

Minutes of the April 11-12, 1994,
United States Sentencing Commission Business Meeting

The meeting was called to order at 2:13 p.m. by Chairman Richard P. Conaboy in the Judicial Conference Meeting Rooms of the Thurgood Marshall Judiciary Building. The following commissioners, staff, and guests participated:

Richard P. Conaboy, Chairman
Michael S. Gelacak, Vice Chairman
A. David Mazzone, Vice Chairman
Wayne A. Budd, Commissioner
Julie E. Carnes, Commissioner
Michael Goldsmith, Commissioner
Deanell R. Tacha, Commissioner
Jo Ann Harris, Ex Officio Commissioner
Edward F. Reilly Jr., Ex Officio Commissioner
Phyllis J. Newton, Staff Director
Paul K. Martin, Deputy Staff Director
John R. Steer, General Counsel
Peter Hoffman, Principal Technical Advisor
Jonathan Wroblewski, Deputy General Counsel
Carla Hernandez, Assistant Public Defender
Barbara Katay, Department of Justice
Al Moskowitz, Department of Justice, Civil Rights Department
Fred Bennett, Chair of Practitioners' Advisory Committee

Motion made by Commissioner Budd to approve the minutes of the March 13, 1995 meeting. Commissioner Tacha seconded the motion. Passed unanimously.

Chairman Conaboy introduced probation officers Sheila Lalley from the Northern District of Illinois and Susan Squires from the District of Arizona on temporary assignment to the Commission.

AMENDMENTS

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

This amendment expands the current list of specific offense characteristics in the drug trafficking guideline to address harms identified in the Commission's Cocaine and Federal Sentencing Policy

report. New or revised enhancements are proposed for weapon possession/use and an upward departure is suggested for bodily injury.

Motion made by Commissioner Tacha to adopt; seconded by Commissioner Budd. Commissioner Gelacak amended the motion by adding the banned semi-automatic assault weapons to the enhancement at §2D1.1(b)(2). Commissioners Budd, Carnes, Conaboy, Gelacak, Goldsmith, and Tacha voted in the affirmative, with Commissioner Mazzone voting against. Passed, 6-1.

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

This amendment addresses the 100-to-1 quantity ratio between powder cocaine and crack cocaine.

Motion made by Commissioner Budd to change the 100-to-1 powder to crack cocaine quantity ratio to a 1-to-1 quantity ratio; seconded by Commissioners Mazzone and Gelacak. Commissioner Goldsmith proposed an amendment to provide a 1-to-1 quantity ratio for lower drug amounts and a higher ratio (4:1 or 5:1) at higher drug amounts. After some discussion, the second degree amendment was withdrawn. Commissioners Budd, Conaboy, Gelacak, and Mazzone voted in the affirmative, with Commissioners Carnes, Goldsmith, and Tacha voting against the motion. Passed, 4-3.

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

This amendment compresses the drug quantity table.

Failed for a lack of a motion.

Crack Amendment 4: §2D1.2 Unlawful Possession: Attempt or Conspiracy

This amendment addresses penalties applicable to defendants convicted of simple possession of crack cocaine. Option One eliminates the cross-reference in §2D2.1 and treats possession of crack the same as possession of powder cocaine and other drugs. Option Two makes no change in the current guideline and lets a reduced quantity ratio mitigate sentences for possessors in the same way it does for traffickers.

Motion made by Commissioner Tacha to adopt Option One with an amendment to reduce the base offense level to 6 (*i.e.*, the same as powder cocaine); seconded by Commissioner Mazzone. Passed unanimously, 7-0.

Amendment 34: §2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

This amendment limits the impact of drug quantity for defendants who have minor or minimal roles in very large-scale offenses. Under this amendment, if the defendant qualified for a minor or minimal role, the base offense level from the drug would not exceed level 28 even if the drug quantity table otherwise would have called for a higher offense level. The other approach suggested is to address this issue via a departure consideration.

Failed for a lack of a motion.

Commissioner Carnes moved that the current safety valve be replaced with a two-level reduction alternative; seconded by Commissioner Tacha. Tabled for discussion tomorrow.

Amendment 35(a): §3B1.1 Aggravating Role

This amendment adds an additional offense level for an organizer or leader in an offense involving at least ten other participants, and revises Application Note 1 by changing "recruited" to "recruited or used" and "the person" to "that person". Commissioner Tacha recommended that this be deferred for consideration in the simplification process.

