

United States Sentencing Commission
Meeting Minutes
February 25, 2003

Chair Murphy opened the meeting at 9:10 a.m. in the commissioners conference room. She stated that Commissioner O'Neill would join the meeting late due to a class that he had to reschedule because of the recent snow storm. She noted that the minutes from the January meeting had been distributed and asked that any additions or corrections be mentioned during the meeting. Chair Murphy reported that the Commission's appropriation for FY 2003 was \$12.09 million, but with the percentage reduction applied to all agencies this year it amounts to \$12.011 million. She noted that her Congressman, Martin Sabo, is a very effective legislator who sits on the House Appropriations Committee and has helped the Commission receive its recent increases; he was recently appointed to the subcommittee that oversees our appropriation. Chair Murphy reported that Congressman Coble has now asked the Comptroller General to conduct a three year investigation of judicial sentencing in drug cases, downward departures, and use of the safety valve for all judges in the District of Minnesota. Chair Murphy reported on the selection process for the next round of Supreme Court Judicial Fellows. She stated that the Commission's fellow will be Scott Carlson, who brings significant experience with legal reforms, effective communication, and legal ethics. Chair Murphy also reported that Todd Jones would give the interim report of the organizational guidelines advisory group at the Commission's April meeting because he has a trial conflict in March.

Chair Murphy asked Tim McGrath to report on the briefings provided for Hill staff on the emergency amendments passed by the Commission in January. Tim, Ken Cohen and Charles Tetzlaff reported that there was great interest in what the Commission had done to respond to Sarbanes-Oxley and that concerns were raised on both the House and Senate sides about the lack of any guideline amendment tied to the Act's higher statutory maximum penalties for wire and mail fraud. Ken also reported that S.151, the bill proposed in response to the recent Supreme Court decision on virtual child pornography laws, had passed in the Senate. This bill contains a number of directives to the Commission including one that is very specific, and Senator Grassley almost offered an amendment that would have barred any downward departures in child pornography cases. Ken also reported that an aggravated identity theft bill with mandatory consecutive penalties likely will pass.

Tim McGrath reported that a new edition of the Guidelines Newsletter is forthcoming and that the mass transit subsidy policy reviewed at the last Commission meeting is now in place. He commended Julie Sickles for her role in helping save an elderly couple from an oncoming train, as reported in the *Washington Post*. Tim introduced two new staff members — Lisa Rich in Legislative Affairs and Sarah Meacham in the Office of Policy Analysis. He also reported that Deray Hodge has been detailed from the Office of Monitoring to the Office of Policy Analysis and thanked Deon Haynes and Lou Reedt for coordinating the work assignment.

Chair Murphy stated that it would be best to defer consideration of corporate fraud until Commissioner O'Neill's arrival and turned to campaign finance, noting that the Commission

may be able to vote on this subject in March. Tom Brown provided the Commission with a draft letter to Congress requesting increased statutory maximum penalties for certain campaign finance offenses which could be sent after the Commission votes on the permanent amendment. Tom stated that the Commission received no additional public comment regarding the proposed permanent amendment for campaign finance offenses. The DOJ noted that it agreed with the work of the Commission on this topic and requested time to review the letter for some minor technical additions.

Lou Reedt updated the Commission on a recent staff meeting with the Drug Enforcement Administration on oxycodone. He stated that the DEA provided information on how oxycodone is diverted for illegal distribution. He also noted that the DEA may have some concerns about the reduction in sentences for percocet offenses that could result from the proposed amendment to raise penalties for oxycontin. Ex Officio Commissioner Jaso responded that while he is aware of the concerns, the DOJ understands that the Commission is attempting to target appropriate punishment for oxycodone. He emphasized that a final position by DOJ on the pending amendment has not been issued.

Pam Barron reported on proposed amendments regarding terrorism and discussed the public comment received. The Commission asked staff to provide revised amendment language as soon as possible in order to prepare for a March vote.

Pam Barron reported on the history of Commission action on manslaughter penalties and comments received on the proposed amendment to the involuntary manslaughter guideline. Kevin Blackwell provided the Commission with data related to manslaughter sentences. Comment is expected from the ad hoc advisory group on Native American sentencing issues after its February 28 meeting.

Pam Montgomery updated the Commission on proposed immigration amendments, and the Commission discussed several different options for proceeding. The Commission would review the materials distributed at the meeting and make suggested modifications before the March meeting.

Charlie Tetzlaff provided the Commission with an overview of proposed miscellaneous amendments, and it was decided not to proceed with a proposal to broaden coverage of the mitigating role cap.

Charlie reported on proposed amendments to §5G1.3. Vice Chair Steer suggested that the Commission consider making retroactive the downward departure provision in Application Note 7, which the Commission passed during the previous amendment cycle. Charlie stated that he would investigate any procedural issues concerning this proposal and report back at the next meeting.

Courtney Semisch provided data on cybersecurity offenses prosecuted under 18 U.S.C. § 1030.

Lisa Klem reviewed the ways in which the existing guidelines and draft amendment language address the factors in the congressional directive on these offenses. Several questions were asked, and the staff will report further.

Charlie reported on proposed amendments relating to the DOJ Reauthorization Act. The Commission decided to extend consideration of amendments related to assaults on federal judges into the next amendment cycle because the issues involved in constructing the guidelines are more complicated than expected. With regard to body armor, the Commission will be prepared to vote on the proposed amendment.

Ken Cohen updated the Commission on proposed permanent amendments relating to the Sarbanes-Oxley Act and corporate fraud. Courtney Semisch provided prison impact analysis on several different proposals for creating an alternative base offense level and amending the loss table in §2B1.1. The Commission discussed the different proposals and asked staff to analyze and draft an additional approach to creating an alternative base offense level, taking into consideration the elements of a fraud offense, and possibly altering the loss tables. The Commission also discussed the possibility of deconsolidating the theft and fraud guidelines in light of negative feedback from the judiciary and the staff analysis and the possibility of inviting testimony on corporate fraud at the March hearing.

Tim McGrath distributed a draft of the full report on the judges survey, noted that the Commission would be surveying probation officers on electronic case filing, referred to a status report from the compassionate release team, and stated that he would move forward with the Internet policy unless there were any objections. Paul Hofer reported on the timetable for completion of the fifteen year review; the Commission would soon begin receiving draft papers for review and could address certain related issues at its retreat in late April. Ex Officio Commissioner Jaso noted that he would have a letter for the Commission's consideration at the April planning meeting concerning a circuit split on conditions of supervised release in child pornography cases.

Chair Murphy adjourned the meeting at 5:00 p.m.