UNITED STATES SENTENCING COMMISSION

PUBLIC MEETING

THURSDAY
DECEMBER 14, 2023

The U.S. Sentencing Commission met in Suite 2-500, One Columbus Circle, N.E., Washington, D.C., at 2:00 p.m. EST, Judge Carlton W. Reeves, Chair, presiding.

PRESENT

JUDGE CARLTON W. REEVES, Chair
JUDGE LUIS FELIPE RESTREPO, Vice Chair
LAURA E. MATE, Vice Chair
CLAIRE MURRAY, Vice Chair
JUDGE CLARIA HORN BOOM, Commissioner
JUDGE JOHN GLEESON, Commissioner
CANDICE C. WONG, Commissioner
JONATHAN J. WROBLEWSKI, Ex-Officio Commissioner

ALSO PRESENT

KATHLEEN GRILLI, General Counsel
KENNETH P. COHEN, Staff Director
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CHAIR REEVES: The meeting is now called to order. Maybe I should have drunk a glass of water before I did that. Good afternoon. I'm Chair of the United States Sentencing Commission, Carlton W. Reeves, and I welcome you all to this public meeting.

I thank each of you for joining us whether you're in this room or with us attending by live stream. I have the honor of opening this meeting with my fellow commissioners.

To my left we have Vice Chair Claire Murray, Vice Chair Laura Mate, and Commissioner Candice Wong. To my right we have Vice Chair Luis Felipe Restrepo, Commissioner Claria Horn Boom, and Commissioner John Gleeson. We also have the ex-officio commissioner to my left at the end, Jonathan Wroblewski.

I wanted to thank all of my fellow commissioners for their extensive
contributions, their spirit of collaboration, and their dedication to our work. I'm so honored, as always, to be sitting among this group of esteemed colleagues.

We are also joined by Commission employees, some of whom are in this room, most of whom are not because this room is too small to hold all those who impact this agency. They have done the research. They have drafted the policies. They have ensured that this meeting is as open to the public as possible, and they have done so much else to make this meeting possible. On behalf of each of my commissioners up here, on behalf of the public, I want to thank all of our agency staff for the amazing work that they do every single day.

So, the first order of business is a vote to adopt the August 24, 2023, public meeting minutes. Is there a motion to do so?

VICE CHAIR RESTREPO: So moved.
CHAIR REEVES: Is there a second?
VICE CHAIR MURRAY: Second.
CHAIR REEVES: All right. Is there any discussion on the motion? Hearing no discussion, for those voting on the motion, please say aye.

(Chorus of ayes.)

CHAIR REEVES: Any nays? Unanimous. Thank you. The motion is now adopted by voice vote.

The next item of business is the Report of the Chair and I want to refer back to what I said about the agency's employees, the incredible work that they do every single day. But there are just two pieces of the work that I want to highlight for this year.

The first is a new series of Commission Chats podcasts we are putting up online this week. Our latest episode features the wit and the wisdom of the Commission's most prominent Philadelphian, the Honorable Luis Felipe Restrepo. You can listen to that chat by visiting www.ussc.gov, or go to your Apple podcasts.
If Philly isn't quite your cup of tea, you know, just not enough for you, don't worry. Our next episode features New York's favorite son, the Honorable John Gleeson.

The second piece of work I wish to highlight is the updated research we published last month on Demographic Differences in Federal Sentencing. After controlling for available personal and offense characteristics, we found that sentencing differences across demographic groups persisted during the five years following the Commission's often-cited 2017 Demographic Differences in Sentencing Report.

We all have a duty to eradicate racial and unwarranted disparities from every part of our criminal justice system. That is why the Commission is committed to providing judges, lawmakers, and citizens with the most up-to-date information about sentencing differences among demographic groups.