Failed for a lack of a motion.

Amendment 35(b): §3B1.2 Mitigating Role

This amendment revises §3B1.2 (Mitigating Role) and the Introductory Commentary to Chapter Three, Part B (Role in the Offense) to provide clearer definitions of the circumstances under which a defendant qualifies for a mitigating role reduction. Commissioner Tacha recommended that this be deferred for consideration with simplification as well.

Failed for a lack of a motion.

Amendment 37: §2D1.1 Unlawful Manufacturing, Importing, Exporting, or trafficking (Including Possession with Intent to Commit These

Offenses); Attempt or Conspiracy

This amendment changes the equivalency ratio for marijuana plants and adopts a uniform rule for guideline purposes that one plant be treated as the equivalent of 100 grams of marijuana.

Motion made by Commissioner Carnes to adopt; seconded by Commissioner Tacha. Passed unanimously, 7-0.

Amendment 39: **§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

This amendment sets a time frame, limiting the amount of drugs involved in certain types of indictments or prosecution to a specified time period .

Failed for lack of a motion.

Amendment 40: **§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

This amendment adopts a drug table based on drug purity.

Failed for a lack of a motion.

Amendment 41: **§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

This amendment would apply the Drug Quantity Table for certain controlled substances by counting the number of pills, rather than by gross weight.

Motion made by Commissioner Mazzone to adopt the amendment; seconded by Commissioner Tacha. Passed unanimously, 7-0.

Amendment 42: **§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

This amendment addresses a number of miscellaneous problems that have arisen in the application of §2D1.1.

Motion made by Commissioner Tacha to adopt those parts of the amendment pertaining to the definition of hashish, the equivalencies for the new drugs LAAM and Khat, the definition of what constitutes a marijuana plant, and delete the distinction between l - and d - methamphetamine. Seconded by Commissioner Carnes. Commissioners Budd, Carnes, Conaboy, Gelacak, Goldsmith, and Tacha voted in the affirmative, with Commissioner Mazzone voting against. Passed, 6-1.

Motion made by Commissioner Carnes to adopt the amendment clarifying the treatment of marijuana that has a moisture content sufficient to render it unusable without drying; seconded by Commissioner Gelacak. Commissioners Carnes, Gelacak, and Goldsmith voted in the affirmative, with Budd, Conaboy, Mazzone, and Tacha voting against. Failed, 3-4.

Amendment 1: §1B1.1 Application Instruction

This amendment to §1B1.1 would modify the definitions of "dangerous weapon" and "permanent or life-threatening injury" to account for the intentional exposure of another to a risk of infection of the Human Immunodeficiency Virus (HIV).

Failed for a lack of a motion.

Amendment 2: §2A2.3 Minor Assault

Amends §2A2.3 to provide an upward departure if the assault resulted in substantial bodily injury to a victim.

Deferred until tomorrow so that staff can redraft new option.

Amendment 3: §2A1.4 Involuntary Manslaughter

This issue for comment suggested a possible increase to the statutory maximum for involuntary manslaughter.

Failed for a lack of a motion.

Amendment 4: §2A4.1 Kidnapping, Abduction, Unlawful Restraint

This amendment provides a guideline for the crime of unlawfully removing a child from the United States in violation of a court order (18 U.S.C. § 1204). Option One would reference this statute to §2A4.1 (Kidnapping, Abduction, Unlawful Restraint) with a separate base offense level for a conviction under this statute. Option Two would reference the statute to §2J1.2 (Obstruction of Justice).

Motion made by Commissioner Mazzone to adopt Option Two; seconded by Commissioner Goldsmith. Passed unanimously, 7-0.

Amendment 5: §2A3.1 Criminal Sexual Abuse: Attempt to Commit Criminal Sexual Abuse

This amendment provides an enhancement for cases in which the sexual assault included more than one assailant. Option One provides an upward departure. Option Two would increase the offense level by two levels.

Commissioner Mazzone suggested no action because of the limited number of cases. Only five cases had more than one participant. Motion made by Commissioner Carnes to adopt Option One; seconded by Commissioner Goldsmith. Commissioners Budd, Carnes, Conaboy, Goldsmith, and Tacha voted in the affirmative, with Commissioners Gelacak and Mazzone voting against. Passed, 5-2.

