

Minutes of the March 26, 1991, United States Sentencing Commission Business Meeting

The meeting was called to order at 9:38 a.m. by Chairman William W. Wilkins, Jr.

The meeting was held in the library of the United States 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
Paul L. Maloney, Ex Officio Member
Phyllis J. Newton, Staff Director
Paul K. Martin, Deputy Staff Director
John R. Steer, General Counsel
Peter Hoffman, Principal Technical Advisor
Deborah DeLambert, Special Counsel
Richard Murphy, Special Counsel
Andy Purdy, Chief Deputy General Counsel
Caryl Ricca, Technical Assistance Specialist
Ronnie M. Scotkin, Guideline Development Analyst
Fred Bennett, Representative, Practitioners' Advisory Group
Abraham Clott, Representative, Federal Public Defenders
Tom Hutchison, Representative, Federal Public Defenders
Roger Pauley, Criminal Division, DOJ
Vicki Portney, Criminal Division, DOJ

Chairman Wilkins welcomed Steve Greber, who formerly worked on the legal staff, as Commissioner Corrothers' law clerk. He also introduced Probation Officer Michael A. Nissen from the Western District of Michigan.

-- Motion made by Commissioner Mazzone to adopt the minutes of the March 12 and 13, 1991, Commission meetings; seconded by Commissioner Corrothers. Passed. Commissioner Carnes and Nagel were not present.

Chairman Wilkins announced that the Sentencing Commission was invited to submit an amicus curiae brief in the case of United States v. Lopez to address various questions regarding the applicability of the Administrative Procedures Act to guideline promulgation.

-- Motion made by Commissioner MacKinnon to ratify the submission of the amicus curiae brief; seconded by Commissioner Corrothers. Passed unanimously.

AMENDMENTS**#2: §2A4.1 Kidnapping, Abduction, Unlawful Restraint**

Chairman Wilkins moved for adoption of staff proposal with the following changes: (1) deletion in §2A4.1(5)(A) of "if the victim was a minor; or" and §2A4.1(5)(B); (2) deletion in §2A4.1(7) of "to facilitate the commission of" and insertion of "during the commission of or in connection with"; and (3) deletion in §2A4.1(6) of "does not have a" and insertion of "had no."; seconded by Commissioner Mazzone. Passed. Commissioner Nagel voted "No."

Motion made by Commissioner Nagel to publish §2A4.1(5) as 4 levels; seconded by Commissioner Gelacak. Motion did not carry.

#25: §2R1.1 Bid Rigging, Price Fixing or Market Allocation Among Competitors

Chairman Wilkins moved for adoption of the following: (1) proposed amendment without the commentary; (2) commentary from the staff proposal; (3) deletion in §2R1.1(b)(2) of "greater" and insertion of "more"; (3) deletion in Application Note #1 of the second "and" and insertion of "or"; seconded by Commissioner Corrothers. Passed unanimously.

**#7(A-C): §2B3.1(b)(1) Robbery of Financial Institution;
§2B3.1 (firearm enhancement); §2B3.1 Robbery**

Commissioner Gelacak recommended deferral during this amendment cycle because changes to the individual guidelines should not continuously be made.

Commissioner Gelacak moved Chairman Wilkins suggestion to adopt proposed amendment to §2B3.1(b)(2) with §2B3.1(b)(2)(A) as level 7, (b)(2)(B) as 6, (b)(2)(C) as 5 and the deletion of the cap in §2B3.1(3); seconded by Commissioner Carnes. Passed. Commissioners MacKinnon and Mazzone voted "No."

#10: §2C1.7 Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

Chairman Wilkins moved for adoption of the proposed amendment with the following changes: (1) insertion in §2C1.7(b)(1)(A) of ",public employee," after "official"; (2) deletion in §2C1.7(c)(1)

and (2) of "bribe" and insertion of "offense" and insertion of "committed" after "was"; (3) deletion in §2C1.7(c)(1) of "aiding and abetting" and insertion of "facilitating"; (4) deletion in §2C1.7(d)(1) of "addressed" and insertion of "covered"; (5) staff directive to show loss as actual and intended in Application Note #1; seconded by Commissioner Mazzone. Passed unanimously.

