

**Minutes of the December 7, 1992,**  
**United States Sentencing Commission Business Meeting**

The meeting was called to order at 10:36 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  
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  
Susan Kuzma, Judicial Fellow  
Jim Beck, Federal Bureau of Prisons  
Fred Bennett, Representative, Practitioners' Advisory Group  
Henry Grinner, Representative, Parole Commission  
Steve Salky, Representative, American Bar Association

Chairman Wilkins introduced Dr. Linda Maxfield, who recently joined the Commission as a Senior Research Associate in the office of Policy Analysis. Chairman Wilkins also introduced Probation Officers Ray Lopez (N.D.CA) and Jose Cordova (D.NM), both on temporary assignment to the Commission.

Motion made by Commissioner Carnes to adopt the minutes of the November 17, 1992, meeting. Passed unanimously.

**AMENDMENTS**

Commissioners agreed that if one Commissioner requests that a proposed amendment be published, it would be published.

**B. Judge Wilkins' Requests**

**B-1: Simplification/Consolidation**

These amendments, primarily technical in nature, consolidate duplicate guidelines in Chapter Two in order to simplify the Guidelines Manual.

Chairman Wilkins moved this proposed amendment for publication in the Federal Register.

**B-2: Chapter Two, Part A, Offenses Against the Person; Chapter Two, Part B, Offenses Involving Property; Chapter Two, Part E, Offenses Involving Criminal Enterprises and Racketeering**

This amendment conforms the above noted guidelines, each of which contains enhancements for physical injury but not death, to the structure of the kidnapping guideline which provides a cross reference to §2A1.1 (First Degree Murder).

Chairman Wilkins moved this proposal for publication in the Federal Register.

**B-3: §2A4.2 Demanding or Receiving Ransom Money; §2B3.3 Blackmail or Similar Forms of Extortion**

This amendment revises §2A4.2 to better differentiate the types of conduct covered by the guideline.

Under certain statutes, the count of conviction may not be specific enough to distinguish the appropriate guideline under the provisions of §1B1.2. This amendment ensures that once led to §2B3.3, the appropriate guideline will be referenced based on the underlying offense.

Chairman Wilkins moved this proposal for publication in the Federal Register.

**B-4: §2A5.2 Interference with Flight Crew Member or Flight Attendant; §2A6.1 Threatening Communications**

This amendment corrects original guideline language.

Chairman Wilkins moved this proposal for publication in the Federal Register.

**B-5: §1B1.11 Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)**

This amendment adds an additional subdivision and accompanying commentary explaining the application of this provision to multiple count convictions.

Chairman Wilkins moved this proposal for publication in the Federal Register.

**C. Commissioner Mazzone's Requests**

**C-1: §6B1.2 Standards for Acceptance of Plea Agreements (Policy Statement)**

This amendment adds commentary recommending that the government disclose to the defendant information known to the government relevant to application of the guidelines to encourage plea negotiations that realistically reflect probable outcomes under the sentencing guidelines.

Commissioner Mazzone moved this proposal for publication in the Federal Register.

**C-2: §2F1.1 Fraud and Deceit**

This amendment more fully explains the commentary to §2F1.1 that addresses non-monetary loss.

Commissioner Nagel moved this proposal for publication in the Federal Register with the proviso that a different example would be inserted in the proposed amendment.

**D. Commissioner Nagel's Requests**

**D-1: §1B1.3 Relevant Conduct**

This amendment provides that conduct of which the defendant has been acquitted after trial shall not be considered in determining the defendant's offense level but may, in an exceptional case, provide a basis for an upward departure.

Commissioner Nagel moved this proposal for publication in the Federal Register.

**D-2: §2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

This amendment clarifies the coverage of this subsection.

No motion was made to publish for comment in the Federal Register.

**E. Commissioner Carnes' Requests**

**E-1: §2D1.1 Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

This amendment addresses the situation in which the offense level determined under §2D1.1 is increased by actions of the government by permitting a downward departure in such cases to compensate for the increase in offense level attributable to the actions of the government.

