

**United States Sentencing Commission Public Meeting Minutes
September 15, 2011**

Chair Patti B. Saris called the meeting to order at 3:00 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge Patti B. Saris, Chair
- William B. Carr, Jr., Vice Chair
- Dabney L. Friedrich, Commissioner
- Judge Ricardo H. Hinojosa, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioners were present via telephone:

- Ketanji B. Jackson, Vice Chair
- Judge Beryl A. Howell, Commissioner

The following Commissioner was not present:

- Isaac Fulwood, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

- Kenneth Cohen, General Counsel

The Chair called for a motion to adopt the June 30, 2011, public meeting minutes. Vice Chair Carr made a motion to adopt the minutes, with Commissioner Hinojosa seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

Chair Saris called on Mr. Cohen to inform the Commission on a possible vote to amend the *Guidelines Manual*.

Mr. Cohen stated that the proposed amendment, attached hereto as Exhibit A, makes certain technical and conforming changes to the *Guidelines Manual* in connection with recently promulgated amendments. First, the proposed amendment makes conforming changes to Application Notes 2 and 3 to §2J1.1 (Contempt) and to the commentary following §3D1.5 (Determining the Total Punishment) to reflect the renumbering of certain specific offense characteristics in §2B1.1 (Theft, Property Destruction, and Fraud). Second, the proposed amendment makes a conforming change to Application Note 3(A) to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to reflect the deletion of a cross-reference at subsection (b)(1) of §2D2.1 (Unlawful Possession; Attempt or Conspiracy). Third, the proposed

amendment makes conforming changes to Application Note 4 to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to reflect the renumbering of the specific offense characteristic in §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) for using or possessing a firearm in connection with another felony offense from (b)(6) to (b)(6)(B).

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order, with a November 1, 2011, effective date, and with staff authorized to make technical and conforming changes as needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with the Chair noting that at least four commissioners voted in favor of the motion.

Chair Saris asked if there was a motion to adopt and publish in the *Federal Register* the final notice of policy priorities for the Commission's 2011-2012 amendment cycle, attached hereto as Exhibit B. Vice Chair Carr made such a motion, with Vice Chair Jackson seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with the Chair noting that at least four commissioners voted in favor of the motion.

Chair Saris asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Hinojosa made a motion to adjourn, with Vice Chair Carr seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 3:03 p.m.

EXHIBIT A

PROPOSED AMENDMENT: TECHNICAL AND CONFORMING AMENDMENTS

Synopsis of Proposed Amendment: *This proposed amendment makes certain technical and conforming changes in connection with certain recently promulgated amendments. See 76 Fed. Reg. 24960 (May 3, 2011). The technical and conforming changes are as follows:*

- (1) *Amendment 1 renumbered specific offense characteristics in §2B1.1 (Theft, Property Destruction, and Fraud), including the specific offense characteristic for violation of a prior, specific order (from (b)(8)(C) to (b)(9)(C)) and the specific offense characteristic for sophisticated means (from (b)(9) to (b)(10)). To reflect these renumberings, conforming changes are made to Application Notes 2 and 3 to §2J1.1 (Contempt) and to the Commentary following §3D1.5 (Determining the Total Punishment).*
- (2) *Amendment 2 amended §2D2.1 (Unlawful Possession; Attempt or Conspiracy) to delete a cross-reference at subsection (b)(1). To reflect this deletion, a conforming change is made to Application Note 3(A) to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).*
- (3) *Amendment 5 renumbered the specific offense characteristic in §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) for using or possessing a firearm in connection with another felony offense from (b)(6) to (b)(6)(B). To reflect this renumbering, conforming changes are made to Application Note 4 to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes).*

Proposed Amendment:

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

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Commentary

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Application Notes:

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3. Application of Subsections (b)(1) and (b)(2).—