#12: §2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (including Possession with Intent to Commit These Offenses)

Motion made by Commissioner Mazzone to adopt the proposed amendment without the commentary and adopt the staff proposed commentary; seconded by Commissioner Corrothers. Passed. Commissioner Gelacak not present.

#14: §2D1.7 Unlawful Interstate Sale and Transporting of Drug Paraphernalia

Chairman Wilkins moved to adopt the proposed amendment without the Application Note and adopt the staff proposed Application Note; seconded by Commissioner Corrothers. Passed. Commissioner Gelacak abstained and Commissioner Mazzone voted "No."

#18: §2G2.5 Recordkeeping Offenses Involving the Production of Sexually Explicit Materials

Motion made by Commissioner MacKinnon to adopt the proposed amendment; seconded by Commissioner Corrothers. Passed unanimously.

#19: §2J1.3 Perjury or Subornation of Perjury

Chairman Wilkins moved to adopt the proposed amendment (Option #1) with the insertion in Application Note #5 of "or matters" after "cases". Passed. Commissioner Mazzone abstained.

#26: §281.1 Laundering of Monetary Instruments

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

#27: §281.3 Failure to Report Monetary Transactions to Evade Reporting Requirements

Motion made by Commissioner Corrothers to adopt the proposed amendment; seconded by Commissioner Carnes. Passed unanimously. Commissioner Nagel not present for the vote but indicated her support for the motion.

#28: §281.3 Failure to Report Monetary Transactions to Evade Reporting Requirements

Motion made by Commissioner MacKinnon to adopt the proposed amendment and staff proposed Application Note #1; seconded by Commissioner Gelacak. Passed. Commissioner Nagel was not present for the vote but indicated support for the motion.

#29(A)-(H): §4A1.1 Criminal History; §4A1.2 Definitions and Instructions for Computing Criminal History Score; §4A1.3 Adequacy of Criminal History Category; §4B1.2 Definition of Terms Used in §4B1.1

Motion made by Commissioner Carnes to adopt the proposed amendments for 29(A), 29(B), 29(D)-(H) and option #1 for 29(C); seconded by Commissioner Gelacak. Passed unanimously.

#31: Chapter Five, Part A - Sentencing Table

Motion made by Commissioner Carnes to defer until the next amendment cycle; seconded by Commissioners Corrothers, Mazzone and Nagel. Passed unanimously.

Commissioner Nagel requested that the original career offender amendment be revisited to see if it was overinclusive and asked for a proposal from the defenders' working group.

#32: §5E1.1 Restitution

Motion made by Commissioner Corrothers to adopt the staff proposed amendment and to conform it with the organizational sanctions proposal to be voted on at a later time; seconded by Commissioner MacKinnon. Passed. Commissioner Nagel abstained and Commissioner Gelacak voted "No."

#33: §5G1.3 Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment

Motion made by Commissioner Mazzone to defer until the next amendment cycle. Commissioner MacKinnon seconded. Motion did not carry.

Motion made by Commissioner MacKinnon to adopt the proposed amendment with (1) §5G1.3(c) (Option #2); (2) deletion in §5G1.3(c) of "result" through "that" and "is imposed" and insertion of "achieve" after "to"; (3) §5G1.3(c) written as a guideline; (4) staff directive to draft commentary reflecting U.S.S.G. §2J1.7 coverage of bail or other release status; seconded by Commissioner Carnes. Passed. Commissioner Gelacak abstained and Commissioner Mazzone voted "No."

#34(A) - (C): Part H - Specific Offender Characteristics

Motion made by Commissioner Nagel to adopt the proposed amendments with sentence regarding elderly and infirm reinserted into §5H1.1, sentence regarding participation in substance abuse program reinserted in §5H1.4, and deletion in §5H1.4 of the second sentence; seconded by Commissioner Corrothers. Passed unanimously.

#36: §6A1.3 Resolution of Disputed Factors (Policy Statement)

Motion made by Commissioner MacKinnon to adopt the proposed amendment with the deletion of the last paragraph; seconded by Commissioner Nagel. Passed unanimously.

Chairman Wilkins recessed the meeting until 2:30 p.m.

