

**Minutes of the April 14, 1992**  
**United States Sentencing Commission Business Meeting**

The meeting was called to order at 10:11 a.m. by Chairman William W. Wilkins, Jr. in the library of the U.S. Sentencing Commission. The following Commissioners and staff participated:

William W. Wilkins, Jr., Chairman  
Julie E. Carnes, Commissioner  
Michael S. Gelacak, Commissioner  
A. David Mazzone, Commissioner  
Ilene H. Nagel, Commissioner  
Paul L. Maloney, Ex Officio Commissioner  
Phyllis J. Newton, Staff Director  
Paul K. Martin, Deputy Staff Director  
John R. Steer, General Counsel  
Sharon Henegan, Director, Training and Technical Assistance  
Peter Hoffman, Principal Technical Advisor

Chairman Wilkins introduced Jackie Rubin, an assistant federal defender on temporary assignment to the Commission and Barry Johnson, a law clerk for Commissioner Nagel.

Motion made by Commissioner Mazzone to approve the minutes of the March 31 and April 1, 1992, Commission meetings. Passed unanimously.

**AMENDMENTS**

Commissioner Gelacak stated that although he would vote in the affirmative on the issues of alternatives and acceptance of responsibility, he would vote "no" on all other amendments in order to be responsive to the complaints from practitioners that there are too many amendments adopted each year.

**#23 §3E1.1 Acceptance of Responsibility**

This amendment provides for a greater reduction for acceptance of responsibility.

Motion made by Commissioner Nagel to adopt for submission to Congress Option A, providing for a three-level reduction for acceptance case with offense level 29 or greater. Commissioners Mazzone and Nagel voted in the affirmative; Commissioners Carnes and Wilkins voted "no"; Commissioner Gelacak abstained. Failed.

Motion made by Commissioner Carnes to adopt for submission to Congress Option B, providing for a potential three-level reduction for acceptance for cases with offense level of 16 or greater in which the defendant assists the authorities in the investigation or prosecution of his misconduct, or timely indicates an intention to plead guilty. The motion included an amendment to insert in §3E1.1(b) after level 16, the words "or greater". Commissioners Carnes, Gelacak, Mazzone, and Wilkins voted in the affirmative; Commissioner Nagel voted "no" but subsequently changed her position to vote in the affirmative in order to allow the Commission to show unanimous support for this issue. Passed unanimously.

Commissioner Nagel had expressed concern that this amendment would destroy the integrity and foundation of the guidelines because the amendment provides a 12 1/2 percent decrease across the board when the guidelines, tied to past practice, were written with careful consideration of each offense.

Commissioner Maloney urged the Commission not to make any amendments in the area of acceptance of responsibility. He stated that the proposal would cut across past practice and would create a new generation of acceptance case law at a time when the practitioners have requested a decrease in the number of amendments.

**#20 §2D1.8 Renting or Managing a Drug Establishment**

This amendment correlates the offense level to the offense level for the underlying drug offense, with a "cap" of level 16 if the defendant had no role in the drug offense other than allowing use of a premises.

Motion made by Commissioner Carnes to adopt for submission to Congress. Commissioners Carnes, Mazzone, and Wilkins voted in the affirmative; Commissioners Gelacak and Nagel voted "no." Failed.

**#26(A) §4A1.3 Adequacy of Criminal History Category (Policy Statement)**

This amendment provides for a structured departure in the case of an offender whose criminal history warrants a sentence in excess of that allowed for Criminal History Category VI at the defendant's particular offense level.

Motion made by Commissioner Carnes to adopt for submission to Congress. Commissioners Carnes, Mazzone, Nagel, and Wilkins voted in the affirmative; Commissioner Gelacak voted "no." Passed.

**#36(B) Application Instructions**

This amendment clarifies the term "defendant" and broadens the applicability of provisions in three guidelines in accordance with the principles of Relevant Conduct.

Motion made by Commissioner Carnes to adopt for submission to Congress. Commissioners Carnes, Mazzone, and Wilkins voted in the affirmative; Commissioners Gelacak and Nagel voted "no." Failed.

**#36(O) §2P1.1 Escape, Instigating or Assisting Escape**

This amendment clarifies the meaning of "non-secure custody" to address a conflict in the case law. It also makes clear that failure to return from a furlough from secure custody does not warrant the permitted decrease in the offense level.

