

**Minutes of the August 28, 2008
United States Sentencing Commission
Public Meeting Minutes**

Chair Ricardo H. Hinojosa called the meeting to order at 2:17 p.m. in the Commissioners' Conference Room.

The following Commissioners were present via teleconference:

Judge Ricardo H. Hinojosa, Chair
Judge Ruben Castillo, Vice Chair
Judge William K. Sessions, III, Vice Chair
Dabney L. Friedrich, Commissioner
Michael E. Horowitz, Commissioner
Beryl A. Howell, Commissioner
Edward F. Reilly, Jr., Commissioner Ex Officio
Jonathan Wroblewski, Commissioner Ex Officio

The following staff participated in the meeting:

Judith Sheon, Staff Director
Kenneth Cohen, General Counsel

Chair Hinojosa stated that the Commission has published a list of tentative priorities in the Federal Register. The Chair noted that the period for public comment will close on Monday, September 8, 2008, and encouraged the public to submit comment by the closing date.

Chair Hinojosa called on Ms. Sheon for the Staff Director's report. Ms. Sheon stated that she did not have anything to report.

Chair Hinojosa called for a motion to adopt the minutes of the April 16, 2008, public meeting. Vice Chair Castillo made a motion to adopt the minutes, with Commissioner Sessions seconding the motion. Hearing no discussion, the Chair called for a vote and the motion was adopted by voice vote.

Chair Hinojosa stated that at the April 16, 2008, public meeting, the Commission voted to adopt the minutes for the December 11, 2007, public meeting. Chair Hinojosa stated that Commissioner Friedrich participated in the April meeting via teleconference and had not received and been able to review the minutes before their adoption. Commissioner Friedrich made a motion to amend the previously adopted December 11, 2007, public meeting minutes to more accurately reflect comments she made at said meeting, as per attached Exhibit A. Commissioner Howell seconded the motion. Hearing no discussion, the Chair called for a vote and the motion was adopted by a voice vote.

Chair Hinojosa called on Mr. Cohen to advise the Commission on a possible vote on technical and conforming amendments.

Mr. Cohen stated that the proposed amendments, attached hereto as Exhibit B, make various technical and conforming changes to §§2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), 1B1.1 (Application Instructions), 5K2.0 (Grounds for Departure (Policy Statement)), and Appendix A (Statutory Index) of the Guidelines Manual. Mr. Cohen advised the commissioners that a motion to adopt the proposed amendments would be in order, with an effective date of November 1, 2008, with the staff being authorized to make technical and conforming changes if needed.

The Chair called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to adopt the proposed amendments, with Vice Chair Castillo seconding. Hearing no discussion, the Chair called for a vote and the motion was adopted with the Chair noting that at least four commissioners voted in favor of the motion.

The Chair asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Vice Chair Castillo made a motion to adjourn, with Commissioner Howell seconding. The Chair called for a vote on the motion, and the motion was adopted by voice vote. The meeting was adjourned at 2:25 p.m.

EXHIBIT A

Amendment to the December 11, 2007, Public Commission Meeting Minutes

The minutes for the December 11, 2007, public meeting, as adopted at the April 14, 2008, public meeting, are amended by striking the first paragraph on page 5 that read as follows:

“Commissioner Friedrich stated that she supported making the crack cocaine amendment retroactive because the powder to crack ratio is unwarranted. Commissioner Friedrich recalled the witness testimony at the Commission’s hearings that questioned the scientific basis for the ratio and how the ratio undermines Congressional objectives set forth in the Sentencing Reform Act of 1984. Commissioner Friedrich concluded by noting that federal judges will decide on a case by case basis who may benefit from the two-level reduction, thus addressing the concerns about public safety.”

and by inserting the following:

“Commissioner Friedrich explained that her decision to support retroactive application of Amendment 706 was based in large part on the recommendation of the federal courts and the Commission's own precedents.

Commissioner Friedrich supported retroactivity despite her concerns about the impact it could have on the safety of communities because reductions in sentences would not be automatic but would be left to the discretion of federal judges in individual cases. Commissioner Friedrich stated that by amending §1B1.10, the Commission had directed federal judges to consider in each case ‘the nature and circumstances of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment.’

Commissioner Friedrich recognized that retroactive application of the amendment would pose substantial administrative burdens for the federal courts. For this reason, Commissioner Friedrich explained, the Commission had followed the recommendation of the federal courts and had implemented procedures to minimize these burdens. In particular, the Commission had amended §1B1.10 to make clear that motions for reductions under 18 U.S.C. § 3582(c) do not constitute full-scale resentencings. As such, they do not require the presence of defendants.

Commissioner Friedrich supported a delay in the effective date of Amendment 706 to give the affected parties, including the courts, probation officers, the Bureau of Prisons, defense attorneys, and prosecutors, adequate time to prepare for the surge in motions and early releases that would likely occur as a result of the Commission's decision. Commissioner Friedrich noted that a delay in the effective date also would ensure that Congress has adequate time to consider the Commission's decision to give retroactive effect to Amendment 706.”

EXHIBIT B

Synopsis of Proposed Amendment: This proposed amendment makes a series of technical changes. First, it makes a clerical change to the chapter heading of Chapter One. Second, it corrects inaccurate references in §2A3.1 (Criminal Sexual Abuse), Application Note 5; §2B1.1 (Theft, Property Destruction, and Fraud), Application Note 3(F)(i); and §5K2.0 (Grounds for Departure), Background. Finally, it amends Appendix A to repromulgate the line reference to 18 U.S.C. § 1040, which had been inserted as an emergency amendment by Amendment 714.

CHAPTER ONE - INTRODUCTION, AUTHORITY, AND GENERAL APPLICATION PRINCIPLES

PART A - INTRODUCTION AND AUTHORITY

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§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

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Commentary

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Application Notes:

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5. Application of Subsection (c)(2).—

- (A) *In General.*—*The cross reference in subsection (c)(2) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.*
- (B) *Definition.*—*For purposes of subsection (c)(2), "sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256(2).*

* * *

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer

Obligations of the United States

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3. Loss Under Subsection (b)(1).—*This application note applies to the determination of loss under subsection (b)(1).*

* * *

- (F) Special Rules.—*Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:*

- (i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—*In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 79(A).*

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§5K2.0. Grounds for Departure (Policy Statement)

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Commentary

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Background:

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As acknowledged by Congress in the Sentencing Reform Act and by the Commission when the first set of guidelines was promulgated, "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." (See Historical Note to §1A1.1 (Authority) Chapter One, Part A). Departures, therefore, perform an integral function in the sentencing guideline system. Departures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing. Departures also help maintain "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B). By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, along with

appellate cases reviewing these departures, the Commission can further refine the guidelines to specify more precisely when departures should and should not be permitted.

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APPENDIX A - STATUTORY INDEX

18 U.S.C. § 1039 2H3.1
18 U.S.C. § 1040 2B1.1

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