While this study's insights into the
roots of those differences is limited by the unavailability of certain data, such as that regarding decisions by law enforcement, prosecutors, or other justice system actors and other relevant history and characteristics of the individual sentenced, its findings offer important information for practitioners, researchers, and others looking to make sentencing more just. I want to again thank our staff for their tremendous work on this and all of our other research products.

We are here today to vote on whether to publish proposed amendments to the sentencing guidelines. What we will be considering today is the product of a process we can all be proud of.

These proposals come from careful, considered deliberation on behalf of my fellow commissioners. These proposals come thanks to an extraordinary preparation and work from the Commission's staff. Perhaps more importantly our proposals come after a remarkable amount of
public input.

We received detailed feedback from prosecutors at the Department of Justice, attorneys with the Federal Defenders, and both magistrate and district judges across our federal courts. We heard thoughtful comments from organizations like FAMM, The Sentencing Project, the Center for Justice and Human Dignity, the Aleph Institute, and the Muslim Legal Fund of America.

We obtained powerful suggestions from a range of individuals including religious leaders, attorneys, professors, and ordinary people who want to help create a better justice system. So many of those suggestions came from people incarcerated in prisons like FCI Allenwood in Pennsylvania, FCI Edgefield in South Carolina, and FCI Sheridan in Oregon.

For every person who wrote to us, please know that regardless of where your words were written, they were read, and they have impact. All of this is to say, again, when you
speak to the Commission you will be heard. I urge those listening now to keep that promise in mind.

Whatever proposals we issue today, we are issuing them first and foremost as a way to obtain comment. We need your critiques. We need your data. We need your experiences to ensure we adopt policies that are just, and evidence based. After our meeting, you can visit our website at www.ussc.gov to both read our proposals and submit comments on them.

If there was anyone who would recognize the value of the Commission receiving public input, it was the recently departed Justice Sandra Day O'Connor. Justice O'Connor, of course, was a fierce defender of the Sentencing Commission and the guidelines we are responsible for creating.

Just as importantly, she was an advocate for, and a reflection of, the value of diversity and policy making. I'll never forget her written tribute that she made to Justice
Thurgood Marshall where she explained how her views on the bench had been changed by, “the perspective of a man who immerses himself in human suffering and then translates that suffering in a way that others can bear and understand.”

I also remember Justice O'Connor's thoughts upon descending to the higher court. “It's all right to be first to do something,” she said, “but I didn't want to be the last woman on the Supreme Court.”

I look around this Commission and I see we have a majority of commissioners who are women. I also see our first Asian-American commissioner. Also, I recognize that I'm here as the first Black chair of this Commission. While these firsts are important, they cannot be lasts. I know that they will not be lasts.

When I've spoken to groups of judges recently appointed to the federal bench, I see how different our judiciary looks from the time even since I received my appointment in
Mississippi. I see judges who look like America, all parts of America. It is a beautiful thing. It is a necessary thing, and it is a thing I am certain that Justice O'Connor would be proud of.

I think about the employees here at the Commission, many of whom are in a leadership role and who are female. I appreciate each one of you.

I think of these remarks, and I think of the remarks of one of Justice O'Connor's former law clerks who said that he always thought she was listening to both sides. “One thing Justice O'Connor did best was to listen and respect both sides of an argument even when disagreeing,” he explained.

That was important when she served on the Supreme Court in the past. That is especially important today in these times, and that will be important tomorrow and the days to come.

I find it fitting then that we take
a moment to honor Justice O'Connor and in doing so there are few better to do so than my fellow Commissioner Candice Wong. Commissioner Wong served as a law clerk to Justice O'Connor and the Justice served as an officiant at Commissioner Wong's wedding.

I welcome your remarks, Commissioner Wong.

COMMISSIONER WONG: Thank you so much, Chair Reeves, for the opportunity to say just a few very brief words. As you mentioned, I had the great honor of clerking for Justice O'Connor in 2011. The Justice was as much a force of nature in person as she was from afar. She was warm, energetic, witty, and utterly unfazed and matter-of-fact about her singular and trail-blazing place in history.