Motion made by Commissioner Mazzone to adopt for submission to Congress. Commissioners Carnes, Mazzone, and Wilkins voted in the affirmative; Commissioners Gelacak and Nagel voted "no." Failed.

**#36(Q) §2X1.1 Attempt, Solicitation or Conspiracy**

Commissioner Gelacak stated that, notwithstanding what the U.S. Supreme Court may have said to the contrary, he did not believe that it is the function of the Commission to resolve inter-circuit conflicts.

This amendment simplifies the structure of this guideline by deleting subsection (b)(3)(B) and addressing the solicitation offenses currently covered by this subsection in the appropriate Chapter Two guidelines.

Motion made by Commissioner Carnes to adopt for submission to Congress. Commissioners Carnes, Mazzone, and Wilkins voted in the affirmative; Commissioners Gelacak and Nagel voted "no." Failed.

**#43 §2A4.1 Kidnapping, Abduction, Unlawful Restraint**

This amendment adds an application note to the kidnapping guideline to clarify how the offense level is determined when the offense involves a conspiracy to commit murder or attempted murder in addition to a kidnapping (or attempt or conspiracy to kidnap).

Motion made by Commissioner Carnes to adopt for submission to Congress. Commissioners Carnes, Mazzone, Nagel, and Wilkins voted in the affirmative; Commissioner Gelacak voted "no." Passed.

**#44 §1B1.11 Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)**

This amendment adds a new Policy Statement stating Commission intent that only one edition of the Guidelines Manual is to be applied in a given case.

Motion made by Commissioner Carnes to adopt for submission to Congress. Commissioners Carnes, Mazzone, Nagel, and Wilkins voted in the affirmative; Commissioner Gelacak voted "no." Passed.

**#10 §2Q1.3 Mishandling of Other Environmental Pollutants: Recordkeeping, Tampering, and Falsification**

This amendment clarifies the intent of the guideline and eliminates a problem with double-counting.

Chairman Wilkins moved to adopt for submission to Congress the amendment to §2Q1.3, with the deletion of the term "environmental" the last time it appears. Commissioners Carnes, Mazzone, and Wilkins voted in the affirmative; Commissioners Gelacak and Nagel voted "no." Failed.

**#11 §2Q2.1 Specially Protected Fish, Wildlife, and Plants; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants**

This amendment revises the guideline to enhance its clarity and more precisely specify the scope of specific offense characteristics.

Chairman Wilkins moved to adopt for submission to Congress. Commissioners Carnes, Mazzone, Nagel, and Wilkins voted in the affirmative; Commissioner Gelacak voted "no." Passed.

**#14 §2T1.1 Tax Evasion**

The amendment provides for an increase in the offense level when the income associated with a tax violation was derived from criminal activity involving or related to illegal drug activities.

Deferred until the next amendment cycle at the request of Commissioner Maloney.

**#16(A) §3B1.2 Mitigating Role**

This amendment rearranges and clarifies commentary describing circumstances in which a defendant does not warrant a mitigating role reduction.

Motion made by Commissioner Nagel to adopt for submission to Congress, with removal of the word "ordinarily" the second time it appears. Commissioners Carnes, Mazzone, Nagel, and Wilkins voted in the affirmative; Commissioner Gelacak voted "no." Passed.

**#16(B) §3B1.1 Aggravating Role**

**§3B1.2 Mitigating Role**

This amendment provides that a defendant who otherwise would receive a mitigating role adjustment but for limited supervisory activities may be considered for a lesser reduction.

Failed for lack of a motion.

**#17(A) §3B1.1 Aggravating Role**

This amendment revises and clarifies the guideline.

Failed for lack of a motion.

**#17(B) §3B1.1 Aggravating Role**

This amendment clarifies that this adjustment is restricted to cases in which the defendant participates in the commission of the offense with at least one other person who is also criminally responsible for the commission of the offense.

Motion made by Commissioner Carnes to adopt for submission to Congress. Commissioners Carnes and Wilkins voted in the affirmative; Commissioners Gelacak, Mazzone, and Nagel voted "no." Failed.

