

**United States Sentencing Commission Public Meeting Minutes
August 14, 2014**

Chair Patti B. Saris called the meeting to order at 2:00 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge Patti B. Saris, Chair
- Ricardo H. Hinojosa, Vice Chair
- Ketanji B. Jackson, Vice Chair
- Charles R. Breyer, Vice Chair
- Dabney L. Friedrich, Commissioner
- Rachel E. Barkow, Commissioner
- William H. Pryor, Jr., Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was not present:

- Isaac Fulwood, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

- Kathleen Grilli, General Counsel

The Chair called for a motion to adopt the July 18, 2014, public meeting minutes. Commissioner Pryor made a motion to adopt the minutes, with Commissioner Barkow seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

Chair Saris announced the Commission's next "USSC Live!" broadcast will be held August 19, 2014, and the topics covered will include the drug guidelines, the Commission's interactive sourcebook, and a discussion of alternatives to incarceration.

Chair Saris stated that the Commission's Annual National Training Seminar will be held in Philadelphia, PA, on September 17-19, 2014. She noted that registration was closed with over 1,000 individuals planning to attend.

Chair Saris announced that the Commission will hold a Crime of Violence/Categorical Approach Roundtable on October 15, 2014. She added that the roundtable will be held in Washington, D.C., and is by invitation only.

Chair Saris recalled that the Commission a decade ago established an ad hoc Native American Advisory Group to inform the Commission on issues related to the operation of the federal sentencing guidelines in Indian Country and other areas with significant Native American populations. She announced that the Commission will publish in the Federal Register an issue for

comment regarding the possible formation of a tribal issues advisory group, either on an ad hoc or on a continuing basis. The Commission will ask for public comment regarding the merits of forming such a group and the scope, duration, and potential membership of the group.

Finally, Chair Saris announced that as part of a multi-year study of recidivism, the Commission intends to host a roundtable discussion on the topic of risk assessment tools and their various uses. Details will be forthcoming.

Chair Saris called on Ms. Grilli to inform the Commission on a possible vote on technical amendments to the sentencing guidelines.

Ms. Grilli stated that the proposed amendment, attached hereto as Exhibit A, makes certain technical amendments to the introduction and commentary of the Guidelines Manual. First, the proposed amendment makes clerical changes to provide United States Reports citations for certain Supreme Court cases. Second, the proposed amendment makes a clerical change to Application Note 1 of §2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government). Finally, the proposed amendment makes a technical and conforming change to Application Note 2(A) of §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment).

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2014, effective date, and with staff authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Ms. Grilli. Vice Chair Hinojosa made a motion to promulgate the proposed amendment, with Commissioner Breyer seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli stated that the next possible vote was on the final priorities for the Commission's 2014-2015 amendment cycle. On June 2, 2014, the Commission published in the Federal Register a notice of possible policy priorities for the amendment cycle ending May 1, 2015. She noted that the Commission received and reviewed public comment pursuant to that notice and the list of proposed priorities was revised accordingly. Ms. Grilli advised the commissioners that a motion to publish in the Federal Register the Commission's final notice of policy priorities for the upcoming amendment cycle would be in order.

Chair Saris called for a motion to adopt and publish in the Federal Register the final notice of policy priorities for the Commission's 2014-2015 amendment cycle, attached hereto as Exhibit B. Commissioner Friedrich 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 at least three commissioners voting in favor of the motion.

Chair Saris asked if there was any other business before the Commission. Commissioner Friedrich observed that this meeting was likely Vice Chair Hinojosa's last public meeting before leaving

the Commission at the end of the year. As a result, she took the opportunity to state that it has been her honor to serve with Vice Chair Hinojosa for the last eight years. Commissioner Friedrich observed that Vice Chair Hinojosa epitomizes what it means to be a public servant, both as a member of the Commission and as a judge in the District of Southern Texas. She noted that during his tenure, Judge Hinojosa ably guided the Commission with his wisdom and good judgment.

Vice Chair Jackson agreed with Commissioner Friedrich, adding that it was an honor to serve with Vice Chair Hinojosa for the last four and one-half years. She stated that she did not know of another commissioner more dedicated than Vice Chair Hinojosa and expressed her appreciation for his friendship and wise counsel.