- (A) Application of Subsection (b)(1).— *Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession in subsection (b)(1) reflects the increased danger of violence when drug traffickers possess weapons. The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at the defendant's residence, had an unloaded hunting rifle in the closet. The enhancement also*

applies to offenses that are referenced to §2D1.1; *see* §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), **and** 2D1.12(c)(1), ~~and 2D2.1(b)(1).~~

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§2J1.1. Contempt

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Commentary

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Application Notes:

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2. Willful Failure to Pay Court-Ordered Child Support.—For offenses involving the willful failure to pay court-ordered child support (violations of 18 U.S.C. § 228), the most analogous guideline is §2B1.1 (Theft, Property Destruction, and Fraud). The amount of the loss is the amount of child support that the defendant willfully failed to pay. In such a case, do not apply §2B1.1(b)(8)(9)(C) (pertaining to a violation of a prior, specific judicial order). Note: This guideline applies to second and subsequent offenses under 18 U.S.C. § 228(a)(1) and to any offense under 18 U.S.C. § 228(a)(2) and (3). A first offense under 18 U.S.C. § 228(a)(1) is not covered by this guideline because it is a Class B misdemeanor.
3. Violation of Judicial Order Enjoining Fraudulent Behavior.—In a case involving a violation of a judicial order enjoining fraudulent behavior, the most analogous guideline is §2B1.1. In such a case, §2B1.1(b)(8)(9)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply.

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

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Commentary

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Application Notes:

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4. Weapon Enhancement.— If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the

underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction.

A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under §2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under §2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or §2K2.1(b)(6)(B) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. § 922(g), the enhancement under §2K2.1(b)(6)(B) would not apply.

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§3D1.5. Determining the Total Punishment

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Illustrations of the Operation of the Multiple-Count Rules

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3. *Defendant D was convicted of four counts arising out of a scheme pursuant to which the defendant received kickbacks from subcontractors. The counts were as follows: (1) The defendant received \$27,000 from subcontractor A relating to contract X (Mail Fraud). (2) The defendant received \$12,000 from subcontractor A relating to contract X (Commercial Bribery). (3) The defendant received \$15,000 from subcontractor A relating to contract Y (Mail Fraud). (4) The defendant received \$20,000 from subcontractor B relating to contract Z (Commercial Bribery). The mail fraud counts are covered by §2B1.1 (Theft, Property Destruction, and Fraud). The bribery counts are covered by §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), which treats the offense as a sophisticated fraud. The total money involved is \$74,000, which results in an offense level of 16 under either §2B1.1 (assuming the application of the "sophisticated means" enhancement in §2B1.1(b)(9)(10)) or §2B4.1. Since these two guidelines produce identical offense levels, the combined offense level is 16.*

EXHIBIT B

BAC2210-40

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of final priorities.

SUMMARY: In July 2011, the Commission published a notice of possible policy priorities for the amendment cycle ending May 1, 2012. See 76 FR 45007 (July 17, 2011). After reviewing public comment received pursuant to the notice of proposed priorities, the Commission has identified its policy priorities for the upcoming amendment cycle and hereby gives notice of these policy priorities.

FOR FURTHER INFORMATION CONTACT: Jeanne Doherty, Office of Legislative and Public Affairs, 202-502-4502.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, the Commission has identified its policy priorities for the amendment cycle ending May 1, 2012. The Commission recognizes, however, that other factors, such as the enactment of any legislation requiring Commission action, may affect the Commission's ability to complete work on any or all of its identified priorities by the statutory deadline of May 1, 2012. Accordingly, it may be necessary to continue work on any or all of these issues beyond the amendment cycle ending on May 1, 2012.