Amendment 6: §2A3.2 Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts

§2A3.3 Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

§2A3.4 Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

§2G2.1 Sexually Exploiting a Minor by Production of a Sexually Explicit Visual or Printed Material: Custodian Permitting Minor to Engage in Sexually Explicit Conduct: Advertisement for Minors to Engage in Production

§2J1.2 Obstruction of Justice

§2L1.1 Smuggling, Transporting, or Harboring an Unlawful Alien

This amendment addresses the increased penalties provided under sections 60010 (sexual abuse resulting in death), 60011 (sexual exploitation of children resulting in death), 60016, 60017 (killing of witnesses, victims, or informants), and 60024 (alien smuggling resulting in death) of the Violent Crime Control and Law Enforcement Act of 1994 when the offense results in the death of a victim. Option One increases the offense level if the court finds that the offense of conviction established that death resulted from the offense. Option Two increases the offense level if the court finds under the provisions of relevant conduct (§1B1.3), that death resulted from the offense.

Deferred until tomorrow.

Amendment 7: §2A3.1 Criminal Sexual Abuse: Attempt to Commit Criminal Sexual Abuse

This amendment implements the directive in section 40111 of the Violent Crime Control and Law Enforcement Act of 1994 by providing for an upward departure when the defendant has a prior sentence for conduct similar to the instant sexual offense.

Deferred until tomorrow; staff to draft an alternative.

Amendment 8: §2B5.1 Offenses Involving Counterfeit Bearer Obligations of the United States

§2F1.1 Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Bearer Obligations of the United States

This amendment provides enhancements for a defendant convicted of a felony under chapter 25 (Counterfeiting and Forgery) of 18 U.S.C. §§ 471 or 513 when the defendant used or carried a firearm during and in relation to the felony. Option One amends §§2B5.1 and 2F1.1 to provide an adjustment for using or carrying a weapon in connection with the offense. Option Two amends §§2B5.1 and 2F1.1 to recommend an upward departure in such circumstances.

Motion made by Commissioner Tacha to adopt Option One; seconded by Commissioner Carnes. Commissioners Carnes, Gelacak, Goldsmith, and Tacha voted in the affirmative, with Commissioners Budd, Conaboy, and Mazzone voting against. Motion passed, 4-3.

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

This amendment addresses the new offense of drive-by shootings created by section 60008 of the Violent Crime Control and Law Enforcement Act of 1994. Option One references this offense to §2D1.1 in the Statutory Index. Option Two references the applicable Chapter Two, Part A, offenses.

Deferred until tomorrow.

Chairman Conaboy recessed the meeting until tomorrow at 1:30 p.m..

April 12, 1995

Chairman Conaboy called the meeting to order at 1:30p.m. The Commission resumed consideration of proposed amendments to the guidelines, policy statements, and commentary.

Amendment 2: §2A2.3 Minor Assault

This amendment responds to the new offense in 18 U.S.C. § 113(a)(7) which provides a five-year statutory penalty for an assault against a minor under age 16 resulting in substantial bodily injury. Option One would reference this new offense to §2A2.3, with an application note recommending an upward departure consideration for "substantial bodily injury." Option Two adds the offense under §2A2.3 and provides a four-level increase if the offense resulted in substantial bodily injury to an individual under the age of 16 years.

Motion made by Commissioner Tacha to adopt Option Two; seconded by Commissioner Carnes. Commissioners Budd, Carnes, Conaboy, Goldsmith, and Tacha voted in the affirmative, with Commissioners Gelacak and Mazzone voting against. Passed, 5-2.

Amendment 6: §2A3.2 Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts

§2A3.3 Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

§2A3.4 Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

§2G2.1 Sexually Exploiting a Minor by Production of a Sexually Explicit Visual or Printed Material: Custodian Permitting Minor to Engage in Sexually Explicit Conduct: Advertisement for Minors to Engage in Production

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This amendment addresses the increased penalties provided under sections 60010 (sexual abuse resulting in death), 60011 (sexual exploitation of children resulting in death), 60016, 60017 (killing of witnesses, victims, or informants), and 60024 (alien smuggling resulting in death) of the Violent Crime Control and Law Enforcement Act of 1994 when the offense results in the death of a victim. Option One increases the offense level if the court finds that the offense of conviction established that death resulted from the offense. Option Two increases the offense level if the court finds under the provisions of relevant conduct (§1B1.3), death resulted from the offense.