Vice Chair Breyer stated that he regretted that he would not have the opportunity to spend more time in service on the Commission with Vice Chair Hinojosa. He recounted that he knew Vice Chair Hinojosa before joining the Commission and was always impressed with his dedication to a given task and that his admiration has increased since joining the Commission.

Commissioner Barkow agreed with her fellow commissioners' comments, adding that in her year on the Commission, she found Vice Chair Hinojosa to be a deep, sincere, honest and intelligent public servant. She stated that it was an honor and privilege to have served with Vice Chair Hinojosa.

Commissioner Pryor also stated his appreciation for the opportunity to have served with Vice Chair Hinojosa on the Commission and noted that both have also served together on the Budget Committee of the Judicial Conference of the United States. Commissioner Pryor observed that in addition to being a good steward of taxpayer dollars, Vice Chair Hinojosa was also a kind, decent and generous person.

Commissioner Wroblewski observed that Vice Chair Hinojosa has always been steadfast and consistent, and always did what he thought was right. He noted that Vice Chair Hinojosa led the Commission through some difficult times, including the transition to the advisory guidelines system after Booker. Commissioner Wroblewski recalled how Vice Chair Hinojosa always reminded the Commission that its work was about real people with real lives, each of whom deserved to be treated with great dignity.

Chair Saris noted that she served with Vice Chair Hinojosa on the Judicial Conference's defender services and budget committees, and that he has been a friend and colleague since she became Chair. Chair Saris noted that Vice Chair Hinojosa's guidance assisted her as Chair to understand the Commission's work and its role in the federal criminal justice system.

Vice Chair Hinojosa thanked his fellow commissioners for their comments. He noted that sentencing is one of the most difficult things a judge has to do and the exposure to different thinking around the country about sentencing through his service with the Commission helped him in this difficult area. He noted that it had become clear during his Commission service that public safety, along with the characteristics of the offender and offense committed, was a very

important factor to consider at sentencing. Vice Chair Hinojosa noted that he had sentenced defendants both before and after the introduction of the guidelines and found the guidelines to extremely helpful at sentencing. In his view, Senators Kennedy and Hatch and the other members of Congress knew what they were doing when they enacted the Sentencing Reform Act of 1984. The Act has made the sentencing process both more transparent and more fair.

Vice Chair Hinojosa stated that the work of the Commission could not be done without the Commission staff. He added that without the input of the Department of Justice, the Federal Public defenders, other stakeholders, and the general public, the Commission would be unable to do its work.

Vice Chair Hinojosa recounted how during a previous conversation with a young visitor about bosses, he stated that, like all federal employees, he had over 300 million bosses. He added that everything a federal worker does involves those 300 million bosses and he thanked the public for the opportunity to serve them.

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 Pryor made a motion to adjourn, with Vice Chair Jackson seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 2:17 p.m.

EXHIBIT A

PROPOSED AMENDMENT: TECHNICAL

Synopsis of Proposed Amendment: *This proposed amendment makes certain technical changes to the Introduction and the Commentary in the Guidelines Manual.*

First, the proposed amendment makes clerical changes to provide U.S. Reports citations for certain Supreme Court cases. The changes are made to—

- (1) Subpart 2 of Part A of Chapter One (Introduction, Authority, and General Application Principles);*
- (2) the Background Commentary to §1B1.1 (Application Instructions); and*
- (3) the Background Commentary to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)).*

Second, the proposed amendment makes a clerical change to Application Note 1 to §2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government) to reflect the editorial reclassification of a section in the United States Code.

Finally, the proposed amendment makes a technical and conforming change to Application Note 2(A) to §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) to reflect that subsection (c) was redesignated as subsection (d) by Amendment 8 of the amendments submitted by the Commission to Congress on April 30, 2014, 79 FR 25996 (May 6, 2014).