Chairman Wilkins reconvened the meeting at 2:39 p.m.

Chairman Wilkins announced that the next Commission meeting would be held on April 2, 1991, at 2:00 p.m.

#37(A), (C-X): §1B1.1 Application Instructions; §1B1.8 Use of Certain Information; §2A2.1 Assault with Intent to Commit Murder: Attempted Murder; §2A3.1 Criminal Sexual Abuse: Attempt or Assault with the Intent to Commit Criminal Sexual Abuse; §2D1.1 Unlawful Manufacturing, Importing, Exporting, Trafficking, or Possession: Continuing Criminal Enterprise; §2E2.1 Making, Financing, or Collecting on Extension of Credit by Extortionate Means; §2G1.2 Transportation of a Minor for the Prostitution or Prohibited Sexual Conduct; §2J1.6 Failure to Appear by Defendant; §2Q2.1 Specially Protected Fish, Wildlife, and Plants: Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants; §2T1.6 Failing to Collect or Truthfully Account for and Pay over Tax; §2T3.1 Evading Importing Duties or Restrictions (Smuggling); §2X1.1 Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline); §2X5.1 Other Offenses; §3A1.3 Restraint of Victim; §5K2.16 Restitution Prior to Discovery of the Offense (Policy Statement) §5K1.17 Voluntary Disclosure of Offense (Policy Statement)

Motion made by Commissioner MacKinnon to adopt the proposed amendments with the following changes: (1) #37-C - Deletion in

Application Note #5 of the last sentence; (2) #37-E - Insert "(3)" in Application Note #3 in place of "(1)"; (3) #37-X - deletion of U.S.S.G. §5K2.16; (4) #37-X - deletion in the first sentence of "his" with insertion of "accepts" and renumber as §5K2.16; seconded by Commissioner Mazzone. Passed unanimously. Commissioner Maloney agreed to have his staff check the conversions to marihuana (37K) to ensure that no substantive change was made.

**#7(A-C): §2B3.1(b)(1) Robbery of Financial Institution;
§2B3.1 (firearm enhancement); §2B3.1 Robbery**

General Counsel Steer was requested to submit a legal memorandum on the issue of whether the Commission, consistent with applicable law, could delete the existing 9-level "cap" under §2B3.1(b)(3) to reflect the increased offense levels for weapon under §2B3.1(b)(2) (amendment #7B).

Commissioner Gelacak stated his view that there is no legal proscription preventing the adoption of any change, regardless of the published caps. Commissioner Nagel agreed with this viewpoint.

#4: §2B1.1 Larceny, Embezzlement, and Other Forms of Theft

Deferred until later this amendment cycle.

#5: §2B1.1 Larceny, Embezzlement, and Other Forms of Theft

Deferred until later this amendment cycle. Commissioner Nagel requested a working group to review the severity of the offense in terms of small fraud.

#6: §2B1.1 Larceny, Embezzlement, and Other Forms of Theft

Deferred until later this amendment cycle.

**#9: §2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe:
Extortion Under Color of Official Right**

Motion made by Commissioner Mazzone to adopt staff proposal for #9(A) with the deletion in §2C1.1(c)(1) and (2) of "bribe" and insertion of "offense", insertion of "committed" after "was", and the deferral of amendment 9(B); seconded by Commissioner Carnes. Passed. Commissioner Nagel was not present for the vote.

**#17: §2G2.4 [Receipt or] Possession of Materials Depicting a Minor
Engaged in Sexually Explicit Conduct**

Motion made by Commissioner MacKinnon to adopt the staff proposed amendment with the following changes: (1) deletion in §2G2.4, Application Note #1 of "matter" with insertion of "items"; (2) insertion of "Receipt or" in the title; (3) the title of §2G2.2 to read "Receiving, Transporting, Advertising, or Possessing Material

Involving the Sexual Exploitation of a Minor with Intent to Traffic."; seconded by Commissioner Mazzone. Passed unanimously.

Special Counsel Murphy gave a brief report on the Oral Argument before the Supreme Court regarding the amounts of drugs that must be put on another medium in order to be ingested.

Chairman Wilkins adjourned the meeting at 4:26 p.m.