She was as invested in her clerks’ personal lives as their professional successes, and she was fiercely devoted to instilling in the next generation the values of civility and service. I feel blessed to have learned from
her and we are all blessed by her example.

CHAIR REEVES: Thank you so much, Commissioner Wong.

Now we are ready to turn to the next item of business. The next item of business is a possible vote to publish in the Federal Register proposed guideline amendments and issues for public comment. The General Counsel will advise the Commission on the first possible vote concerning an amendment on the rule for calculating loss.

MS. GRILLI: Thank you, Judge Reeves. Before you, you have a proposed amendment that would address a decision from the Third Circuit regarding the validity and enforceability of Application Note 3(A) to §2B1.1 to ensure consistent loss calculation across circuits.

The proposed amendment would create notes to the loss table at §2B1.1 and move the general rule regarding loss as the greater of actual or intended loss from the Commentary to
the guideline itself along with several of the other rules and definitions contained in those notes. It makes corresponding changes to §2B2.3, §2C1.1, §8A1.2, and includes an issue for comment.

A motion to publish with a public comment period closing on February 22, 2024, and technical and conforming amendment authority to staff is appropriate at this time.

CHAIR REEVES: Is there a motion to publish the proposed amendment as suggested by the General Counsel?

VICE CHAIR MURRAY: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER WONG: Second.

CHAIR REEVES: Is there any discussion on the motion? Hearing no discussion, you may vote on the motion by saying aye. Any ayes?

(Chorus of ayes.)

CHAIR REEVES: Any nays? The motion is adopted. Let the record reflect that at
least three commissioners voted in favor of the motion to publish.

The General Counsel will now advise the Commission on a possible vote concerning a proposed amendment on youthful individuals.

MS. GRILLI: This proposed amendment contains two parts, A and B. The Commission is considering whether to promulgate either or both as they are not mutually exclusive. Part A addresses the computation of criminal history points for offenses committed prior to the age of 18, and Part B addresses the sentencing of youthful individuals.

Part A contains three options; one that would amend §4A1.2(d)(2)(A) to exclude juvenile sentences from receiving two criminal history points; one that would amend §4A1.2(d) to exclude all juvenile sentences from being considered in the calculation of the criminal history score, and a third that would amend §4A1.2(d) to exclude all sentences resulting from offenses committed prior to the age of 18
from being considered in the calculation of
criminal history. This option would also make
changes to the Commentary of §2K1.3, §2K2.1,
§2L1.2, and §4B1.2, and includes issues for
comment.

Part B of the proposed amendment
would amend the first sentence in §5H1.1 to
provide solely that age may be relevant in
determining whether a departure is warranted.

It would also add language
specifically providing for a downward departure
for cases in which a defendant was youthful at
the time of the offense and sets forth
considerations for the court in determining
whether a departure based on youth is
warranted. This part also includes issues for
comment.

A motion to publish with a public
comment period closing on February 22, 2024,
and technical and conforming amendment
authority to staff would be in order at this
time.
CHAIR REEVES: Is there a motion to publish the proposed amendment as suggested by the General Counsel?

COMMISSIONER GLEESON: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR RESTREPO: Second.

CHAIR REEVES: Is there any discussion on the motion? Hearing no discussion, we may now vote. Vote on the motion by saying aye.

(Chorus of ayes.)

CHAIR REEVES: Are there any nays?

VICE CHAIR MURRAY: Nay.

COMMISSIONER WONG: Nay.

COMMISSIONER BOOM: Nay.

CHAIR REEVES: The motion is adopted. Let the record reflect that at least three commissioners voted in favor of the motion to publish.

The General Counsel will now advise the Commission on a possible vote concerning a proposed amendment on acquitted conduct.
MS. GRILLI: The proposed amendment on acquitted conduct would amend the Guidelines Manual to address the use of acquitted conduct for purposes of determining a sentence and includes three options.