Motion made by Commissioner Carnes to adopt Option Two; seconded by Commissioner Tacha. Commissioner Budd, Carnes, and Tacha voted in the affirmative, with Commissioners Conaboy, Goldsmith, Gelacak, and Mazzone voting against. Failed, 3-4.

Amendment 7: §2A3.1 Criminal Sexual Abuse: Attempt to Commit Criminal Sexual Abuse

This amendment implements the directive in section 40111 of the Violent Crime Control and Law Enforcement Act of 1994 by providing for an upward departure when the defendant has a prior sentence for conduct similar to the instant sexual offense.

Motion made by Commissioner Carnes to adopt the amendment but without the language referring to §4A1.3; seconded by Commissioner Budd. Commissioners Budd, Carnes, Conaboy, Mazzone, and Tacha voted in the affirmative, with Commissioner Gelacak voting against and Commissioner Goldsmith abstaining. Passed, 5-1-1.

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

This amendment addresses the new offense of drive-by shootings created by section 60008 of the Violent Crime Control and Law Enforcement Act of 1994. Option One references this offense to §2D1.1 in the Statutory Index. Option Two references the applicable Chapter Two, Part A, offenses.

Motion made by Commissioner Tacha to adopt Option One; seconded by Commissioner Mazzone. Passed unanimously, 7-0.

Amendment 44: §2S1.1 Laundering of Monetary Instruments: Engaging in Monetary Transactions in Property Derived from Unlawful Activity

This amendment revises §§2S1.1 and 2S1.2 by consolidating the two guidelines and revising the offense levels so that they better reflect the seriousness of the offense conduct.

Motion made by Commissioner Carnes to adopt the amendment but change the base offense level at (a)(2) from 12 to 14; seconded by Commissioner Tacha. At Commissioner Budd's suggestion, Commissioner Carnes revised her motion to change the base offense level back to level 12 as originally proposed in the staff substitute amendment. Commissioners Budd, Carnes, Conaboy, Gelacak, Mazzone, and Tacha voted in the affirmative, with Commissioner Goldsmith abstaining. Passed, 6-0-1.

Amendment 45(A): §5D1.1 Imposition of a Term of Supervised Release

This amendment gives greater flexibility to the court to not impose supervised release when it is not required.

Motion made by Commissioner Mazzone to adopt; seconded by Commissioner Tacha. Commissioners Budd, Goldsmith, Mazzone, and Tacha voted in the affirmative, with Commissioners Carnes, Conaboy, and Gelacak opposing the motion. Passed, 4-3.

Amendment 46: §5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

This amendment addresses the operation of §5G1.3.

This amendment was deferred until later in the amendment cycle.

Amendment 47: §4B1.1 Career Offender

This amendment inserts additional background commentary explaining the Commission's rationale and authority for §4B1.1(Career Offender).

Motion made by Commissioner Mazzone to adopt; seconded by Commissioners Carnes and Goldsmith. Commissioners Budd, Carnes, Conaboy, Goldsmith, and Mazzone voted in the affirmative, with Commissioner Gelacak voting against and Commissioner Tacha abstaining. Passed, 5-1-1.

14: §3A1.1 Hate Crimes and Chapter Two, Part H, Offenses solving Individual Rights

This amendment addresses section 280003 of the Violent Crime Control and Law Enforcement Act of 1994. Option One and Option Two both provide a three-level enhancement through a Chapter Three adjustment, and both amend the Chapter Two civil rights guidelines to avoid duplicate punishment. Option One further consolidates and simplifies the civil rights guidelines.

Motion made by Commissioner Mazzone to adopt Option One; seconded by Commissioner Carnes. Commissioners Carnes and Mazzone voted in the affirmative, with Commissioners Budd, Conaboy, Gelacak, Goldsmith, and Tacha voting against. Failed, 2-5.

Motion made by Commissioner Tacha to adopt Substitute Amendment 14, except the second sentence in Application Note 5; seconded by Commissioner Budd. Commissioners Budd, Conaboy, Gelacak, Goldsmith, and Tacha voted in the affirmative, with Commissioners Carnes and Mazzone voting against. Passed, 5-2. Staff was instructed to draft and insert an appropriate sentence of commentary to express Commission intent that the 2-level vulnerable victim enhancement should not be applied based on the same conduct that had resulted in the application of a 3-level hate crime enhancement.