Commissioner Carnes requested publication in the Federal Register of the following question instead:

Whether §2D1.1 needs to be amended to address the calculation of weight under negotiation in a reverse sting operation (an operation in which government agents sell or negotiate to sell controlled substances to a defendant). When government agents have set a price for the controlled substance that is substantially below the market value for the substance, thereby leading to the defendant's purchase of a substantially larger quantity of the controlled substance than his available resources would have otherwise allowed him to purchase, except for the artificially low prices set by the government.

**E-2: §2D1.1 Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

This amendment restructures the guideline so that, except in extremely large scale cases, the scale of the offense is based on the largest amount of controlled substances with which the defendant was associated at any one time or within any thirty-day period.

Commissioner Carnes moved this proposal for publication in the Federal Register.

**F. Juvenile Offenses**

This amendment adds a policy statement addressing the determination of the maximum imposable sentence in case of a juvenile delinquent.

Chairman Wilkins moved this proposal for publication in the Federal Register.

**G. Money Laundering Offenses**

These amendments consolidate §§2S1.1 and 2S1.2 for ease of application, and provides additional modifications with the aim of better assuring that the offense levels prescribed by these guidelines comport with just punishment principles. These amendments also consolidate §§2S1.3 and 2S1.4 for ease of application and modifies them to assure greater consistency of punishment for similar offenses and greater sensitivity to indicia of offense seriousness.

Chairman Wilkins moved these proposals for publication in the Federal Register.

**H. Violent Crimes and Gangs**

**H-1: §2A1.1 First Degree Murder**

This amendment deletes the discussion pertaining to whether 18 U.S.C. § 111(b) mandates a term of life imprisonment.

Commissioner Carnes moved this proposal for publication in the Federal Register.

**H-2: §2A2.1 Assault with Intent to Commit Murder; Attempted Murder; §2A2.2 Aggravated Assault**

This amendment clarifies that the bodily injury enhancement applies when any victim within the parameters of §1B1.3 (Relevant Conduct), not necessarily the victim established by the offense of conviction, sustains injury from the assault.

Chairman Wilkins moved this proposal for publication in the Federal Register.

**H-3: §2A4.1 Kidnapping, Abduction, Unlawful Restraint; §2K1.3 Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials; §2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

This amendment clarifies that §2A4.1(b)(7) and (c)(1), §2K1.3(b)(3) and (c)(1), and §2K2.1(b)(5) and (c)(1) apply to federal, state and local offenses.

Commissioner Carnes moved this proposal for publication in the Federal Register.

**H-4: §2A4.1 Kidnapping, Abduction, Unlawful Restraint; §2K1.3 Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials; §2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

Chairman Wilkins moved for publication in the Federal Register only the first issue for comment.

**I. Firearms Offenses**

**I-1: §2K1.3 Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials; §2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

This amendment provides that the determination of prior conviction(s) of felony crimes of violence or controlled substance offenses under §2K1.3(a)(1) and (2) and §2K2.1(a)(1), (2), (3), and (4)(A) is made under the same terms and conditions as such determinations under §4B1.2.

Chairman Wilkins moved this proposal for publication in the Federal Register.

**I-2: §2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

This amendment clarifies the knowledge requirement for a stolen firearm.

Commissioner Carnes moved this proposal for publication in the Federal Register.

**I-3: §2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition §7B1.2 Classification of Violations (Policy Statement)**

This amendment conforms the definitions of firearms listed under 26 U.S.C. § 5845(a) currently contained in Application Notes to §§2K2.1 and 7B1.1. In addition, the amendment simplifies application of the guideline by incorporating the statutory definition of short-barreled rifle and shotgun into the commentary. The amendment also corrects a technical misstatement regarding whether unaltered handguns may be considered "other weapons" under the statute.

Commissioner Carnes moved this proposal for publication in the Federal Register.

- I-4: §2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition; §2K2.4 Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes; §2K2.5 Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone

Commissioner Carnes moved only the second issue for comment and those amendments related to §2K2.4 and §2K2.5 for publication in the Federal Register.