Option One would amend §1B1.3 to add a new subsection (c) providing that acquitted conduct is not relevant conduct for purposes of determining the guideline range and includes the definition of acquitted conduct.

Option Two would amend the Commentary to §1B1.3 to add a new application note providing that a downward departure may be warranted if the use of acquitted conduct has a disproportionate impact in determining the guideline range relative to the offense of conviction.

Option Three would amend §6A1.3 to add a new subsection (c) addressing the standard of proof required to resolve disputes involving sentencing factors and would provide that acquitted conduct should not be considered
unless it is established by clear and convincing evidence.

The proposed amendment also includes four issues for comment.

A motion to publish the acquitted conduct amendment with a public comment period closing on February 22, 2024, and technical and conforming amendment authority to staff is in order at this time.

CHAIR REEVES: Is there a motion to publish the proposed amendment as suggested by the General Counsel?

VICE CHAIR MATE: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER GLEESON: Second.

CHAIR REEVES: Is there any discussion on the motion? Hearing no discussion, you may vote in favor of this motion by saying aye. Any ayes?

(Chorus of ayes.)

CHAIR REEVES: Any nays? No nays.

The motion is adopted. Let the record reflect
that at least three commissioners voted in favor of the motion to publish.

The General Counsel will now advise the Commission on a possible vote concerning a proposed amendment on circuit conflicts.

MS. GRILLI: The circuit conflict amendment contains two parts. Again, the Commission is considering whether to promulgate either or both as they are not mutually exclusive.

Part A would amend §2K2.1 to address a circuit conflict concerning whether a serial number must be illegible in order to apply the four-level increase in §2K2.1(b)(4)(B)(i) for a firearm that has an altered or obliterated serial number. Two options are presented on either side of the conflict.

Part B would amend the Commentary to §2K2.4 to address a circuit conflict concerning whether subsection (c) of §3D1.2, the grouping rules, permit grouping of a firearms count under 18 U.S.C. § 922(g) with a drug
trafficking count where the defendant also has a separate count under 18 U.S.C. § 924(c). One option is provided and an issue for comment is also included.

A motion to publish this proposed circuit conflicts amendment with a public comment period closing on February 22, 2024, and technical and conforming amendment authority to staff would be appropriate at this time.

CHAIR REEVES: Is there a motion to publish the proposed amendment as suggested by the General Counsel?

VICE CHAIR RESTREPO: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER WONG: Second.

CHAIR REEVES: Is there any discussion on this motion? Vote on the motion by saying aye.

(Chorus of ayes.)

CHAIR REEVES: Any nays? The motion is adopted and let the record reflect that at least three commissioners voted in favor of the
motion to publish.

The General Counsel will now advise the Commission on a possible vote concerning a proposed miscellaneous amendment.

MS. GRILLI: Miscellaneous amendment contains six parts, A through F. Again, the Commission is considering whether to promulgate any and all of these parts as they are not mutually exclusive.

Part A responds to the Safeguard Tribal Objects of Patrimony Act by amending Appendix A and the Commentary to §2B1.5. It includes an issue for comment.

Part B responds to the Export Control Reform Act of 2018 and concerns raised in public comment about §2M5.1. It amends Appendix A and §2M5.1 and includes issues for comment.

Part C responds to concerns raised in public comment relating to offenses under 31 U.S.C. §§ 5322, 5336, and guideline §2S1.3. It amends the specific offense characteristic at
§2S1.3(b)(2)(B) to reflect the enhanced penalties applicable to offenses under those statutes.

Part D responds to concerns raised in public comment relating to statutes referenced in Appendix A to §2R1.1 and amends Appendix A and the Commentary to §2R1.1 to replace the reference to 15 U.S.C. § 3(b) with a reference to 15 U.S.C. § 3(a).

Part E addresses a miscellaneous issue regarding application of the base offense levels at subsections (a)(1) through (a)(4) of §2D1.1. It provides two options to respond to that miscellaneous issue.