Amendment 10(A): §2P1.2 Providing or Possessing Contraband in Prison

This amendment adds methamphetamine to §2P1.2.

Motion made by Commissioner Carnes to adopt without the bracketed language; seconded by Commissioner Mazzone. Commissioners Budd, Carnes, Conaboy, Gelacak, Mazzone, and Tacha voted in the affirmative. Passed, 6-0 (Commissioner Goldsmith not present).

Amendment 10(B): §2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

This amendment provides a two-level enhancement in §2D1.1 for an offense involving a prison or detention facility. In addition, a cross reference is provided in §2D2.1(Unlawful Possession; Attempt or Conspiracy) to §2P1.2 (Providing or Possessing Contraband in Prison).

Motion made by Commissioner Carnes; seconded by Commissioner Mazzone. Commissioners Budd, Carnes, Conaboy, Gelacak, Mazzone, and Tacha voted in the affirmative. Passed, 6-0 (Commissioner Goldsmith not present).

Amendment 11: §2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals: Attempt or Conspiracy

This amendment would provide a lower base offense level if an offense is committed in a protected location selected by law enforcement or its agents.

Failed for a lack of motion.

Amendment 12: §2D1.11 Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical: Attempt or Conspiracy

This amendment implements revisions made by the Domestic Chemical Diversion Act of 1993 (Public Law 103-200).

Motion made by Commissioner Tacha to adopt; seconded by Commissioner Carnes. Commissioners Budd, Carnes, Conaboy, Goldsmith, Mazzone, and Tacha voted in the affirmative, with Commissioner Gelacak voting against. Passed, 6-1.

Amendment 13: §2D1.12 Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment: Attempt or Conspiracy

This amendment revises §2D1.12 to provide a three-level reduction in the offense level for cases in which the defendant had reasonable cause to believe, but not actual knowledge or belief, that the equipment the defendant was manufacturing or distributing was to be used to manufacture a controlled substance.

Motion made by Commissioner Mazzone to adopt; seconded by Commissioner Budd. Commissioners Budd, Carnes, Conaboy, Goldsmith, Mazzone, and Tacha, voted in the affirmative, with Commissioner Gelacak voting against the motion. Passed, 6-1.

Amendment 15: §2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition: Prohibited Transactions Involving Firearms or Ammunition

This amendment establishes a base offense level of twelve for a violation of section 110102 of the Violent Crime Control and Law Enforcement Act of 1994, which prohibits the manufacture, transfer, or possession of certain semiautomatic "assault" firearms.

Motion made by Commissioner Gelacak to adopt, with the change that semiautomatic weapon be treated as a machine gun and thus assigned a base offense level of 18; seconded by Commissioner Tacha. Commissioners Budd, Conaboy, Gelacak, Goldsmith, and Tacha voted in the affirmative, with Commissioner Mazzone voting against the motion and Commissioner Carnes abstaining. Passed, 5-1-1.

Amendment 16: §2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition: Prohibited Transactions Involving Firearms or Ammunition

This amendment addresses the newly created offense involving the sale of a handgun to a juvenile. Option One provides a base offense of six for a violation of 18 U.S.C. § 922(x). Option Two provides a base offense level of 12. Option Three raises the offense level for the misdemeanor portion of 18 U.S.C. § 922(x) to a minimum of level 14, and raises the offense level for a defendant who sells or transfers a firearm knowing, believing, or having reasonable cause to believe that the transferee was a prohibited person from level 12 to 14.

Motion made by Commissioner Mazzone to adopt Option One; seconded by Commissioner Budd. Commissioners Budd, Carnes, Conaboy, Gelacak, and Mazzone voted in the affirmative, with Commissioner Tacha voting against and Commissioner Goldsmith abstaining. Passed, 5-1-1.

Amendment 17: §5K2.17 High Capacity Semiautomatic Firearms

This amendment provides that an upward departure may be warranted if a semiautomatic firearm is used in connection with a crime of violence or controlled substance offense.