**J. Drug-Related Offenses**

**J-1: §3B1.2 Mitigating Role**

This amendment deletes Application Note Two that contains language serving to narrowly define a minimal participant in a drug offense. A second option to this amendment would delete only the last six words of the note.

No motion was made to publish for comment in the Federal Register.

**J-2: §2D1.1 Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

This amendment returns the upper limit of the Drug Quantity Table to level 36, allowing other aggravating factors (such as weapon, obstruction, and role) to enhance the penalty. In addition, this amendment adds a cross reference to §2A1.1 (First Degree Murder) where the offense conduct resulted in the murder of a victim.

No motion was made to publish for comment in the Federal Register.

**J-3: §2D1.1 Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

The amendment would limit the impact quantity would play in determining the sentence of a low-level, mitigating-role defendant.

Chairman Wilkins moved only Option One for publication in the Federal Register.

**J-4: §2D1.1 Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

This amendment creates a guideline that considers quantity as a very significant measure of offense seriousness but provides additional indicia of risk.

Chairman Wilkins moved this proposal for publication in the Federal Register with §2D1.1(b)(1) written in its original form; i.e., not written as "if the defendant. . . ." Also, §2D1.1(d)(1) is to be expanded to include a cross reference for bodily injury.

**J-5: Proposed Issues for Public Comment**

No motion was made to submit for publication in the Federal Register.

**J-6: §2D1.1 Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

This amendment addresses the definition of "mixture or substance."

Chairman Wilkins moved this proposal for publication in the Federal Register.

**J-7: §2D1.1 Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

This amendment clarifies the meaning of the commentary to this guideline.

Commissioner Carnes moved this proposal for publication in the Federal Register.

**J-8: §2D1.1 Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

This amendment would address the issue of whether the definition of "cocaine base" should include more than "crack cocaine."

No motion was made to submit for publication in the Federal Register.

**J-9: §2D1.1 Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

This amendment would provide that in the case of marijuana that has a significant moisture content, and is therefore not useable in such form, the court should exclude the weight of the moisture content in assessing the weight of the marijuana.

No motion was made to submit for publication in the Federal Register.

**J-10: §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 distributed at a protected location but the location of the drug transaction was determined by law enforcement authorities rather than by the defendant.

No motion was made to submit for publication in the Federal Register.

**K.**            **Tax Offenses**

**K-1: Chapter Two, Part T- Offenses Involving Taxation**

This amendment consolidates guidelines §§2T1.1, 1.2, 1.3, and 1.5 into a single guideline to ease application. The proposal also adopts a uniform definition of "tax loss."

Chairman Wilkins moved this proposal for publication in the Federal Register.

**K-2: Chapter Two, Part T- Offenses Involving Taxation**

Comment is solicited on the advisability of increasing offense levels in the tax table at §2T4.1 to offset the potential impact of Commission amendments effective November 1, 1992, that increase the potential for sentences of probation without confinement conditions for lower-level tax offenders (i.e., offenders in Criminal History Category I with final offense levels of 7 or 8.

Chairman Wilkins moved this proposal for publication in the Federal Register.

Chairman Wilkins moved the Internal Revenue Service recommendations for publication in the Federal Register.

**K-3: Tax Guidelines -- Illegally Derived Income**

Commissioner Maloney reported that illegally derived income proposals would be covered in the Department of Justice's proposals.

**L.**            **White Collar Offenses**

**L-1: More than Minimal Planning and Changes to the Theft, Fraud, and Tax Loss Tables (Chapter Two, Parts 2B, 2F, and 2T)**

This amendment eliminates "more than minimal planning" as a specific offense characteristic from §§2B1.1, 1.2, and 2F1.1 in order to increase uniform application. The amendment also modifies the loss tables in §§2B1.1, 2F1.1, and 2T4.1.

Chairman Wilkins moved this proposal for publication in the Federal Register.

**L-2: Chapter Two, Part B - Offenses Involving Property; Chapter Two, Part F - Offenses Involving Fraud or Deceit**

These amendments make the discussion of loss in §§2B1.1 and 2F1.1 more consistent, provide guidance for determining loss, clarify the meaning of "infringing items," and clarifies the operation of §2F1.1(b)(3).