As so prefaced, the Commission has identified the following priorities:

(1) Continuation of its work on statutory mandatory minimum penalties, including (A) its study of and, pursuant to the directive in section 4713 of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, Pub. L. 111-84, report to Congress on statutory mandatory minimum penalties, including a review of the operation of the "safety valve" provision at 18 U.S.C. § 3553(e); and (B) its study of and, pursuant to the directive in section 107(b) of the Comprehensive Iran Sanctions, Accountability, and

Divestment Act of 2010, Pub. L. 111–195, report to Congress regarding violations of section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. § 287c(a)), sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778, 2779, and 2780), and the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.).

(2) Continuation of its work on implementation of the directives in section 1079A of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, regarding securities fraud offenses and fraud offenses relating to financial institutions or federally related mortgage loans; and implementation of any other crime legislation enacted during the 111th or 112th Congress warranting a Commission response.

(3) Continuation of its work with the congressional, executive, and judicial branches of government, and other interested parties, to study the manner in which United States v. Booker, 543 U.S. 220 (2005), and subsequent Supreme Court decisions have affected federal sentencing practices, the appellate review of those practices, and the role of the federal sentencing guidelines. The Commission anticipates that it will issue a report with respect to its findings, possibly including (A) an evaluation of the impact of those decisions on the federal sentencing guideline system; (B) development of recommendations for legislation regarding federal sentencing policy; (C) an evaluation of the appellate standard of review applicable to post-Booker federal sentencing decisions; and (D) possible consideration of amendments to the federal sentencing guidelines.

(4) Continuation of its multi-year review of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and possible consideration of amendments to the federal sentencing guidelines for drug offenses.

(5) Continuation of its review of child pornography offenses and report to Congress as a result of such review. It is anticipated that any such report would include (A) a review of the incidence of, and reasons for, departures and variances from the guideline sentence; (B) a compilation of studies on, and analysis of, recidivism by child pornography offenders; and (C) possible recommendations to Congress on any statutory changes that may be appropriate.

(6) Continuation of its multi-year study of the statutory and guideline definitions of "crime of violence", "aggravated felony", "violent felony", and "drug trafficking offense", including (A) possible consideration of an amendment to specify the types of documents to be considered under the "categorical approach", see Taylor v. United States, 495 U.S. 575 (1990); Shepard v. United States, 544 U.S. 13 (2005), for determining the applicability of guideline enhancements; (B) an examination of relevant circuit conflicts regarding whether any offense is categorically a "crime of violence", "aggravated felony", "violent felony", or "drug trafficking offense" for purposes of triggering an enhanced sentence under certain federal statutes and guidelines; and (C) possible report

to Congress making recommendations on any statutory changes that may be appropriate to relevant statutes, such as 8 U.S.C. § 1326.

(7) Continuation of its review of departures within the guidelines, including provisions in Parts H and K of Chapter Five of the Guidelines Manual, and the extent to which pertinent statutory provisions prohibit, discourage, or encourage certain factors as forming the basis for departure from the guideline sentence.

(8) Continuation of its multi-year review of the guidelines and their application to human rights offenses, including genocide under 18 U.S.C. § 1091, war crimes under 18 U.S.C. § 2441, torture and maiming to commit torture under 18 U.S.C. §§ 2340A and 114, respectively, and child soldier offenses under 18 U.S.C. § 2442, and possible promulgation of guidelines or guideline amendments with respect to these offenses.

(9) Resolution of circuit conflicts, pursuant to the Commission's continuing authority and responsibility, under 28 U.S.C. § 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991), to resolve conflicting interpretations of the guidelines by the federal courts.

(10) Consideration of (A) §5K2.19 (Post-Sentencing Rehabilitative Efforts) (Policy Statement) in light of Pepper v. United States, 131 S.Ct. 1229 (March 2, 2011); (B) whether to provide a specific reference for N-Benzylpiperazine (BZP) in the Drug Quantity Table in §2D1.1; and (C) any other miscellaneous guideline application issues coming to the Commission's attention from case law and other sources.

AUTHORITY: 28 U.S.C. § 994(a), (o); USSC Rules of Practice and Procedure 5.2.

Patti B. Saris

Chair