Motion made by Commissioner Carnes to adopt; seconded by Commissioner Tacha. Commissioners Budd, Carnes, Mazzone, and Tacha voted in the affirmative, with Commissioner Conaboy, Gelacak, and Goldsmith abstaining. Passed, 4-0-3.

Amendment 18: §2K2.4 Use of Firearm, Armor-Piercing Ammunition, of Explosive During of in Relation to Certain Crimes

This amendment suggests an upward departure under certain circumstances involving a second conviction under 18 U.S.C. § 844(h).

Commissioner Mazzone moved to adopt; failed for lack of second.

Amendment 19: **§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition: Prohibited Transactions Involving Firearms or Ammunition**

Failed for a lack of motion.

Amendment 20: **§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition: Prohibited Transactions Involving Firearms or Ammunition**

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft: Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

This amendment addresses the question of the appropriate treatment of theft of firearms and controlled substances where the offense of conviction is a general statute referenced to §2B1.1 (Theft). Option One treats offenses referenced to §2B1.1 (theft and stolen property offenses) that involve firearms or drugs by a cross reference to the appropriate firearm or drug offense guideline. Option Two addresses such cases by an upward departure instruction.

Motion made by commissioner Tacha to adopt Option One and partial substitute language; seconded by Commissioner Budd. Commissioners Budd, Conaboy, Gelacak, Goldsmith, and Tacha voted in the affirmative, with Commissioners Carnes and Mazzone voting against. Passed, 5-2.

Amendment 21: **Appendix A -- Statutory Index**

This amendment addresses the creation of 18 U.S.C. § 924(n), conspiracy to commit a violation of 18 U.S.C. § 924(c), by amending the statutory index to reference conspiracies to violate 18 U.S.C. §§ 844(h) and 924(c) to §§2K1.3 and 2K2.1, respectively.

Motion made by Commissioner Goldsmith to adopt; seconded by Commissioner Tacha. Commissioners Budd, Carnes, Conaboy, Goldsmith, Mazzone, and Tacha voted in the affirmative, with Commissioner Gelacak voting against. Passed, 6-1.

Amendment 22(A): **§2L1.1 Smuggling, Transporting, or Harboring an Unlawful Alien**

The issue for comment suggested a possible increase in offense levels in view of increased statutory maxima.

Failed for lack of a motion.

Amendment 22(B): Reentry after Deportation for a Felony

The issue for comment suggested possible changes in offense levels in view of modified statutory penalties.

Failed for a lack of a motion.

Amendment 22(C): §2L1.1 Smuggling, Transporting, or Harboring an Unlawful Alien

This amendment increases the base offense level for immigration offense committed by certain means and increases the offense level if any person sustained bodily injury.

Commissioner Carnes moved to adopt; failed for lack of a second.

Amendment 22(D): §2L1.2 Unlawfully Entering or Remaining in the United States

This amendment allows an upward departure for repeated instances of prior deportations not resulting in criminal convictions.

Motion made by Commissioner Carnes to adopt substitute amendment 22(D); seconded by Commissioner Tacha. Commissioners Budd, Carnes, Conaboy, Mazzone, and Tacha voted in the affirmative, with Commissioner Gelacak voting against. Passed, 5-1 (Commissioner Goldsmith not present).

Amendment 23: §2L2.1 Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport: False Statement in Respect to the Citizenship or Immigration Status of Another Fraudulent Marriage to Assist Alien to Evade Immigration Law

§2L2.2 Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for own Use: False Personation or Fraudulent Marriage by Alien to Evade Immigration Law: Fraudulently Acquiring or Improperly Using a United States Passport

This amendment allows a specific offense characteristic in §2L2.1 and a cross reference in §2L2.2 covering passport and visa offenses committed for the purpose of facilitating another felony offense.

Motion made by Commissioner Tacha to adopt substitute amendment with deletion of the example in parentheses at Application Note 3; seconded by Commissioner Gelacak. Commissioners Carnes, Conaboy, Gelacak, Goldsmith, Mazzone, and Tacha voted in the affirmative, with Commissioner Budd not present for the vote. Passed, 6-0.

Amendment 29: §5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

This amendment addresses section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994 (the "Safety Valve" provision), which directs the Commission to promulgate guidelines and policy statements to provide an exception to otherwise applicable statutory mandatory minimum sentences for certain defendants convicted of specified drug offenses.