Chairman Wilkins moved this proposal for publication in the Federal Register.

**L-3: Issues for Comment**

Commissioner Carnes moved these issues for publication in the Federal Register.

**L-4: Conforming Changes Pertaining to the Interaction of Chapter Two (Offense Conduct) and Chapter Eight (Sentencing of Organizations)**

Chairman Wilkins moved this proposal for publication in the Federal Register.

**L-6: §3B1.3 Abuse of Position of Trust or Use of Special Skill**

This amendment reformulates the definition of an abuse of trust to provide an operationally more workable definition that appropriately distinguishes cases warranting this enhancement.

Commissioner Carnes moved this proposal for publication in the Federal Register.

**M. Legal Staff Issues**

**M-1: §4A1.2 Definitions and Instructions for computing Criminal History**

This amendment clarifies Commission intent with respect to whether the guidelines or commentary confer on defendants a right to attack prior convictions collaterally at sentencing.

Commissioner Maloney reported that this amendment would be part of the Department of Justice's request for publication in the Federal Register.

**M-2: §2X1.1 Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)**

This amendment clarifies the operation of this section.

Chairman Wilkins moved this proposal for publication in the Federal Register.

**M-3: Response to 1992 Legislation**

Commissioner Nagel asked that the recommendation under section 101 of Pub. L. No. 102-519 be posed in the Federal Register as a question asking what the penalties should be for carjacking and what is the most analogous guideline. Also, Commissioner Nagel asked that the recommendations under section 102-103 of Pub. L. No. 102-519 be posed as questions inquiring as to the appropriate penalties.

**M-4: §3B1.1 Aggravating Role; §3B1.4 No title**

This amendment simplifies the operation of this section.

No motion was made to publish for comment in the Federal Register.

**N. SRA Prison Issues Working Group Report**

Jim Beck announced that Michael Quinlan, Director of the Federal Bureau of Prisons, resigned last Friday for health reasons and that Dr. Kathleen M. Hawk would be replacing him.

Jim Beck summarized the report from the Sentencing Reform Act Prison Issues Working Group. Mr. Beck stated that the Group, in response to section 994(q) of the Sentencing Reform Act, was working with BOP on a joint report to Congress concerning the "maximum utilization of resources." Chairman Wilkins asked that this report be presented at the next Commission meeting. Chairman Wilkins expressed an interest in the Commission giving BOP more authority to designate the place of an offender's imprisonment. Commissioner Nagel requested that the group address the issue of de-emphasizing the length of imprisonment to show severity.

Commissioner Gelacak asked that the following proposed amendment be published in the Federal Register:

The Sentencing Commission invites comment with regard to §5K1.1 of the guidelines on the question of whether in cases involving first offenders where no violence was associated with the offense of conviction, where the government does not present the motion for substantial assistance, and the court nonetheless feels such motion would be appropriate, the court should be able on its own to depart from the guidelines.

**O. Defense Bar Recommendations**

Chairman Wilkins asked that proposals from all defense groups be published in the Federal Register. The Commission agreed.

**P. Department of Justice Recommendations**

Commissioner Maloney requested publication in the Federal Register. The Commission agreed.

**R. Criminal Law Committee Recommendations**

Chairman Wilkins moved the proposal for publication in the Federal Register. Commissioner Nagel asked for publication of a question as to whether the Chapter One language on departures should be amended, and if so, in what manner.

**S. U.S. Postal Inspection Service Recommendations**

Chairman Wilkins moved the proposals for publication in the Federal Register.

Fred Bennett, on behalf of the Practitioners' Advisory Group, commended the Commission, especially the chairpersons of the working groups, Paul Martin, and Andy Purdy for the good liaison with the Commission.

Staff Director Newton announced that the Commission's holiday celebration is today at 4:00 p.m. In the future, guests at the Commission are asked to call Judy Mercer the day before Commission meetings in order for lists to be forwarded to guards in hopes of easing entry to Commission meetings.

Chairman Wilkins adjourned the meeting at 12:37 p.m.