**#18(A) Role in the Offense**

This amendment provides the court guidance in applying the role adjustments with specific factors that the courts can use to determine the relative culpability of the defendant.

Motion made by Commissioner Carnes to adopt for submission to Congress Option A, with Option B of Application Note #8. Commissioners Carnes, Mazzone, and Wilkins voted in the affirmative; Commissioners Gelacak and Nagel voted "no." Failed.

**#18(B) §3B1.2 Mitigating Role**

This amendment provides for a downward departure for defendants whose degree of minimal participation is less than that considered by the Commission in the guidelines.

Failed for lack of a motion.

**#36(Z) §4B1.2 Definitions of Terms Used in Section 4B1.1**

This amendment deletes superfluous and potentially confusing language in the Career Offender guideline definition of "crime of violence."

Chairman Wilkins moved to adopt for submission to Congress. Commissioners Carnes, Mazzone, and Wilkins voted in the affirmative; Commissioners Gelacak and Nagel voted "no." Failed.

**#19 §2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)**

This amendment limits the offense level exposure of a minor or minimal participant in drug cases.

Chairman Wilkins moved to adopt for submission to Congress. Commissioners Carnes, Mazzone, and Wilkins voted in the affirmative; Commissioners Gelacak and Nagel voted "no." Failed.

**#21 §3C1.2 Reckless Endangerment During Flight**

This amendment expressly authorizes a departure in cases of reckless endangerment involving death or bodily injury or the risk thereof to more than one person.

Motion made by Commissioner Carnes to adopt for submission to Congress. Commissioners Carnes, Mazzone, Nagel, and Wilkins voted in the affirmative; Commissioner Gelacak voted "no." Passed.

**#1(A) §1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)**

This amendment clarifies the meaning of relevant conduct and moves language concerning jointly-undertaken criminal activity from the Commentary to the guideline.

Chairman Wilkins moved to adopt for submission to Congress this amendment as preliminarily approved (with conforming editorial changes). Commissioners Carnes, Mazzone, Nagel, and Wilkins voted in the affirmative; Commissioner Gelacak voted "no." Passed.

Commissioner Gelacak stated that he objects to staff having editorial license to make conforming changes.

**#29 Alternatives**

This amendment expands the points in the guidelines at which alternatives to incarceration may be used.

Commissioner Nagel requested testing the alternatives proposal to see whether the new language can work in practice. She also asked that staff continue to work on language that would exempt tax and antitrust offenses from these additional alternatives.

**#35(C) §6A1.3 Resolution of Disputed Factors (Policy Statement)**

This amendment clarifies that acquitted conduct may be used for sentencing purposes under certain circumstances.

A motion was made to approve for submission to Congress this preliminarily approved amendment (with editorial changes). Commissioners Carnes, Mazzone, and Wilkins voted in the affirmative; Commissioners Gelacak and Nagel voted "no." Failed.

Motion made by Commissioner Mazzone to adopt for submission to Congress all preliminarily approved amendments, with the exception of #36(N), which will be considered after the lunch recess. Commissioners Carnes, Mazzone, Nagel, and Wilkins voted in the affirmative; Commissioner Gelacak voted "no." Passed.

Chairman Wilkins received editorial license to make necessary conforming changes.

Chairman Wilkins announced that the next Commission meeting would be held on May 13, 1992, at 10:00 a.m.

Chairman Wilkins moved November 1, 1992, as the effective date of the amendments. Passed unanimously.

Chairman Wilkins recessed the meeting at 1:31 p.m.

Chairman Wilkins reconvened the meeting at 2:33 p.m.

#36(N)      §2L2.1      **Trafficking in Evidence of Citizenship or Documents  
Authorizing Entry**

                 §2L2.2      **Fraudulently Acquiring Evidence of Citizenship or Documents  
Authorizing Entry for Own Use**

This amendment provides for the inclusion of 8 U.S.C. § 1325(c) under both immigration guidelines, statutory provisions, and in the Statutory Index. It also expands the title of the guidelines and the list of statutory provisions to include other similar offenses.

Motion made by Commissioner Nagel to adopt for submission to Congress. Commissioners Carnes, Mazzone, Nagel, and Wilkins voted in the affirmative; Commissioner Gelacak voted "no." Passed.

Chairman Wilkins adjourned the meeting at 4:34 p.m.