Motion made by Commissioner Carnes to adopt substitute amendment 29 with two-level decrease; seconded by Commissioner Tacha. Commissioner Mazzone voiced a preference to incorporate this change as part of a general compression of the drug table. Commissioners Budd, Carnes, Conaboy, Gelacak, Goldsmith, and Tacha voted in the affirmative, with Commissioner Mazzone voting against the motion. Passed, 6-1.

Amendment 24: §3A1.4 International Terrorism

This amendment addresses a congressional directive concerning international terrorists. Option One would rely on the current upward departure provision at §5K2.15. Option Two would add a Chapter Three adjustment. Option Three treats the defendant as if he/she were a career offender. Substitute Amendment 24 is a combination of Options Two and Three. The substitute amendment increases the offense level by 12; provides a minimum offense level of 32; and provides a Criminal History Category of VI in each case.

Motion made by Commissioner Tacha to adopt the substitute amendment; seconded by Commissioner Carnes. Commissioners Budd, Carnes, Conaboy, Gelacak, Goldsmith, and Tacha voted in the affirmative, with Commissioner Mazzone voting against the motion. Passed, 6-1.

Amendment 25: §3B1.4 Using a Minor to Commit a Crime

This amendment addresses the requirement in section 140008 of the Violent Crime Control and Law Enforcement Act of 1994 to provide an enhancement applicable to a defendant, age 21 or older, who involved a person under 18 years of age in the offense. The proposed amendment would provide a defendant 21 years of age or older an increase of two levels for involving a person under 18 years old. In addition, if the defendant used more than five minors, an increase of one additional level, and if the defendant used more than 15 minors, an additional increase of two levels. The substitute amendment prescribes a two-level adjustment for any person, regardless of age, if a minor is involved. In addition, if the defendant used more than five persons under 18, an upward departure may be warranted.

Motion made by Commissioner Tacha to adopt the substitute amendment with insertion of "more one than one person" in place of "five or more persons" in Application Note 3; seconded by Commissioner Carnes. Commissioners Budd, Carnes, Conaboy, Gelacak, Mazzone, and Tacha voted in the affirmative, with Commissioner Goldsmith not present. Passed, 6-0.

Amendment 26(A): §5K2.19 Violent Street Gangs

This amendment allows an upward departure if the defendant is subject to an enhanced sentence under 18 U.S.C. § 521 (pertaining to criminal street gangs).

Motion made by Commissioner Carnes to adopt substitute amendment; seconded by Commissioner Mazzone. Commissioners Budd, Carnes, Conaboy, Mazzone, and Tacha voted in the affirmative, with Commissioner Gelacak voting against and Commissioner Goldsmith not present. Passed, 5-1.

Amendment 26(B): §2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

§2K2.5 Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone

This amendment increases the offense level under §§2K2.1 and 2K2.5 by four levels if the defendant committed the offense in connection with a criminal street gang. In addition, the amendment increases the offense level provided under §2K2.5 by two to seven levels, depending on the nature of the possession or use of the firearm involved in the offense.

Failed for a lack of a motion.

Amendment 27(A): §3A1.1 Vulnerable Victim

This amendment changes Application Note One of the Commentary to §3A1.1 to conform the wording of the Commentary to the guideline itself.

Motion made by Commissioner Budd to adopt substitute amendment; seconded by Commissioner Gelacak. Commissioners Budd, Carnes, Conaboy, and Gelacak voted in the affirmative, with Commissioners Mazzone and Tacha abstaining and Commissioner Goldsmith not present. Passed, 4-0-2.

Amendment 27(B): §3A1.1 Vulnerable Victim

This amendment implements the directive in section 240002 of the Violent Crime Control and Law Enforcement Act of 1994 by providing an upward departure consideration for any offense involving a vulnerable victim where the defendant has a prior offense that involved selection of a vulnerable victim.

Motion made by Commissioner Mazzone to adopt; seconded by Commissioner Tacha. Commissioners Budd, Carnes, Conaboy, Gelacak, Mazzone, and Tacha voted in the affirmative, with Commissioner Goldsmith not present. Passed, 6-0.

Amendment 27(C): Fraud Offenses involving Elderly Victims

The issue for comment suggested possible rebuttable presumptions regarding the age at which a victim would be considered vulnerable.

Failed for a lack of a motion.