Part F responds to concerns relating to the scope of the definition of “sex offense” in subsection (b)(2) of §4C1.1. Two options are provided in Part F.

A motion to publish the proposed miscellaneous amendment with a public comment period closing on February 22, 2024, and technical and conforming amendment authority to
staff would be warranted at this time.

CHAIR REEVES: Is there a motion to publish the proposed amendment as suggested by the General Counsel?

COMMISSIONER BOOM: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR MURRAY: Second.

CHAIR REEVES: Is there any discussion on the motion? Hearing no discussion, let's vote on the motion by saying aye.

(Chorus of ayes.)

CHAIR REEVES: Any nays? The motion is adopted. Let the record reflect that at least three commissioners voted in favor of the motion to publish.

The General Counsel will now advise the Commission on a possible vote concerning a proposed technical amendment.

MS. GRILLI: The proposed technical amendment would make technical and other non-substantive changes to the Guidelines Manual.
It also contains two parts, A and B, and they are not mutually exclusive. The Commission is considering both.

Part A would amend §4C1.1, and Part B would make technical and clerical changes to multiple guidelines to provide stylistic consistency on how subdivisions are designated and to correct typographical errors.

A motion to publish the proposed technical amendment with a public comment period closing on February 22, 2024, and technical and conforming amendment authority to staff is in order at this time.

CHAIR REEVES: Is there a motion to publish the proposed amendment as suggested by the General Counsel?

COMMISSIONER GLEESON: So moved.

CHAIR REEVES: Is there a second?

VICE CHAIR RESTREPO: Second.

CHAIR REEVES: Is there any discussion on the motion? Hearing no discussion, you may vote on the motion by
saying aye. Any ayes?

(Chorus of ayes.)

CHAIR REEVES: Any nays? No nays. The motion is adopted. Let the record reflect that at least three commissioners voted in favor of the motion to publish.

The General Counsel will now advise the Commission on a possible vote concerning a proposed amendment on simplification of the three-step process.

MS. GRILLI: The simplification of the Three-Step Process amendment before you responds to the priority of exploration of ways to simplify the guidelines and consideration of amendments that might be appropriate. The Commission is including issues for comment and a proposed amendment to inform the Commission's consideration of these issues.

The proposed amendment contains two parts. Part A contains issues for comment on whether changes should be made to the Guideline Manual relating to the three-step process set
forth in §1B1.1, and the use of departures and policy statements relating to specific offense characteristics.

Part B contains a proposed amendment that would restructure the Guidelines Manual to simplify both the current three-step process used in determining whether a sentence that is sufficient but not greater than necessary, and the existing guidance in the Guidelines Manual regarding a court's consideration of the individual circumstances of the defendant as well as certain offense characteristics.

A motion to publish the proposed amendment with a public comment period closing February 22, 2024, and technical and conforming amendment authority to staff is in order at this time.

CHAIR REEVES: Is there a motion to publish the proposed amendment as suggested by the General Counsel?

VICE CHAIR MATE: So moved.

CHAIR REEVES: Is there a second?
COMMISSIONER GLEESON: Second.

CHAIR REEVES: Is there any discussion on the motion? You may vote on the motion by saying aye.

(Chorus of ayes.)

CHAIR REEVES: Any nays? The motion is adopted. Let the record reflect that at least three commissioners voted in favor of the motion to publish.

Is there any further business before the Commission? Hearing none, is there a motion to adjourn?

VICE CHAIR RESTREPO: So moved.

CHAIR REEVES: Is there a second?

COMMISSIONER WONG: Second.

CHAIR REEVES: Vote on the motion by saying aye.

(Chorus of ayes.)

CHAIR REEVES: Anyone opposed? The motion is adopted by voice vote and the meeting is now adjourned. Happy Holidays!

(Whereupon, the above-entitled
matter went off the record at 2:30 p.m.)