Proposed Amendment:

CHAPTER ONE - INTRODUCTION, AUTHORITY, AND GENERAL APPLICATION PRINCIPLES

PART A - INTRODUCTION AND AUTHORITY

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2. CONTINUING EVOLUTION AND ROLE OF THE GUIDELINES

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The continuing importance of the guidelines in the sentencing determination is predicated in large part on the Sentencing Reform Act's intent that, in promulgating guidelines, the Commission must take into account the purposes of sentencing as set forth in 18 U.S.C. § 3553(a). See 28 U.S.C. §§ 994(f), 991(b)(1). The Supreme Court reinforced this view in Rita v. United States, 427 S. Ct. 2456 **551 U.S. 338** (2007), which held that a court of appeals may apply a presumption of reasonableness to a sentence

imposed by a district court within a properly calculated guideline range without violating the Sixth Amendment. In Rita, the Court relied heavily on the complementary roles of the Commission and the sentencing court in federal sentencing, stating:

[T]he presumption reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task. In instructing both the sentencing judge and the Commission what to do, Congress referred to the basic sentencing objectives that the statute sets forth in 18 U.S.C. § 3553(a) The provision also tells the sentencing judge to "impose a sentence sufficient, but not greater than necessary, to comply with" the basic aims of sentencing as set out above. Congressional statutes then tell the Commission to write Guidelines that will carry out these same § 3553(a) objectives.

Id. at 2463-347-48 (emphasis in original). The Court concluded that "[t]he upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale." Id. at 348, and that the Commission's process for promulgating guidelines results in "a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice." Id. at 2464-350.

Consequently, district courts are required to properly calculate and consider the guidelines when sentencing, even in an advisory guideline system. See 18 U.S.C. § 3553(a)(4), (a)(5); Booker, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing."); Rita, 127 S. Ct. at 2465-551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); Gall v. United States, 128 S. Ct. 586, 596-552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."). The district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a). See Rita, 127 S. Ct. at 2465-551 U.S. at 351. The appellate court engages in a two-step process upon review. The appellate court "first ensure[s] that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . [and] then consider[s] the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard[,] . . . tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range." Gall, 128 S. Ct. at 597-552 U.S. at 51.

The second and related theme resonant in this line of Supreme Court cases is that, as contemplated by the Sentencing Reform Act, the guidelines are evolutionary in nature. They are the product of the Commission's fulfillment of its statutory duties to monitor federal sentencing law and practices, to seek public input on the operation of the guidelines, and to revise the guidelines accordingly. As the Court acknowledged in Rita:

The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases, may depart (either pursuant to the Guidelines or, since Booker, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law

enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

Id. at 2464; Rita, 551 U.S. at 350; see also Booker, 543 U.S. at 264 ("[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."); Gall, 128 S. Ct. at 594; 552 U.S. at 46 ("[E]ven though the Guidelines are advisory rather than mandatory, they are, as we pointed out in Rita, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.").

* * *

Congress retains authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines. As the Supreme Court noted in Kimbrough v. United States, 128 S. Ct. 558; 552 U.S. 85 (2007), "Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guideline sentences for serious recidivist offenders 'at or near' the statutory maximum." Id. at 571; 103; 28 U.S.C. § 994(h).

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§1B1.1. Application Instructions

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Commentary

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Background: The court must impose a sentence "sufficient, but not greater than necessary," to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). See 18 U.S.C. § 3553(a). Subsections (a), (b), and (c) are structured to reflect the three-step process used in determining the particular sentence to be imposed. If, after step (c), the court imposes a sentence that is outside the guidelines framework, such a sentence is considered a "variance". See Irizarry v. United States, 128 S. Ct. 2198, 2200-03; 553 U.S. 708, 709-16 (2008) (describing within-range sentences and departures as "sentences imposed under the framework set out in the Guidelines").

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§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

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Commentary

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Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. See *Dillon v. United States*, 130 S. Ct. 2683, 560 U.S. 817 (2010).

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§2M3.1. Gathering or Transmitting National Defense Information to Aid a Foreign Government

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Commentary

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Application Notes:

1. "Top secret information" is information that, if disclosed, "reasonably could be expected to cause exceptionally grave damage to the national security." Executive Order 13526 (50 U.S.C. § 435 note, 50 U.S.C. § 3161 note).

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§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment

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Commentary

Application Notes:

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2. Application of Subsection (b).—

(A) *In General.—Subsection (b) applies in cases in which all of the prior offense is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct). Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection ~~(e)~~(d).*

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EXHIBIT B

BAC2210-40

UNITED STATES SENTENCING COMMISSION

Final Priorities for Amendment Cycle

AGENCY: United States Sentencing Commission.