Amendment 28: Mandatory Life Sentences for Career Offenders

The issue for comment concerned whether the career offender guideline should be amended in view of the enactment of mandatory life sentences for some career offenders.

Failed for a lack of a motion.

Amendment 30: §5E1.1 Restitution

This amendment adds Commentary to §5E1.1 to alert the courts that there are special restitution requirements under 18 U.S.C. §§ 2248 and 2259 applying to convictions under 18 U.S.C. §§ 2241-2258 (sexual abuse offenses and sexual exploitation of minors); 18 U.S.C. § 2327 (applying to convictions under sections 1028-1029, 1341-1344 for telemarketing fraud offenses); and 18 U.S.C. § 2264 (applying to convictions under 18 U.S.C. §§ 2261-2262 for domestic violence offenses).

Motion made by Commissioner Carnes to adopt the substitute amendment; seconded by Mazzone. Commissioners Budd, Carnes, Conaboy, Gelacak, Mazzone, and Tacha voted in the affirmative, with Commissioner Goldsmith not present. Passed 6-0.

Amendment 31(A): §7B1.3 Revocation of Probation or Supervised Release

This amendment provides guidance in the implementation of section 110505 of the Violent Crime Control and Law Enforcement Act of 1994 and makes a technical change in the guideline because the revised statute refers to the defendant being placed on a term of supervised release following imprisonment rather than the original term of supervised release being "recommended."

Motion made by Commissioner Mazzone to adopt substitute amendment; seconded by Commissioners Budd and Tacha. Commissioners Budd, Carnes, Conaboy, Gelacak, Mazzone, and Tacha voted in the affirmative, with Commissioner Goldsmith not present. Passed, 6-0.

Amendment 31(B): §7B1.4 Term of Imprisonment

This amendment provides a number of technical changes in §7B1.4 to provide guidance in implementing section 20414 of the Violent Crime Control and Law Enforcement Act of 1994.

Motion made by Commissioner Budd to adopt substitute amendment ; seconded by Commissioners Tacha and Mazzone. Commissioners Budd, Conaboy, Gelacak, Mazzone, and Tacha voted in the affirmative, with Commissioner Carnes voting against and Commissioner Goldsmith not present. Passed, 5-1.

Amendment 32: Appendix A -- Statutory Index

This amendment makes Appendix A more comprehensive by adding offenses enacted by the Violent Crime Control and Law Enforcement Act of 1994 and certain other recent laws.

Motion made by Commissioner Mazzone to adopt; seconded by Commissioner Tacha. Commissioners Budd, Conaboy, Gelacak, Mazzone, and Tacha voted in the affirmative, with Commissioner Carnes abstaining and Commissioner Goldsmith not present. Passed, 5-0-1.

Amendment 42: §2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

One part of this amendment addresses concerns regarding the meaning of negotiated transactions in drug trafficking offenses.

Motion made by Commissioner Carnes to adopt the revised Application Note 12; seconded by Commissioner Budd. Commissioners Budd, Carnes, Conaboy, Gelacak, and Mazzone voted in the affirmative, with Commissioner Tacha abstaining and Commissioner Goldsmith not present. Passed, 5-0-1.

Amendment 42: §2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

Another part of this amendment clarifies Application Note 1 of §2D1.1 regarding the treatment of "wet marijuana."

Motion made by Commissioner Mazzone to vacate previous vote on this amendment; seconded by Commissioner Budd. Passed unanimously (Commissioner Goldsmith not present). Commissioner Carnes then moved to adopt the commentary amendment pertaining to "wet marijuana"; Commissioner Mazzone seconded. Commissioners Budd, Carnes, Conaboy, Gelacak, Mazzone, and Tacha voted in the affirmative, with Commissioner Goldsmith not present. Passed, 6-0.

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

Motion made by Commissioner Mazzone to add departure language to this amendment regarding certain additional systemic harms; Commissioner Budd seconded. Commissioner Mazzone voted in the affirmative, with Commissioners Budd, Carnes, Gelacak, and Tacha voting against, Commissioner Conaboy abstaining, and Commissioner Goldsmith not present. Failed, 1-4-1.

Commissioner Carnes moved for an amendment effective date of November 1, 1995; seconded by Commissioner Tacha. Passed by a unanimous voice vote.

Chairman Conaboy adjourned the meeting at 4:37 p.m..