksheet.

§1B1.2: Applicable Guidelines

The amendment corrects a clerical error and clarifies the meaning in the the last sentence of the second paragraph of Application Note 1 which refers to "three counts of robbery."

§2B1.2: Receiving Stolen Property

The amendment conforms to §2B1.1 by adding a specific offense characteristic where stolen property involved "undelivered mail."

§2B2.2: Burglary of Other Structures

Application Note #4 is amended to read:

Subsection (b) (4) does not apply to possession of a firearm or other dangerous weapon that was stolen during the course of the offense.

§2B6.1: Altering Motor Vehicle Numbers, etc.

Guideline §2B6.1(b) (2) is amended to read:

If the defendant was in the business of receiving and selling stolen property, increase by 2 levels.

§2C1.1: Bribery

Guideline §2C1.1(b) (1) is amended to read:

If the value of the bribe or the benefit received, or to be received, in return for the bribe exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit)

§2D1.2: Juveniles Trafficking in Controlled Substances

The amendment corrects a clerical error in the Commentary (Application Note #1) by replacing the reference to the "amount from the first and second offense" with "amounts from the two offenses not involving juveniles."

§2G1.1: Transportation For Prostitution

Guideline §2G1.1(b)(1) is amended to read:

If the offense involved the use of physical force, or coercion by threats or drugs or in any manner, increase by 4 levels.

§2J1.1: Perjury

Guideline §2J1.3(c)(1) is amended to read:

If the perjury or subordination of perjury involved another criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to the charged offense, if the resulting offense level is greater than that determined above.

§2J1.8: Bribery Of A Witness

Subsection(c)(1) is amended by substituting the term "offense involved" for the term "conduct was." Additionally, a surplus sentence is deleted from Application Notes.

§2J1.9: Payment To A Witness

Guideline §2J1.9(b)(1) is amended to read:

If the payment was made or offered for refusing to testify or for the witness absenting himself to avoid testifying, increase by 4 levels.

§2K1.3: Trafficking In Explosives

This amendment corrects a clerical error, deleting "firearm offense" from subsection (b)(5) and substituting "offense involving explosives."

§2K2.3: Prohibited Shipment Of Firearms

Guideline §2K2.3(b)(1) is amended to read:

If the number of firearms unlawfully involved in the offense exceeded 5, increase as follows: . . .

§2N3.1: Odometer Laws

Guideline §2N3.1(b) is amended to read:

If the offense involved more than one vehicle, apply §2F1.1 (Fraud and Deceit).

§2T1.9: Conspiracy To Defeat Tax

Guideline §2T1.9(b) is amended to read:

If more than one applies, use the greater.

§2X1.1: Attempts, etc. Not Covered By Specific Guideline

Application Note #4 is deleted from the Commentary.

§3C1.1: Willfully Obstructing Proceedings

Application Note #4 in the Commentary to this Guideline is amended to correct an inconsistency with the Commentaries in Chapter Two, Part J.

The Commission then considered the minutes from its meetings on April 19 and May 19, 1988. Commissioner Corrothers moved that the minutes be approved, subject to correction of minor clerical errors in the drafts. The motion was seconded by Commissioner Breyer and approved unanimously.