ACTION: Notice of final priorities.

SUMMARY: In June 2014, the Commission published a notice of possible policy priorities for the amendment cycle ending May 1, 2015. See 79 FR 31409 (June 2, 2014). 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, Public Affairs Officer, 202-502-4502, jdoherty@ussc.gov.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent commission 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).

Pursuant to 28 U.S.C. § 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority.

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, 2015. 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, 2015. Accordingly, it may be necessary to continue work on any or all of these issues beyond the amendment cycle ending on May 1, 2015.

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

(1) Continuation of its work with Congress and other interested parties on statutory mandatory minimum penalties to implement the recommendations set forth in the Commission's 2011 report to Congress, titled Mandatory Minimum Penalties in the Federal Criminal Justice System, including its recommendations regarding the severity and scope of mandatory minimum penalties, consideration of expanding the "safety valve" at 18 U.S.C. § 3553(f), and elimination of the mandatory "stacking" of penalties under 18 U.S.C. § 924(c), and to develop appropriate guideline amendments in response to any related legislation.

(2) Continuation of its work on economic crimes, including (A) a comprehensive, multi-year study of §2B1.1 (Theft, Property Destruction, and Fraud) and related guidelines, including examination of the loss table, the definition of loss, and role in the offense; (B) a study of offenses involving fraud on the market; and (C) consideration of any amendments to such guidelines that may be appropriate in light of the information obtained from such studies.

(3) Continuation of its multi-year study of statutory and guideline definitions relating to the nature of a defendant's prior conviction (e.g., "crime of violence," "aggravated felony," "violent felony," "drug trafficking offense," and "felony drug offense") and the impact of such definitions on the relevant statutory and guideline provisions (e.g., career offender, illegal reentry, and armed career criminal), possibly including recommendations to Congress on any statutory changes that may be appropriate and development of guideline amendments that may be appropriate.

(4) Implementation of the directive to the Commission in section 10 of the Fair Sentencing Act of 2010, Pub. L. 111-220 (enacted August 3, 2010) (requiring the Commission, not later than 5 years after enactment, to "study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act").

(5) Study of the operation of §3B1.2 (Mitigating Role) and related provisions in the Guidelines Manual (e.g., the "mitigating role cap" in §2D1.1(a)(5)), and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.

(6) Study of the guidelines applicable to immigration offenses and related criminal history rules, and consideration of any amendments to such guidelines that may be appropriate in light of the information obtained from such study.

(7) Continuation of its comprehensive, multi-year study of recidivism, including (A) examination of circumstances that correlate with increased or reduced recidivism; (B) possible development of recommendations for using information obtained from such study to reduce costs of incarceration and overcapacity of prisons; and (C) consideration of any amendments to the

Guidelines Manual that may be appropriate in light of the information obtained from such study.

The Commission also intends to study risk assessment tools and their various uses, possibly including development of recommendations about the proper role of these tools.

(8) Continuation of its multi-year review of federal sentencing practices pertaining to imposition and violations of conditions of probation and supervised release, including possible consideration of amending the relevant provisions in Chapters Five and Seven of the Guidelines Manual.

(9) Continuation of its work with the legislative, executive, and judicial branches of government, and other interested parties, with respect to the Commission's December 2012 report to Congress, titled The Continuing Impact of United States v. Booker on Federal Sentencing, and development of appropriate guideline amendments in response to any related legislation.

(10) Beginning a multi-year effort to simplify the operation of the guidelines, including an examination of (A) the overall structure of the guidelines post-Booker, (B) cross references in the Guidelines Manual, (C) the use of relevant conduct in offenses involving multiple participants, (D) the use of acquitted conduct in applying the guidelines, and (E) the use of departures.

(11) Continuation of its work with Congress and other interested parties on child pornography offenses to implement the recommendations set forth in the Commission's December 2012 report to Congress, titled Federal Child Pornography Offenses.

(12) Study of the availability of alternatives to incarceration.

(13) Implementation of any crime legislation enacted during the 113th Congress warranting a Commission response.

(14) 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.

(15) Consideration of any 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