

**United States Sentencing Commission Public Meeting Minutes
September 16, 2009**

Acting Chair Ricardo H. Hinojosa called the meeting to order at 11:33 a.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge Ricardo H. Hinojosa, Acting Chair
- William B. Carr, Jr., Vice Chair
- Judge William K. Sessions, III, Vice Chair
- Beryl A. Howell, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was present via telephone:

- Dabney L. Friedrich, Commissioner

The following Commissioners were not present:

- Judge Ruben Castillo, Vice Chair
- Isaac Fulwood, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

- Judith Sheon, Staff Director
- Kenneth Cohen, General Counsel

Acting Chair Hinojosa reported that the Commission held its fourth regional public hearing in Chicago, IL., and will hold its next hearing in Denver, CO. The hearings are held in conjunction with the 25th anniversary of the passage of the Sentencing Reform Act of 1984. The Acting Chair expressed the commissioner's appreciation to the individuals who appear before the Commission to share their thoughts. The Acting Chair also thanked staff for their work on the hearings.

Ms. Sheon announced that the Commission will publish a notice soliciting membership on the Victim's Advisory Group in the Federal Register. She encouraged all qualified individuals to apply.

The Acting Chair called for a motion to adopt the minutes of the April 15, 2009, public meeting. Commissioner Howell made a motion to adopt the minutes, with Vice Chair Sessions seconding the motion. Hearing no discussion, the Acting Chair called for a vote, and the motion was adopted by voice vote.

The Acting Chair called on Mr. Cohen to advise the Commission on a possible vote to amend the

sentencing guidelines.

Mr. Cohen stated that on April 15, 2009, the Commission promulgated an amendment to the undue influence enhancement at subsection (b)(2)(B)(ii) of §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) and at subsection (b)(2)(B) of §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor).

The amendment, which was submitted to Congress on May 1, 2009, as Amendment 7 and will be designated Amendment 732 in Appendix C of the Guidelines Manual, may have the effect of lowering the guideline sentencing range for certain categories of offenses and offenders. As a result, pursuant to its statutory authority at 28 U.S.C. § 994(u) and Rule 2.2 of the Commission's Rules of Practice and Procedure, the Commission instructed staff to prepare a retroactivity analysis of the amendment. The Commission also waived the provision in Rule 4.1 (Promulgation of Amendments) that provides that the Commission shall decide whether to make the amendment retroactive at the same meeting at which it decides to promulgate an amendment that may have the effect of lowering the guideline sentencing range for certain categories of offenses and offenders.

On June 10, 2009, the Commission also published in the Federal Register a request for comment regarding whether the undue influence amendment should be added to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement) as an amendment that the courts may apply retroactively. To inform that public comment, on June 22, 2009, the Commission posted on its website the retroactivity analysis prepared by staff. The public comment period ended on August 10, 2009.

Mr. Cohen advised the commissioners that if the Commission would like the undue influence amendment to be given retroactive effect, a motion to amend §1B1.10(c) to add Amendment 732 to the list of covered amendments, with an effective date of November 1, 2009, and with staff having technical and conforming amendment authority, would be in order.

Acting Chair Hinojosa asked if there is a motion as suggested by Mr. Cohen. Hearing none, the Acting Chair called for any discussion. Commissioner Howell stated that when the Commission considers whether to make an amendment retroactive, it considers the factors listed in the commentary at §1B1.10(c). Commissioner Howell stated that the reason she believes Amendment 732 is not appropriate to make retroactive rests primarily on the first factor listed, which is the purpose of the amendment. She noted that the purpose of Amendment 732 is to clarify the application of the undue influence enhancement in circumstances when there is no actual minor involved to be unduly influenced by the defendant. The Amendment is not intended to correct any perceived unfairness of the guidelines. She observed that the majority of the 31 offenders who appear eligible to receive a reduced sentence if Amendment 732 were

made retroactive were sentenced post-*Booker*, and the sentencing courts were able to exercise their discretion to impose a sentence sufficient to achieve the purposes of sentencing, whether within or outside the sentencing range. For these reasons, Commissioner Howell believes the Commission is appropriately not making Amendment 732 retroactive.

Hearing no further discussion on the motion, Acting Chair Hinojosa asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Howell made a motion to adjourn, with Vice Chair Sessions seconding. The Acting Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 11:39 a.m.